

mental illness, had a history of nonadherence to recommended treatment, and had “tendencies toward violent behavior when off his medication” (*Malmstrom*, p 2). In addition, although Mr. Malmstrom asserted that he had been compliant with his medication since early 2020, the district court noted that he had “consistently refused medication for much of his past” (*Malmstrom*, p 2). Accordingly, the Eighth Circuit Court of Appeals ruled that the district court did not err in finding Mr. Malmstrom to be dangerous by clear and convincing evidence.

Mr. Malmstrom also argued that the district court erred by finding that the government met its burden to prove that there existed no suitable arrangements for him to be committed to state custody. He argued that under prior case law, the government had the burden to prove unavailability of custody by clear and convincing evidence. The circuit court disagreed with Mr. Malmstrom. The court said the burden on unavailability of custody is not the high burden asserted by Mr. Malmstrom. Following *United States v. Wigren*, 641 F.3d 944 (8th Cir. 2011), the court said that the government’s burden as to the unavailability of custody is met when a director certifies that no such state arrangements exist. In Mr. Malmstrom’s case, the court found that the director had made such a certification and Mr. Malmstrom did not challenge the sufficiency of the certification. The court concluded that the district court did not err in finding that the government met its burden of proof on unavailability of state custody. The court affirmed the judgment of the district court.

Discussion

This case discusses the criteria for federal civil commitment under 18 U.S.C. § 4246 and clarifies the government’s burdens of proof as to dangerousness and unavailability of state custody. Although forensic mental health professionals are unlikely to have a significant role in the availability of custody prong, they are commonly called to perform assessments and testify as to the person’s risk of future dangerousness. This case makes clear that district courts can consider many factors in determining the person’s dangerousness, including historic and clinical factors associated with increased risk of violence beyond evidence of the person’s recent behaviors.

This case also recalls *United States v. Dalasta*, another Eighth Circuit case. Kevin Allen Dalasta challenged a finding of his dangerousness and resulting commitment to the custody of the Attorney

General under 18 U.S.C. § 4246. The question in *Dalasta* was whether it was error for the trial court to place more weight upon the testimony of one expert witness rather than another. Both Eighth Circuit cases, *Malmstrom* and *Dalasta*, remind us that court rulings on a person’s dangerousness may be challenged on appeal and the forensic evaluations scrutinized.

In *Dalasta*, one doctor’s opinion that Mr. Dalasta would not be dangerous if released (based upon the assumption that he would live with his parents and not have access to guns) simply did not pass a common sense test because Mr. Dalasta had expressed an adamant desire to live on his own and possess firearms if released.

Although the Eighth Circuit has acknowledged the possibility of “the government’s home-field advantage” (*Thomas*, p 1124) regarding cases where the state experts are provided more time with the clients, the factfinder ultimately has wide discretion to assess and make judgements about expert testimony.

Parent of an Emancipated Adult with Mental Illness Does Not Have a Duty to Control or Supervise That Adult

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Mental Illness Does Not Create a Special Relationship Duty, or a Gratuitous Assumption of a Duty to Supervise an Emancipated Adult Child with Mental Illness Involved in a Criminally Violent Act

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In *Koenig v. London*, 968 N.W.2d 646 (SD 2021), the South Dakota Supreme Court considered the question of whether a mother of an adult child with mental illness had a duty to a law enforcement officer and his family when her son shot and injured the officer in an altercation. The lower court had granted the mother's motion for summary judgment and ruled that she did not owe a legal duty to control or supervise her adult son. The state supreme court affirmed the lower court.

Facts of the Case

Donald London (Donald; hereafter first names are used to avoid confusion, although the usual Journal style would be to refer to these persons as Mr. or Ms.), a 42-year-old male diagnosed with paranoid schizophrenia, was living alone in his grandmother's farmhouse in Kimball, South Dakota after she fell ill and was being treated in Sioux Falls. Prior to that, he had been living in another state for many years. Donald's mother, Bonnie, lived in Pierre but was staying in Sioux Falls while her mother received treatment. When psychotic, Donald became detached from reality and believed his deceased wife was alive and being held captive by various law enforcement or intelligence agencies. As a prior felon, he was prohibited from possessing firearms.

Donald had contact with police officers in early January 2015. On January 5, he had an altercation in a bar, and police later found him walking on the side of the road after his car broke down. He was released to the care of his father Michael London (Michael). On January 6, he had contact with police after he continued to have mental problems. Donald held a rifle at one point in the interaction but surrendered peacefully. Firearms were secured in a gun safe to which Michael had the key. Police did not pursue a mental health hold after Donald agreed to have Michael take him for an evaluation. Donald was evaluated in Mitchell, South Dakota, but was not admitted for inpatient treatment. He was advised to stop drinking and stop his antipsychotic medications until he could be seen six days later. Donald and Michael returned to the farmhouse. Bonnie said she would be able to come to Kimball and help with his care the following day.

On January 7, Donald became increasingly erratic. Michael called law enforcement believing Donald was coming to retrieve the firearms, which had been moved to Michael's home. Donald made threats against an officer who had pointed a firearm at him the previous day, and the chief of police. After returning to

the farmhouse, Donald spoke by phone with the county sheriff about these threats. The sheriff made preparations with multiple law enforcement agencies to confront Donald at the farmhouse. Bonnie arrived at the farmhouse and saw that Donald was calm and assumed things were de-escalating. Michael left for a medical appointment but noticed law enforcement vehicles near by and returned to the farmhouse. Bonnie left to investigate but was detained by law enforcement.

Sergeant John Koenig fanned out with other officers and found Donald outside the house with a rifle. He announced himself and commanded Donald to drop the weapon and to get on his knees. Donald dropped the rifle but instead returned to the farmhouse, where he got in his pickup and drove out to the yard to reclaim the rifle, after which he drove back to the house. Donald took a position behind his truck as cover. Michael was angered, feeling betrayed by the sheriff, and yelled out to Donald, "Shoot those sons of bitches!" Donald began firing at two officers and a round struck Sgt. Koenig in his shoulder. Donald surrendered seventeen hours later. Donald and Michael were charged, but Michael died before the completion of criminal proceedings. Donald pled guilty but mentally ill to three counts of aggravated assault against a law enforcement officer. This plea allows juries and judges to find a defendant guilty of an offense while acknowledging the presence of a mental illness. He was sentenced to 30 years in the state penitentiary plus 45 years suspended.

The Koenigs sued after the criminal proceedings alleging that Bonnie breached a legal duty by falsely telling Donald that Officers of the Bureau of Alcohol, Tobacco, and Firearms (ATF) were coming to the farmhouse, thus agitating him. They also argued that Bonnie assumed a duty to supervise Donald's conduct and had effectively entrusted him with weapons. Bonnie denied making any statement to Donald that ATF agents were coming to the farmhouse.

Bonnie moved for summary judgment, and the court granted the motion agreeing with her claim that she did not owe a legal duty to the Koenigs as she lacked sufficient control over her emancipated adult son and because his act of shooting the sergeant was not foreseeable. The court also found that she did not assume a duty to supervise Donald and she did not have control over the firearms she was alleged to have entrusted to Donald.

The Koenigs raised two concerns on appeal. The first was that the circuit court erred in determining

that Bonnie did not owe a duty to control Donald or prevent his misconduct. The second was that the court erred when it determined that Bonnie did not undertake a gratuitous duty to supervise.

Ruling and Reasoning

The court first recognized that in general, while there are some exceptions to the rule, individuals do not have a duty to prevent third-party misconduct unless there exists “a special relationship” and if the criminal acts were foreseeable. The court determined that Bonnie was not under “a special relationship” duty to control Donald’s actions. The court agreed with the finding of the circuit court summarizing, “Donald was a 42-year-old emancipated adult at the time of the shooting. He lived by himself out of the state and had not resided with Bonnie since high school. Donald was not the subject of a guardianship, and there were no restrictions on his movement or conduct” (*Koenig*, p 653). Furthermore, the court found nothing special in the relationship. “As his mother, Bonnie was involved and supportive” of his “effort to address his mental health. But this relationship appears to be no more special or remarkable than would the case of any parent concerned for the health of an adult child” (*Koenig*, p 653–654). The court determined that Bonnie was not liable for Sergeant Koenig’s injuries.

The court next determined if Bonnie’s actions increased the risk of harm. The Koenigs had argued that Bonnie’s alleged statements regarding the ATF created a foreseeable risk of harm to others, which she had a duty to prevent. The court, however, concluded that “Bonnie’s purported comments about the ATF did not create a foreseeable high risk that Donald would act criminally to harm Sergeant Koenig” (*Koenig*, p 658).

Finally, the court reviewed the question of Bonnie’s actions creating a gratuitous duty to supervise. After restating the relevant rule, the court noted that there was no support in law for a person being held responsible for an adult child, who was previously living independently without assistance. They found no authority for this and described the Koenigs’ argument as a “but-for causation,” and not a persuasive argument that Bonnie was “voluntarily assuming a duty to supervise another adult” (*Koenig*, p 659).

Discussion

The duty to protect others from the harm of third parties is an area of negligence law with some controversy. In

the tort of negligence, one must prove a legal duty existed, the behavior of an actor breached that legal duty, the actor behaved in a way that was the actual and proximate cause of a harm, and the harm constituted a legally recoverable damage. The question of duty is always a question of law. One owes duties to others based on the relationship between the parties. There are also a general duty not to incite others to foreseeable tortious or criminal acts and a duty to protect others if one created a peril. One may also assume a duty by intervening in a situation where actions may prevent a harm if executed in a nonnegligent manner.

The *Koenig* case contributes to the complex litigation involving duties to third parties and third-party liability. A duty to third parties, as in the *Tarasoff* progeny of cases, exists based on the relationship between the relevant parties. In general one is responsible only for foreseeable consequences of one’s actions or omissions. Had the court decided differently, this case would have had perilous consequences for the families of people who are mentally ill. One can easily imagine facts where parents of an individual with serious mental illness who is dependent on them might be found to have a duty to protect others. For purposes of a forensic evaluation, determining the level of disability and dependence, and discussing the nature of the care relationship, may be useful in elucidating details and assisting the court in the determination of the nature of a legal duty based on relationships. This case presented the possibility that the court might use the power of hindsight to expand the duties of the parents of adult children with mental illness. The court, however, took a conservative approach consistent with existing precedent in South Dakota, and did not create a new duty for parents.

Criminal Competencies and Extreme Racial Views

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