tested, the trial court was not obligated to conduct the special inquiry.

Discussion

This case raises several questions stemming from Mr. Howard's mute condition. First, can a mute defendant be found competent to stand trial? *Dusky v. United States*, 362 U.S. 402 (1960), established the standard to test whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (*Dusky*, p 402). While it is not difficult to imagine a case of a volitionally mute defendant who is malingering and subsequently found competent to stand trial, the expert should remember that competency is a present ability. In this case, the court seems to have arrived at a final opinion of competency, not by assessing Mr. Howard's present abilities and deficits, but by contrasting his past ability to communicate with his present mutism.

The second question focuses on the ethics-related dilemma of dual agency. The American Academy of Psychiatry and the Law (AAPL) guidelines recommend that treating psychiatrists should try to avoid conducting forensic evaluations on their own patients (Mossman D, *et al*: AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial. *J Am Acad Psychiatry Law* 35:S24–5, 2007). The conflicting duties of attending to the patient's best interests while trying to serve the legal system objectively could be problematic. The legal role would not only compromise the therapeutic relationship, but access to inculpatory information could result in a violation of confidentiality. The guideline recognizes, however, that there are situations in which dual roles cannot be avoided and offers suggestions of strategies to mitigate the conflicts. Alternatively, if issues of confidentiality and agency could be clearly delineated, one could argue that the better expert may not be an independent evaluator but the treating physician who had been successful in establishing a therapeutic alliance and enabling Mr. Howard to participate in an interview.

Finally, the case describes Mr. Howard as mute and noncommunicative, not as a result of mental disease or defect, but because he purposefully and intentionally sought to deceive the court. Three months elapsed between Dr. Sweda's report and Mr. Howard's competency hearing—certainly enough time for his clinical presentation to change, necessitating a new competency evaluation. The court does not appear to have attended to the clinical understanding that psychotic symptoms, mutism included, may fluctuate depending on treatment response and stress and that competency to stand trial is not a global, static state of mind.

Degree of Proof Necessary to Establish Proximate Causation of Suicide

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"Probability of a Possibility" of Suicide Is Insufficient to Prove a Psychiatrist's Negligence in a Malpractice Suit

In *Thompson v. Patton*, 6 So.3d 1129 (Ala. 2008), the Supreme Court of Alabama reviewed the trial court's decision to grant a motion for summary judgment in favor of the defendant in a malpractice suit alleging negligence by a psychiatrist who discharged a patient from the hospital three days before the patient's suicide. At issue was whether the testimony of the plaintiff's expert that "it was highly probable that [the patient] might do something to herself" (*Thompson*, p 1135) was sufficient to establish proximate causation between the psychiatrist's actions and the patient's death. The court decided that "the probability of a possibility" of suicide did not establish proximate causation and affirmed the trial court's decision (*Thompson*, p 1135).

Facts of the Case and Procedural History

Peggy Sue Ellis, who was 53 years of age, had been psychiatrically ill for approximately 30 years when she was admitted to Baptist Medical Center Montclair on November 11, 1999, following a suicide attempt. She was treated by Dr. Rita Patton, a psychiatrist who had also treated her during three previous hospitalizations in 1999. Ms. Ellis was placed on a

suicide watch and prescribed Seroquel, the dosage of which was increased after her condition regressed eight days later. On November 22, Ms. Ellis was asked by Dr. Patton whether she would hurt herself, and she replied, "I hope not." On that same day, she showed "signs of paranoia," "unreasonable fear regarding her family," and apprehension about her discharge (*Thompson*, p 1131). She was discharged on November 23, 1999, with a plan that included a follow-up appointment with her therapist the next morning, daily visits by a home health psychiatric nurse, and help from her cousin in monitoring medication compliance.

On November 24, 1999, Ms. Ellis kept her scheduled appointment with her therapist. The therapist noted that Ms. Ellis had been unable to fill her prescription for Seroquel, was "obsessed with psychotic thoughts," "frightened," and "had an inappropriate and blunted affect" (*Thompson*, p 1131). Two days later, Ms. Ellis committed suicide by drug overdose.

Marty Thompson, the administrator of Ms. Ellis' estate, sued Dr. Patton on November 19, 2001, alleging wrongful death under the Alabama Medical Liability Act, Ala. Code § 6-5-480 *et seq.* and § 6-5-541 *et seq.* (LexisNexis 1999). The suit alleged that Dr. Patton had breached the standard of care by discharging Ms. Ellis from the hospital prematurely, failing to formulate an appropriate outpatient treatment plan, failing to readmit Ms. Ellis to a psychiatric unit, and failing to implement proper suicide precautions. At the trial on March 19, 2004, Dr. Nathan Strahl, a psychiatrist, testified as an expert witness for Mr. Thompson, stating that Ms. Ellis' discharge from the hospital fell below the standard of care and that "it was highly probable that she might do something to herself" (*Thompson*, p 1135). Dr. Patton and Dr. Joseph Lucas, the defense's expert witness, also testified. The jury was unable to reach a verdict, and a mistrial was declared.

Following the trial, Dr. Patton moved for summary judgment, arguing that Mr. Thompson had failed to produce sufficient evidence to prove that Dr. Patton's negligence was the proximate cause of Ms. Ellis' death. The trial court denied the motion, but Dr. Patton was allowed a permissive appeal to clarify "the degree of proof necessary to establish the essential element of proximate causation in a medical malpractice/wrongful death action against a psychiatrist for the suicide of that psychiatrist's patient and whether the plaintiff in this case has met that requisite degree of proof" (*Patton v. Thompson*, 958 So.2d 303, 304 (Ala. 2006)). In that case, the Alabama Supreme Court clarified that the degree of proof required in a malpractice case involving suicide is no different from any other type of malpractice—that the plaintiff must prove "by substantial evidence that the psychiatrist breached the applicable standard of care and that that breach was a proximate cause of the patient's death" (*Patton*, p 313). The court reversed the denial of Dr. Patton's motion for summary judgment and remanded the case to the trial court.

Dr. Patton filed another motion for summary judgment, again arguing that Mr. Thompson had failed to offer sufficient evidence of proximate causation. The trial court granted the motion and entered a judgment against Mr. Thompson on June 26, 2007. The trial court held that expert testimony was necessary to prove proximate causation and that Mr. Thompson's expert, Dr. Strahl, did not establish in his testimony that Dr. Patton's alleged negligence proximately caused Ms. Ellis' suicide. Mr. Thompson appealed the decision to the Supreme Court of Alabama.

Ruling and Reasoning

The Supreme Court of Alabama affirmed the trial court's decision to grant Dr. Patton's motion for summary judgment.

Mr. Thompson made several arguments in his appeal to the supreme court, three of which are relevant from a psychiatric point of view. He first argued that the expert testimony of Dr. Strahl provided substantial evidence that Dr. Patton's alleged negligence in discharging Ms. Ellis from the hospital proximately caused her to commit suicide. The court disagreed, reasoning that, at best, Dr. Strahl's testimony established that it was reasonably foreseeable that Ms. Ellis "might" attempt to harm herself if discharged from the hospital. The court equated Dr. Strahl's assertion with "an unquantitative probability" or "the probability of a possibility" (*Thompson*, p 1135) that Ms. Ellis would commit suicide. Under Alabama law, evidence showing only a probability of a possibility is not sufficient to establish proximate causation in a negligence action alleging medical malpractice. The court therefore concluded that Dr. Strahl's testimony did not establish "a *causal connection* between Dr. Patton's act or omission constituting the alleged breach and the injury suffered by Ellis" (*Thompson*, p 1137, emphasis in original).

The second point argued by Mr. Thompson was that Dr. Patton, in her testimony, agreed with the statement that "had Ms. Ellis been hospitalized, the likelihood of her committing suicide would have been lessened," and thus Dr. Patton's own testimony provided sufficient proof of proximate causation (*Thompson*, p 1139). The court disagreed, stating that Dr. Patton's testimony indicated that continued hospitalization would have made it less likely, but not impossible, for Ms. Ellis to commit suicide. Therefore, Dr. Patton's testimony could not be construed to establish proximate causation between the decision to discharge Ms. Ellis from the hospital and her death.

The third point argued by Mr. Thompson was that expert testimony was not necessary to establish proximate causation, because the facts were simple and obvious enough for a layperson to determine, without the assistance of an expert, whether Dr. Patton's actions caused Ms. Ellis' death. The court disagreed, stating that the issue of proximate causation was not obvious and that discharging a patient from the hospital following a suicide attempt is a complex medical decision. In this case, it was "one of a number of decisions that [Dr. Patton] made about the appropriate medical care of [Ms. Ellis'] illness"; therefore, the jury could not be expected to use "common knowledge and experience" to determine the reasonableness of these actions, and expert testimony was required (*Thompson*, p 1141).

Discussion

This case raises an interesting point related to the semantics of expert witness testimony in malpractice cases. The majority opinion in this case relied heavily on the interpretation of Dr. Strahl's testimony that "it was highly probable that Ms. Ellis might do something to herself" (*Thompson*, p 1135) as the probability of a possibility of suicide, which the court did not equate with proximate causation. This seems to put a great deal of importance on the particular words chosen by Dr. Strahl during his testimony—far more importance than he probably realized when he spoke them on the witness stand. As Justice Murdock points out in his concurring opinion, the majority decision "imposes upon both Dr. Strahl and the jury a standard of precision in the oral use of the English language" that may not be "appropriate or required as a matter of law in this case" (*Thompson*, p 1143). As an expert witness for the plaintiff, Dr. Strahl was clearly trying to make the point that Dr. Patton's actions fell below the standard of care and caused the patient's death, but his words were ultimately used by the court to reach the opposite conclusion.

Another interesting aspect of the case is that, during his testimony, Dr. Strahl was prevented from answering a direct question about whether, in his opinion, Dr. Patton's actions were the proximate cause of Ms. Ellis' death. Counsel for Dr. Patton objected on the grounds that the testimony "invade[d] the province of the jury" (*Thompson*, p 1137). When a similar question regarding whether Ms. Ellis' release from the hospital led directly to her death was asked, Dr. Strahl was again prevented from answering after the court sustained an objection by Dr. Patton's counsel. Just as the reasoning in this decision highlights the importance of expert witnesses' choosing their words carefully, it also highlights the importance of attorneys' asking questions in a way that allows experts to offer a meaningful opinion while stopping just short of reaching the ultimate issue. In this case, the reader may wonder whether there was a way for the attorney to have phrased the questions differently to convey Dr. Strahl's opinion and still avoid "invading the province of the jury."

Finally, this case raises a noteworthy point about the standard of care for follow-up of patients who are discharged from psychiatric hospitals. Dr. Patton was sued by Mr. Thompson even though she had formulated an excellent discharge plan for Ms. Ellis, and another mental health professional had intervened between the discharge and Ms. Ellis' death. Although this suit was unsuccessful, it raises the question of whether a standard of care has been established for follow-up of patients after they are discharged from the hospital. Practice guidelines such as those issued by the American Psychiatric Association do not specifically address the topic, and so it remains an interesting "gray area" for future legal and scientific inquiry.

Physician's Duty to Treat Despite Religious Objection

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