

# Volk Update: January, 2018

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## **What you need to know:**

Following the decision of the WA Supreme Court in *Volk v. deMeerleer*, the legislature authorized the expenditure of approximately \$160,000 to the UW law school to study two basic questions:

1. How have the various states defined the duty to protect/warn in situations where a client poses a danger to a third party? How does our state compare to the others following the Volk decision?

2. Did the Volk decision change the applicable standard? What are the implications of the Volk decision for future access to mental health services? Will providers be less likely to serve clients with a potential for violent behavior?

On November 18 the study group released a draft powerpoint of their findings at an hour-long presentation. Duncan Hollomon, JD, PhD, and WMHCA board member was among the leaders of provider organizations present.

This summary of their findings was provided by the study group:

- ◆ Volk substantially changed the duty to protect and warn in Washington with respect to outpatient mental health care
  - ❖ The duty is broader for outpatient providers than for inpatient providers who have more power to control.
- ◆ Washington is now an outlier
  - ❖ No other state by Wisconsin has such a broad duty for outpatient care
- ◆ Providers are uncertain how to practice under Volk

- ◆ Little to no additional inpatient capacity
  - ❖ Washington is still relying on single bed certifications to fill gaps in access to inpatient mental health care.

The following are Duncan's reflections:

The study group highlighted several critical areas where there is confusion or uncertainty regarding the duty of mental health practitioners to the public at large in response to the threat of violence by a client. Prior to the Volk decision, many in our field assumed that the duty, as defined in Tarasoff, was limited to situations in which there a threat was made (not just posed) by a client, and there was an identifiable or identified potential victim. Indeed, this was the standard codified as (now) RCW 71.05.120(3):

mental health professionals have a "duty to warn or to take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims." listed under the Involuntary Treatment Act (inpatient).

However, for reasons that were not explained in their opinion, the court did not rely on the statute, but rather looked to a previous case<sup>1</sup> as precedent, and defined the duty much more broadly. The Volk court's opinion indicates that the duty is a duty to protect, not just to warn<sup>2</sup>, which is extended to any member of the public who it is "reasonably foreseeable" could become a victim of a client's violent behavior, based on the "special relationship" between the treating professional and the client, regardless of whether or not there was an actual threat made.

As things stand currently, it appears that there is one standard for in-patient treatment (the language of the statute) and one for out-patient (the Volk

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<sup>1</sup> Petersen v. State of Washington 100 Wn. 2d 421 (1983) 671 P.2d 230

<sup>2</sup> In the so-called Tarasoff II decision, issued by the California Supreme Court two years following its initial decision, the court was explicit that the duty was to protect, not just to warn.

language). It's not clear that this situation is optimal, or that logically it makes sense. That is, the standard is much broader in the very area of practice (outpatient) where practitioners have the lesser degree of control over their client's behavior.

We are faced with a number of areas of uncertainty, based on the imprecise language of the Volk court:

1. How do we determine whether a "special relationship" exists? It appears that the length of time in treatment is relevant, but in Volk there was a lag of some 4 months since the psychiatrist and the patient had met together.
2. What does "reasonably foreseeable" victim mean in the context of potentially dangerous clients?
3. How do we assess the potential for dangerousness? What is the level at which the duty to protect is triggered?
4. How is the duty to protect to be discharged? What "precautions" should be taken

### **The Need for Professional Standards of Care**

One of the challenges that we face as mental health practitioners is the lack of clear, coherent professional standards in the area of a client's potential danger to others to which the courts can look to determine the question of negligence. Rather than having the court impose a standard, it would serve us better to generate our own, which would serve as guidance to courts.

I would suggest that to clarify some of the areas of uncertainty in the Volk opinion we generate some standards of practice for situations of potential danger to third parties, just as we have in situations of the potential danger of suicide. Those standards would include protocols for threat assessment and for outlining the possible ways we can fulfill our duty to protect.

### **A final word: Understanding Negligence**

Finally, I would stress that we are not being held potentially liable for the behavior of another, although people often talk that way, even lawyers who should know better. The Volk decision involved a question of negligence. In order to determine whether or not there was negligence, the court looks to see what the duty was that was breached. If I have a duty to exercise a certain level of care toward someone, and that person was harmed because I failed to exercise that level of care, then I will be found negligent with regard to that duty.

The Volk court did NOT find that the psychiatrist was negligent; it said that he owed a third party a duty to protect. Whether or not he was negligent with regard to that duty was a question for the trial court. And, we'll never know how the court would have ruled on that question, because, following the decision of the Supreme Court, the care was settled.

Bottom line: Make sure you are providing the appropriate level of due diligence and care in treating your clients, particularly the ones that have some potential for violence. If you are meeting the professional standard of care, the court will not find you negligent, even if your client eventually does harm to a third party.