



UW PACC

Psychiatry and Addictions Case Conference

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LEGAL UPDATE ON THE DUTY TO PROTECT

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GENERAL DISCLOSURES

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OBJECTIVES

1. Understand the legal basis for mental health clinicians' duty to protect
2. Distinguish legal duties under statutory and common law in Washington
3. Appreciate how to approach the duty from a clinical perspective

QUESTION 1

Breach of a patient's confidentiality may result in all of the following for a physician, except:

- a. A tort suit
- b. A criminal conviction
- c. Sanction by state medical board
- d. Sanction by the American Medical Association

QUESTION 2

The decision in *Tarasoff* (Cal. 1976) expanded which element of negligence?

- Duty
- Dereliction
- Direct causation
- Damages

QUESTION 3

In *Volk v. DeMeerleer* (Wash. 2016), the treating psychiatrist was found liable for which of the following?

- a. Failure to warn
- b. Failure to seek involuntary hospitalization
- c. Medical malpractice
- d. The psychiatrist was not found liable

BALANCING ACT



- Protect patient confidentiality
- Protect therapeutic alliance
- Treat in least restrictive environment
- Protect others from patient's violence
- Difficulty with accurate violence prediction
- Liability concerns

TERMS OF ART

- Duty to warn
- Duty to protect
- Tarasoff-type duty
- Tarasoff limiting law

TARASOFF

- Tarasoff I (Cal. 1974): Duty to warn
 - *The protective privilege ends where the public peril begins*
- Tarasoff II (Cal. 1976): Duty to protect
 - *Where a therapist determines, or should determine, that his patient presents a serious risk of danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim from danger*

WASHINGTON LAW



PETERSON V. STATE (WASH. 1983)

- Washington's first Tarasoff-type law
- Inpatient psychiatrist has a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by the patient

RCW 71.05.120 (1987)

- *This action does not relieve a person from ... the duty to warn or take reasonable measures to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims*
- Discharge as matter of law: warn victim and police

VOLK V. DEMEERLEER (WASH. 2016)

Key Facts



- Episodic treatment over many years
- Homicidal thoughts against his ex-wife years prior, but never acted on them
- Intermittent suicidal thoughts, but no actions since treatment
- No homicidal thoughts voiced at last appointment
- Killed ex-girlfriend and one of her children, then killed himself

VOLK V. DEMEERLEER

PROCEDURE:

- Suit filed by representatives of the victims
- Psychiatrist granted summary judgment
- Appellate court reversed (2014)
 - RCW 71.05.120 (3) does not apply outside involuntary commitment
- Washington Supreme Court upheld appellate court's reversal of summary judgement (2016)

VOLK V. DEMEERLEER (WASH. 2016)

RULING:

- When there is a special relationship between a provider and patient, the mental health professional is under a duty of reasonable care to act consistent with the standards of the mental health profession in order to protect the foreseeable victims of his or her patient's dangerous propensities

KEY CONSIDERATIONS

- Does not require warning *ALL FORESEEABLE* victims
- Terms left for clarification
 - Special relationship
 - Dangerous propensities
 - Foreseeable victim
- Applicability to various types of clinicians
 - Act consistent with the standards of the profession
- Did not reconcile common law and statute
 - This means that we have TWO sources of law

CLINICAL APPROACH



- What triggers the duty?
- Who needs protection?
- How can the duty be discharged?

COMPARISON

	<u>RCW 71.05.120</u>	<u>Volk</u>
When triggered? Treatment setting	Involuntary treatment	Voluntary treatment
When triggered? Conditions	Actual threat of physical violence	Special relationship Dangerous propensities
Whom is duty owed?	Reasonably identifiable victim	Foreseeable victims
How is duty discharged?	Warn (clean discharge) or reasonable measure to protect	Measures to protect, which could include warning
Type of violence protected by law	Intentional harm of physical violence	Broader, may include patient's negligent behavior
Dangerousness	Make a threat	Pose a threat

MEANS TO “PROTECT”

Court (n. 12)

- Closer monitoring of medication compliance
- Closer monitoring patient’s mental state
- Increase family involvement
- Warning others of the risk posed by the patient
- Involuntarily hospitalization

Other

- Voluntary hospitalization
- Increase frequency of appointments
- Removal of weapons
- Refer to alcohol/substance abuse programs
- Address anger management (therapy)

SUMMARY OF KEY POINTS

- Washington's laws on duty to protect are unique to this state
- Washington has two sources of law (RCW 71.05.120, Volk) that apply in different settings
- Under Volk, consider patients who pose a risk for violence and foreseeable victims of harm
- Warnings are one means for protection

QUESTIONS

References:

Piel JL, Opara R. Does Volk v. DeMeerleer Conflict with the AMA Code of Medical Ethics on Breaching Patient Confidentiality to Protect Third Parties? AMA J Ethics, 20(1): 10-18 (2018)

Bree Collaborative's Risk of Violence to Others, available online:
<http://www.breecollaborative.org/topic-areas/previous-topics/risk-of-violence/>

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