

GUIDANCE ON NEW DUTY TO WARN OR PROTECT STANDARD

May 2017: The Washington Supreme Court decision in *Volk v. DeMeerleer*, 386 P.3d 254, 187 Wn.2d 241 (2016), **alters the scope of the “duty to warn or protect” in at least three critical ways:**

1. It brings into question the groups of health care professionals who are subject to the duty to warn or protect in the voluntary inpatient and outpatient setting.
2. The duty now clearly applies in the voluntary inpatient and outpatient setting.
3. Most importantly, outside of the context of an involuntary commitment proceeding, the scope of persons to warn or protect now includes those that are “foreseeable” victims, not reasonably identifiable victims subject to an actual threat.

Facts of the case: The *Volk* decision involved circumstances in which a psychiatrist was treating a patient who had expressed suicidal and homicidal thoughts in the past. Many years later, and about four months after being last seen by the psychiatrist, the patient killed two individuals known to the patient. The patient had not voiced any thoughts to harm them. Representatives of the deceased filed a lawsuit against the psychiatrist for failing to protect them from the patient’s violent actions. That lawsuit is still pending at the trial court, but the Supreme Court’s decision established a new standard that is now binding on treatment providers.

In *Volk*, the Supreme Court held that, in the outpatient and voluntary inpatient treatment setting, the duty of health care providers to warn or protect potential victims of violence extends to all individuals who may be “foreseeably” endangered by a patient, even if no specific target was identified.



The WSMA, Physicians Insurance, and the Washington State Hospital Association recommend that physicians and providers who treat patients with violent tendencies or ideations consider implementing the following guidelines (these guidelines are intended to be general guidance and not legal advice):

- ✓ Continue to use reasonable care to act consistent with the standards of your profession.
- ✓ Complete and update suicide and violence risk assessments with findings documented in the patient’s medical record.
- ✓ Develop a policy and procedure to assess whether a patient has dangerous propensities, and use it consistently.
- ✓ Document in the patient’s medical record why you reached your clinical decision and measures you have recommended to mitigate potential risk, even when you are assessing a patient who has violent tendencies or ideations and do not believe the patient will harm others.
- ✓ In all cases, carefully consider and document in the patient’s medical record the measures taken to mitigate risk. Measures will fall into two categories: measures to treat the patient and measures to warn potential victims. Measures to treat the patient may include, but are not limited to: seeking to hospitalize the patient; seeking to initiate involuntary commitment proceedings;

WSMA, Physicians Insurance and the Washington State Hospital Association will continue to pursue legislative, regulatory and judicial options to address the results of the *Volk* decision.

Currently, legislative efforts to fund a study of the decision on the state’s mental health treatment system are underway. Additional details on those options will be forthcoming.

scheduling more frequent visits or contacts with the clinic; starting injectable medication, etc. Measures to warn potential victims may include notifying law enforcement and notifying “foreseeable” victims.

- ✓ When you decide to issue a warning, notify law enforcement before contacting potential victims. Document in the patient’s medical record your notification efforts and the individuals or groups notified.
- ✓ In *Volk*, the Supreme Court held that it is a jury’s responsibility to determine who may be a foreseeable victim. We cannot, therefore, provide firm guidance on how to identify a foreseeable victim. In assessing the scope of foreseeable victims, consider people close to the patient, such as family members, work colleagues and others

within the person’s social circle. Depending on your assessment, notification to a broader group could be required. In that case, coordination with law enforcement may be necessary. You must assess every case individually.

- ✓ For any action taken, document in the patient’s medical record the reasons the action is necessary to warn or protect foreseeable victims, and, if applicable, to prevent or lessen a serious and imminent threat to a person or the public’s health or safety, as described above.

Finally, we recommend that you consider these points in a clinical context, act in good faith and document in the patient’s medical record your thought process in sufficient detail to justify any course of action you decide to take, even if you feel that a patient has not triggered the duty to warn or protect potential victims.

Questions?

Washington State Medical Association: Tierney Edwards, JD, 206-956-3657, tee@wsma.org

Physicians Insurance: Risk Management, 800-962-1399, risk@phyins.com

Washington State Hospital Association: Taya Briley, 206.216.2554, tayab@wsha.org