Up at Night: Liability for Mental Health Professionals for Failure to Warn

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Among the most acute challenges facing mental health professionals is trying to predict the future behavior of their patients--including potential acts of violence. Also, a therapist might be uncertain about their legal obligation. Mental health professionals have a duty of confidentiality to their patients, but that duty is limited by the duty to protect those who might be at risk, including the patient. The tension between these two duties can keep mental health professionals awake at night.

This article discusses Idaho law regarding confidentiality and the duty to warn, and analyzes a recent Washington Supreme Court case which has generated much discussion in this area for potential application to Idaho. In an era when violent events seem to be part of the daily news cycle, a discussion of the role and responsibilities of mental health professionals is timely.

Duty of confidentiality

The duty of confidentiality is an essential part of the therapeutic relationship. Individuals with troubled thoughts seek professional care and guidance to help them cope. They do so with the expectation that their communications will be private. Without that assurance, fewer people might seek help, with adverse consequences both to the patient and potentially others. Breach of patient confidentiality can result in civil and regulatory liability.[1]

An analysis of patient privacy begins with the federal Privacy Rule, which was promulgated as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[2] The Privacy Rule, found at 45 CFR Parts 160 and 164, creates standards for the use and disclosure of protected health information, a broad term which includes health information that relates "to the past, present, or future physical or mental health or condition of an individual . . . ."[3] HIPAA includes a preemption provision that preempts state law, unless state law is more protective or certain other conditions are met.[4]

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HIPAA prohibits disclosure of protected health information unless an exception applies. One of those exceptions is for a situation in which the provider "in good faith, believes the use or disclosure . . . [i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public . . . ."[5] In other words, HIPAA recognizes that patient privacy must give way to disclosure when certain conditions exist creating a safety risk.[6]

Various Idaho laws also provide for confidentiality by professionals providing mental health services. These include: physicians (Idaho Code § 9-203(4));[7] psychologists (§ 54-2314);[8] and, school counselors and psychologists (§ 9-203(6)).[9] There are exceptions to these confidentiality rules, including: malpractice actions (Idaho Code § 39-1392e); board review (§ 54-3410); physical injury to children (§ 9-203(4)(A)); and domestic violence (§ 9-203(4)(B)).

In short, both federal and state laws provide for exceptions to patient privacy and professional confidentiality in situations in which there is a risk of harm to the patient or others.

Duty to warn in Idaho

Many states have "duty to warn" laws that permit or require disclosure of otherwise confidential information when there is a risk of harm to an individual (including the patient) or the public.[10] Most if not all of these laws followed the landmark decision of the California Supreme Court, *Tarasoff v. Regents of University of California*,[11] which held that therapists have a duty to protect individuals who are threatened with harm by a patient. These laws recognize the importance of therapeutic confidentiality and the difficulty of predicting future dangerousness.

Idaho has adopted both a mandatory duty to warn law and corresponding immunity law for mental health professionals.[12] Idaho Code §§ 6-1902 and 1903 deal with the duty to warn. The duty arises when a patient has communicated an explicit threat of imminent serious physical harm or death to a clearly identified or identifiable victim or victims and the patient has the ap-

parent intent and ability to carry out such a threat. The professional must then make a reasonable effort in a timely manner to communicate the threat both to the victim and to law enforcement closest to the patient's or victim's residence.

Idaho Code § 6-1904 creates immunity from civil and disciplinary liability for providers who do warn and those who do not warn. A mental health professional who warns about a patient's threats when there is a reasonable basis to do so has immunity, as does a mental health professional who fails to predict or take precautions to prevent a patient's violent behavior when there is no specific threat. There can be liability for failure to warn, however, when "the mental health care professional failed to exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of his professional specialty under similar circumstances."[13]

This immunity can be viewed as incomplete, since there can be liability for negligence in failing to warn or take other action. Most immunity laws bar negligence claims and allow claims only for more aggravated conduct or a lack of good faith.

Current scope of liability in Idaho

The Idaho Supreme Court has recognized the challenge for mental health professionals in predicting future dangerousness. In *Caldwell v. Idaho Youth Ranch*,[14] the trial court granted summary judgment for a youth corrections facility when a former resident committed murder three months after his release. The Supreme Court affirmed, saying that liability required "claimants to demonstrate that the harmful behavior should have been highly predictable based upon demonstrated past conduct."[15]

Caldwell is helpful to limiting potential liability of mental health professionals in setting the "highly predictable" standard. Nevertheless, the court also recognized that a duty to warn or act arises when there is a foreseeable risk, with foreseeability generally to be decided by a jury. No Idaho appellate decision forecloses the possibility of a mental health professional being liable to a member of the general public injured by a patient's violent act, even when there is no specific threat.

The foreseeability analysis also applies to harm to self. In *Cramer v. Slater*,[16] the Idaho Supreme Court affirmed a trial court decision that "when a psychiatrist, psychologist, or doctor fails to properly assess a patient's suicidal ideations and consequently fails to take steps to prevent the suicide, these professionals can be held liable for the patient's suicide."[17] The court held that a jury should have decided whether it was foreseeable that the patient would commit suicide after being informed of a positive HIV status.

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Under current Idaho law, a mental health professional or other health care professional can be held liable if a patient commits suicide, the patient's act was foreseeable, and the provider failed to take preventive action.

Washington expands scope of liability

In a highly anticipated decision in December 2016,[18] the Washington Supreme Court expanded the scope of liability for mental health providers. The case, *Volk v. DeMeerleer*,[19] 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 one 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, he had not expressed a specific intent to harm anyone.

The trial court granted summary judgment for the psychiatrist and the clinic. The Washington Court of Appeals reversed.[20] In a 6-3 decision, the Washington Supreme Court agreed with the Court of Appeals and remanded the case for trial. The court ruled that a psychiatrist could be liable for homicides and other violent acts committed by a patient, even though the patient never identified the victims as potential targets for violence.

In reaching its decision, the Washington Supreme Court relied on prior case law and the Restatement (Second) of Torts § 315. The court found that a "special relation" exists between a mental health professional and a patient which triggers "'a duty to take reasonable precautions to protect *anyone* who might foreseeably be endangered by the patient's condition."[21] The court went on to hold that a "mental health professional is under a duty of reasonable care to act consistent with the standards of the mental health profession and to protect the foreseeable

victims of his or her patient."[22] With regard to the standard of care issue, the court noted that the plaintiffs' case was supported by the opinion of an expert forensic psychiatrist.[23]

The *Volk* decision discussed competing policy arguments involved in imposing a duty on mental health professionals in the outpatient setting, which included the public's interest in safety, difficulty in predicting dangerousness, and the need for confidential therapeutic communications. The court concluded that the legal rights of foreseeable victims were most important, and declined to grant "absolute immunity to health care professionals in the outpatient setting."[24]

The language of the *Volk* decision expands the scope of liability, not just for mental health professionals, but potentially for many other health care providers. 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."[25]

Idaho mental health professionals and their counsel should be aware of this case because Idaho courts may rule similarly in future cases. It is questionable whether *Volk* is consistent with current Idaho law given the decision in *Caldwell*: in *Volk*, there was no identifiable victim or "highly predictable" risk. Nevertheless, the concept of having foreseeability determined by juries is found in recent Idaho tort jurisprudence, and could result in the same expansion of liability for mental health professionals in Idaho. Furthermore, there is an argument that *Caldwell* can be read as limited to its facts and still permitting a claim against a mental health professional for patient violence in a different factual setting. Washington, too, has a duty to warn and immunity statute. Moreover, the principles underlying the *Volk* decision are not necessarily limited to the mental health field.[26]

Idaho law in this area is not settled and will require further study and resolution by the legislature and the courts.

Conclusion

This article is being written very shortly after the horrific events in Las Vegas, Nevada and Sutherland Springs, Texas. Memories of other shootings involving school children and moviegoers and nightclub patrons, have not faded. These are events involving mass casualties. Violence on a smaller scale seems to be reported on continually.

The overwhelming majority of people with mental health issues are not violent. People with no mental health history or treatment are often perpetrators. Nevertheless, the fact is that a certain number of violent acts are committed by people who have received mental health treatment of some type, sometimes remote in time from those acts, and sometimes closer in time. This raises legal and policy questions about potential liability of their care providers.

The legal principles discussed here are not unique to any one state. They require balancing of competing interests: encouraging those in need to seek treatment, protecting privacy and confidentiality, assuring access to care, and avoiding limitless liability while providing for protection of the public and compensatory justice in appropriate cases.

Idaho law in this area is not settled and will require further study and resolution by the legislature and the courts. In the meantime, mental health professionals (and other health care providers) and those advising them will continue to struggle in this acutely challenging area where there are no bright line rules.

Endnotes

1. *See e.g.*, 42 U.S.C. § 1320d-6; 45 C.F.R. Part 160, Subpart D.

2. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

3. 45 C.F.R. § 160.103.

4. 45 C.F.R. § 160.203.

5. 45 C.F.R. § 164.512(j)(1)(i)(A).

6. The full range of federal laws providing for confidentiality and privacy of mental health and substance abuse information is outside the scope of this article.

7. Physicians cannot, unless the patient has consented, "be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Idaho Code § 9-203(4).

8. "A person licensed as a psychologist under the provisions of this act cannot, without the written consent of his client, be examined in a civil or criminal action as to any information acquired in the course of his professional services in behalf of the client." Idaho Code § 54-2314.

9. "Any certified counselor, psychologist or psychological examiner, duly appointed, regularly employed and designated in such capacity by any public or private school in this state for the purpose of counseling students, shall be immune from disclosing, without the consent of the student, any communication

made by any student so counseled or examined in any civil or criminal action to which such student is a party. Such matters so communicated shall be privileged and protected against disclosure." Idaho Code § 9-203(6).

10. For a state by state list of these laws, see Nat'l Conference of State Legislators, Mental Health Professionals' Duty to Warn (Nov. 28, 2015), http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx (last visited Nov. 8, 2017).

11. 17 Cal. 3d 425, 551 P.2d 334 (1976).

12. Idaho Code §§ 6-1902-1904.

13. Idaho Code § 6-1904(1).

14. 132 Idaho 120, 968 P.2d 215 (1998).

15. *Id.* at 125; *see also Harris v. Dep't of Health & Welfare*, 123 Idaho 295, 299, 847 P.2d 1156 (1992) (holding that the Department of Health and Welfare was not liable for injuries sustained from the tortious acts of a juvenile in its custody because "no act or omission of the employees involved a high degree of probability that *the kind of harm which [the plaintiff] suffered would result therefrom.*") (italics in original).

16. 146 Idaho 868, 204 P.3d 508 (2009).

17. *Id.* at 878.

18. Sandeep Jauhar, Op-Ed, *Protect Doctor-Patient Confidentiality*, N.Y. Times, Nov. 19, 2015, at A31, *available at* https://www.nytimes.com/2015/11/19/opinion/protect-doctor-patient-confidentiality.html.

19. 187 Wn.2d 241, 386 P.3d 254 (2016).

20. *Id.* at 252.

21. *Id*. at 256 (quoting *Petersen v. State*, 100 Wn.2d 421, 428 (1983)).

22. *Id.* at 274.

23. *Id*. at 275.

24. *Id.* at 274.

25. *Id.* at 275.

26. An effort to legislatively overrule *Volk* failed in the 2017 Washington legislature. According to one of the involved attorneys, *Volk* settled after remand to the superior court for trial.

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