



Alan Van Dyne

Bill Analysis
Legislative Service Commission

Am. H.B. 71

123rd General Assembly
(As Passed by the House)

Reps. Vesper, Van Vyven, D. Miller, Krupinski, Lawrence, Mottley, Callender, Evans, Hartnett, Bender, Sullivan, Opfer, Olman, Hoops, Jones, Pringle, Patton, Haines, Maier, Taylor, Ogg, Terwilleger, Sutton, Brading, Hollister, Padgett, Schuring, Smith, Harris, Metzger, Thomas, Bateman, Young, Allen, Britton, Krebs, Myers, O'Brien, Barrett, Winkler, Willamowski, Gardner, DePiero

BILL SUMMARY

- Establishes a duty for a mental health professional or organization to warn of or protect against a threat made by a client or patient if the client or patient communicates an explicit threat of serious harm against a readily identifiable individual or structure and there is reason to believe the client or patient has the intent to carry out the threat.
- Specifies how the mental health professional or organization is to discharge the duty.
- Provides that a mental health professional or organization may be held liable in damages in a civil action or be subject to professional discipline for serious injury or harm resulting from failing to warn of or protect against a threat only if the professional or organization fails to discharge the duty.

CONTENT AND OPERATION

Background

Current law provides that persons acting in good faith, either upon actual knowledge or information thought by them to be reliable, who procedurally or physically assist in the hospitalization, discharge, or determination of appropriate placement, or in judicial proceedings involving the hospitalization of a patient, do not come within any criminal provisions and are free from liability to the person hospitalized or any other person. No person is to be liable for any harm that results

to any other person as a result of failing to disclose any confidential information about a mental health client, or failing to otherwise attempt to protect another person against harm by a mental health client. In a recent decision, the Ohio Supreme Court held that these provisions apply only to civil commitment proceedings and do not provide immunity to psychotherapists who provide outpatient treatment, *Estate of Morgan v. Fairfield County Counseling Center* (1997), 77 Ohio St.3d 284. The Court held that the relationship between the psychotherapist and the patient in the outpatient setting constitutes a special relation justifying the imposition of a duty upon the psychotherapist to protect against or control a patient's violent propensities.¹ Therefore, the Court concluded, when a psychotherapist knows or should know that his or her outpatient represents a substantial risk of harm to others, the therapist is under a duty to exercise his or her best professional judgment to prevent harm from occurring.

Immunity

(sec. 5122.34)

The bill maintains the existing provision that no person is to be liable for any harm that results to any other person as a result of failing to disclose any confidential information about the mental health client or failing otherwise to attempt to protect another person from harm by the client, but limits the provision by specifying that it applies except as otherwise provided by the bill (see "**Duty to control**," below). The bill also specifies that the provision applies "regardless of whether any affirmative action has been taken with respect to a mental health patient or client."

Duty to control

(sec. 2305.51)

The bill provides that a mental health professional or mental health organization may be held liable in damages in a civil action, or may be subject to disciplinary action by an entity with licensing or other regulatory authority over the professional or organization, for serious harm or death resulting from failure to predict, warn of, or take precautions to provide protection from the violent behavior of a mental health client or patient only under circumstances specified in

¹ *Common law imposes no duty to control the actions of a third person or protect another person from serious physical harm, unless there is a special relation. If there is a special relation and a third person is likely to cause bodily harm if not controlled, common law imposes a duty to exercise reasonable care to control the third person and prevent him or her from doing harm. (2 Restatement of the Law, 2nd, Torts (1965), Sections 314 to 319.)*

the bill.² These circumstances may exist if a mental health professional or organization receives information from a client or patient or a knowledgeable person about a threat of violence. "Knowledgeable person" is defined by the bill as an individual who has reason to believe that a mental health client or patient has the intent and ability to carry out an explicit threat of inflicting imminent and serious physical harm to or causing the death of a clearly identifiable victim or victims and who is either an immediate family member of the client or patient or an individual who otherwise personally knows the client or patient. The bill provides that in the case of a threat to a readily identifiable structure, a clearly identifiable victim includes any potential occupant of the structure.

Under the bill, a mental health professional or mental health organization may be found liable for damages if the client or patient or a knowledgeable person has communicated to the professional or organization an explicit threat of inflicting imminent and serious physical harm to or causing the death of one or more clearly identifiable potential victims, the professional or organization has reason to believe that the client or patient has the intent and ability to carry out the threat, and the professional or organization fails to take one or more of the following actions in a timely manner:

(1) Exercise any authority the professional or organization possesses under Ohio law to hospitalize the client or patient on an emergency basis;

(2) Exercise any authority the professional or organization possesses under Ohio law to have the client or patient involuntarily or voluntarily hospitalized;

(3) Establish and undertake a documented treatment plan that is reasonably calculated, according to appropriate standards of professional practice, to minimize the possibility that the client or patient will carry out the threat;

(4) Communicate to a law enforcement agency with jurisdiction in the area where each potential victim resides, where a structure threatened by a mental health client or patient is located, or where the mental health client or patient resides, and if feasible, communicate to each potential victim (or potential victim's

² "Mental health professional" is defined by the bill as an individual who is licensed, certified, or registered under the Revised Code, or otherwise authorized in this state, to provide mental health services for compensation, remuneration, or other personal gain. "Mental health organization" is defined as an organization that engages one or more mental health professionals to provide mental health services to one or more mental health clients or patients. "Mental health client or patient" is defined as an individual who is receiving mental health services from a mental health professional or organization.

parent or guardian if the potential victim is a minor or has been adjudicated incompetent) all of the following information: the nature of the threat, the identity of the mental health client or patient making the threat, and the identity of each potential victim of the threat.

If a mental health professional or mental health organization takes one of these actions, the bill requires the professional or organization to consider each of the alternatives set forth in the bill and document the reasons for choosing or rejecting each alternative. The professional or organization may give special consideration to those alternatives that, consistent with public safety, would least abridge the rights of the mental health client or patient under Ohio law. The professional or organization is not required to take any action that, in the exercise of reasonable professional judgment, would endanger the professional or organization, increase the danger to a potential victim, or increase the danger to the mental health client or patient. The professional or organization is not liable in damages in a civil action, and is not to be made subject to disciplinary action by any entity with licensing or other regulatory authority over the professional or organization, for disclosing any confidential information about a mental health client or patient that is disclosed for the purpose of taking any of the actions listed above.

Statement of effects

The bill specifies that the immunities it confers are in addition to and not in limitation of any immunity conferred on a mental health professional or organization under statute or judicial interpretation. The bill further specifies that its provisions regarding the warning of potential victims do not affect the civil rights of a mental health client or patient under Ohio or federal law. "Civil rights" is defined as including the rights to contract, hold a professional or driver's license, marry or divorce, make a will, vote, and sue.

Uncodified law

(Section 3)

The bill provides that in amending existing law (Revised Code section 5122.34) and enacting new law (section 2305.51), it is the intent of the General Assembly "to respectfully disagree with and supersede" the statutory construction holdings of the Ohio Supreme Court relative to section 5122.34 as set forth in *Estates of Morgan* under Heading G of Section I at 304-5, and, thereby, to supersede the second, third, and fourth syllabus paragraph holdings of the Court in that case.

Heading G of Section I of the Ohio Supreme Court's opinion in *Estates of Morgan* contains the Court's interpretation of section 5122.34; paragraphs two, three, and four of the syllabus give parts of the Court's holding or conclusions of law in the case. The second paragraph of the syllabus holds that section 5122.34 does not preclude the finding that a special relation exists between the psychotherapist and the outpatient which imposes a common-law duty on the therapist to take affirmative steps to control the patient's violent conduct. The third paragraph holds that the relationship between the psychotherapist and the patient in the outpatient setting constitutes a special relation justifying the imposition of a duty upon the psychotherapist to protect against and/or control the patient's violent propensities. The fourth paragraph holds that when a psychotherapist knows or should know that his or her outpatient represents a substantial risk of harm to others, the therapist is under a duty to exercise his or her best professional judgment to prevent such harm from occurring.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	p. 97
Reported, H. Health, Retirement & Aging	02-10-99	pp. 192-193
Passed House (96-0)	02-17-99	pp. 205-207

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