

# **Duty to Protect:**

## **Historical Review & Current Considerations**



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# Duty to Warn or Protect: Reactions to this term?



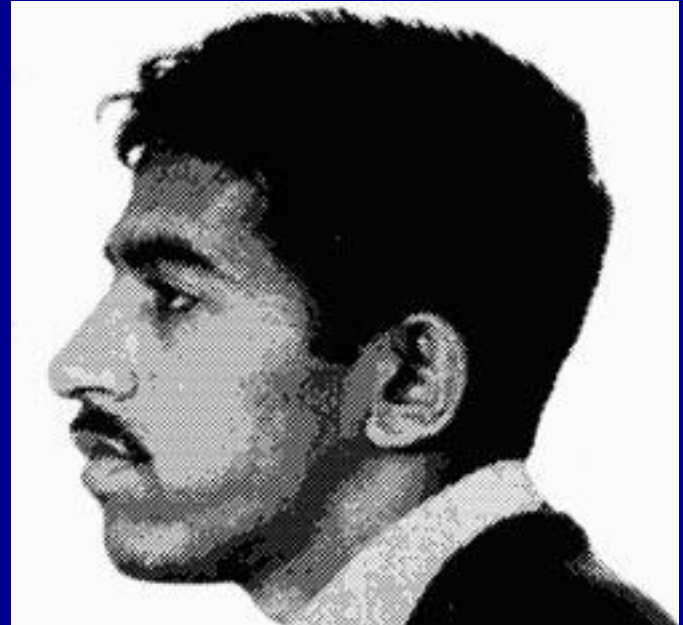
# A Balancing Act: Forces in Conflict

- Protect patient confidentiality
- Protect others from patient's violence
- Protect therapeutic alliance
- Difficulty with accurate risk prediction
- Treat in least restrictive environment
- Liability

# Terms of Art

- Confidentiality
- Duty to warn
- Duty to protect
- Tarasoff-type duty
- Tarasoff limiting law

# The Beginning



# Tarasoff

- Tarasoff I (1974) : Duty to warn
  - *The protective privilege ends where the public peril begin*
- Tarasoff II (1976): Duty to protect
  - *When a therapist determines, or should determine, that his patient presents a serious risk of danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim from danger*

# Trends Post-*Tarasoff*

- Period of extensions (1980s)
  - To unidentifiable victims
  - For unintentional harm
  - To property
- Period of retractions (1990s)
  - Further define what triggers the duty
  - Specific steps to discharge duty

# Post-Tarasoff Concerns

- Patients will not be honest with providers
- Patients will not seek care
- Patients often vent thoughts that are fleeting
- Risk of overreaction of clinician (liability)
- How to discharge the duty



# Tarasoff-Limiting Statutes

- Most statutes require either a “serious” or “actual threat” against a clearly identified or reasonably identifiable victim(s)
- Statutes identify one or more options to discharge the duty. For example:
  - Notify intended victim(s)
  - Notify law enforcement
  - Initiate hospitalization (voluntary, involuntary)
  - Other reasonable steps

# Model Statute

## APA Model Statute on the Physician's Duty to Take Precautions Against Patient Violence (1987)

- Framework to guide legislators and courts
- Clear parameters for triggering duty
  - Patient communicates explicit threat
  - Kill or seriously injure
  - Clearly identified or reasonably identifiable victim
  - Patient has intent and ability to carry out threat
- Reasonable precautions to prevent the threatened harm
  - Not limited to items below
- Means to discharge as a matter of law
  - Notification
  - Seek hospitalization

# California: Duty to Protect

- Thompson v. Alameda (1980): identifiable victim
- First to enact a statute to limit Tarasoff liability (Cal. Civil Code 43.92 (1985))
  - Identifiable victim
  - Discharge by warning (similar to RCW)
- Jury Instructions on protection (CACI Civil Jury Instruction 503A)

# Current Legal Landscape

Volk Study – UW Law School (2017)

- Terminology with inconsistent meaning
- Mandatory obligations
  - “Warn and/or protect” (or similar) language: 19 states
  - Duty to “warn”: 9 states (may actually include protective measure)
  - Duty to “protect”: 5 states
- Permissive breach of confidentiality: 9 states
- Not addressed or no duty: 8 states
- Foreseeability: 1 state besides WA (Wisconsin)

# Example: Ohio

Ohio Rev. Code 2305.51

## Limits on the duty

- Explicit threat
- Directly communicated to the clinician
- Presents imminent *and* serious physical harm/death
- Clearly identifiable victim
- Intent and ability to carry out the threat

## Discharge the duty

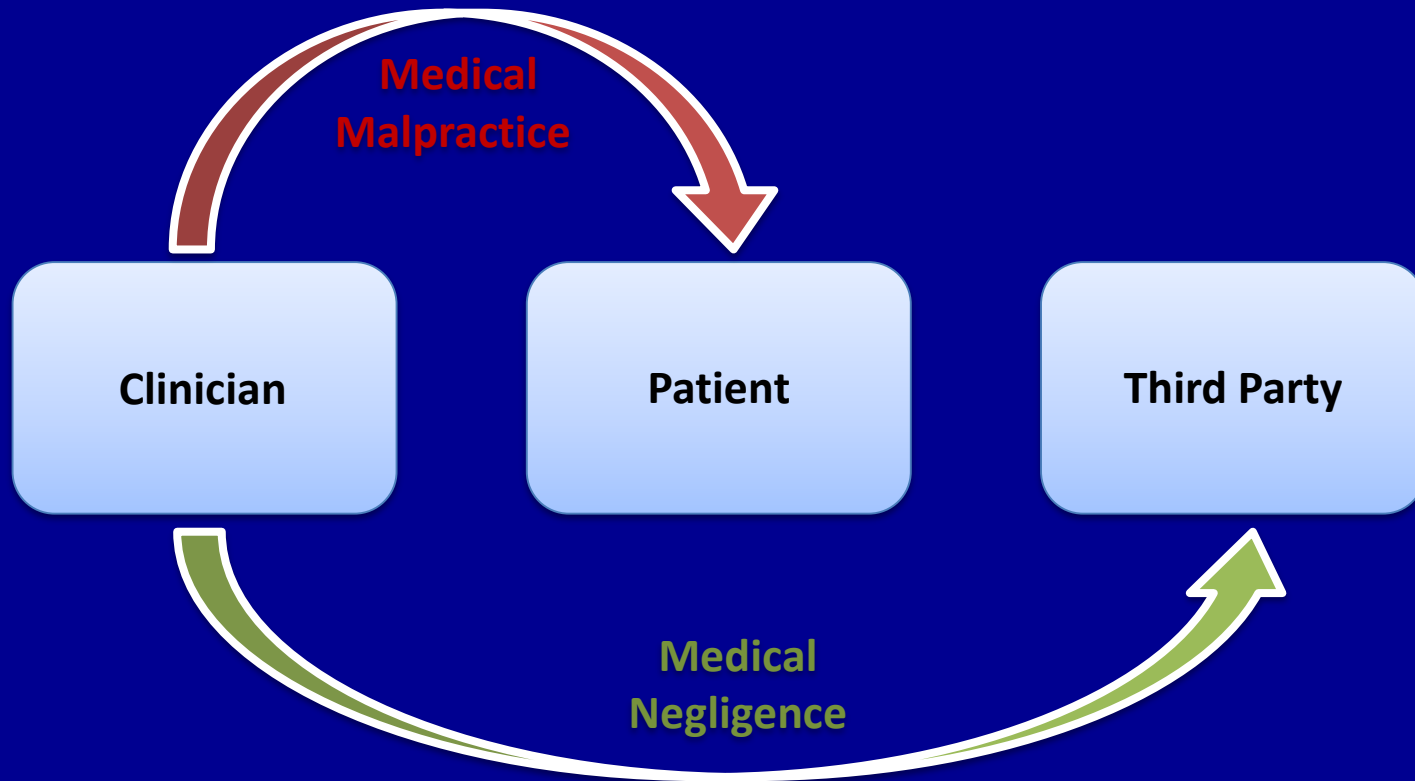
- Initiate efforts to hospitalize (emergent, involuntary, voluntary)
- Undertake documented treatment plan and arrange second opinion
- Communicate to law enforcement (and victim if feasible)

# Professional Organizations

- Protection of confidentiality is central to mental health care
- Protection of confidentiality is not an absolute
- Ethics guidelines
  - American Medical Association
  - American Psychiatric Association
  - American Counseling Association
  - National Association of Social Workers
  - *Serious, imminent harm, identifiable person*



# Liability Scheme





# Peterson v. State (Wash. 1983)

Inpatient psychiatrist has a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by his patient

## RCW 71.05.120 (1987)

- This section does not relieve a person from . . . the 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
- Discharge: warn victim and police

# Volk v. DeMeerleer

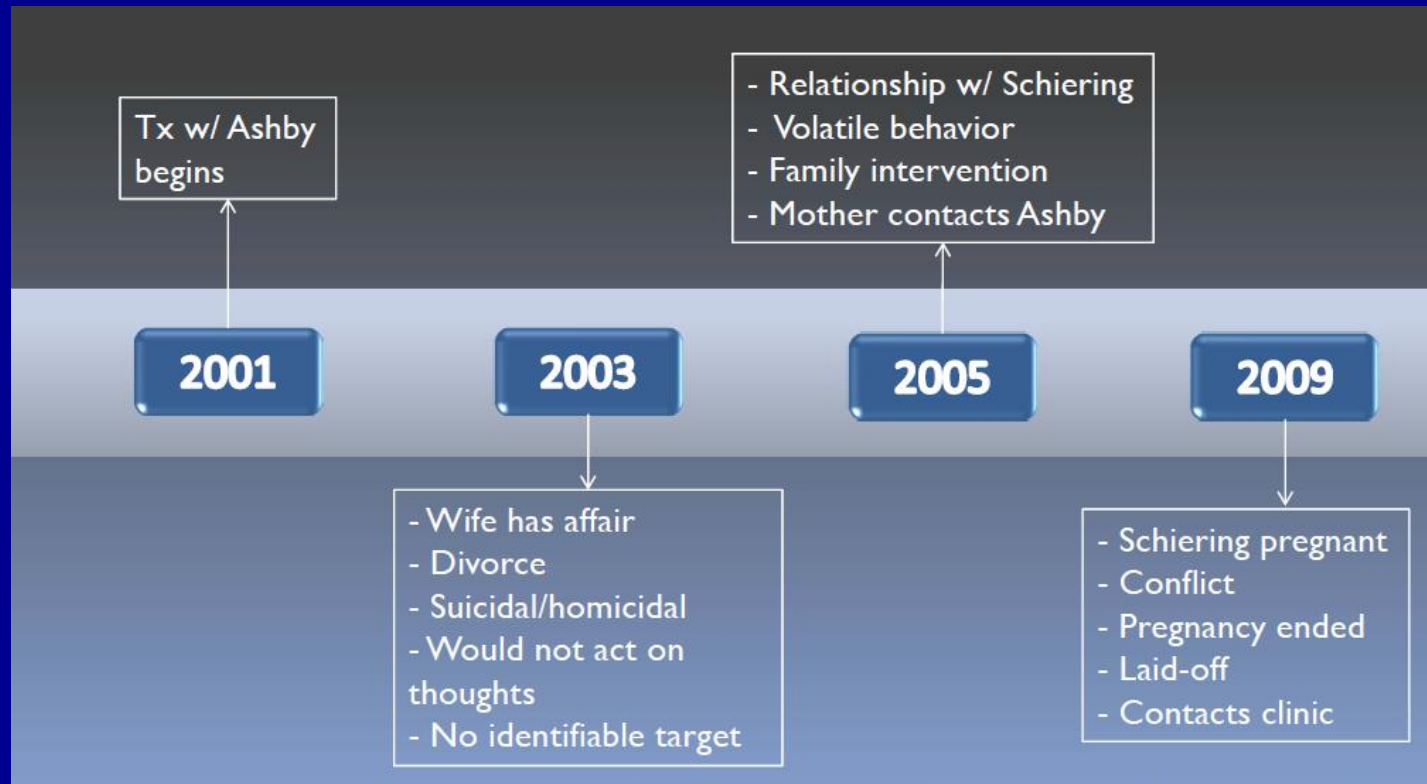


# Facts: Volk v. DeMeerleer



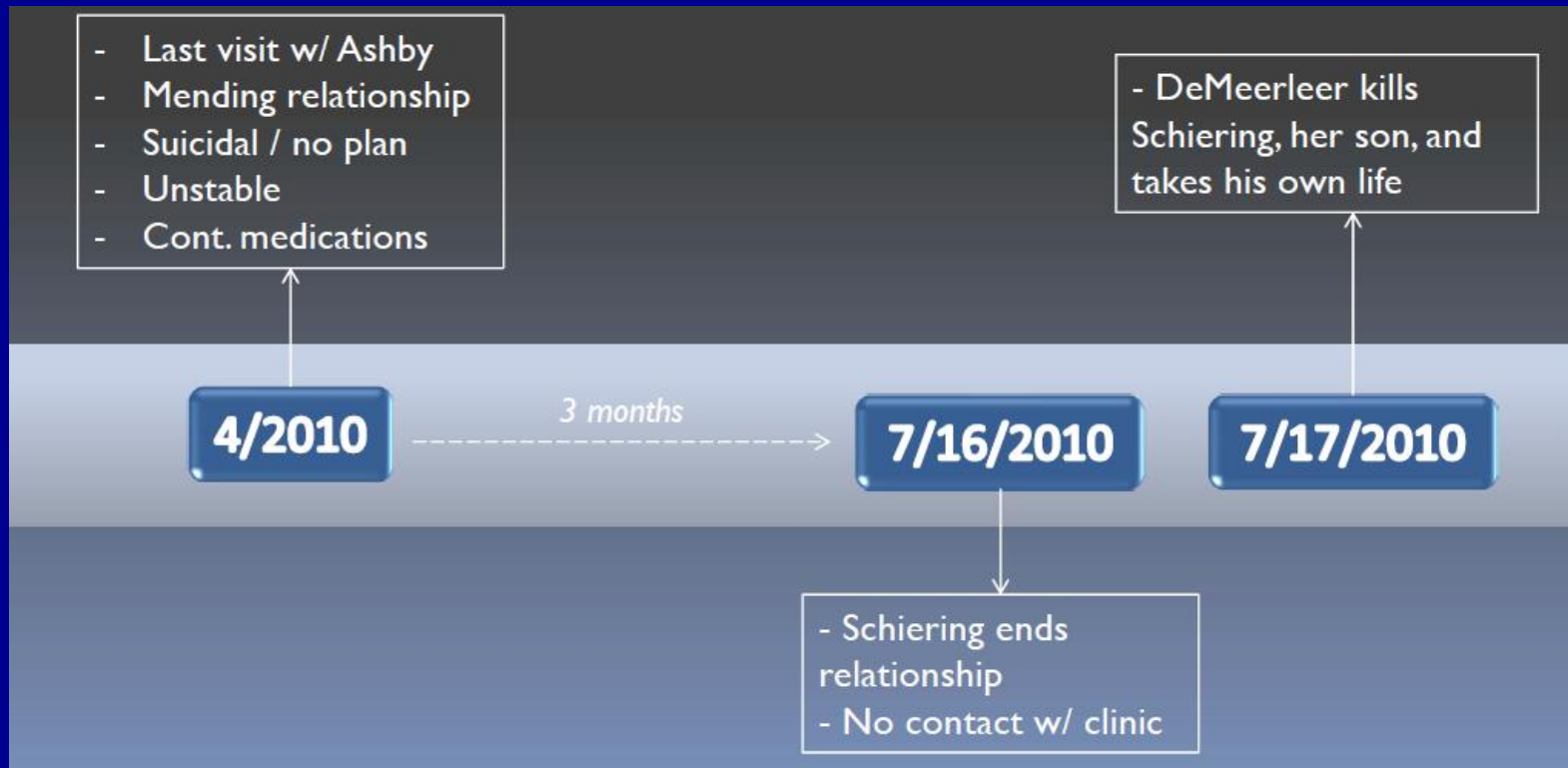
# Facts: Volk v. DeMeerleer

Adapted from McDermott & Maher (2017)



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# Volk: Key Facts

- Episodic treatment over many years
- Homicidal thoughts against his ex-wife years prior, but never acted on them
- Intermittent suicidal thoughts, but never acted on them
- No homicidal thoughts voiced at last appointment
- Killed ex-girlfriend and one of her children, then killed himself
- *Facts subsequent to decision*

# Procedure: Volk v. DeMeerleer

- Suit filed by representatives of the victims
- Psychiatrist granted summary judgment
- Appellate court reversed (2014)
  - RCW 71.05.120(3) does not apply outside of involuntary commitment
- Washington Supreme Court upheld appellate court's reversal of summary judgment (2016)



# Volk v. DeMeerleer (Wash. 2016)

## Holding:

- A mental health professional is under a duty of reasonable care to act consistently with the standards of the mental health profession in order to protect the foreseeable victims of his or her patient.
- The foreseeability of DeMeerleer's victims is a question of fact.

# Reasoning

- Restatement (Second) of Torts, 315
  - No duty to control conduct of another unless
  - Special relationship
- Policy considerations
  - Control
  - Safety
  - Prediction of violence
  - Least restrictive
  - Confidentiality/privilege

# Key Considerations

- Terms left for clarification
  - Special relationship (conceded by Dr. Ashby)
  - Dangerous propensities
  - Foreseeable victim
- Applicability to various types of clinicians
  - act consistently with the standards of the profession
- Did not reconcile common law with the statute



# Approach

1. What triggers the duty?
2. Who needs protection?
3. How can the duty be discharged?

# Comparison

	<u>RCW 71.05.120</u>	<u>Volk</u>
When triggered?	Actual threat of physical violence	Special relationship Dangerous propensities
Whom is duty owed?	Reasonably identifiable victim	Foreseeable victim
How is duty discharged?	Warn (clean discharge) or protect	Measure to protect, which can include warning

# Additional Comparison

	<u>RCW 71.05.120</u>	<u>Volk</u>
Type of violence protected by law	Intentional harm of violence	Broader, may include patient's negligent behavior
Dangerousness	Make a threat	Pose a threat

# Potential Gaps

- Emergency treatment
- Episodic treatment
- Voluntary hospitalization



# Jackson v. City Of Mountlake Terrace (W.D. Wa., 2017)

- *Volk* not applicable where plaintiffs fail to allege any “definite, established or continuing relationship” between the defendant medical center and the patient
- Single contact insufficient to create any duty running from the clinician or medical center to plaintiffs
  - Treatment
  - Prior contacts with provider/facility

# Consequences

Piel & Opara: AMA J Ethics (2018)

- Outlier among states
  - Different standards across practice settings
  - Foreseeability
- Multiple undefined terms
  - special relationship
  - dangerous propensities
- Misinterpretation that Volk requires warning
- When warn, risk conflict with privacy laws and ethics codes
  - Rev. Code Wash. 70.02.050 (2016): Disclosures permitted to avoid or minimize an imminent danger to patient or another
  - HIPAA (2016): Disclosure permitted where there exists a serious and imminent threat

# The Psychiatrists' Program®

## Cause of Loss – Administrative Lawsuits, Claims, and Lawsuits

### 1986 - 2016

Primary Allegation	All States	Washington
Suicide / Attempted Suicide	27%	27%
Incorrect Treatment	24%	26%
Breach of Confidentiality	14%	17%
Other	9%	12%
Medication Issues	8%	6%
Incorrect Diagnosis	5%	3%
Unnecessary Commitment	3%	1%
Improper Supervision	3%	4%
Boundary Violation	2%	1%
Lack of Informed Consent	1%	0%
Duty to Warn / Protect	1%	1%
Forensic	1%	1%
Abandonment	1%	1%

# Means to “protect”

Volk v. DeMeerleer (2016), n. 12

## Court

- Closer monitoring of medication compliance
- Closer monitoring patient's mental state
- Increase family involvement
- Warning others of the risk posed by the patient
- Involuntarily hospitalization

## Other

- Voluntary hospitalization
- Increase frequency of appointments
- Removal of weapons
- Refer to alcohol/substance abuse programs
- Address anger management (therapy)

# Response: Court Remedy

Piel: JAAPL (2018)

- Amicus brief – Court of Appeals
  - Washington State Psychological Association
- Amicus brief – State Supreme Court
  - Washington State Psychological Association
  - Multiple: WSPA, APA, WSMA, AMA, WSHA et al
- Amicus for motion for reconsideration
- Opinion from Federal Office of Civil Rights

# Response: Legislative Remedy

- Coalition of health organizations
  - Divergent interests (warn)
- HB 1810/SB 5800 (2017)
  - Consistent with language in RCW 71.05.120
  - Place in RCW Chapter 7.70 (Regulation of Healthcare)
  - SB 5800 passed out of Senate Law and Justice Committee. HB 1810 did not get a hearing in House Judiciary Committee.
  - 5800 O'Ban Amendment: a) Removal of reasonable precautions from violent behavior; *and* b) Change from serious AND imminent to serious OR imminent threat. If passed, would place in RCW 7.05 (Mental Illness)
- Legislative budget provisions in response to Volk
  - UW Law, 2017
  - Bree, starting January 2019



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