

The Court Revisits The "Dangerous Patient Exception" to the Psychotherapist Privilege

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Practice Area: Health Law

Recently, the Wisconsin Court of Appeals revisited the issue of balancing a psychotherapist's duty to protect patients' confidentiality with the requirement to warn potential victims of patient threat. The case, *State v. Agacki*, is important in light of the recent Columbine High School shootings.

The Facts

The facts were undisputed. Baldrige, Agacki's psychotherapist, became concerned when, after a tavern fight, Agacki became agitated. During a telephone call with Baldrige he stated, "I will pull my piece out and blow their...heads off. I will kill them. I don't care what happens to me...I am not afraid of...dying." Baldrige, concerned for Agacki's mental health, suggested they meet at a tavern. Before leaving for the tavern, Baldrige called the Milwaukee Police Department and requested assistance because he believed Agacki might need mental health hospitalization. At the tavern, Agacki indicated he was armed. Baldrige excused himself and alerted the police officer outside that he believed Agacki was emotionally unstable, in need of hospitalization and armed. When Agacki left the tavern, the officer stopped him, recovered an unloaded gun and arrested him for carrying a concealed weapon.

At issue in the case was a trial court's ruling on a motion to suppress evidence. For the first time, the court of appeals was asked to interpret the holding in the case of *Schuster v. Altenburg* in a criminal evidentiary setting. Agacki argued that the officer stopped him and seized his gun based upon a privileged communication with his psychotherapist. As such, Agacki argued, the information should be inadmissible to support a finding of probable cause for the stop and subsequent arrest.

The Ruling's Application in the Field

While the *Agacki* decision involved an evidentiary issue in a criminal proceeding, the finding and conclusion of the court has direct applications for mental health care providers. The purpose of the privilege associated with confidential patient communications is to prevent unnecessary disclosure of "confidential information" to encourage patients to candidly discuss concerns with those treating them. **However, the *Schuster* case stands for the proposition that, although mental health professionals have a duty of confidentiality to their patients, that duty is not absolute and must sometimes give way to "protect the patient or community from imminent danger."** Relying on *Schuster*, the trial court ruled against Agacki and allowed the evidence in. The court of appeals agreed. Extending *Schuster's* patient threat exception, the court held that to prevent testimony regarding the lawful actions taken by police and the therapist under the dangerous patient exception would make no sense.

Often, it is not always clear to mental health professionals when the duty of confidentiality gives way to the duty to warn. The Agacki court set forth standards in an effort to assist therapists in resolving the seemingly conflicting duties. **According to the court, if during the course of diagnosis and treatment there is a reasonable cause for the psychotherapist to believe that (1) the patient is dangerous and (2) disclosure of the communication is necessary to prevent any harm, a psychotherapist has a duty to warn third parties of the patient's dangerousness and to take whatever steps are reasonably necessary under the circumstances to prevent harm to the patient and others.** Likewise, police have a duty to take appropriate action once warned. It would result in an absurd result if police could not then present conversations with the therapist to show probable cause.

Lessons to Learn. In making the assessment as to whether the dangerous patient exception exists, treating professionals should remember that:

- The harm must be imminent; in other words, very likely to occur in the near future.
- The patient need not have identified the victim directly. Unlike other jurisdictions, in Wisconsin a duty is owed where there are generalized statements of dangerous intent.
- The exception broadly encompasses the duty to protect, warn and take all steps reasonably necessary, including hospitalization or clinical intervention for the patient, instituting commitment proceedings and, where the dangerous tendencies are imminent yet generalized, calling the police.

Implications for Institutions and Others

Although the duties described in this article apply directly to individual therapists, hospitals and nursing homes that employ therapists need to be aware of the scope of these duties. In an employment setting, tort liability based on negligent acts of employees can extend to the employer. Thus, it is important that employers ensure employed therapists remain educated on this issue.

In Wisconsin, the dangerous patient exception has not been extended to other health care providers, such as nurses or emergency room physicians. This may be because of the unique nature of the therapist/client relationship. In other words, the therapist may be the only person in a position to prevent the imminent harm. As such, he or she has a responsibility to act. Whether the duty will be extended to others in the future is an unanswered question. There is certainly a good argument that absent that unique relationship, patient confidences should remain confidential, and no other health care providers should owe such a duty to the general population.

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