



Psychologists' Duty to 3rd Parties: Courts Weigh Factors Outside the Treatment Relationship

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Brandon Smith was William Freund's only friend. William had Aspergers Syndrome, and while he had shown explosive outbursts with his parents, he was never violent with Brandon. To Brandon, William was not the violent type. William was being treated with medications by his psychiatrist, Dr. Laurence Greenberg. He was attending college at ITT Tech, and at the age of 19, he was holding down a computer-related job. Nevertheless, on the morning of October 29, 2005, William went to Brandon's house, used a recently purchased shotgun, and murdered Brandon's father and sister. He then returned home, pointed the gun at himself, and committed suicide. Brandon discovered the bodies of his father and sister after awakening to the sounds of gunshots, and his sister screaming his name.¹

On April 9, 2009, the California Court of Appeal for the Fourth District weighed in on the most recent case affecting a psychotherapist's duty to third parties. In *Greenberg v. Superior Court*, the Court held that under the circumstances, William's treating psychiatrist did not owe a duty of care to William's neighbors in the absence of knowledge that William had any motivation to hurt them. Mere awareness of sometimes violent tendencies did not trigger a legal duty, and his duty to properly manage William's medications did not extend to neighbors.² Nevertheless, while the Court did not find a duty to third parties under the circumstances, it left the door open for such a duty to exist.

A Psychotherapist May Owe a Duty to Parties Outside the Treatment Relationship Other Than the Duty to Warn and Protect

Many psychotherapists tend to look for awareness of a specific threat by a patient as the lynchpin for whether a duty to third parties arises. Civil Code section 43.92(a) clarifies that a psychotherapist has no duty to predict, warn, or protect third parties from a patient's violent behavior, except in those circumstances where a patient communicates to the psychotherapist a threat against an identifiable victim.³ It is not necessary that the patient communicate the threat directly to the therapist.⁴ If the therapist becomes aware of a credible threat of physical harm to an identifiable third party, he or she must take steps to warn and protect the targeted individual or individuals.

Greenberg does not change the effect of section 43.92(a). To the contrary, the Court agreed with Dr. Greenberg that he could not be liable for failing to warn the plaintiffs absent awareness of a threat. However, the analysis of whether a duty to individuals outside the treatment relationship exists, and under what circumstances, is more

complicated than the determination of whether there is a credible threat to an identifiable individual. Rather, according to *Greenberg* and following the recent *Calderon v. Glick* decision by the Court of Appeal, Second District, California courts balance numerous factors in determining whether a legal duty exists, only one of which is the foreseeability of harm to another.⁵

In *Greenberg*, Brandon and his mother, Denise Smith, sued Dr. Greenberg, William Freund's estate, the gun vendor, and an online website where William had posted comments of a suicidal nature in October 2005. The comments suggested that he wanted to kill himself and had unsuccessfully tried suicide. He complained about medication side effects including shaking and increased depression. He wrote that he had purchased a gun and needed to admit himself to a hospital for counseling and "social skills training." He also wrote that he wanted to "cause a lot of damage" with his gun and use it to hunt and "blast things away." There was no evidence that William's parents or Dr. Greenberg were aware of the postings, or of threats by William to harm himself or others.⁶

The plaintiffs argued that even if Dr. Greenberg was immune from liability under section 43.92(a), the duty to third parties is not limited to circumstances where an otherwise dangerous individual communicates a substantial threat of harm to an identifiable third party. Rather, they argued, Dr. Greenberg had a duty, and breached that duty, by *creating* a dangerous condition through the mismanagement of his patient's medications.⁷ The Court did not reject plaintiffs' argument outright, but found, using a balancing of factors test, that a legal duty did not arise under the circumstances.

In order to establish negligence, a plaintiff must prove the legal elements of duty, breach, causation and damages.⁸ The existence of a duty to use due care in response to a legally protected interest of another is the threshold element of a negligence cause of action, absent which, the cause of action cannot proceed.⁹

The Court Will Balance Six Factors to Determine Whether a Duty Exists

In the 2005 case, *Calderon v. Glick*, the Court of Appeals, Second District, adopted a six factor "checklist" to be considered when determining whether a duty arises between a psychotherapist and individuals outside the treatment relationship.¹⁰ The case arose after a patient, suffering a delusion that his former girlfriend had infected him with a rare blood disease, entered her home and killed several members of her family.¹¹

On appeal from the trial court's grant of summary judgment in favor of the treating defendants, the surviving family members argued that a treating psychotherapist owes a duty of care to third parties who suffer reasonably foreseeable harm from the therapist's negligent treatment of his or her patient.¹² The Court held that whether a duty exists between a patient's psychotherapist on the one hand, and the plaintiffs on the other, depends on the balancing of six factors:

- 1) the extent to which the treatment relationship was intended to affect the plaintiffs;
- 2) the foreseeability of harm to the plaintiffs;
- 3) the degree of certainty that the plaintiffs suffered injury;
- 4) the closeness of the connection between the defendant's conduct and the injury suffered;
- 5) the moral blame attached to the defendant's conduct; and
- 6) the policy of preventing future harm.¹³

Under the particular circumstances, the Court reasoned that the therapeutic relationship between the patient and the defendants was not intended to benefit the victims or their family members in any way. Instead, the treatment relationship was intended to benefit the patient by providing him with therapy. It was not reasonably foreseeable that the patient would harm members of his former girlfriend's family since they had nothing to do with his contracting a rare blood disease. The defendants had no information indicating that the patient had been violent in the past, and "lacking clairvoyant powers, they could not predict future dangerousness."¹⁴ Furthermore, the patient insisted on numerous occasions that he did not intend to harm his former girlfriend, or anyone else.¹⁵

The Court observed that the family members unquestionably suffered injury. However, the connection between the defendants' conduct and the injury was not sufficiently close to impose a duty of care to the family members, and the defendants were not responsible for their patient's mental illness or his delusional belief, which existed before he entered therapy. Furthermore, their conduct did not deserve moral blame even if they were negligent since the evidence showed that they acted in good faith in caring for their patient. Finally, the Court concluded that imposing a duty of care would not prevent harm in future cases by encouraging greater care by psychotherapists.¹⁶

Following *Calderon*, the Court of Appeal in *Greenberg* applied the same six-factor analysis for the purpose of determining when a psychotherapist owes a duty of care to a third party. The Court observed that in *Calderon*, the patient's pre-existing delusion regarding his former girlfriend increased the foreseeability of harm to the victims, and his targeted anger towards her made both her and her family members "identifiable." Yet those two factors alone were not sufficient to justify imposing a duty of care.¹⁷ The Court observed that William Freund had exhibited no violent tendencies or motives toward the Smith family, and thus the argument *against* imposing a duty of care was even stronger.¹⁸ Furthermore, the Court observed that William had not been diagnosed as a danger to himself or others, and there was no allegation that Dr. Greenberg had acted for reasons unrelated to necessary medical treatment to justify moral blame.¹⁹

The Court's six-factor approach suggests that the closer a third party is to the treatment relationship, and the more it can be said that the treatment relationship provides a benefit to the third party, the more it may be that the psychotherapist will be found to owe a duty of care to the third party. Consider the situation of an ex-spouse who may claim that a psychotherapist was negligent in the provision of treatment to her former husband, where treatment can be said to have been for the benefit of the marital relationship. Traditionally, the Court has held that a psychotherapist does not owe a duty to the ex-spouse absent a professional relationship between them, and a meaningful connection between the wrongful conduct and the purpose of the professional relationship.²⁰ However, the balancing of factors test would suggest that an actual treatment relationship with the ex-spouse is no longer required. The case for the ex-spouse may be stronger where a therapist's conduct with the patient is found to exceed the scope of necessary ethical treatment so that moral blame attaches. (N)

1 *Greenberg v. Superior Court* (Smith) (2009) 92 Cal.Rptr.3d 96, 98.

2 *Id.* at p. 104.

3 Civil Code section 43.92(a) provides that "there shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."

4 *Calderon v. Glick* (2005) 131 Cal.App.4th 224, 230-231.

5 *Greenberg*, 92 Cal.Rptr.3d at p. 103-104.

6 *Id.* at p. 98-99.

7 *Id.* At p. 99-100.

8 *Id.* at p. 103.

9 *Ibid.*

10 *Calderon*, 131 Cal.App.4th at p. 233.

11 *Id.* at p. 228.

12 *Id.* at p. 233.

13 *Ibid.*

14 *Id.* at p. 233-234.

15 *Ibid.*

16 *Id.* at p. 234.

17 *Greenburg*, 92 Cal.Rptr.3d at p. 104.

18 *Ibid.*

19 *Id.* at p. 106.

20 *Smith v. Pust* (1993) 19 Cal.App.4th 263, 269.

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