

email alert



To: Behavioral Health Task Force Members

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Date: January 3, 2017

Washington Supreme Court Expands Liability of Mental Health Professionals

By Sharon Peters and Eric Neiman*

On December 22, the Washington Supreme Court issued its long-awaited decision in [*Volk v. DeMeerleer*](#), a case involving the liability of mental health professionals.¹ The court ruled that a psychiatrist could be liable for homicides committed by a patient, even though the patient never identified the victims as targets of violence. The decision expands the scope of liability, not just for mental health professionals, but potentially for many other health care providers.

The case involved a double murder-suicide in July 2010. The patient, who had received outpatient treatment for mental health issues with the same psychiatrist for years, killed his former girlfriend and one of her children, and attacked another of her children with a knife. The patient last saw his psychiatrist three months before the killings. Although he reported that he had suicidal thoughts when depressed, the patient had not expressed a specific intention to harm anyone.

The trial court granted summary judgment for the psychiatrist and his clinic. The Washington Court of Appeals reversed, holding that a jury should decide whether the psychiatrist met the standard of care and should have done something to prevent the patient's violent acts. In a 6-3 decision, the Washington Supreme

Court largely agreed with the Court of Appeals, and remanded the case for trial. The Supreme Court stated that whether the patient's "actions were foreseeable... is a question of fact that should have been resolved by a jury."

The Supreme Court's analysis was based on Washington and national case law, scholarly articles, and the *Restatement (Second) of Torts* § 315. The *Restatement* creates a duty to "control the conduct" of another person when a "special relation" exists. The court decided that the relationship between a mental health professional and a patient creates a duty to "take reasonable precautions to protect *anyone* who might foreseeably be endangered² by the patient's condition. The court emphasized the term "anyone" in its opinion.

The decision discusses the difficult policy interests presented by the case, including provider-patient confidentiality, the importance of avoiding unnecessary confinement, the limited ability to control conduct of patients, and the "incredibly difficult task in ascertaining whether a patient will act violently." Nevertheless, the court decided that these factors were outweighed by "society's strong interest in preventing attacks by mentally ill patients." According to the court, the "mental health professional is under a duty of reasonable care ... to protect foreseeable victims of his or her patient."

The *Volk* case has been the subject of much discussion in medical and legal circles since the 2015 Court of Appeals decision. There was an immediate reaction to that decision by mental health professionals who were concerned, that they might be held legally responsible for unforeseeable events, and would be required to breach patient confidentiality, and damage therapeutic relationships to avoid claims. The concerns were not limited to Washington state.

Forty years ago, the Supreme Court of California¹'s decision in *Tarasoff v. Regents of the University of California* imposed an obligation on mental health professionals to warn specific individuals who were targeted by their patients.² In the following years, most states adopted some form of mandatory or permissive duty to warn. These laws generally included a degree of immunity for providers acting in good faith. The Washington Supreme Court's decision last week represents a significant expansion of the scope of liability for mental health professionals.

The liability rule announced by the *Volk* decision concerns mental health professionals, but may have implications for other health care providers. Emergency medicine professionals, primary care providers, therapists, and counselors are among many professionals often seeing people who, in the course of disclosing highly personal thoughts, might offer troubling information suggesting danger to self or others. In the overwhelming number of cases, those suggestions do not mean that violent acts will follow.

This decision raises many questions, including whether changes in clinical practice are needed, patients will be deterred from effective treatment, lawsuits will increase, and if catastrophic events will lead to mass litigation. Cases based on a *Volk* theory often will involve tragic outcomes and horrific facts.

It remains to be seen if this holding is limited to Washington state, or if it reflects a national trend of expanding the scope of liability for mental health and other health care professionals. Legislatures and courts of other states facing similar questions will likely look to the *Volk* decision as a starting point, in the same way they looked to *Tarasoff*.

**We would like to thank Sharon C. Peters and Eric J. Neiman (Lewis Brisbois Bisgaard & Smith LLP, Portland, OR) for authoring this email alert.*

¹ *Volk v. DeMeerleer*, No. 91387-1 (Wash. filed Dec. 22, 2016).

² *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334 (1976).

About the Behavioral Health Task Force:

The Behavioral Health Task Force (BHTF) is committed to advancing the understanding of laws impacting behavioral health, including the delivery of services to those living with mental illness, certain neurological conditions, substance use disorders or developmental disabilities, and reimbursement for such services. The work of the BHTF serves to raise awareness about how behavioral health laws influence health improvement efforts.

The membership of the BHTF is comprised of the members of the Academic Medical Centers and Teaching Hospitals; Business Law and Governance; Fraud and Abuse; Health Care Liability and Litigation; Health Information and Technology; Hospitals and Health Systems; In-House Counsel; Labor and Employment; Payers, Plans, and Managed Care; Physician Organizations; Post-Acute and Long Term Services; and Regulation, Accreditation, and Payment Practice Groups (PGs). The members of these PGs have access to all of the benefits and resources offered by the BHTF, including discounted rates on webinars and luncheons, free email alerts and publications, free online toolkits and tutorials, and priceless networking opportunities.

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