trend toward affirmation of the rights of transgender persons from the highest quarters.

Defining the Scope of Duty to Warn Readily Identifiable Individuals

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Pennsylvania Supreme Court Considers Neighbors to Be Identifiable Victims under Duty to Warn

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In *Maas v. UPMC Presbyterian Shadyside*, 234 A.3d 427 (Pa. 2020) the Supreme Court of Pennsylvania examined the scope of the state's duty to warn in a case where a patient killed a victim in his 40-unit apartment building after making statements about wanting to kill a "neighbor." In a trial over wrongful death, the patient's health care providers moved for summary judgment arguing that they did not have a duty to warn under Pennsylvania common law because the patient did not identify a "readily identifiable" victim. The Pennsylvania Supreme Court affirmed the lower courts' decisions not to grant it, because his threat toward a "neighbor" was specific enough to constitute a "readily identifiable" victim.

Facts of the Case

In 2008, after moving from a personal care home to an apartment building, Terrance Andrews, a patient at University of Pittsburgh Medical Center (UPMC) Western Psychiatric Institute & Clinic (WPIC), repeatedly told outpatient and emergency room providers that he was experiencing homicidal ideation, suicidal ideation, and hallucinations. The exact targets of his homicidal ideation varied, including his neighbor and others. He was hospitalized multiple times, but the symptoms persisted.

On May 9, 2008, Mr. Andrews presented to the WPIC emergency room expressing homicidal ideation toward his "neighbor" but was discharged after a discussion with his outpatient case worker. The following day, he was voluntarily hospitalized for three days. A few days later, he was discharged from the WPIC emergency room after expressing ideation "to kill the next-door neighbor and everyone" (*Maas*, p 429). On May 25, 2008, he presented to the WPIC emergency room reporting suicidal ideation, homicidal ideation, and voices. He was discharged after his caseworker made a plan to deliver medications to his apartment and transfer him to a personal care home within 36 hours.

On May 29, 2008, Mr. Andrews killed Laura Maas, a 19-year-old culinary arts student, living on the same floor of his apartment building. He told officers: "Take me to jail. I did it" and "I told [a psychiatrist] to put me in Western Psych . . . I told people I was going to kill someone" (*Maas*, p 430). Mr. Andrews was convicted of murder and sentenced to life in prison.

The victim's mother filed a wrongful death and survival action against defendants at UPMC alleging that Mr. Andrews' providers had a duty to warn residents of his apartment building, specifically his floor, of his threats. The UPMC defendants moved for summary judgment, arguing that mental health care providers in Pennsylvania have a duty to warn only under limited circumstances under *Emerich v. Philadelphia Ctr. for Human Dev.*, 720 A.2d 1032 (Pa. 1998). According to *Emerich*, a patient must communicate a "specific and immediate threat" toward a "readily identifiable" victim. UPMC argued that Mr. Andrews' "amorphous, nonimmediate" threats against an unidentifiable "neighbor" or "neighbors" did not create a duty to warn (*Maas*, p 430). The trial court denied summary judgment, and the Pennsylvania Supreme Court affirmed.

Ruling and Reasoning

The Pennsylvania Supreme Court concluded the lower court did not err in denying the appellants' motion for summary judgment and said that the current record supports a finding that the victim was

"readily identifiable." The majority noted that the providers were well aware that living in the building was a stressor for Mr. Andrews. The providers, they reasoned, could have known on a "moment's reflection" that his statements, including "next door neighbor" and "neighbor who knocked on his door" at night, were references to those living in his building, with whom he had frequent opportunity to interact (*Maas*, p 439).

The court recognized that *Emerich* had limited the duty to warn, relying on *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980), a California Supreme Court case which held that mental health professionals do not have a duty to warn the "public at large" or a "large amorphous group" of threats to unidentified persons. In this case, however, the court argued that the residents in Mr. Andrews' apartment building did not constitute a "large amorphous group."

Dissent

Justice Baer maintained that the majority's decision significantly departed from *Emerich* because "neighbor" in an urban setting is not a "readily identifiable" group and could include those in adjacent buildings, the same block, or even in the broader community. Mr. Andrews had never referred specifically to those living on his floor, and he had made threats toward many different groups (e.g., "others" and those who "pissed him off").

Justice Baer felt that the majority had strayed from the limits to the duty to warn set forth in *Thompson*, in which there was no duty to warn where a juvenile threatened to kill a neighborhood child. It would be impracticable and ineffective to warn a broad segment of the public. The *Emerich* court, relying on *Thompson*, had recognized the importance of feasibility, stating that a mental health professional would have "great difficulty in warning the public at large of a threat against an unidentifiable person" (*Emerich*, p 1041).

Justice Baer reasoned that requiring providers to broadcast "generalized threats" to "broad segments" of the population could negatively impact the treatment of the mentally ill. Patients could be ostracized from their community and distrust their providers, who had breached confidentiality. Furthermore, increasing liability would threaten to "paralyze" providers who are seeking to provide treatment to a vulnerable population.

Discussion

Since *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976), courts across the country have grappled with defining the scope of the duty to warn, particularly in cases where patients make generalized threats beyond a specific individual. Many states have cited *Thompson*, which limited California's duty to warn to "identifiable victims" and excluded "large amorphous groups."

The vast majority of states with a duty to warn or to protect limit the duty to specific, reasonably identifiable, or clearly identifiable victims. Exceptions include Wisconsin, which includes all "foreseeable victims" (*Schuster v. Altenberg*, 424 N.W.2d 159 (Wis. 1988)) and Washington, which recognizes a duty to protect anyone who "might foreseeably be endangered" by one's patient in the outpatient context (*Volk v. Demeerleer*, 386 P.3d 254, 260–261 (Wash. 2016)).

As outlined by the dissent, restricting the duty to warn to "readily identifiable" individuals was intended to prevent limitless liability and recognize practical limitations to mental health care professionals' ability to identify and notify groups that have not been clearly defined. In *Maas*, it is not clear whether the psychiatrists have the duty to contact the building manager, each individual living in the apartment building, or an even broader group of people.

The majority's interpretation moves closer to a broader foreseeability standard without providing guidance on identifying the victim prospectively. Mr. Andrews' statement, "I told people I was going to kill someone" (*Maas*, p 430) and his varied and vague descriptions of his targets highlight the lack of specificity in this case. While the Pennsylvania Supreme Court ruled that neighbors were identifiable victims in this case, the question of whether the defendants breached that duty in this case remains to be determined by the finder of fact in a separate trial.

The *Maas* decision has implications for community integration, confidentiality, and risk assessment. As the dissent points out, the decision has negative implications for patients who will face loss of community and fewer housing options if broad groups are notified about their threats. Furthermore, broadcasting a threat to a large audience could erode the trust patients have in their providers and reduce their engagement in treatment. Together, these factors could significantly increase patients' risk of harm through alienation. It is difficult to imagine that Mr.

Andrews could have remained in his building if the residents of the 40-unit building were notified about his threats. While a broad interpretation of "readily identifiable" victims might at first glance appear to protect victims, discharging a warning to a large group may ultimately increase patients' risk of violence.

Limitations of Right against Self-Incrimination in Statements Made to Psychiatrists

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Voluntary Statement to a Psychiatrist May Be Used to Impeach Criminal Defendant at Trial after Psychiatric Defense Is Withdrawn

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In *Rosen v. Superintendent Mahanoy SCI*, 972 F.3d 245 (3d Cir. 2020), the Third Circuit Court of Appeals affirmed that the trial court did not err in permitting statements made to the Commonwealth's expert for impeachment purposes because it does not violate clearly established Fifth Amendment law.

Facts of the Case

On June 30, 2001, Adam Rosen stabbed and killed his wife, Hollie Rosen, in their home in Pennsylvania. He called the police initially claiming that his wife had been stabbed by two masked intruders. Shortly thereafter he confessed that he had "blacked out" in the middle of a heated argument with her and, after regaining consciousness, found her wounded on the floor. Mr. Rosen was arrested and charged with first-degree murder.

Mr. Rosen underwent two trials. During his first trial, in 2002, he presented a diminished capacity defense and retained an expert witness psychiatrist, Dr. Paul Fink. Mr. Rosen also underwent evaluation by the Commonwealth's expert, Dr. Timothy Michals. At trial, the jury heard testimony from Dr. Fink, who opined that Mr. Rosen could not have formed the specific intent to kill due to his bipolar disorder with psychotic features and stress from his failing marriage. Dr. Michals, however, testified that Mr. Rosen did not have a mental disorder affecting his ability to form intent, pointing to discrepancies in statements Mr. Rosen made to his psychiatric examiners and to the police. The jury convicted Mr. Rosen of first-degree murder.

After claiming ineffective assistance of counsel, Mr. Rosen was granted a new trial. At his second trial, in 2008, he abandoned his diminished capacity defense and planned to testify that he did not premeditate or have the deliberate, willful intent to kill his wife. Although Mr. Rosen had planned to proceed without the use of a mental health expert, the Commonwealth sought to admit evidence from Mr. Rosen's first trial, including his statements to Dr. Michals about killing his wife and previously attempting to rape her. Mr. Rosen claimed Dr. Michals failed to adequately administer *Miranda* warnings prior to examining him. The trial court ruled that, although these statements could not be used as substantive evidence in Mr. Rosen's case-in-chief, they could be used to impeach him should he choose to testify. Mr. Rosen then elected not to testify during the bench trial, where he was convicted of first-degree murder and sentenced to life in prison without the possibility of parole.

Mr. Rosen appealed, asserting among other things that the trial court erred in allowing for admission of psychiatric evidence from his first trial in a subsequent trial where no mental health defense was presented. The appellate court affirmed; the Pennsylvania Supreme Court likewise affirmed. In 2015, Mr. Rosen filed a *habeas* petition, arguing that the trial court violated his Fifth Amendment right against self-incrimination by ruling that his statements to Dr. Michals could be used to impeach him during his second trial. A federal district court denied his petition, and the Third Circuit affirmed the denial.

Ruling and Reasoning

In denying Mr. Rosen's *habeas* petition, the district court explained that Mr. Rosen failed to show