Recent AMA Litigation Center Cases Concerning
Physicians' Medical Practice Liability to Non-Patients

Davis v. South Nassau Communities Hospital

26 N.Y.3d 563 (NY Ct. App. 2015)

Issue

The issue in this case was whether a physician, a physician assistant, and a hospital may be liable to a third party who was injured by their patient, allegedly because they failed to warn the patient that she should not drive her car while under the influence of a narcotic medication.

Case summary

Lorraine Walsh presented at the South Nassau Communities Hospital emergency room, complaining of abdominal pain. She was examined by an emergency room physician and by a physician assistant, who administered medications to reduce her pain. These included a narcotic medication. A few hours after she had come to the emergency room, Walsh was discharged. She claims she was not advised of the soporific effects of her medications.

While driving home from the hospital, Walsh became unconscious, allegedly as a result of her medications. Her car crossed a double yellow line and struck a bus operated by Edwin Davis, who was traveling in the opposite direction.

Davis and his wife sued the physician, the physician assistant, and the hospital for medical malpractice. The defendants moved to dismiss for failure to state a cause of action, because their duty of medical care was owed only to their patient, Walsh, and not to a third person, Davis. The trial court granted their motion, and the Appellate Division affirmed. The case was then appealed to the New York Court of Appeals, the highest court in New York.

On December 16, 2015, the Court of Appeals reversed. In a split decision, it held that, although physicians generally owe a duty of care only to their patients, and not to third persons, it would make an exception in this case. The burden on the physician of warning about the side effects of the medication were small, and the number of persons against whom the physician might owe liability was limited.

Litigation Center involvement

The Litigation Center and the Medical Society of the State of New York filed an *amicus* brief with the New York Court of Appeals in support of the defendants.

Doe v. Cochran

332 Conn. 325 (2019)

Issue

The issue in this case is whether a physician whose office had mistakenly told a patient that the patient was *not* infected by a sexually transmitted disease can be found liable to the patient's girlfriend, after the patient subsequently infected the girlfriend with herpes.

Case summary

Dr. Cochran's patient asked to be tested for sexually transmitted diseases. The test report showed that he had herpes, but Dr. Cochran's office mistakenly informed the patient that the test report came back negative. The patient then infected his girlfriend, Jane Doe (a pseudonym) with herpes. Doe sued Dr. Cochran under a variety of legal theories, all based on professional negligence.

The trial court found that Dr. Cochran did not have a professional duty to Doe, and he dismissed the complaint. Doe appealed to the Connecticut Supreme Court, which, *sua sponte*, asked the Connecticut State Medical Society (and other organizations) to submit an *amicus* brief to advise the Court of the policy issues.

The Connecticut Supreme Court held that: (1) girlfriend pleaded cause of action sounding in ordinary negligence rather than medical malpractice, and (2) as a matter of first impression, physician owed duty of care to girlfriend. The case was reversed and remanded.

Litigation Center involvement

The Litigation Center, along with the Connecticut State Medical Society, filed an *amicus* brief in the Connecticut Supreme Court to argue in favor of affirmance of the trial court dismissal.

Leight v. University of Pittsburg Physicians (Pa. S. Ct.)

Issue

The issue in this case is whether physicians who cared for a mentally ill patient, including recommending that the patient receive psychiatric care, but who did not involuntarily commit the patient, owe a duty under the Pennsylvania Mental Health Procedures Act (50 P.S. § 7101-7503) (MHPA) to protect the general public against the patient's violent acts.

Case summary

Beginning in June 2011, John Shick, a thirty-year-old living alone in Pittsburgh, Pennsylvania had received outpatient medical care from numerous physicians, in various medical specialties, employed by University of Pittsburgh Physicians (UPP) and the University of Pittsburgh (Pitt).

Although the physicians were not psychiatrists, many of them had strongly encouraged Shick to seek psychiatric treatment. None, however, initiated an involuntarily commitment proceeding.

On March 12, 2012, Shick randomly shot various persons in the lobby of the Western Psychiatric Institute and Clinic (WPIC). In addition to his own death, he killed one other person and injured several others. One of the injured persons was Kathryn Leight, a WPIC receptionist.

In the trial court, Leight and her husband alleged that the physicians knew or should have known – based upon observations and review of past medical records – that Shick was severely mentally disabled and in need of immediate treatment. The plaintiffs further set forth claims for vicarious liability and corporate negligence against UPP and Pitt for their alleged failure to "take [Shick] to Western Psych for an involuntary emergency examination" and to complete an application for involuntary commitment. Their claims were founded on alleged violations of the MHPA.

The trial court dismissed Plaintiffs' lawsuit, reasoning that the MHPA does not apply because the physicians never applied to have Shick involuntarily examined and/or treated, and Shick was a voluntary outpatient. The Superior Court (an intermediate level appellate court) affirmed the dismissal.

The Leights appealed to the Pennsylvania Supreme Court.

Litigation Center Involvement

The Pennsylvania Medical Society (PMS) and the Litigation Center filed an *amicus* brief to support the defendants.

Maas v. UPMC Presbyterian Shadyside (Pa. S. Ct.)

Issue

The issue in this case is whether a mental health professional has a duty to warn non-patients of a threat of imminent harm by a patient.

Case summary

Terrence Andrews had a long history of mental illness. He had been an inpatient at a local hospital, where he was diagnosed with, *inter alia*, paranoid personality disorder and antisocial personality disorder. He had attempted suicide on several occasions and suffered opioid and cocaine dependence. Between 2006 and 2008, Dr. Michelle Barwell, a psychiatrist who worked at UPMC Presbyterian Shadyside mental health clinic, oversaw Andrews's transition from inpatient treatment to independent living in a private apartment building.

However, Andrews did not function well in the independent environment. Within one week of moving into a private apartment, he presented to an emergency room and reported that he had been experiencing homicidal ideations for two weeks toward his neighbor. He complained that the neighbor knocked on his door in the middle of the night to ask him "stupid" questions.

Andrews repeatedly voiced his desire to be placed in a personal care home where he would have more support from caregivers on site.

Over the next few months, Andrews's condition continued to deteriorate. He experienced several hospitalizations for attempted suicide and continued homicidal ideation. Andrews repeatedly articulated a plan to stab one of the neighbors with scissors.

By late May of 2008, Andrews had completely decompensated. He reported that he had not been taking his medications for three weeks and that he had both suicidal and homicidal ideations. On May 25, Andrews reported auditory hallucinations, which were causing him to rave and scream in his apartment. He asked again to be admitted. A case manager intervened and dissuaded him from being admitted. Instead, the plan was to deliver his medications to him the next morning and to move him to a personal care home in 36 hours. After receiving medication for agitation, Andrews was sent home in a cab.

On May 29, Andrews attacked and killed Lisa Maas, a neighbor who lived four doors away in his apartment building. Andrews told police that he did it, and he asked to be jailed. He also informed the officers that he had told Dr. Barwell to put him in residential care because he was going to kill someone and the medication was not working.

Laura Maas, the victim's mother and administratrix of her estate, filed several actions against the local medical center where Andrews was treated and the staff—including Dr. Barwell—who treated him. She claimed that they failed to warn her daughter of the risk Andrews presented to her daughter and her daughter's neighbors.

At the trial court, the defendants moved for summary judgment, alleging that mental health care professionals only have a duty to warn specifically identified persons, not a nebulous group of individuals. The trial court denied the defendants' motion. The court based its decision on the Code of Ethics for Psychologists, finding that it contemplates a duty to reveal confidential information to non-patients. It found that a jury could find that the defendants owed a duty to warn the tenants residing on Andrews's floor of his potentially dangerous behavior.

The defendants filed an interlocutory appeal of the trial court's denial to the Superior Court of Pennsylvania. The Superior Court—Pennsylvania's intermediate level court—affirmed the trial court holding. The defendants appealed to the Pennsylvania Supreme Court.

Litigation Center involvement

The Litigation Center, along with the Pennsylvania Medical Society and the Pennsylvania Psychiatric Society, filed an *amicus* brief in the Pennsylvania Supreme Court. The brief supports the defendants and argues that liability in this case would undermine the patient/physician relationship and diminish the availability of health care.

Vizzoni v. Mulford-Dera

(N.J. Super. Ct., App. Div.)

Issue

The issue in this case was whether a psychiatrist owes a duty to a third-party injured by the psychiatrist's patient.

Case summary

Barbara Mulford-Dera hit and killed a bicyclist, Judith Schrope, while driving under the influence of psychotropic medications. When the police interviewed her, Mulford-Dera told them that her psychiatrist, Stefan Lerner, had prescribed the medications but failed to warn her that she should not drive while under their influence.

Tracey L. Vizzoni, the executor of Schrope's estate, sued, among others, Dr. Lerner. Dr. Lerner moved for and was granted summary judgment. The judge observed that, because Schrope was not Dr. Lerner's patient, he could not be liable, even if he breached the standard of care.

Vizzoni appealed to the Superior Court Appellate Division, the intermediate court of appeals in New Jersey. Subsequently, the case settled.

Litigation Center involvement

The Litigation Center, along with the Medical Society of New Jersey, filed an *amicus* brief to support Dr. Lerner. The brief argued that an expansion of physician liability to persons other than the physician's patients would diminish the availability of health care.

Volk v. DeMeerleer

187 Wash.2d 241 (2016)

Issue

The issue in this case was whether a psychiatrist owes a duty to a third-party killed by the psychiatrist's patient.

Case summary

Jan DeMeerleer first met with a psychiatrist, Howard Ashby, MD on September 13, 2001. Ten years earlier, DeMeerleer had tried to kill himself, and he expressed suicidal thoughts during this initial meeting. Dr. Ashby diagnosed DeMeerleer as being bipolar. He prescribed Depakote, a mood stabilizing drug.

For the next several years, DeMeerleer would meet with Dr. Ashby on an intermittent basis. Dr. Ashby continued to prescribe Depakote, as well as other psychotropic medicines. When DeMeerleer was compliant with his medication regimens, he was able to form social

relationships and secure employment. However, when DeMeerleer would refuse to take his medications, which was frequently, he would lose his job and express suicidal and homicidal thoughts. He told Dr. Ashby that he was thinking of killing his ex-wife and his ex-wife's boyfriend. He also told Dr. Ashby that his girlfriend had ended their relationship, in part because he had slapped the girlfriend's autistic son. This termination made him despondent. DeMeerleer never told Dr. Ashby that he intended to harm his now ex-girlfriend.

On the night of July 17-18, 2010, DeMeerleer entered the home of the ex-girlfriend. He killed her and one of her sons, and tried, unsuccessfully, to kill her two other sons. He then killed himself. Family members, friends, and acquaintances who had visited with DeMeerleer shortly before the incident gleaned no indication of a plan to kill someone or to commit suicide. Post-mortem toxicology reports showed that DeMeerleer had not been taking his medications at the time of the killings.

Beverly Volk, who was the guardian of the surviving sons and the representative of the estates of the ex-girlfriend and the deceased son, sued Dr. Ashby and the medical clinic where he worked for professional malpractice. Dr. Ashby and the clinic moved for summary judgment, arguing that Dr. Ashby had no professional duty to the ex-girlfriend or her children.

In opposition to the motion for summary judgment, Volk filed a declaration from a board-certified psychiatrist and professor of psychiatry. The expert opined that Dr. Ashby was negligent because he "failed to conduct a systematic and focused assessment of DeMeerleer's condition or prepare a treatment plan with periodic follow-up care." Had he done so, he probably would have improved DeMeerleer's mental state to the point where DeMeerleer would not have been homicidal. If, having received this better care, DeMeerleer did not improve, Dr. Ashby would probably have learned that DeMeerleer intended to harm the ex-girlfriend and her children. Dr. Ashby could then have warned the ex-girlfriend, and she could then have taken appropriate steps to protect herself and her children from DeMeerleer.

The trial court entered summary judgment on behalf of Dr. Ashby and the medical clinic, concluding that Dr. Ashby owed no professional duty to the ex-girlfriend or her children. Dr. Ashby could not have reasonably identified the ex-girlfriend or her children as a target for DeMeerleer, who had not communicated any threats to harm them. Volk, the representative of the ex-girlfriend and her children, appealed.

By a split decision, the Washington Court of Appeals reversed. It found that, under the rulings of the Washington Supreme Court, Dr. Ashby did owe a duty to the ex-girlfriend and her children.

Dr. Ashby and the medical clinic appealed to the Washington Supreme Court. The Washington Supreme Court concluded that Ashby and DeMeerleer shared a special relationship and that special relationship required Ashby to act with reasonable care, consistent with the standards of the mental health profession, to protect the foreseeable victims of DeMeerleer. Noting that the foreseeability of DeMeerleer's victims was a question of fact, the Court reversed the summary judgment and remanded the case for trial.

Litigation Center involvement

On October 2, 2015, the Litigation Center, along with the Washington State Medical Association and others, submitted an *amicus* brief to the Washington Supreme Court in support of Dr. Ashby and his medical clinic.