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Report on Patient Privacy Volume 19, Number 8. August 07, 2019 Judge Upholds $1M Award for Psychiatrist's Warning of Possible Shooting; Appeal Begins

By Theresa Defino

Although mental health professionals and others have a "duty to warn" when they suspect a patient may be at risk of causing harm, a jury decided that a psychiatrist erred when she informed a veteran's boss and the local police that he had thought about shooting the man in the head, a federal judge has ruled. But acknowledging that some of his rulings in the case followed "scant precedent," North District of California Judge William Orrick is allowing an appeal of the verdict, which included a $1 million judgement against the psychiatrist, despite her attorneys missing a crucial filing deadline.

The veteran, Ronald Turner of Eureka, California, won a $2.75 million award in March, after his attorney convinced a jury that his thought of killing his boss did not pose a serious enough threat to warrant violating his privacy. After the psychiatrist, Tracie Rivera, M.D., informed Turner's boss, he lost his job, has been shunned by former friends and coworkers, and lost his faith in the medical system. Orrick reduced the total award to $1 million, citing caps set on noneconomic damages by California malpractice law.

In his July 19 ruling, Orrick noted Rivera could herself suffer more than monetarily should she lose on appeal. "An adverse final judgment may well affect her future employment and career," he wrote.

The case is significant to providers and privacy officials nationwide as it pits the duty to provide a so-called "Tasaroff" warning to protect patients and the public against the privacy rights of patients. Depending on the final outcome, the case may either have a chilling effect on others' warnings or serve to encourage them. Some in the mental health field have previously warned that patients won't share confidences if they believe their privacy, particularly crucial in mental health settings, could be threatened.

Tanya Tasaroff, also a California resident, was murdered in 1969 by her former boyfriend. In a case that went to the California Supreme Court (twice), the University of California was found to have a duty to warn her of the threat against her life that the former boyfriend had admitted to his psychologist (who worked at UC hospital). The rulings sparked laws nationwide that are inconsistent in how they define what type of threat should be communicated and to whom, among other differences. HIPAA also contains provisions that apply in such cases ("HIPAA and 'Duty to Warn,'" *RPP* 19, no. 8).

Case Is Unusual

Nancy Delaney, who represents Rivera, told *RPP* the psychiatrist had a clear obligation to make the disclosures that she did and said the case needs further clarity.

"As the trial judge acknowledged, there are significant legal issues with ramifications for all California practitioners that need to be resolved," Delaney said. "We believe that these will ultimately be resolved in the spirit of the original Tasaroff decision—that reporting was appropriate."

Fred Norton, Turner's attorney, did not respond to *RPP*'s requests for comment. Following the jury verdict in March, he posted news of what he called a "just and pleasing result" on his firm's blog (see

http://bit.ly/2KAJzHZ). He has not addressed the case since.

From the start, the case has been marked by a number of unusual features. Firstly, it is one of only a few where a provider has fallen into jeopardy for reporting a patient; typically the greater worry comes from failing to report.

In 2014, Turner filed the suit himself and got the litigation all the way to a jury trial; the court assigned Norton as pro bono counsel just two months before the trial began. It proceeded in federal court, which was not bound by the shorter statute of limitations that bind state courts.

While most of the trial focused on whether Rivera's actions were warranted, some testimony related to Rivera's employment status with a firm that provides temporary assignments for physicians. Turner was treated at facilities operated by Veterans Affairs (VA), which was also originally named in the suit. HIPAA was never mentioned during the trial, which hinged on whether Rivera had committed medical malpractice or professional negligence.

According to hundreds of pages of trial transcripts reviewed by *RPP*, Rivera appeared to hurt her defense when she revealed during testimony that other medical "notes" on the case existed but that she wasn't sure where they were. Orrick instructed the jury that Rivera could have purposely withheld them if their content would have weakened her defense, but Delaney argued that was not the case and that the medical record that was available was complete and demonstrated all the steps Rivera had taken before making her disclosure. He also ruled against Rivera and did not allow Delaney to inform the jury that, as a result of Rivera's warning, Turner's boss had obtained a restraining order against him.

War Experiences Triggered PTSD

Norton sought to portray Rivera as arrogant and uncaring as to the consequences of her actions on Turner. Norton also said she was inexperienced in treating veterans, and noted she had joined the VA less than two weeks before she reported Turner.

Both sides agreed on at least a few things: that Turner and Rivera only met once, for an hour, and that it would turn out to be a fateful encounter for both.

Turner retired from the Marines in 2007 after 20 years. In 2004, he served in Iraq for six months, living with other military personnel in open air tents; his job was repairing vehicles, as it had been in the United States, according to Norton. Although Turner "never fired a gun…he was in danger every single day" and a "close friend" was killed, Norton said. As a result of his service, Turner developed post-traumatic stress disorder and received mental health and other services on an ongoing basis from a local VA facility.

In 2009, he was hired as a fleet maintenance supervisor for the U.S. Forest Service. Several years into the job he began to experience problems with his boss and other workers. Things reached a boiling point in May 2014, and Turner, without having an appointment, came to see his counselor, Andrew McLaughlin, who had been treating him for several years.

When he came to see McLaughlin that day, Turner testified, he was prompted by McLaughlin to answer questions about whether he felt suicidal or homicidal. Turner said he was not suicidal, but initially refused to answer the second question, saying that, as a combat veteran, "especially with people knowing that…you see mental health care professionals, there's a stigma." Turner testified that people are already needlessly "scared" of combat veterans and that "there's a stigma when…you start to talk about things of that nature."

'Shoot My Supervisor in the Head'

But when McLaughlin—who did not testify at the trial—told Turner that he needed to be honest or that he couldn't help him, Turner said he was "not comfortable talking about this because I had no intention of doing anything." But McLaughlin continued to press him, according to Turner. "He says to me, `Then we're going to sit here and go through a hypothetical scenario.' And he started. Just like with the suicide [assessment], homicide has additional questions. And so in addition to asking if you're homicidal, the questions are, `Well, if you are [homicidal], do you have a person identified?' I told Andrew, hypothetically, yes. And he asked me who, and I told him it would be my supervisor," Turner testified.

Turner recounted that McLaughlin then asked, "Hypothetically, do you have a plan to carry this out?" Turner said he responded by saying, "Well, Andrew, I mean, if I had to, I'd probably dress up in my Forest Service uniform, borrow a gun, drive three hours, and shoot my supervisor in the head." On the stand, Turner said he had no friend in mind from whom he could borrow a gun.

After this conversation, according to Turner, McLaughlin brought in his supervisor and the three sat in a circle and developed what Turner called a "crisis plan…to help me to de-escalate my anxiety," which included him taking time off work.

Turner said they also "taught me some new techniques to use while I was awaiting my sick leave approval." When shown that the medical record indicated that McLaughlin wrote that he "Advised veteran of mandated reporting requirements and need to alert [his supervisor] of his reported crisis," Turner denied any knowledge of such a conversation. McLaughlin never made any warnings.

Disclosure Stunned Turner

In his opening statement, Norton said the medical record also indicated that Turner, "when asked about his level of intent on a Likert scale of 1 to 10, with 10 being the highest, he said 3." As Norton put it, "in other words, there was only a 30 percent chance he was going to blow his boss's head off." Turner said he could recall no such conversation, and he responded "None," when Norton asked him if he ever had "any intention of harming" his boss.

An appointment was made for Turner to see Rivera, which occurred nine days later. McLaughlin never phoned or contacted Rivera prior to the appointment, so she had no idea what Turner's situation was.

By the time he saw Rivera, Turner testified, he was feeling "calm, relaxed, and happy." When asked why he was there, Turner said he told Rivera he wanted to discuss some medication side effects and recounted his earlier appointment with McLaughlin, the crisis plan, and what had prompted it. Turner testified that he stressed to Rivera that these were only hypothetical concerns, and that he was not upset during his visit with Rivera. He said he left the appointment with no hint that the very next day Rivera would call and tell him that she had to report his alleged threat to his boss and to law enforcement officials.

When he got that call, Turner said he was shocked and told Rivera that he had never threatened his boss and that if Rivera carried through with her disclosures it would "ruin our lives," referring to himself and his wife. As a result of Rivera's calls, Turner was put on administrative leave, and informed that he could not contact any forest service employees and was "not to step onto any federal facility."

He was on administrative leave for eight months before he was let go. Since this occurred, Turner said he remained unemployed (as of the trial, in March, he was enrolled in college courses), he lost his faith in the VA system, and had been paying out-of-pocket for psychotherapy that was nearly four hours from his home. In addition, he testified that he lost friends and coworkers and was shunned by people in his town.

Psychiatrist: Hypothetical Is Meaningless

During the trial, Delaney noted the word "hypothetical" did not appear in Turner's medical records nor was there any reference to him denying an intent to harm his boss.

Rivera testified as to how psychiatrists view "hypothetical" situations.

Providers, she said, "won't refer someone to a psychiatrist with a three-day follow-up for hypothetical symptoms. First of all, in medicine, there's no such thing as hypothetical symptoms," Rivera said. "For example, you're either having chest pain or you don't. You don't have hypothetical chest pain. If you have diabetes, either your sugar is elevated or it's not. You don't have…hypothetical elevated blood sugar. In medicine, it's symptom-specific. We treat symptoms. We don't treat hypothetical symptoms. It's too dangerous. We have to assess, what are your symptoms; hence, his reason for his referral [to her]."

After she met with Turner, Rivera testified that she called McLaughlin and although he described Turner's thoughts and the 21-point crisis or safety plan, McLaughlin was repeatedly dismissive of the notion that Turner would become violent toward his boss, stating "That's just Ron." Rivera testified that she was "not reassured" by McLaughlin's comments, and concluded that he should have reported Turner's statements himself, and not left that up to her.

Rivera said her worry was that Turner wanted to return to work, and what might happen if he did so. She said her "biggest concern is that he still had access to work with a uniform and badge, and he didn't want to be off work and he wanted to be at work, so he was someplace he didn't want to be and he was angry about that."

In addition to phoning McLaughlin after seeing Turner, she also spoke by phone to Turner's wife that same day. Janice Turner, who also testified, was aware of Turner's statements regarding his boss, and of the crisis plan.

After meeting with a care team who were familiar with Turner and who all expressed concerns, Rivera determined that Turner should be reported. She consulted others in the VA because "we didn't have a clear protocol on what to do when homicidal threats or homicidal thoughts are articulated on a federal campus." The care team "wanted to know what is the best way that we can—and the most caring way—that we can disclose information and protect the patient's privacy at utmost, but at the same time upholding our legal obligation to making sure the patient is safe, the intended victim is safe, and the community is safe."

A police report was made and Rivera phoned Turner's boss and told him about that, offering the case number but no other details, according to her testimony.

Judge: Appeal Will 'Test' Rulings

Under questioning by Delaney, her attorney, Rivera also explained her rationale for the disclosure.

Turner, she said, told her he "wanted help with his harmful thoughts. He wanted help." Replied Delaney, "And when you make the decision to warn, in your professional judgment, are you helping?" Yes, Rivera replied. "Because if he attempted to execute that plan, it could have led to his death, not just the death of his supervisor. Or if he didn't die, it could have led to his arrest. And I couldn't imagine talking to his wife knowing that I saw her husband in my office and he told me he was struggling and I did not help him. I couldn't do that. And then a family member saying to me, `My husband is dead and you knew what he was going to do and you let him go and do that and, now he's dead and you knew about it? What kind of doctor are you?'"

Continued Delaney, "In your judgment, did you meet the standard of care for a psychiatrist in making the report that you did?" Responded Rivera: "I exceeded it."

In her closing argument, Delaney said any provider in Rivera's situation would have disclosed Turner's statements, noting that when he assessed on the Likert scale, he rated his intent to act as a three, not a zero. McLaughlin, she said, "passed off" the decision to report Turner. "As the psychiatrist, as the buck stops here… Dr. Rivera had to make the hard decision and she made it," Delaney said.

But in his final remarks, Norton said, "What we see is not a conclusion by Dr. Rivera that the threat was serious but, rather, that she wanted to err on the side of caution. And, again, she may have thought that was the right thing to do, but it's not the law. It's not the standard that she's held to as a psychiatrist, as a psychotherapist. And it did real harm, and for that she has to be held accountable."

As Judge Orrick recounted in his July 19 order on motions presented after trial, the jury "found that Dr. Rivera committed professional negligence and awarded Turner $750,000 in economic damages and $2,000,000 in noneconomic damages." But under California law, non-economic damages are limited to $250,000, making the total award $1 million.

As noted earlier, Orrick granted the defense's motion to file an appeal past a deadline, and he underscored the importance of giving Rivera that option. "I made rulings in this case on matters for which there was scant precedent. As this Order suggests, I think they were correct, and that the jury's verdict should stand," Orrick wrote. But I do not want to deprive Dr. Rivera of the opportunity to test them on appeal."

Orrick set a deadline of Nov. 7 for Rivera's attorneys to file an opening brief and Dec. 9 for Turner's to file their answer.

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