

SUBSTITUTE

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12451

SUFFOLK COUNTY

CYNTHIA WILLIAMS, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF MARY L. MILLER, ASHLEY GOMES
INDIVIDUALLY AND ON BEHALF OF
HER MINOR DAUGHTER "M"
PLAINTIFFS-APPELLANTS

V.

STEWARD HEALTH CARE SYSTEM, LLC.
AND STEWARD CARNEY HOSPITAL, INC.
DEFENDANTS-APPELLEES

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
FOR SUFFOLK COUNTY

SUBSTITUTE BRIEF OF THE PLAINTIFFS-APPELLANTS

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I. STATEMENT OF ISSUES

1. Whether a duty to obey a court order issued pursuant to M.G.L. Chapter 123 §§7 and 8 to retain a homicidal patient is nondelegable?

2. Whether M.G.L. Ch. 123 §36B, which affords immunity to a "licensed mental health professional" but not to mental health "facilities", affords immunity to a hospital corporation which violates a court order to retain a homicidal patient?

3. Whether a hospital corporation which has been ordered by a court pursuant to M.G.L. Chapter 123 §§7 and 8 to retain a homicidal patient owes a duty to third persons who are injured or killed as a result of the violation of the court order?

II. STATEMENT OF THE CASE

The defendant-appellee Steward Carney Hospital, Inc. is a Massachusetts corporation which owned and operated the Carney Hospital during 2012. The defendant-appellee Steward Carney Hospital, Inc. will be referred to as Carney Hospital in this brief.

Carney Hospital had been ordered by a court pursuant to M.G.L. Chapter 123 §§7 and 8 to retain a homicidal patient (hereinafter referred to as "N") "for a period not to exceed six months or until there is no longer a likelihood of serious harm by reason of mental illness, whichever is shorter...." Carney Hospital released "N" eleven days into the six month commitment while there was still "a likelihood of serious harm by reason of mental illness." Twenty-two days later, "N" broke into the apartment of his neighbor, Mary Miller, in the early morning hours and stabbed her to death in the presence of Mary Miller's eight year old granddaughter.

This is a wrongful death and infliction of emotional distress action filed in the Superior Court. Carney Hospital moved for summary judgment, in large part contending that there was no duty owed because of M.G.L. Ch. 123 §36B, which affords immunity to "a licensed mental health professional" but is silent as to all others, including hospital corporations which are the subject of orders pursuant to M.G.L. Chapter 123 §§7 or 8. The plaintiffs-appellants opposed the motion complete with the affidavit from a psychiatric

expert to attest to the fact that there was still "a likelihood of serious harm by reason of "N's" mental illness" at the time of his release. The superior court granted the motion of the Carney Hospital. The plaintiffs-appellants filed and perfected their appeal in a timely manner.

III. STATEMENT OF FACTS

A. CARNEY HOSPITAL WAS ORDERED TO RETAIN "N" FOR A PERIOD NOT TO EXCEED SIX MONTHS OR UNTIL THERE WAS NO LONGER A LIKELIHOOD OF SERIOUS HARM BY REASON OF MENTAL ILLNESS, WHICHEVER WAS SHORTER.

On January 19, 2012, a Court Order of Civil Commitment Pursuant to M.G.L. Chapter 123 §§7 and 8 issued to the Carney Hospital to retain "N" at the Carney Hospital with the finding that "failure to retain said person in a facility would create a likelihood of serious harm, and there is no less restrictive alternative for said person." The court ordered that "N" be committed to the Carney Hospital "for a period not to exceed six months or until there is no longer a likelihood of serious harm by reason of mental illness, whichever is shorter...." The order states that the commitment order was to expire on July 19, 2012. [App. 148].

The order was directed to the Carney Hospital with the instruction that "N" be delivered to the Superintendent or Medical Director of the hospital. "N" was already in the custody of the Carney Hospital at the time that the Civil Commitment Order issued. While the court order used the name "Caritas Carney Hospital", the petition for commitment was filed by the interim Medical Director of "Steward Carney Hospital" Michael Henry, M.D. who understood that the commitment order was directed to "Steward Carney Hospital." [App. 213 Lines 2-10; App. 214 Lines 1-15].

"N" was released from the Carney Hospital, by a physician on staff, Peggy Johnson, M.D., on January 30, 2012, eleven (11) days into the court ordered commitment. [A. 215 Lines 15-22]. On February 21, 2012, three weeks after "N" was released from the Steward Carney Hospital, he broke into his neighbor's apartment and stabbed her to death. [App. 112 Agreed Fact 25]. Mary Miller's minor granddaughter "M" was present in the apartment at the time of the murder. [App. 112 Agreed Fact 26].

B. CARNEY HOSPITAL RELEASED "N" WHEN THERE REMAINED A LIKELIHOOD OF SERIOUS HARM BY REASON OF MENTAL ILLNESS.

The central issue in this case is whether "there [was] no longer a likelihood of serious harm by reason of mental illness" at the time "N" was discharged from Carney Hospital on January 30, 2012. The plaintiffs submit that there is a dispute as to this material fact requiring that the motion for summary judgment be denied and the case submitted to a jury. The plaintiffs submitted the affidavit of Thomas G. Gutheil, M.D. in opposition to the defendants' motion. Dr. Gutheil is a Professor of Psychiatry in the Department of Psychiatry, Beth Israel-Deaconess Medical Center, Harvard Medical School. He is a practicing general and forensic psychiatrist. He has worked extensively in psychiatric inpatient units, has worked closely with and taught resident physicians and social workers, and is familiar with the standard of care required of them under the circumstances of this case. He has published extensively, specifically in the area of evaluating patients' dangerousness. He was intimately involved in the drafting of the Massachusetts dangerousness statute, G.L. c. 123 § 36B. He regularly consults with clinicians who are

evaluating patients for dangerousness and frequently lectures and instructs psychiatrists, psychologists, social workers, attorneys and judges on issues of patient dangerousness as well as the criteria for civil commitment. [App. 194, Affidavit T. Gutheil, M.D. Par. 1].

Dr. Gutheil reviewed the complete records of the Carney Hospital for "N", which included admissions in 2008 and 2012. He reviewed the Petition for Commitment Pursuant to M.G.L. c. 123 §§ 7 and 8 as well as the Order of Civil Commitment Pursuant to M.G.L. Chapter 123 §§7 and 8. He reviewed the deposition transcript of Peggy Johnson, M.D. He based his opinions on the review of these materials, his education, experience and training, and further stated that the opinions expressed in his affidavit were stated with reasonable medical certainty. [App. 196, Affidavit T. Gutheil, M.D. Par. 6]. Dr. Gutheil concluded, with reasonable medical certainty that at the time "N" was discharged from the Carney Hospital on January 30, 2012, there remained "a likelihood of serious harm by reason of mental illness." His conclusions were based upon the following information.[App. 196, Affidavit T. Gutheil,

M.D. Par. 7].

On September 25, 2008, "N", formerly of 43 Codman Hill Avenue, Dorchester, Massachusetts was taken to the Carney Hospital for a psychiatric evaluation. The record documents a diagnosis of schizophrenia and a history of "med non-compliance." [App. 196, Affidavit T. Gutheil, M.D. Par. 8].

On September 26, 2008, an application for a temporary involuntary hospitalization of "N" was completed by a physician at the Carney Hospital because of the "Substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them..." [App. 196, Affidavit T. Gutheil, M.D. Par. 9]. The records of the Carney Hospital state that "N" threatened to harm his family members and that he had "an extensive history including aggression and violence" [App. 197, Affidavit T. Gutheil, M.D. Par. 10]; that "N" was "noncompliant" with his psychiatric medications [App. 197, Affidavit T. Gutheil, M.D. Par. 11]; that "N"'s

family "fear for their lives" [App. 197, Affidavit T. Gutheil, M.D. Par. 12]; that "N" was "uncooperative", "agitated", and "hostile" [App. 197, Affidavit T. Gutheil, M.D. Par. 13]; that "N" had previous psychiatric hospitalizations at Bridgewater State Hospital and Shattuck Hospital [App. 197, Affidavit T. Gutheil, M.D. Par. 14]; that "N" had a "serious assault history." [App. 197, Affidavit T. Gutheil, M.D. Par. 15]; that "N" had been brought to the Carney Hospital by police and was "quite combative requiring multiple officers to contain him safely" [App. 198, Affidavit T. Gutheil, M.D. Par. 16]; that "N" was observed by his sister "often talking to himself, talking to the TV or talking to unseen others in the room" [App. 198, Affidavit T. Gutheil, M.D. Par. 17]; that "N" "was arrested for assault and battery over two years ago. While in court for one assault and battery charge, assaulted people in the courtroom leading to more charges. Patient hospitalized for 2 years. Bridgewater x 1 year - Shattuck x 1 year . . . today really deteriorating. Babbling to self. Talking about killing people. No one in particular. . . Applied for Social Security benefits but blew up in the middle of the interview with the [Social Security]

doctor and left. Today sister called reporting that patient was talking crazy about killing people . . . He hasn't been normal and has been talking to himself a lot. Talking to TV. Just being crazy like talking about killing and whatnot . . . Quiet with those he doesn't know but at home, sits there talks crazy about killing somebody and going to war. Using profanities, swearing, talking to self. Patient does not express any particular victim when yelling about killing people. Patient has hurt family members . . . Sister reports that he seems worse than he did before he went into the hospital 2 years ago . . . Patient has an active default warrant out of the court. The patient is ordered to take his medication, attend all hearings and report to his parole officer. The patient stopped taking all medications around February and has not been reporting to his [Parole Officer] and defaulted on his court appearances." [App. 198, Affidavit T. Gutheil, M.D. Par. 18]; that "N" reported that he had a history of "hearing voices telling him to do things such as fight with other people". The evaluation concluded that "N" had poor impulse control, suffered from "paranoid ideation", had "homicidal ideation" with "threats to kill without naming a plan." The

evaluation also concluded that "N" was a "high risk" and "The patient has become agitated and threatening and has a history of assaultiveness. The patient is noncompliant with medication. The patient is also uncooperative and hostile and thus not able or willing to cooperate in his own assessment or safety planning." The evaluation concluded that "N" was a "danger to others". [App. 199, Affidavit T. Gutheil, M.D. Par. 19]; that "N" "denied all history of any symptoms. He denied threatening the Boston Police Department, his family or EMS. The patient denied any psychiatric criminal history . . . Most of the information is from the record because the patient is lying in bed with the sheets over his head refusing to speak to this author . . . He had violent behavior as noted by the staff . . . The patient is noncompliant with medication, which boggles my mind because he is court ordered to do so . . . The patient reported never being in a psychiatric facility before and he was not involved with the court system which is false . . . The patient needs an inpatient level of care and is a danger to self and others." [App. 199, Affidavit T. Gutheil, M.D. Par. 20]; that "Nursing reports that patient had been threatening to staff."

[App. 200, Affidavit T. Gutheil, M.D. Par. 21]; that "N" was "psychotic, angry, paranoid, threatening at times. Uncooperative, irritable and difficult to engage." [App. 200, Affidavit T. Gutheil, M.D. Par. 22].

The records of the Carney Hospital contain a progress note for September 29, 2008 that "N's" sister "reported frustration with news of patient's potential discharge. Reported not feeling safe with patient returning home because of violent behavior of patient in past and because she was one to call ambulance for patient. Sister requested patient be placed in place like Bridgewater. Reported lack of med compliance longer than 6 months and when patient returned from Shattuck, he was good, then with lack of med compliance, becomes demanding and displays psychotic symptoms." [App. 200, Affidavit T. Gutheil, M.D. Par. 23].

The records of the Carney Hospital contain a progress note for September 30, 2008 that "family hopes to have patient transition to long term hospitalization" [App. 200, Affidavit T. Gutheil, M.D.

Par. 24] but that "N" was discharged on September 30, 2008 at which time he was "anxious to leave" and that he was "refusing to see psychologist/counseling/CRS" after discharge and "refusing to take meds on discharge." "N's" family was advised to get a restraining order against "N" and the discharge papers concluded with "The patient will be discharged from the inpatient unit today. The local police have been informed of his whereabouts and hopefully they will arrest him under his current warrant and then he can be adjudicated to Bridgewater if in fact the court feels to do so." [App. 200, Affidavit T. Gutheil, M.D. Par. 25].

On January 7, 2012 "N", was taken to the Carney Hospital for a psychiatric evaluation. [App. 201, Affidavit T. Gutheil, M.D. Par. 26]. The records of the Carney Hospital state that "N" had threatened to kill his grandmother on January 7, 2012 [App. 201, Affidavit T. Gutheil, M.D. Par. 27]; that "N" was "hostile" and "uncooperative" [App. 201, Affidavit T. Gutheil, M.D. Par. 28]; that "N" denied that he threatened anyone; denied previous hospitalizations; denied being prescribed any medications and denied

past medical history [App. 201, Affidavit T. Gutheil, M.D. Par. 29]; that "N" "has a history of several charges of assault and battery, some of which were dismissed and some being adjudicated guilty. He is presently charged with assaulting a fellow prisoner in 2005 by striking him in the head with handcuffs, resulting in the victim receiving stitches" [App. 201, Affidavit T. Gutheil, M.D. Par. 30]; that "N" "has a history of hearing voices telling him to do things such as fight with other people" [App. 201, Affidavit T. Gutheil, M.D. Par. 31]; that "N" "was threatening his mother with a knife at her home" and that he had "a history of aggression and violence" [App. 202, Affidavit T. Gutheil, M.D. Par. 32]; that "N" was described as having "very poor insight and judgment" [App. 202, Affidavit T. Gutheil, M.D. Par. 33]; that "N" had previous psychiatric hospitalizations at Bridgewater State Hospital in 2005 and Carney Hospital in 2008 "in the context of acute psychotic symptoms in association with aggressive and/or assaultive behavior." [App. 202, Affidavit T. Gutheil, M.D. Par. 34]; that "N" "has a pattern of noncompliance with outpatient treaters." [App. 202, Affidavit T. Gutheil, M.D. Par. 35]; that "N" had been

exhibiting "bizarre and threatening behavior" [App. 202, Affidavit T. Gutheil, M.D. Par. 36]; that "N" was not at that time engaged in any direct threatening behavior toward others, "though he expressed a desire to do so" [App. 202, Affidavit T. Gutheil, M.D. Par. 37]; that "N" was noted to be "homicidal toward mother/grandmother with plan to use a knife ..." [App. 202, Affidavit T. Gutheil, M.D. Par. 38].

On January 8, 2012, Dr. B. Jackson signed an application for authorization for involuntary hospitalization of "N" for his exhibiting homicidal ideations. The application states that "N" posed a "Substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them..." [App. 203, Affidavit T. Gutheil, M.D. Par. 39].

On January 12, 2012, Michael Henry, M.D. signed a Petition for Commitment Pursuant to G.L. c.123 §§ 7 & 8 stating that "N" was suffering from "chronic paranoid schizophrenia" which created a "likelihood of

serious harm" described as "substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them." Dr. Henry stated that "N" was exhibiting homicidal ideations and had threatened to kill his mother with a knife. [App. 203, Affidavit T. Gutheil, M.D. Par. 40].

The records of the Carney Hospital on January 13, 2012, document that "N" told a nurse that he "wanted to punch MD in the face then stated 'just kidding'. 'I am going kick your ass'. Then stated it again, 'just kidding'. Got up from chair and approached RN in a threatening way. Patient got up from chair, approached MD and punched MD in the face. Security intervened, male social worker and other security held patient, then stayed with patient while RN got meds. Patient received Haldol, 10 milligrams P.O., Ativan, 2 milligrams P.O., Benadryl, 50 milligrams P.O., placed on constant obs with CO with security due to assault. Went to room, napped. No other violent behavior

noted." [App. 204, Affidavit T. Gutheil, M.D. Par. 42].

The records of the Carney Hospital contain a psychiatry attending note dated January 13, 2012 that states that "N" "at end of meeting, approached me and without warning punched me in the face requiring my going to the ER with nasal/lip contusion, facial trauma." For the same date the physicians' orders include "constant observation with security." [App. 204, Affidavit T. Gutheil, M.D. Par. 42]. The records of the Carney Hospital for January 17, 2012 state that since the time of admission, "N" "has had a presentation best described as tending toward being isolative, defiant, oppositional, with rather tough guy vernacular" that "he remains irritable and defiant when approached" and "felt justified in his assault on Dr. Spiro." "N" 's behavior was described as "unchanged, goal oriented and deliberate." [App. 204, Affidavit T. Gutheil, M.D. Par. 43]. The records of the Carney Hospital for January 18, 2012 state that "N" has a "History of Schizophrenia, Paranoid Type. He has a history of past psychiatric treatment at Bridgewater State Hospital secondary to assaultive

behavior. He has never been consistent with outpatient treatment. The patient is particularly angry and explosive. Spoke with patient's mother who described him as prone to being explosive for much of his life. He will hide knives in his room for no apparent reasons . . . She reports that he watches television and talks to himself or dialogues with the television." [App. 204, Affidavit T. Gutheil, M.D. Par. 44]. The records of the Carney Hospital for January 18, 2012 state that during conversation with a therapist, "N" "was focused on being discharged and otherwise was dismissive of the conversation and walked away." The therapist described "N" as "verbally aggressive." [App. 205, Affidavit T. Gutheil, M.D. Par. 45].

On January 19, 2012, a Justice of the Boston Municipal Court entered an Order of Civil Commitment Pursuant to G.L. c. 123 §§ 7 and 8. The Order states "I find that "N" is mentally ill and that failure to retain said person in a facility would create a likelihood of serious harm and there is no less restrictive alternative for said person. Therefore, it is ORDERED that said person be committed to the

Caritas Carney Hospital for a period not to exceed six months or until there is no longer a likelihood of serious harm by reason of mental illness, whichever period is shorter...." The order states that the commitment order expires on 7/19/2012. [App. 205, Affidavit T. Gutheil, M.D. Par. 46].

The records of the Carney Hospital for January 20, 2012 describe "N" as "angry/irritable . . . resistant and defiant." [App. 205, Affidavit T. Gutheil, M.D. Par. 48]. The records of the Carney Hospital for January 24, 2012 document that "N" had a "verbal altercation with another patient." [App. 206, Affidavit T. Gutheil, M.D. Par. 49]. The records of the Carney Hospital for January 25, 2012 document that "N" "is resistant to engaging with treaters and has been aggressive toward his family." [App. 206, Affidavit T. Gutheil, M.D. Par. 50]. The records of the Carney Hospital for January 26, 2012 document that "N" "had an altercation with a peer last evening and today . . . because the man was staring at him. Patient was guarded." [App. 206, Affidavit T. Gutheil, M.D. Par. 51]. The records of the Carney Hospital for January 28, 2012 document that "N's" diagnosis was

schizophrenia and that he "remains irritable. Continues to be provocative with other patients and noted to be posturing. On 5 minute checks for safety." [App. 206, Affidavit T. Gutheil, M.D. Par. 52].

The discharge summary dated January 30, 2012 describes "N's" Hospital Course" including the following information: "The patient demonstrated considerable hostility and verbal aggressiveness in the milieu. He would not agree to assessment and his language could best be described as him using almost exaggerated [vernacular] and he would frequently express himself by stating "yo" and using considerable expletives including referring to this writer, the admitting physician as a bitch. The patient is not open to answering any questions." "He presented as largely as defiant, irritable, episodically threatening, territorial and rigid. The patient was seemingly paranoid and prone to distortion of his peers' behavior as well. The best example of this was an incident in which the patient assaulted a peer because the peer looked at him. The patient felt 'disrespected'. The patient has other incidents with

peers that were largely in the form of verbal aggression. He maintained a similar client posture regarding staff as well." "The patient remained largely resistant to treatment in any modality." "He would not participate in any group and had limited participation and efforts to engage the patient in individual supportive therapy as well." "The patient would respond to questions regarding the reasons for his aggression as because he was disrespected." "The patient's family expressed concern about the patient's behavior. They were particularly concerned about his pattern of noncompliance with treatment. Under the heading "Condition at the Time of Discharge" the record states, "The patient presented as irritable. He denied suicidal or homicidal ideation. He denied perceptual disturbances. He had no impairment of thought process. He was cognitively intact. The patient would not participate in a full mini mental exam and the patient was considered appropriate for discharge." Under the heading "Discharge Disposition" it is written "The patient refused all discharge disposition including DMH referral, pharmacological management, and case management. [App. 206, Affidavit T. Gutheil, M.D. Par. 53].

"N" remained on 5 minute safety checks through 11:00 a.m. on January 30, 2012, the date and minute he was released from the Carney Hospital. [App. 207, Affidavit T. Gutheil, M.D. Par. 54]. The discharge plan of the Carney Hospital states that the "patient's family has been encouraged to obtain an emergency restraining order." Under the heading "Psychiatry Follow-Up" is written the word "Refuses". Under the heading "Therapy Follow-Up" is written the word "Refuses". [App. 207, Affidavit T. Gutheil, M.D. Par. 55]. At the time of discharge from the Carney Hospital, "N" refused to sign his discharge papers. [App. 208, Affidavit T. Gutheil, M.D. Par. 56].

Dr. Gutheil concluded that "Given "N's" long standing history of non-compliance in taking anti-psychotic medications, even when court ordered, his history of violence, his history of hearing voices telling him to do things like fight with other people, his threats to kill his mother, sister, grandmother and sometimes "no one in particular", his threats to use knives that he kept in his room to commit murder, his mother's confirmation that "N" kept knives in his room "for no apparent reason", his assaulting Dr.

Spiro by punching him in the face on January 13, 2012 while in the Carney Hospital, his refusals to take anti-psychotic medications without a "show of force" while in the Carney Hospital, his stated refusal to take anti-psychotic medications when discharged, his stated refusal to get outpatient treatment for his severe mental illness when discharged, it was highly likely that "N" would again (as he had in 2008) stop taking his court ordered anti-psychotic medications, again (as he had in 2008) stop therapy resulting in worsening of his dangerous behavior, which he was exhibiting throughout his 2012 stay at the Carney Hospital. [App. 208, Affidavit T. Gutheil, M.D. Par. 57].

Commenting on the defense suggestion to the effect that whether to release "N" was a matter of "clinical judgment", Dr. Gutheil concluded, "First of all releasing "N" on January 30, 2012, was not a clinical judgment" that a qualified psychiatrist would make on the facts of this case and was grossly below the standard of care required of a psychiatrist evaluating such a patient for discharge. More importantly, the court order does not so read. The

order required that "N" remain committed to the Carney Hospital as long as there remained "a likelihood of serious harm by reason of mental illness" or until July 19, 2012, whichever came first. [App. 208, Affidavit T. Gutheil, M.D. Par. 58]. Based upon the documented facts in this case, at the time "N" was discharged from the Carney Hospital on January 30, 2012, there remained "a likelihood of serious harm by reason of mental illness" and "N" should not have been released from the Carney Hospital other than to the custody of another locked psychiatric facility such as a state hospital under the control of the Department of Mental Health." [App. 209, Affidavit T. Gutheil, M.D. Par. 59].

IV. ARGUMENT

A. THE DUTY TO OBEY A COURT ORDER ISSUED PURSUANT TO M.G.L. CHAPTER 123 §§7 AND 8 TO RETAIN A HOMICIDAL PATIENT IS NONDELEGABLE

On January 19, 2012, a Court Order of Civil Commitment Pursuant to M.G.L. Chapter 123 §§7 and 8 issued to the Carney Hospital to retain "N" at the Carney Hospital with the finding that "failure to retain said person in a facility would create a likelihood of serious harm, and there is no less

restrictive alternative for said person." The court ordered that "N" be committed to the Carney Hospital "for a period not to exceed six months or until there is no longer a likelihood of serious harm by reason of mental illness, whichever is shorter...." The order states that the commitment order was to expire on July 19, 2012. [App. 148]. The order was directed to the Carney Hospital with the instruction that "N" be delivered to the Superintendent or Medical Director of the hospital. "N" was already in the custody of the Carney Hospital at the time that the Civil Commitment Order issued. While the court order used the name "Caritas Carney Hospital", the petition for commitment was filed by the interim Medical Director of "Steward Carney Hospital" Michael Henry, M.D. who understood that the commitment order was directed to "Steward Carney Hospital." [App. 213 Lines 2-10; App. 214 Lines 1-15].

A court order creates a nondelegable duty. *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 361 Mass. 35, 39 fn. 15 (1972). The fact that "entities [to whom a court order is directed] must be held responsible for the conduct of their employees is not based

necessarily on the doctrine of *respondeat superior* but rather on a rule that the obligation to obey a court order is nondelegable but remains at all times the responsibility of the person to whom the order has been directed." *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 361 Mass. 35, 39 fn. 15 (1972). Because compliance with a court order is nondelegable, the fact that the entity which was the subject of the order relied upon others will not excuse compliance with the order. *Singer Manufacturing Company v. Sun Vacuum Stores*, 192 F.Supp. 738 (D.N.J. 1961). In *Singer*, supra, the Court pointed out that once there is a court order directed to the defendant, "It is not an instance of *respondeat superior*. It is a case of the non-performance of a nondelegable duty." 192 F.Supp. 738 at 741. If a duty is nondelegable, reliance upon third parties will not relieve a defendant of liability should the order be violated. *Levesque v. Hildreth & Rogers Company*, 276 Mass. 429 (1931). See *O'Brien v. Christenson*, 422 Mass. 281, 662 N.E.2d 205 (1996).

In *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 361 Mass. 35, 39 (1972), the Court held that

"When a corporation is charged with civil contempt for violating a court order because of the acts of its agents or servants, it is not necessary to show that there was wilful disobedience or intention to violate the order. It is enough to establish that persons acting for the corporation were responsible for acts or inaction which in fact constituted a violation. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599, where it was said, 'The absence of wilfulness does not relieve from civil contempt . . . Since the purpose (of civil contempt) is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of (the defendants') mind . . . It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently."

Here, "N" was ordered committed to the "Caritas Carney Hospital" [App. 148]. The medical director of Carney Hospital fully understood that the order was directed to Steward Carney Hospital. [App. 213Lines 2-

10; A. 214 Lines 1-15]. The duty imposed was nondelegable. As set forth below, there was ample evidence that the order was violated; that when "N" was discharged from the Carney Hospital on January 30, 2012, there remained "a likelihood of serious harm by reason of mental illness" and "N" should not have been released from the Carney Hospital other than to the custody of another locked psychiatric facility such as a state hospital under the control of the Department of Mental Health." [App. 209, Affidavit T. Gutheil, M.D. Par. 59]. Under these circumstances the defendant's motion for summary judgment should have been denied.

B. M.G.L. CH. 123 §36B, WHICH AFFORDS IMMUNITY TO A "LICENSED MENTAL HEALTH PROFESSIONAL" BUT NOT TO MENTAL HEALTH "FACILITIES" AFFORDS NO IMMUNITY TO A HOSPITAL CORPORATION WHICH HAS BEEN ORDERED TO RETAIN A HOMICIDAL PATIENT.

M.G.L. Ch. 123 §1 defines a licensed mental health professional, as "any person who holds himself out to the general public as one providing mental health services and who is required pursuant to such practice to obtain a license from the commonwealth." The statute distinguishes "licensed mental health

professional[s]" from mental health "facilities". M.G.L. Ch. 123 §1 defines a "facility", as "a public or private facility for the care and treatment of mentally ill persons, except for the Bridgewater State Hospital." M.G.L. Ch. 123 §36B, affords immunity to a "licensed mental health professional" but grants no such immunity to a "facility".

The lower court relied upon the case of *Shea v. Caritas Carney Hospital*, 79 Mass App 530, 947 N.E. 2d 99 (2011) as establishing no duty of care, in the present case meaning, no duty to obey a court commitment order of a homicidal patient. If the plaintiffs' complaint were for a failure to warn, reliance upon *Shea* would have some merit, assuming *Shea* was correctly decided. The *Shea* case however, involved a voluntary admission and voluntary discharge from a hospital. The issue in *Shea* was whether there was a duty to warn third persons. In *Shea*, there was no court finding that "failure to retain said person in a facility would create a likelihood of serious harm, and there is no less restrictive alternative for said person." In *Shea*, there was no court commitment order as there was in the present case that "N" be

committed to the Carney Hospital "for a period not to exceed six months or until there is no longer a likelihood of serious harm by reason of mental illness, whichever is shorter..." [App. 148]. In *Shea*, unlike the present case, there was no proof that at the time "N" was discharged from the Carney Hospital on January 30, 2012, there remained "a likelihood of serious harm by reason of mental illness" and "N" should not have been released from the Carney Hospital other than to the custody of another locked psychiatric facility such as a state hospital under the control of the Department of Mental Health." [App. 209, Affidavit T. Gutheil, M.D. Par. 59].

The present case is not based upon a failure to warn at all but a failure to control, a failure to obey a court order to retain a homicidal patient. The duty to control was addressed in *Carr v. Howard*, Norfolk Superior Court Civil Action No. 94-47 (1996) (Cowin, J.) [App. 91-106]. In the Memorandum of Decision, Justice Cowin denied the defendant's motion for summary judgment on similar but less compelling facts, noting the distinction between the no duty to warn unidentified victims set forth in M.G.L. Ch. 123

§36B, and the negligent release of a psychiatric patient.

Carney Hospital cannot avail itself of *Shea v. Caritas Carney Hospital*, 79 Mass App 530, 947 N.E. 2d 99 (2011) or M.G.L. Ch. 123 §36B as an excuse for not obeying a court order keep a homicidal patient in custody. M.G.L. Ch. 123 §36B affords immunity to a "licensed mental health professional" but grants no such immunity to a "facility" such as Carney Hospital. Carney Hospital has a nondelegable duty to obey the court commitment order but released "N" while there remained "a likelihood of serious harm by reason of mental illness" and did just as he said he would. He took the life of another with "knives that he kept in his room". The defendants-appellees were not entitled to summary judgment on these facts.

C. A HOSPITAL CORPORATION WHICH HAS BEEN ORDERED BY A COURT PURSUANT TO M.G.L. CHAPTER 123 §§7 AND 8 TO RETAIN A HOMICIDAL PATIENT OWES A DUTY TO THIRD PERSONS WHO ARE INJURED OR KILLED AS A RESULT OF THE VIOLATION OF THE COURT ORDER.

The defendant contends that it owed no duty and cannot be held accountable. For the reasons set forth below, it is apparent that the defendant in fact owed

a duty to obey the court's order and is accountable for the harm caused. The Restatement of Torts, Second provides:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. Restatement of Torts 2d, §319.

The Restatement Comment states as follows:

The rule stated in this Section applies to two situations. The first situation is one in which the actor has charge of one or more of a class of persons to whom the tendency to act injuriously is normal. The second situation is one in which the actor has charge of a third person who does not belong to such a class but who has a peculiar tendency so to act of which the actor from personal experience or otherwise knows or should know.

The Restatement provides two illustrations of this rule:

A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employed by A, C, a delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes

harm to C. A is subject to liability to C.

The Reporters Notes provide as follows:

This Section has been changed from the first Restatement by eliminating the word "voluntarily," so that the Section now includes those who "involuntarily" take charge of third persons, if that be possible. None of the decisions supporting the Section has laid stress upon the defendant's voluntary conduct in taking charge, and it would appear that his protests against being required to do so would not be material to the rule stated, so long as he does so.

Restatement of Torts Third §41 is in accord and provides:

(a) An actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

(2) a custodian with those in its custody.

The Restatement provides an illustration as follows:

f. *Duty of Custodians.* Custodians of those who pose risks to others have long owed a duty of reasonable care to prevent the person in custody from harming others. The classic custodian under this Section is a jailer of a dangerous criminal. Other well established custodial relationships include hospitals for the mentally ill and for those with contagious diseases. Custodial relationships imposing a duty of care are

limited to those relationships that exist, in significant part, for the protection of others from risks posed by the person in custody.

The key to this analysis is whether the defendant has "taken charge" or taken "custody" of the third person. In *Estate of Davis ex rel. Davis v. U.S.*, 340 F. Supp.2d 79 (D. Mass 2004), suit was brought against the government, alleging that it wrongfully caused the victim's death by allowing FBI informants to commit murder and other criminal activities with impunity. Denying a motion to dismiss, the Court held that although there was no general duty to protect others from the criminal acts of a third party, one who took charge of or had a special relationship with a third person, whom he knew or should have known to be likely to cause bodily harm to others if not controlled, would be under duty to exercise reasonable care to control such third person. *Estate of Davis ex rel. Davis v. U.S.*, 340 F.Supp.2d 79 (D. Mass 2004). In *McCloskey v. Mueller*, 385 F.Supp.2d 74, 83, affirmed 446 F.3d 262 (1st. Cir. 2006), the Court found no duty where the "third person" had not yet been taken into custody or supervised in any way before the murder.

The Court in *Leavitt v. Brockton Hospital*, 454 Mass. 37 (2009) noted the importance of a voluntary outpatient status citing *Hoehn v. United States*, 217 F.Supp.2d 39, 47, 48 (D. D.C.2002) (where patient was "voluntary outpatient," hospital "had no right or ability to control her" and "owed no duty to unidentified third parties to control [the patient] and prevent her from driving upon release"). The Court also cited with approval the Restatement of Torts Third §41 stating absent a special relationship with a person posing a risk, there is no duty to control another person's conduct to prevent that person from causing harm to a third party, and as we shall explain, there is no special relationship between the hospital and the patient that would give rise to such a duty in the circumstances of this case. See Restatement (Second) of Torts §315(a) (1965). [9] See also Restatement (Third) of Torts: Liability for Physical Harm §41 (Proposed Final Draft No. 1, 2005). [10]. The *Leavitt* Court went on to state:

Consistent with that principle, this court has recognized a duty to control the conduct of another for the benefit of a third party in narrowly prescribed circumstances. See, e.g., *Jean W. v. Commonwealth*, 414 Mass. 496, 513-514 (1993) (Liacos, C.J., concurring) (Department of Correction and

parole board "may have been in a special relationship with [the released prisoner] because of their custody of and control over him"). We have also recognized such a duty based, in part, on statutory responsibilities. See, e.g., *Irwin v. Ware*, 392 Mass. 745 (1984) (town liable to motorist injured by intoxicated driver whom police officer had permitted to drive on highway). [11]

The *Leavitt* Court cited with approval the Restatement (Third) of Torts: Liability for Physical Harm §41 "Duty to Third Persons Based on Special Relationship with Person Posing Risks," noting the special relationships that give rise to a "duty of reasonable care to third persons": " (1) a parent with dependent children, (2) a custodian with those in its custody, (3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and (4) a mental health professional with patients."

The Supreme Judicial Court has also found a "special duty" where a probation officer failed to verify a probationer's employment where a condition of probation forbade the probationer from teaching in a school with young boys and the probationer went on to molest young boys. The Court held that a "special

duty" was created under which the Commonwealth could be held liable. *A.L. v. Commonwealth*, 402 Mass. 234, 521 N.E. 2d 1017 (1988).

Here, there is no doubt that the defendant had "taken charge" and taken "custody" of "N" creating a special relationship for which a duty of care was owed. *Leavitt v. Brockton Hospital*, 454 Mass. 37 (2009); *Jean W. v. Commonwealth*, 414 Mass. 496, 513-514 (1993); *A.L. v. Commonwealth*, 402 Mass. 234, 521 N.E. 2d 1017 (1988); *Irwin v. Ware*, 392 Mass. 745 (1984); *Estate of Davis ex rel. Davis v. U.S.*, 340 F.Supp.2d 79 (D. Mass 2004); Restatement of Torts 2d, §319; Restatement of Torts Third §41b(2).

The present case does not involve a patient with "voluntary outpatient status" as in *Leavitt*. The present case involves the "homicidal maniac" described in the Restatement of Torts Second illustration. "N" had a history of being non-complaint with outpatient treatment; striking an inmate over the head with handcuffs; assaulting spectators in a courtroom; being combative with police officers and emergency medical personnel; threatening to kill others

including family members as well as no one in particular and of hearing voices telling him to do things to others. "N" was ordered committed by a judge for a period of six months or until no longer a danger to others by reason of mental illness. The fact that "N" remained a danger to others when released eleven days after the commitment order is apparent from the fact that "N" punched one of his doctors in the face while in the defendant's custody; assaulted another patient who was "staring at him"; remained on five minute watches right up until the time of discharge; and the defendant warned family members that they should get a restraining order against "N" upon his release. The affidavit of the plaintiff's expert also established that at the time "N" was discharged from the Carney Hospital on January 30, 2012, there remained "a likelihood of serious harm by reason of mental illness" and "N" should not have been released from the Carney Hospital other than to the custody of another locked psychiatric facility such as a state hospital under the control of the Department of Mental Health." [App. 209, Affidavit T. Gutheil, M.D. Par. 59].

The defendant's assertion that it cannot be held accountable absent a direct relationship with the victims ignores established precedent in the Commonwealth. In *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 326-328 (1982) the Court held that a tavern keeper owes a duty toward all drivers not to serve alcohol to intoxicated patrons even though the vehicle accident was caused by patron's criminal act of driving while intoxicated. In *Jupin v. Kask*, 447 Mass. 141, 849 N.E.2d 829 (2006), the Court held that "the risk in the instant case—that a mentally unstable and violent person, to whom unfettered and unsupervised access to Kask's home was granted, would take a gun from that home and shoot someone—was both foreseeable and foreseen". The Court found that a duty of care existed to a police officer who was later shot with a gun taken from the defendant's home. *Jupin v. Kask*, 447 Mass. 141, 849 N.E.2d 829 (2006).

The Court in *Jupin v. Kask*, 447 Mass. 141, 849 N.E.2d 829 (2006), reasoned that "The assertion that liability must . . . be denied because defendant bears no duty to plaintiff 'begs the essential question—whether the plaintiff's interests are entitled to

legal protection against the defendant's conduct." *Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal.3d 425, 434 (1976), quoting *Dillon v. Legg*, 68 Cal.2d 728, 734 (1968). "[A] duty finds its 'source in existing social values and customs,' " see *Pine Manor*, *supra* at 51, quoting *Schofield v. Merrill*, 386 Mass. 244, 247 (1982), and thus "imposition of a duty generally responds to changed social conditions." *Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n*, 177 Ariz. 256, 262 (1994). *Jupin v. Kask*, 447 Mass. 141, 146-147, 849 N.E.2d 829 (2006). "The concept of 'duty' . . . 'is not sacrosanct in itself, but is only an expression of the sum total of . . . considerations of policy which lead the law to say that the plaintiff is entitled to protection . . . No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." *Luoni v. Berube*, 431 Mass. 729, 735 (2000).

Here, reasonable persons would not only "recognize and agree" that such a duty exists but would be appalled that the defendant chose to violate a court order releasing a homicidal patient who

expressed killing others using knives and did just that three weeks later.

The *Jupin* Court looked to the "significant social benefit to be realized by recognizing a duty of the person in control of the premises to exercise due care with regard to the storage of guns on the premises, particularly with respect to those who have been granted regular access to it." *Jupin v. Kask*, 447 Mass. 141, 146-147, 849 N.E.2d 829 (2006). The same "significant social benefit" exists in not releasing homicidal, mentally ill patients in violation of court orders of commitment.

Other jurisdictions considering the issue have found a duty to not release homicidal patients from custody. In *Perreira v. State*, 768 P.2d 1198 (Colo. 1989), the Colorado Supreme Court held that a state mental health center and its staff psychiatrist can be held liable in tort for the shooting death of a police officer by a mentally ill person, recently released from an involuntary commitment for short-term treatment. In *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (D.Neb.1980) the Court held that the

psychiatric staff of Veterans Administration hospital treating previously committed patient as outpatient had duty to initiate whatever precautions were reasonably necessary to protect potential victims from violence when staff knew or should have known of patient's dangerous propensities. In *Williams v. United States*, 450 F.Supp. 1040 (D.S.D.1978) the Court held that the defendant was liable under theory of negligent release for the shooting death of three persons one day after mentally ill person was released from Veterans Administration hospital, where patient had history of chronic psychosis and violence, hospital staff knew that patient was dangerous but made no effort to seek involuntary commitment before release. In *Bradley Center, Inc. v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982) the Court held that where the staff of private mental hospital knew that a voluntary patient would likely cause serious bodily harm to his wife if the patient had opportunity to do so, the hospital had duty to exercise reasonable care in controlling patient and breached that duty by issuing unrestricted weekend pass to patient, who thereafter purchased gun and shot and killed his wife. In *Furflinger v. Artiles*, 234 Kan. 484, 673 P.2d 86

(1983) the Court "recognize[d] as a valid cause of action, a claim which grew out of a negligent release of a patient who had violent propensities, from a state institution, as distinguished from negligent failure to warn persons who might be injured by the patient as the result of the release." The Court said that "this Court refuses to rule as a matter of law that a reasonable therapist would never be required to take precautions other than warnings, or that there is never a duty to attempt to detain a patient." *Furflinger v. Artiles*, 234 Kan. 484, 499 (1983). In *Naidu v. Laird*, 539 A.2d 1064 (Del.1988) the Court upheld a judgment against state hospital psychiatrist based on psychiatrist's failure to take reasonable steps to protect potential victim from violence resulting from release of committed patient who killed victim in automobile accident while in psychotic state. In *Homere v. State*, 79 Misc.2d 972, 361 N.Y.S.2d 820 (1974) a state hospital was held liable under a theory of negligent release, for injuries suffered by plaintiffs assaulted by a patient released from state hospital on day of assault where, notwithstanding patient's extensive history of mental care and treatment and past acts of violence, hospital

commission authorized release without an updated reevaluation of patient's condition. aff'd. 48 A.D.2d 422, 370 N.Y.S.2d 246 (1975). In *Pangburn v. Saad*, 73 N.C.App. 336, 326 S.E.2d 365 (1985) the Court held that a complaint against state hospital and staff psychiatrist stated a claim for relief in reckless negligence and intentional misconduct where it alleged that staff psychiatrist released involuntarily committed patient who stabbed sister shortly after release, and release decision was made notwithstanding several prior admissions to mental hospitals, history of violence, and parents' objection to patient's release due to their fear of his violent acts. In *Petersen v. State*, 100 Wash.2d 421, 671 P.2d 230 (1983) the Court held that a psychiatrist at state hospital who diagnosed patient, committed as "gravely disabled," as a paranoid schizophrenic with drug-related problems had duty to take reasonable precautions to protect persons who might be endangered by patient's dangerous propensities, including duty to petition for extended commitment.

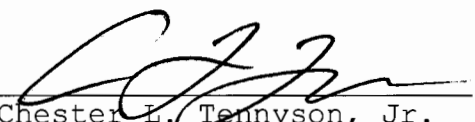
This Court too should "refuse . . . to rule as a matter of law that a reasonable therapist would never

be required to take precautions other than warnings, or that there is never a duty to attempt to detain a patient." *Furflinger v. Artiles*, 234 Kan. 484, 499 (1983). It is important to not lose sight of the fact that in the present case there was a court order to hold "N" and for the purposes of summary judgment, it was established that the order was violated by the defendant.

V. CONCLUSION

WHEREFORE, the plaintiffs-appellants respectfully request that this Honorable Court reverse the decision of the Superior Court granting summary judgment for the defendants-appellees and remand this case to the superior court for trial.

Respectfully Submitted
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By their attorney,




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Dated: February 26, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).


Chester L. Tennyson, Jr.

Dated: February 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon all counsel of record by first class mail to:

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ADDENDUM TO BRIEF

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§ 123:1. Definitions.

GENERAL LAWS OF MASSACHUSETTS

Part I. ADMINISTRATION OF THE GOVERNMENT

Title XVII. PUBLIC WELFARE

Chapter 123. MENTAL HEALTH

Current through Chapter 120 of the 2017 Legislative Session

§ 123:1. Definitions

The following words as used in this section and sections two to thirty-seven, inclusive, shall, unless the context otherwise requires, have the following meanings:

"Commissioner", the commissioner of mental health.

"Department", the department of mental health.

"Dependent funds", those funds which a resident is unable to manage or spend himself as determined by the periodic review.

"District court", the district court within the jurisdiction of which a facility is located.

"Facility", a public or private facility for the care and treatment of mentally ill persons, except for the Bridgewater State Hospital.

"Fiduciary", any guardian, conservator, trustee, representative payee as appointed by a federal agency, or other person who receives or maintains funds on behalf of another.

"Funds", all cash, checks, negotiable instruments or other income or liquid personal property, and governmental and private pensions and payments, including payments pursuant to a Social Security Administration program.

"Independent funds", those funds which a resident is able to manage or spend himself as determined by the periodic review.

"Licensed mental health professional", any person who holds himself out to the general public as one providing mental health services and who is required pursuant to such practice to obtain a license from the commonwealth.

"Likelihood of serious harm", (1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

"Patient", any person with whom a licensed mental health professional has established a mental health professional-patient relationship.

"Psychiatric nurse", a nurse licensed pursuant to section seventy-four of chapter one hundred and twelve who specializes in mental health or psychiatric nursing.

"Psychiatrist", a physician licensed pursuant to section two of chapter one hundred and twelve who specializes in the practice of psychiatry.

"Psychologist", an individual licensed pursuant to section one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one hundred and twelve.

"Qualified physician", a physician who is licensed pursuant to section two of chapter one hundred and twelve who is designated by and who meets qualifications required by the regulations of the department; provided that different qualifications may be established for different purposes of this chapter. A qualified physician need not be an employee of the department or of any facility of the department.

"Qualified psychiatric nurse mental health clinical specialist", a psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section eighty B of chapter one hundred and twelve who is designated by and meets qualifications required by the regulations of the department, provided that different qualifications may be established for different purposes of this chapter. A qualified psychiatric nurse mental health clinical specialist need not be an employee of the department or of any facility of the department.

"Qualified psychologist", a psychologist who is licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one hundred and twelve who is designated by and who meets qualifications required by the regulations of the department, provided that different qualifications may be established for different purposes of this chapter. A qualified psychologist need not be an employee of the department or of any facility of the department.

"Reasonable precautions", any licensed mental health professional shall be deemed to have taken reasonable precautions, as that term is used in section thirty-six B, if such professional makes reasonable efforts to take one or more of the following actions as would be taken by a reasonably prudent member of his profession under the same or similar circumstances:--

- (a) communicates a threat of death or serious bodily injury to the reasonably identified victim or victims;
- (b) notifies an appropriate law enforcement agency in the vicinity where the patient or any potential victim resides;
- (c) arranges for the patient to be hospitalized voluntarily;
- (d) takes appropriate steps, within the legal scope of practice of his profession, to initiate proceedings for involuntary hospitalization.

"Restraint", bodily physical force, mechanical devices, chemicals, confinement in a place of seclusion other than the placement of an inpatient or resident in his room for the night, or any other means which unreasonably limit freedom of movement.

"Social worker", an individual licensed pursuant to sections one hundred and thirty to one hundred and thirty-two, inclusive, of chapter one hundred and twelve.

"Superintendent", the superintendent or other head of a public or private facility.

Cite as Mass. Gen. Laws ch. 123, § 1

§ 123:7. Commitment and retention of dangerous persons; petition; notice; hearing.

GENERAL LAWS OF MASSACHUSETTS

Part I. ADMINISTRATION OF THE GOVERNMENT

Title XVII. PUBLIC WELFARE

Chapter 123. MENTAL HEALTH

Current through Chapter 120 of the 2017 Legislative Session

§ 123:7. Commitment and retention of dangerous persons; petition; notice; hearing

- (a) The superintendent of a facility may petition the district court or the division of the juvenile court department in whose jurisdiction the facility is located for the commitment to said facility and retention of any patient at said facility whom said superintendent determines that the failure to hospitalize would create a likelihood of serious harm by reason of mental illness.
- (b) The medical director of the Bridgewater state hospital, the commissioner of mental health, or with the approval of the commissioner of mental health, the superintendent of a facility, may petition the district court or the division of the juvenile court department in whose jurisdiction the facility or hospital is located for the commitment to the Bridgewater state hospital of any male patient at said facility or hospital when it is determined that the failure to hospitalize in strict security would create a likelihood of serious harm by reason of mental illness.
- (c) Whenever a court receives a petition filed under any provisions of this chapter for an order of commitment of a person to a facility or to the Bridgewater state hospital, such court shall notify the person, and his nearest relative or guardian, of the receipt of such petition and of the date a hearing on such petition is to be held. The hearing on a petition brought for commitment pursuant to paragraph (e) of section 15, and sections 16 and 18, or for a subsequent commitment pursuant to paragraph (d) of section 8 shall be commenced within 14 days of the filing of the petition, unless a delay is requested by the person or his counsel. For all other persons, the hearing shall be commenced within 5 days of the filing of the petition, unless a delay is requested by the person or his counsel. The periods of time prescribed or allowed under the provisions of this section shall be computed pursuant to Rule 6 of the Massachusetts Rules of Civil Procedure.

Cite as Mass. Gen. Laws ch. 123, § 7

History. Amended by Acts 2004, c. 410, §1, eff. 3/1/2005.

Amended by Acts 2000, c. 249, §§ 1, 2, eff. 11/11/00; Acts 2002, c. 127, eff. 8/28/2002.

§ 123:8. Proceedings to commit dangerous persons; notice; hearing; orders; jurisdiction.

GENERAL LAWS OF MASSACHUSETTS

Part I. ADMINISTRATION OF THE GOVERNMENT

Title XVII. PUBLIC WELFARE

Chapter 123. MENTAL HEALTH

Current through Chapter 120 of the 2017 Legislative Session

§ 123:8. Proceedings to commit dangerous persons; notice; hearing; orders; jurisdiction

- (a) After a hearing, unless such hearing is waived in writing, the district court or the division of the juvenile court department shall not order the commitment of a person at a facility or shall not renew such order unless it finds after a hearing that (1) such person is mentally ill, and (2) the discharge of such person from a facility would create a likelihood of serious harm.
- (b) After hearing, unless such hearing is waived in writing, the district court or the division of the juvenile court department shall not order the commitment of a person at the Bridgewater state hospital or shall not renew such order unless it finds that (1) such person is mentally ill; (2) such person is not a proper subject for commitment to any facility of the department; and (3) the failure to retain such person in strict custody would create a likelihood of serious harm. If the court is unable to make the findings required by this paragraph, but makes the findings required by paragraph (a), the court shall order the commitment of the person to a facility designated by the department.
- (c) The court shall render its decision on the petition within ten days of the completion of the hearing, provided, that for reasons stated in writing by the court, the administrative justice for the district court department may extend said ten day period.
- (d) The first order of commitment of a person under this section shall be valid for a period of six months and all subsequent commitments shall be valid for a period of one year; provided that if such commitments occur at the expiration of a commitment under any other section of this chapter, other than a commitment for observation, the first order of commitment shall be valid for a period of one year; and provided further, that the first order of commitment to the Bridgewater state hospital of a person under commitment to a facility shall be valid for a period of six months. If no hearing is held before the expiration of the six months commitment, the court may not recommit the person without a hearing.
- (e) In the event that the hearing is waived and on the basis of a petition filed under the authority of this chapter showing that a person is mentally ill and that the discharge of the

person from a facility would create a likelihood of serious harm, the district court or the division of the juvenile court department which has jurisdiction over the commitment of the person may order the commitment of the person to such facility.

- (f) In the event that the hearing is waived and on the basis of a petition filed under the authority of this chapter showing that a person is mentally ill, that the person is not a proper subject for commitment to any facility of the department and that the failure to retain said person in strict security would create a likelihood of serious harm, the district court or the division of the juvenile court department which has jurisdiction over a facility, or the Brockton district court if a person is retained in the Bridgewater state hospital, may order the commitment of the person to said hospital.

Cite as Mass. Gen. Laws ch. 123, § 8

§ 123:36B. Duty of licensed mental health professional to warn potential victims.

GENERAL LAWS OF MASSACHUSETTS

Part I. ADMINISTRATION OF THE GOVERNMENT

Title XVII. PUBLIC WELFARE

Chapter 123. MENTAL HEALTH

Current through Chapter 120 of the 2017 Legislative Session

§ 123:36B. Duty of licensed mental health professional to warn potential victims

- (1) There shall be no duty owed by a licensed mental health professional to take reasonable precautions to warn or in any other way protect a potential victim or victims of said professional's patient, and no cause of action imposed against a licensed mental health professional for failure to warn or in any other way protect a potential victim or victims of such professional's patient unless: (a) the patient has communicated to the licensed mental health professional an explicit threat to kill or inflict serious bodily injury upon a reasonably identified victim or victims and the patient has the apparent intent and ability to carry out the threat, and the licensed mental health professional fails to take reasonable precautions as that term is defined in section one; or (b) the patient has a history of physical violence which is known to the licensed mental health professional and the licensed mental health professional has a reasonable basis to believe that there is a clear and present danger that the patient will attempt to kill or inflict serious bodily injury against a reasonably identified victim or victims and the licensed mental health professional fails to take reasonable precautions as that term is defined by said section one. Nothing in this paragraph shall be construed to require a mental health professional to take any action which, in the exercise of reasonable professional judgment, would endanger such mental health professional or increase the danger to potential victim or victims.
- (2) Whenever a licensed mental health professional takes reasonable precautions, as that term is defined in section one of chapter one hundred and twenty-three, no cause of action by the patient shall lie against the licensed mental health professional for disclosure of otherwise confidential communications.

Cite as Mass. Gen. Laws ch. 123, § 36B

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 94-47

JOHN F. CARR
Plaintiff

vs.

MARJORIE A. HOWARD¹
and
KERRY L. BLOOMINGDALE, M.D.
Defendants

MARJORIE A. HOWARD
Third Party Plaintiff

vs.

NEW ENGLAND DEACONESS HOSPITAL
Third Party Defendant

MEMORANDUM OF DECISION AND ORDER ON MOTION
FOR SUMMARY JUDGMENT OF DEFENDANT KERRY L. BLOOMINGDALE, M.D.
AND NEW ENGLAND DEACONESS HOSPITAL

In this case, Stanley Howard ("Howard"), a patient receiving psychiatric care at the New England Deaconess Hospital ("hospital"), escaped from the hospital and jumped from a building to commit suicide. While jumping from the building, Howard injured the plaintiff, John Carr ("Carr"). Carr brought this negligence action against Howard's treating psychiatrist, Kerry Bloomingdale, M.D. ("Dr. Bloomingdale").² The defendant, Dr. Bloomingdale, moves

¹ Administratrix of the Estate of Stanley W. Howard.

² The plaintiff also brought a negligence claim against the Administratrix of Howard's estate, Marjorie Howard. Marjorie Howard brought a third party complaint against New England Deaconess Hospital and a cross-claim against Dr. Bloomingdale under the Wrongful Death Statute, G.L. c. 229, §2, and seeks contribution against them for any judgment she may be required to pay the plaintiff.

for summary judgment pursuant to Mass. R. Civ. P. 56 on all counts of the complaint on the ground that she owed no duty of care to protect the plaintiff from the conduct of her patient. Doctor Bloomingdale also moves for partial summary judgment on Count III of the cross-claim seeking contribution by the estate. By means of the same motion, the third-party defendant, New England Deaconess Hospital, seeks partial summary judgment on Count IV of the third-party claim for contribution asserted against it by the estate. For the reasons set forth below, the defendants' motion for summary judgment is DENIED.

BACKGROUND

The following facts are taken from the submissions of the parties. On this summary judgment motion, all inferences are drawn in favor of the plaintiffs. On July 14, 1993, Stanley Howard, 52, was admitted to New England Deaconess Hospital for psychiatric treatment for depression and suicidal and homicidal ideation. Howard's Initial Treatment Plan ("the Plan"), dated July 14, 1993, the date of his admission, states that he was a danger to himself, had homicidal and suicidal ideation, and that he was an escape risk. The Plan also states that Howard should be closely watched. Howard was admitted involuntarily³ and placed on a suicide watch in

³ The hospital records, including the admissions evaluation and Howard's treatment plan, indicate that Howard was admitted involuntarily. The Progress Note dated July 18, 1993 in Howard's medical records states that Howard signed a Conditional Voluntary form. No such form, however, appears in his medical records. The defendants concede, for purposes of the motion for summary judgment, that the degree of control of the psychiatrist and of the hospital over Howard was equivalent to that over an involuntarily committed patient.

the hospital's locked psychiatric ward. His treating psychiatrist at the hospital was the defendant, Dr. Kerry Bloomingdale.

Various hospital staff members noted in medical records that Howard was angry about his commitment. On July 15, Howard escaped the ward for one hour and fifteen minutes.

On July 22, 1993, Howard was transported from the psychiatric ward to another building at the hospital for an MRI test. The order for his transportation required a staff person to escort Howard one-on-one.⁴ After undergoing the MRI test, Howard escaped from his escort, Sheila Bruce, a mental health aid, and went to the upper level of the hospital's parking garage to jump to his death.

At approximately 11:55 a.m., the plaintiff, John Carr, was landscaping the hospital grounds. Carr's attention was drawn to persons shouting and looking at the upper level of the parking garage. The plaintiff, a co-worker, and a hospital security guard began to set up a tarp to catch Howard. A security guard warned them to stand back but did not prevent them from spreading out the tarp. Before the tarp was in place, however, Howard jumped to his death, landing on and seriously injuring the plaintiff.

Plaintiff brought this action in negligence against Marjorie Howard, the administratrix of Howard's estate, and against Dr. Bloomingdale, the psychiatrist responsible for the care, treatment and protection of Howard. Cross-claims were also filed as detailed above. Specifically, the plaintiff alleges that his injuries were

⁴ There is evidence that assigning a single person as his escort was inadequate. (See deposition of Shiela Bruce, the escort, at 136-137).

a direct and proximate result of Dr. Bloomingdale's negligent failure to take special precautions in the transportation of Howard, such as ensuring that Howard was escorted by a person competent to provide him protective measures. Dr. Bloomingdale and the hospital move for summary judgment, arguing that, as a matter of law, they owed no duty to protect the plaintiff from the conduct of Howard.

DISCUSSION

Summary judgment shall be granted if the papers filed establish that there are no genuine issues as to any material fact in dispute and that the moving party is entitled to judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983). Mass. R. Civ. P. 56(c). The judge must consider the evidence presented in the light most favorable to the nonmoving party. Connecticut Nat'l Bank of Hartford v. Kommit, 31 Mass. 348, 353 (1991); Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 113 (1990).

For purposes of this motion, the crux of Carr's claim and the estate's claims is that Dr. Bloomingdale and the hospital were negligent in failing to provide additional security measures to prevent Howard's escape from his attendant and his jump from the garage roof.⁵ (The estate's claims at issue in this motion are ones for contribution.) Dr. Bloomingdale and the hospital contend that they owed no duty to the plaintiff because (1) no special

⁵ The estate also claims negligence in the psychiatric treatment of Howard.

relationship existed between Dr. Bloomingdale and the plaintiff to warrant imposition of a duty of care; (2) a psychiatrist owes no duty to members of the general public to control the conduct of his or her patients; (3) Howard's conduct and the resulting injury to the plaintiff were not reasonably foreseeable events giving rise to a duty of care; and (4) even if Dr. Bloomingdale owed a duty to the general public, such a rule is inapplicable here because Carr's voluntary acts relating to Howard's conduct rendered Carr's negligence greater, as a matter of law, than any negligence of the defendants.

This case initially raises an issue concerning the applicability of G.L. c. 123. § 36A. Said statute, enacted in 1989 as part of an act entitled "Mental Health Care Professionals - Patient Violence," provides in pertinent part as follows:

- (1) There shall be no duty owed by a licensed mental health professional to take reasonable precautions to warn or in any other way protect a potential victim or victims of said professional's patient, and no cause of action imposed against a licensed mental health professional for failure to warn or in any other way protect a potential victim or victims of such professional's patient unless: (a) the patient has communicated to the licensed mental health professional an explicit threat to kill or inflict serious bodily injury upon a reasonably identified victim or victims and the patient has the apparent intent and ability to carry out the threat, and the licensed mental health professional fails to take reasonable precautions as that term is defined in section one; or (b) the patient has a history of physical violence which is known to the licensed mental health professional and the licensed mental health professional has a reasonable basis to believe that there is a clear and present danger that the patient will attempt to kill or inflict serious bodily injury against a reasonably identified victim or victims and the licensed mental health professional fails to take

reasonable precautions as that term is defined by said section one. Nothing in this paragraph shall be construed to require a mental health professional to take any action which, in the exercise of reasonable professional judgment, would endanger such mental health professional or increase the danger to potential victim or victims.

The specific question is whether this statute applies to bar any action against Dr. Bloomingdale and/or the New England Deaconess Hospital.

A licensed mental health professional is defined under G.L. c. 123 as "any person who holds himself out to the general public as one providing mental health services and who is required pursuant to such practice to obtain a license from the commonwealth." G.L. c. 123, § 1. There is no question that Dr. Bloomingdale is a licensed mental health professional under the statute. It is unclear, however, whether the hospital is encompassed by that term. It is not necessary in this case to resolve whether the hospital is a licensed mental health professional, given this Court's conclusion regarding the applicability of the statute.

The statute insulates licensed mental health professionals from failure to warn or protect potential victims of their patient's conduct unless a) patient has communicated explicit threats of harm to a reasonably identified victim and has the apparent intent and ability to carry out the threat or b) a patient with a known history of physical violence presents a clear and present danger to a reasonably identified victim and, in either case, the professional fails to take reasonable precautions.

Although at first blush the statute may appear to insulate Dr.

Bloomingtondale from liability, a more careful reading of its terms indicates that the statute simply is not intended to apply to the facts of this case. According to the facts presented, there is no reasonably identified victim about whom the patient (Carr) had communicated a threat nor is there any reasonably identified victim to whom the patient presented a clear and present danger.⁶

Further, the Act is titled as one "clarifying the duty of licensed mental health professionals to take precautions against patient violence." Mr. Carr's act of committing suicide was not one of violence, except as to himself. Although the title of a statute is not part of the law, it may be used as a guide in resolving an ambiguity in the legislation. Breault v. Ford Motor Company, 364 Mass. 352, 353-354, n. 2 (1973).

Thus, it appears to this Court that this statute is simply not intended to encompass the present circumstances. Accordingly, it is necessary to resort to the common law as it exists apart from the passage of this statute.

Massachusetts courts have not determined whether a psychiatrist's duty of care extends to protect third parties harmed by a patient. Under the common law, a person had no duty to prevent a third party from causing injury to another. Many courts, however, have recognized an exception to this general rule. Under this exception, a person (here, the psychiatrist) has a duty to control

⁶ In addition, since the patient was already confined, he did not have the ability to carry out a threat to anyone outside the hospital, even had such a threat been uttered, which it had not.

the conduct of a third person (here, the patient) to prevent physical harm to another (here, the plaintiff) if (a) a special relation exists between the actor (the psychiatrist) and the third person (patient) which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the third party which gives the third party a right to protection. Restatement (Second) of Torts, § 315 (1965). See Libari v. Sears Roebuck & Co., 497 F. Supp. 185, 194 (D. Neb. 1980).

Massachusetts courts have determined that such a special relation exists, creating a duty of care, when the defendant reasonably could foresee that he or she would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so. Such special relationships have been recognized between a student and a college (Mullins v. Pine Manor College, 389 Mass. 47, 52-53 (1983)); a passenger and a common carrier (Sharpe v. Peter Pan Bus Lines, Inc., 401 Mass. 788, 792-793 (1988)); patrons and commercial eating and drinking establishments (Kane v. Fields Corner Grill, Inc., 341 Mass. 640 (1961)); and guests and hotels (Addis v. Steele, 38 Mass. App. Ct. 433, 436 (1995); Fund v. Hotel Lenox of Boston, Inc., 418 Mass. 191, 193 (1994)).⁷

⁷ To be foreseeable harm, there is no requirement that the injured party be identified. See Irwin v. Ware, 392 Mass. at 756 (defendant could reasonably foresee he would be expected to take affirmative action to protect plaintiff and could reasonably anticipate harm to the plaintiff for failure to do so.) See also discussion of Irwin v. Ware, infra.

Defendants' position is that Massachusetts law to date does not support the proposition that a potential victim of an intentional or negligent act of a patient has a special relationship with the treating doctor and hospital sufficient to impose a duty of care. Although no reported Massachusetts case specifically considers the relationship in this case,⁸ the Restatement (Second) of Torts §319 (1965), is relevant. Said section provides:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Illustration 2 under Section 319 describes the situation in this case:

A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.⁹

Thus, this section describes an exception to the general rule of non-liability for the conduct of others. Buchler v. Oregon Correctional Div., 316 Or. 499, 505 (1993).

This concept has been applied in a number of cases in other jurisdictions. See, for example, White v. United States, 780 F.2d

⁸ This Court does not consider whether there may be a distinction between the duty owed by the hospital and that owed by Dr. Bloomingdale. Defendants' brief appears to equate the two. There is no reason at this point for the Court to do otherwise.

⁹ There is no discussion in this section of any relationship between B, the inmate, and C, the victim. See, however, discussion on foreseeability, infra.

97, 103 (D.C. Cir. 1986) (where committed mental patient known to have dangerous propensities escaped and attacked his wife, clearly erroneous to find hospital not negligent in failing to supervise, as it had duty to public to exercise reasonable care to control patients in its custody); Tamsen v. Weber, 166 Ariz. 364 (1990) (under §319, psychiatrist may be liable to stranger attacked by escaped inpatient; where psychiatrist knew or should have known of patient's dangerous propensities, psychiatrist had duty to act with due care to protect others by controlling patient). Estate of Mathes v. Ireland, 419 N.E.2d 782 (Ind. App., 1981) (husband's wrongful death action against psychiatric centers which allegedly treated his wife's killer stated cause of action where complaint alleged centers had actually taken charge of killer, had actual knowledge killer was extremely dangerous and that staff were negligent in releasing killer without extended treatment).

Treatises in other jurisdictions have concluded that "there now seems to be sufficient authority to support the conclusion that by entering the doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient."¹⁹ Fleming and Maximov, The Patient or his Victim: The Therapist's Dilemma (1974) 62 Cal. L. Rev. 1025, 1030.

Accordingly, this Court believes that the Supreme Judicial

¹⁹ See infra regarding the foreseeability of the third person.

Court would conclude, in accord with the Restatement, that a psychiatrist and a hospital that have custody over dangerous persons have an affirmative duty to members of the public to take reasonable precautions to control their patients. The relationship giving rise to this duty may be found either in that existing between the therapist (and hospital) and the patient or in the therapist's (and hospital's) obligation to protect the welfare of the community. Lipari v. Sears Roebuck & Co., supra, at 190. The difficulty in predicting dangerousness does not negate the existence of a cause of action for the negligence of the psychiatrist and the hospital. This duty arises only when, in accordance with the standards of the profession, a psychiatrist (or hospital) knows or should know that the patient's dangerous propensities present an unreasonable risk of harm to others. The duty requires that the caregiver initiate whatever precautions are reasonably necessary to protect potential victims of the patient. To that end, a psychiatrist may have a duty to control, to some appropriate degree, the actions of the patient. Naidu v. Laird 539 A. 2d 1064, 1072-1073 (Del. Sup. Ct. 1988).

Imposing a duty to exercise reasonable care to protect third persons is not futile simply because of the difficulties of predicting future acts of violence by a patient. The role of the psychiatrist is similar to that of the physician who must conform to the standards of the profession and must often make diagnoses and predictions based upon evaluations. Thus, the psychiatrist's judgment in diagnosing emotional disorders and predicting whether

a patient is a serious danger is comparable to the judgment doctors regularly give under accepted rules of responsibility. The difficulty in predicting whether a patient is a serious danger is recognized by judging the psychiatrist's performance by the standard employed for physicians. The psychiatrist is bound only to exercise the degree of care and skill of the average psychiatrist at the time the services were rendered. The psychiatrist may exercise his or her own best judgment without liability as long as it is within the broad range of reasonable practice and treatment. See Tarasoff v. Regents of the University of California, 131 Cal. Rptr. 14, 20-25 (1976). Unless people injured by the hospital's and/or the psychiatrist's failure to perform their functions properly can recover, "society's ability to insure that [the hospital and doctor] conscientiously [perform their] duties is rendered haphazard at best." Hicks v. United States, (Tamm, J. And McGowan, J., concurring), 511 F. 2d 407, 422 (D.C. Cir. 1975).

Here, there is no question that the defendants predicted that Howard was a serious danger. (See the "Initial Treatment Plan" which indicates that Howard was a danger to himself, had homicidal and suicidal ideation, was an escape risk, and was to be watched closely.)¹¹

¹¹ It is noted that in most of the reported cases in which courts have held that liability has been imposed, the patient was "extremely dangerous" and had a long history of dangerous acts. See, for example, Tamsen v. Weber, 802 P.2d 1063, 1065 (Ariz. App. 1990) and Williams v. United States, 450 F.Supp. 1040, 1041-1042 (D. Ct. S.D. 1978). The present record clearly presents evidence that Howard was considered a danger.

The defendants argue that even were the Massachusetts courts to adopt the duty of care reasoning set forth above, such a rule would be limited to identified or reasonably foreseeable victims of the patient's dangerous conduct. This Court agrees. The defendants contend further, however, that as a matter of law, Carr was not a reasonably foreseeable victim of Howard's actions. For this proposition, the defendants rely on Foley v. Boston Housing Authority, 407 Mass. 640 (1990).

In Foley, the plaintiff, an employee of the defendant Boston Housing Authority ("BHA"), while in the course of performing his duties, was attacked by another BHA employee. The plaintiff predicated the liability of the BHA on prior threats by tenants of the BHA and the volatile situation between BHA employees and tenants. The Court held that the BHA owed no duty to protect the plaintiff from another BHA employee. The Court said that the BHA could foresee that a tenant might attack Foley, given the volatility of the BHA-tenant situation; an attack on Foley by another BHA employee was not foreseeable. There was nothing in the record of threats by employees to reasonably put the BHA on notice that Foley could be the target of an employee's attack.

By contrast, in the instant case, it cannot be said as a matter of law that the plaintiff, working on the hospital grounds near the parking garage where the patient was being transported, was not a reasonably foreseeable victim of an escape or suicide attempt by Howard. There is a distinction between the relationship of an employer-employee (the Foley case) and that of a

psychiatrist/hospital and its patient. The employer is not ordinarily concerned about violence perpetrated by employees against each other. Psychiatrists and hospitals, by contrast, who are charged with controlling dangerous patients, must constantly be on notice to protect others who might be harmed.¹²

This Court believes that the Supreme Judicial Court would conclude that the present case is more closely akin to the situation in Irwin v. Ware, 392 Mass. 745 (1984) than that in Foley. In Irwin v. Ware, the Supreme Judicial Court imposed a duty on a police officer to remove from the road a motorist whom the officer knew to be intoxicated and who was an immediate and foreseeable risk of harm to the travelling public. In that situation, the Court held that the police officer was expected to take affirmative action to protect the plaintiff, another motorist, and that the officer could anticipate harm to the plaintiff from

¹² Cases in many other jurisdictions permit liability to be imposed in the psychiatrist-patient area only when the plaintiff is a specific identifiable victim of the patient's condition. See, for example, Thompson v. County of Alameda, 614 P.2d 728, 738 (Calif. 1980). This is not always the case, however. Some courts have not required as a precondition to recovery that plaintiff be an identifiable victim of the patient's condition. These courts appear to have required only that the doctor reasonably foresee that the risk engendered by his patient's condition would endanger other persons. See, for example, Estate of Mathes v. Ireland, supra (hospital could be held liable for releasing patient who hospital knew to be extremely dangerous when patient abducted a stranger from a laundromat and drowned her); and Lipari v. Sears, Roebuck & Co., supra, at 193-195. Some courts even seem to hold that a psychiatrist's duty of care extends to the public at large. See, for example, Naidu v. Laird, supra; Durflinger v. Artiles, 234 Kan. 484, 493-495 (1983). At least one jurisdiction has rejected a psychiatrist's duty to the public at large, without stating a position about a duty to those occupying the middle ground. Sherrill v. Wilson, 653 S.W.2d 661, 667 (Mo. 1983).

failing to take such affirmative action. In the instant case, given Howard's history and the facts known to the defendants, it cannot be said as a matter of law that the defendants should not reasonably foresee that the negligent performance of their function may result in injury to a third person in Carr's position. Prosser and Keeton, The Law of Torts §33, at 202-03 (5th ed. 1984).

There need not be a requirement that the defendant be able to predict the precise type of injury the patient perpetrates on the plaintiff. That would require clairvoyance. See Buchler v. Oregon Corrections Div., supra, at 800 (required showing for summary judgment purposes is whether reasonable juror could determine prisoner was likely to cause bodily harm to others; summary judgment affirmed because no reasonable juror could infer that felon, with only a history of drug abuse and "violent temper" in childhood, was likely to cause bodily harm to others two days after his escape). All that is necessary is that the defendant reasonably be on notice that the public or certain portions thereof is in danger from the patient unless reasonable precautions are taken. If reasonable precautions are not taken, and the patient injures one in Carr's position, that is within the scope of foreseeable risk. The plaintiff need not prove that defendants knew of Carr's identity or the precise type of injury involved.

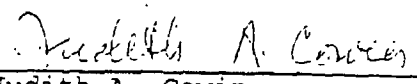
Howard had been diagnosed as a danger to himself and having homicidal and suicidal ideation. He also had previously escaped from the hospital's psychiatric ward and was angry about his commitment. These factors warranted extreme caution by those

controlling Howard when he was transported to and from the MRI testing. It is at least a factual question whether Dr. Bloomingdale and the hospital could reasonably have foreseen that some precautions were necessary¹³ to ensure the safety of not only Howard, but others whom Howard might injure. The assignment of a sole escort to Howard may well have been insufficient to protect him from escaping and attempting suicide. Carr was working on the hospital grounds, clearly within the danger zone of one who is a suicidal, homicidal escape risk.¹⁴

Given this Court's view of the law, that the relationship in the present case creates legal responsibilities on the psychiatrist and hospital, I cannot say that on the facts alleged a jury would not be warranted in finding negligence on this record. Accordingly, summary judgment is inappropriate.

ORDER

For the foregoing reasons, it is hereby ORDERED that the defendants' motion for summary judgment be DENIED.



Judith A. Cowin
Justice of the Superior Court

A TRUE COPY

DATED: February 27, 1996

Attest: 

Deputy Assistant Clerk

It is noteworthy here that Howard was transported by a sole escort who conceded that she could not physically control him at all. See note 4, supra.

Whether Carr acted to place himself in the zone of danger, see G.L. c. 231, §85, is a fact question for the jury.