A Physician’s Duty to Warn Others

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Over the past several months, our nation has endured several acts of violence that resulted in tragedy. Several of these horrific acts – including the Sandy Hook Elementary School shootings, the Aurora, Colorado, movie theatre shootings, and the attempted assassination of U.S. Representative Gabrielle Giffords – were carried out by individuals who had shown signs of behavioral disturbance in the days and weeks leading up to the incident.

Prior to the Aurora, Colorado, movie theatre shootings, James Holmes had been seeing a psychiatrist and (according to at least one report) the psychiatrist had warned University of Colorado officials about Holmes, although no action was taken because he later withdrew from the school’s graduate program. Similarly, just a few months before he attempted to assassinate Representative Giffords, Jared Lee Loughner was expelled from the college he attended due to his erratic behavior during class, which had prompted one classmate to presciently express concern that Loughner might commit a mass shooting during class.

For many physicians, particularly psychiatrists, these horrific incidents have raised questions concerning the balance between doctor-patient confidentiality and the need to disclose confidential patient information when a patient signals that he/she might present a risk of violence toward himself or others. In addition to clinical concerns, these issues raise several legal questions. Could a physician face civil liability for failing to warn of the dangers posed by a patient who later commits violence? If there is a legal duty to disclose confidential patient information, when does that duty arise and how is it discharged? Does the duty to warn trump doctor-patient confidentiality in all cases? This article will discuss those issues.

The leading case nationally on these issues is *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal 1976), a landmark California case which sparked litigation in nearly every state. Unfortunately, the law that has emerged from that litigation is laden with inconsistencies concerning when a duty to warn will arise. Since *Tarasoff*, some states have enacted legislation to address these inconsistencies, but Missouri has not. Moreover, Missouri’s judiciary has addressed these issues on just a few occasions. Accordingly, Missouri case law does not provide clear answers to the above questions.

Nevertheless, the few cases in which the Missouri judiciary has addressed the physician’s duty to warn do provide some guidance to practitioners who face the unenviable task of assessing patient dangerousness and the need to warn others of such dangerousness, balanced against confidentiality and HIPAA privacy protections.

In *Bradley v. Ray*, 904 S.W.2d 302 (Mo. App. 1995), the plaintiff brought an action on behalf of Kelly,
a child, against the psychiatrists who counseled Kelly’s step-father for his prolonged and ongoing sexual abuse of Kelly. According to the plaintiff’s petition, the step-father had been sexually abusing Kelly since 1980, when Kelly was four-years old. When Kelly’s mother learned of the abuse in 1988, she arranged for the psychiatrists to provide counseling to the step-father. Shortly after the psychiatrists began counseling the step-father, the psychiatrists terminated the counseling. The plaintiff’s petition alleged that the psychiatrists were aware that the step-father was abusing Kelly, but failed to report it to any law enforcement authorities during the counseling or upon termination of their services. According to the plaintiff, Kelly continued to be abused as a result of the defendant’s failure to report the abuse.

As a matter of first impression, the Bradley court held that the psychiatrists owed a duty to Kelly to warn appropriate authorities that the step-father, their client, presented a serious danger of future violence to Kelly, who was an identified victim. In so holding, the court stated:

“When a psychologist or other health care professional knows or pursuant to the standards of his profession should have known that a patient presents a serious danger of future violence to a readily identifiable victim the psychologist has a duty under Missouri common law to warn the intended victim or communicate the existence of such danger to those likely to warn the victim including notifying appropriate enforcement authorities.”

The Bradley holding has limited application – for a duty to warn to arise, the health care professional must know or should know that a patient: 1) presents a serious risk of future violence; and 2) that is targeted at a readily identifiable victim. In Bradley, this standard was met because the defendant healthcare professionals were specifically retained to counsel the step-father regarding his ongoing violence (in the form of sexual abuse) toward a readily identifiable victim (his step-daughter).

While the Bradley court enunciated the general circumstances under which a duty to warn will arise, it left several questions unanswered. For instance, it offered little guidance on how the duty to warn can be satisfied. Moreover, Bradley does not identify the specific information that should be included in a warning from a physician. In this regard, the court stated only that the physician “must warn the intended victim or communicate the existence of the danger to those likely to warn the victim, including notifying appropriate enforcement authorities.” Thus, the Bradley holding suggests that the physician should warn those in a position to thwart the potential violence and should include the information that will allow them to do so. In the context of child abuse, this may mean notifying the police and social services of the potential victim and of the nature of the abuse threatened, so that the authorities may be in a position to intervene to prevent the anticipated violence.

In reaching its decision, the Bradley court relied upon Sherrill v. Wilson, 653 S.W.2d 661 (Mo. 1983). In Sherrill, the plaintiff sued various physicians because a mental patient, after being released on a two-day pass from his court-ordered confinement, killed the plaintiff’s son. Unlike the plaintiff in Bradley, the plaintiff in Sherrill did not proceed on a failure to warn theory. Instead, the plaintiff argued that the defendant physicians were negligent for releasing the patient when they knew of his dangerous proclivities and for failing to recapture the patient when he did not return from his two-day pass. The Missouri Supreme Court held that the physicians did not owe a duty to protect the general public. Because the plaintiff’s son was a member of the general public – and not a readily identifiable victim like Kelly in the Bradley case – the Court upheld the trial court’s dismissal of the plaintiff’s petition.

Another Missouri case, Virgin v. Hopewell Center, 66 S.W.3d 21 (Mo. App. 2001), illustrates the limitations of the “readily identifiable victim” rule announced in Bradley. In Virgin, the plaintiff was injured in a head-on...
automobile collision with a patient who had been diagnosed with bipolar disease, manic, with psychotic features and paranoia, and who had previously told her psychiatrist that she had a “death wish” when she drove. The plaintiff filed a lawsuit against 14 of the driver’s health care providers, alleging that they were negligent for failing to warn the innocent driver, her family, her close associates, the police, and the Department of Revenue that the patient should not drive a motor vehicle.

The appellate court affirmed the dismissal of the action. In reaching this conclusion, the court took great care to distinguish the facts in Virgin from the facts in Bradley, which involved a specific person who had been identified as a target of the patient’s abuse. Relying on Sherrill and the limitations of the duty to warn recognized in Bradley, the Court determined that “Appellant’s request that ‘this Court recognize a potential duty to warn a class of foreseeable potential victims (i.e., motorists, like Appellant) . . . runs contrary to Missouri law.”

The Virgin court also stressed the importance of the confidential nature of the doctor-patient relationship:

“[A] finding of no duty furthers the public interest in maintaining the physician-patient privilege. The policy behind this privilege is to protect the patient by allowing him to make full disclosure without fear that the information will be used against him. The purpose of the privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between the patient and the physician, free of fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information. Establishing a duty in the instant case would erode, to say the least, the physician-patient privilege, as well as subvert the purpose and policy behind it.”

Taken together, Bradley and Virgin establish that foreseeability of harm alone is not sufficient to create a duty to warn. Rather, for a duty to arise, the patient must present a foreseeable danger to a readily identifiable victim.

Thus, a physician should seriously evaluate any danger or threat that a patient poses to a specific individual. The most obvious sign that a patient poses such a danger is where the patient expressly threatens harm to a named individual. Under certain circumstances, a duty to warn will arise even where the patient fails to convey to the physician an intent to harm a specific individual. For instance, where a physician becomes aware that an unstable patient with a history of violence toward a specific individual has purchased a gun and begun stalking that
individual, a duty to warn may arise. Moreover, where the physician, like the physicians in the Bradley case, becomes aware of a history of violence that is ongoing, a duty to warn may arise. Unfortunately, because Missouri law on these issues is unclear, it is difficult to formulate definite rules or guidelines that apply broadly to a clinical practice. Rather, whether to disclose patient information to protect a third party is a situational evaluation that considers the individual patient, potential victim, and the danger posed.

If a physician does suspect that a duty to warn has arisen, he/she should consider the nature, format, and scope of the warning. For instance, for purposes of establishing that a warning was given, a physician should consider issuing the warning in writing or otherwise documenting the warning. If a threat is imminent, a physician may not have time to issue the warning in writing. In such cases, the physician, when time allows, should still document in writing that the warning was given. In addition to documenting the warning itself, physicians should also consider documenting the reasoning and logic in deciding to issue the warning. Moreover, when in doubt about the specific type of danger posed by the patient, a physician should not speculate or offer gratuitous suggestions regarding how best to thwart the danger. Finally, a physician should not make dichotomous or percentage-probability predictions regarding whether a patient will or will not act violently.

Notably, the HIPAA Privacy Rule does not prevent a health care provider from disclosing necessary information about a patient to law enforcement or other persons, when the provider believes the patient presents a serious and imminent danger to himself or others. As such, if a duty to warn under Bradley has arisen, a physician should be able to exercise that duty without violating the HIPAA Privacy Rule. The provisions allowing for disclosure of protected information may be found in the Privacy Rule at 45 CFR § 164.512(j).

Disclosure

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