

## Patient-psychiatrist confidentiality hampered in liability ruling

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A decision of the Supreme Court of Washington requires a psychiatrist to do the impossible: predict imminent dangerousness in patients who have neither communicated recent threats, indicated intent to do harm, nor indicated a target for a potential threat. This extra duty placed on the shoulders of psychiatrists could have a major impact on patient-psychiatrist confidentiality.

Howard Ashby, MD, is a psychiatrist in Washington. In 2010, one of Dr. Ashby's out-patients, Jan DeMeerleer, attacked his ex-girlfriend, Rebecca Schiering, killing her and her son Philip Schiering, and injuring another son, Brian Winkler. DeMeerleer then returned home and committed suicide.

The attack occurred in July. Yet DeMeerleer had last met with Dr. Ashby in April, almost four months earlier. Dr. Ashby's notes for this last meeting state that DeMeerleer had indicated only "suicidal ideation"—not a threat of harm against another person.

At stake in *Volk v. DeMeerleer* was whether or not Dr. Ashby, or any psychiatrist, should be held responsible for failing to notify third parties that a threat of violence was imminent—even though the patient had not expressed violent intentions toward that third party. A lower court decided the psychiatrist could not have identified the actual victims as targets because the patient had communicated no threats against them during his treatment.

An appeals court then examined the duty of a mental health professional to protect a third party, ultimately reversing the trial court and ruling that mental health professionals who treat voluntary outpatients may owe a duty to protect "all foreseeable victims, not only those reasonably identifiable victims who were actually threatened by the patient."

But the Supreme Court of Washington in December held that a psychiatrist may be liable for damages if his patient kills or injures a third party, even if the patient has not communicated to the psychiatrist homicidal or violent intentions and even if, as here, the psychiatrist only treated the patient in an office setting.

“Holding mental health professionals liable to third-party victims who were not reasonably identifiable as targets of actual threats places an impossible burden on mental health professionals and limits their ability to treat patients,” the Litigation Center of the AMA and several other medical societies argued in an amicus brief.

Psychiatrists are dedicated to providing treatment for patients who pose a risk for violence, “but they cannot accurately predict whether and when any particular patient will have a violent outburst, much less the target of that violence, as here, no threat of harm was made and no victim was indicated,” the brief said.

The brief further argued that the law should protect patient-physician confidentiality. Mental health professionals should owe a duty to third persons only when a patient has communicated an actual threat of physical violence against a reasonably identifiable victim.

## **A blow to confidentiality**

That a patient trusts his or her psychiatrist is essential to mental health care. If the patient cannot speak in confidence, with candor, in the privacy of the exam room then the relationship between patient and psychiatrist crumbles.

“This ruling could seriously erode the confidentiality of the physician-patient relationship, in that a physician could be held liable for any violent behavior by a patient under his or her care even if the patient makes no threats of violence directed toward specific individuals,” said Marvin Swartz, MD, a psychiatrist and professor at Duke University and chair of the American Psychiatric Association’s Committee on Judicial Action.

“As a result, a physician might disclose to third parties otherwise confidential information if concerned about violence,” he said. “I suspect that psychiatrists might be much more careful in accepting referrals or continuing treatment for patients with any history of violence or risk for violence.”

“Given the ongoing shortage of psychiatrists,” he said, “it would likely get even more difficult to find a willing psychiatrist to treat complex patients.”

Mental health therapy is not effective if patients stay away or refuse to open up when they do seek treatment. And patients may not be honest with their physicians if they cannot trust that what they say will be held in confidence.

Treating patients with serious mental health issues can be difficult because the patients “are not under the ‘control’ of the psychiatrist, and do not meet the criteria for involuntary commitment,” the amicus brief said. “These patients must be encouraged to continue treatment by a secure and confidential

relationship with their physician. Any diminution in patient confidentiality ... will jeopardize the chances for continued and successful mental health treatment and will cause some practitioners to cease serving such patients.”

Patients with a history of violence can benefit from therapy, but if the relationship with their psychiatrist is not confidential they will not share any violent intentions, further hindering a psychiatrist’s ability to alert anyone to potential violence.

“Rather than the traditional notion of medical malpractice, the decision appears to create a new category of liability in the form of ‘medical negligence,’” Dr. Swartz said in an email. That would make psychiatrists in Washington “potentially legally liable if it is determined that they should have known someone would be a victim of violence.”.

The court’s ruling “suggests psychiatrists have an ability to predict violent behavior well beyond our current ability to predict,” Dr. Swartz said.