



Legal Update Forensic Division, 2005

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Topics

- The “new” medical model of civil commitment
- Developments in the duty to warn
- The courts and SVP legislation
- Therapeutic courts
- Thoughts on the APA brief in *Roper v. Simmons*



Civil commitment: Return of the medical model

- The Wisconsin 5th standard
 - Mental illness
 - Incompetent to make treatment decisions
 - Substantial probability that treatment necessary to prevent further deterioration
 - Substantial probability that will lack necessary services if left untreated
 - Impact of non-treatment on condition



The 5th Standard, cont.

- Without treatment, the person will *suffer severe mental, emotional or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions.*



Wisconsin Supreme Court

- “By permitting intervention before a mentally ill person's condition becomes critical, the legislature has enabled the mental health treatment community to break the cycle associated with incapacity to choose medication or treatment, restore the person to a relatively even keel, prevent serious and potentially catastrophic harm, and ultimately reduce the amount of time spent in an institutional setting. This type of ‘prophylactic intervention’ does not violate substantive due process.”
 - *In re Dennis H*, 647 NW 2d 851 (2002)



Kendra's Law

- Permits intervention to “prevent a relapse or deterioration” likely to result in harm to self or others
- “Family members and caregivers often must stand by helplessly and watch their loved ones and patients decompensate”



New York Court of Appeals

- Access to treatment “may enable patients who might otherwise require involuntary hospitalization to live and work freely and productively through compliance with necessary treatment.”
- Legislative interest in “warding off the longer periods of hospitalization that, as the Legislature has found, tend to accompany relapse or deterioration.”
 - *In the Matter of K.L.*, 1 NY3rd 362 (2004)



The duty to warn

- Tarasoff created the duty
- California legislature modified it
 - In general, no duty to third parties
 - Except “where the patient has communicated an ‘actual threat of violence against an identified victim’”
 - Designed to “abolish the expansive rulings of Tarasoff and Hedlund...that a therapist can be held liable for the mere failure to predict and warn of potential violence by his patient.”



California Appellate Decisions

- Lawsuit may proceed when “when, the communication of a serious threat of grave bodily injury is conveyed to the psychotherapist by a *member of the patient’s immediate family*, and is shared for the purpose of facilitating and furthering the patient’s treatment, the fact that the family member is not a patient of psychotherapist is not material. If a therapist *actually believes* or predicts a patient poses a risk of inflicting serious physical harm upon a reasonably identifiable person, the therapist must take steps to warn...”
 - *Ewing v. Northridge Hospital*, 120 Cal. App. 4th 1289 (Cal. 2004).



Expert Testimony

- The “pivotal factual question” is “whether the psychotherapist actually held the belief or made the prediction.”
- “the mind-set of a therapist can be evaluated by resort to common knowledge without the aid of expert testimony”



Implications

- Expansion of the statutory exception to general rule that therapists have no duty
- Further detaches the issue from professional judgment and knowledge
- Therapist could effectively malpractice and still be exempt from liability



Courts and SVP Legislation

- *Any* form of risk assessment goes
- Not all civil committees are alike
- SVPs are “special”



Hendricks

- While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others
- It would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed.



Implications

- Treatment promises yield to legislative findings of non-treatability
- “there is no broad constitutional right of treatment for persons involuntarily confined as dangerous and mentally impaired, at least where ‘no acceptable treatment exist [s]’ or where they cannot be ‘successfully treated for their affliction”
 - *Hubbart v. Superior Court, 19 Cal. 4th 1138 (1999)*



SVP and Equal Protection

- Individuals committed under SVP statute in Washington have no right to LRA consideration at initial hearing (In re Thorell, 72 P. 3rd 708 (2003))
- Legislature could rationally distinguish between individuals committed under the SVP statute and others (SVPs had different, more complex needs)



Therapeutic Courts: What We Do Know

- Approximately 100 in the United States
- Referral process/time to admission varies
- 36 clients (median); 3-1,977 as range
- Charges:
 - 43% primarily misdemeanor court
 - 14% primarily felonies
 - 43% mixed
 - (*taken from Redlich, Steadman, Robbins, Monahan, & Petrila*)



Therapeutic Courts

- Mixed forms of supervision (mental health & criminal justice) common
- Status hearings vary: Majority either weekly or monthly
- Use of jail as sanction
 - 8% never use it
 - 33% used jail less than 5% of cases
 - 39% use jail between 5%-20% of cases
 - 18% use jail between 20%-50% of cases
 - 2% used jail in more than one-half of cases



What We May Know

- Court process *may* be perceived as non-coercive and as fair
- MHC *may* reduce jail time
- MHC *may* increase treatment access
- MHC appears to forge new community alliances



What Do We Need to Know?

- For whom do these courts “work” and why?
- What is the impact of resources on the court and the court on resources?
- What is the impact of the use of jail?
- What is the impact of the judge as part of the therapeutic alliance?
- Should we worry that increased oversight leads to increased use of jail?



Roper v. Simmons

- “It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles’ comparative moral culpability.”
 - *Justice O’Connor, **dissenting**, Roper v Simmons*



APA Brief in Roper

- Adolescents (10/11-18-19 years old) as a group think and behave differently from adults
 - Character is forming
 - Adolescents are less future-oriented
 - Brain has not reached adult maturity



Character is Forming

- Late adolescence involves significant risk-taking and the under-valuing of true consequences (Laurence Steinberg, *Adolescence*)
- From early to late adolescence, death rates increase by more than 200 percent (CDC, 2001)
- Behavior becomes more settled over time



Adolescents Less Future-Oriented

- Adolescents on average are “less responsible, more myopic, and less temperate than the average adult” (Cauuffman & Steinberg, 2000).
- Most dramatic change occurred between 16 and 19 years of age with perspective (consideration of different viewpoints) and temperance (impulsivity)
- Adolescents perform more poorly than adults on decision-making competency (Halpern-Felsher & Cauuffman, 2001)
- Impact of social context, peer relationships, etc.



Brain Not Yet Mature

- Magnetic resonance imaging (MRI) shows frontal lobe less developed among adolescents (Sowell et al, Journal of Neuroscience, 2001)
- “Later to mature were areas involved in executive function, attention, and motor coordination (frontal lobes)” (Gogtay, et al, 2004) (longitudinal study showed maturation of the brain cortex followed “regionally relevant milestones...”)



APA Concluded

- The “emerging character [of adolescence], demonstrated by developmentally immature decision-making when compared with adults, and paralleled by a still developing brain, diminishes adolescent blameworthiness...” (*APA Amicus Brief in Roper v Simmons*)



Unintended Consequences?

- *May* result in more punitive attitudes
- Impact on other types of decisions
 - Medical decision making
 - Abortion (“By middle adolescence (14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems” *APA Brief in Hodgson v. Minnesota*)



Summary

- Changing judicial and legislative attitudes on civil commitment
- Potential detachment of “duty to warn” from evolving scientific knowledge
- Continuing definitional issues regarding meaning of adolescence