[J-21-2020] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

KATHRYN F. LEIGHT AND JOHN L. LEIGHT, HER HUSBAND,	:	No. 35 WAP 2019
Appellants	:	Appeal from the Order of the Superior Court entered December 31, 2018 at No. 1912 WDA 2017, affirming the Order of the Court of Common Pleas of Allegheny County entered December 15, 2017 at No. GD12-9942.
v.	:	
UNIVERSITY OF PITTSBURGH PHYSICIANS, UPMC, UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, SUSAN SHICK, AND PHILLIP L. CLARK, ADMINISTRATOR OF THE ESTATE OF JOHN F. SHICK, DECEASED,	:	ARGUED: May 19, 2020
Appellees	:	

CONCURRING OPINION

JUSTICE WECHT **DECIDED: DECEMBER, 22, 2020**

On March 8, 2012, a deeply troubled man named John Shick armed himself with Makarov and Beretta 9 mm semi-automatic handguns and extra ammunition, and entered Western Psychiatric Institute and Clinic ("WPIC") in Pittsburgh. Once inside WPIC, Shick shot several people, killing one. A University of Pittsburgh police officer responded, shooting and killing Shick. Among the wounded was Kathryn Leight, a receptionist. Leight and her husband sued several defendants, including the University of Pittsburgh Physicians ("UPP"), which employed the health care providers who treated Shick, and the University of Pittsburgh Medical Center ("UPMC"). In their complaint, the Leights raised a claim only for statutory liability under the Mental Health Procedures Act ("MHPA"), 50

P.S. §§ 7101-7503, against these defendants. It is important to stress that the sole issue presented in this appeal is thus one of statutory interpretation.

I join the Majority's interpretation of the MHPA. Under the plain terms of that statute, physicians are not liable for merely considering (while not formalizing) the prerequisites for an involuntary emergency examination. Maj. Op. at 1. The legislature has created a limited cause of action under the MHPA, and the Court's role is to apply the terms of that statute as written. Because the defendants have chosen nonetheless to raise arguments that invoke common-law legal principles, I write to emphasize the difference between this statutory cause of action and the common law duty to warn.

The MHPA applies to circumstances that fall within its statutory language. As the Majority recognizes, the statutory cause of action is defined by the interplay of Sections 103, 114, and 302. Based upon the plain language of these provisions, the Majority correctly perceives that the MHPA establishes a bright-line rule which allows for liability only upon satisfaction of one or more of the prerequisites for an involuntary emergency examination under Section 302. *Id.* at 20-22. Only those physicians who invoke Section 302 are deemed to participate in a decision that a person be examined under the MHPA. *Id*. at 22. Physicians who merely think about, consider, or take some preliminary action that falls short of the necessary statutory prerequisites cannot be held liable for participating in a decision subjecting a person to examination or treatment under Section 114. *Id*. at 23. This result is dictated by the statute's language.

Instead of focusing upon the statutory requirements, the Leights venture twenty-one instances in which UPP and/or UPMC personnel expressed or noted "thoughts" about involuntary commitment, thereby demonstrating that it was apparent to such personnel that Shick was an archetypal candidate for involuntary commitment.[1] Compelling as

[1] Appellants' Br. at 53-61.

these may seem, had the General Assembly intended to allow statutory liability for physicians who simply contemplate commitment, it needed to say so. This Court would then follow that statutory directive (provided there was no preserved constitutional challenge directing otherwise). As things stand, the Leights' argument contravenes the plain words of the MHPA.

As the Majority observes, the scope of the MHPA extends to the act of initiating the commitment process through the formal written procedures of the statute. It does not extend to thoughts, ruminations, or states of mind. To privilege the Leights' argument while subordinating the plain statutory requirements would be to inject uncertainty and speculation into a statutory framework designed to be clear and precise in its protections of the due process rights of both mentally ill patients and the health care professionals that treat them. The Court would contravene that intent if it were to construe the plain language to allow imposition of liability solely upon a showing of ponderings, proposals, debates, or suggestions.

Under the Leights' paradigm, countless resources would be expended in litigating whether various preliminary or partly formed thoughts, states of mind, back-and-forths, and mullings-over were encompassed within the MHPA, and health care providers would labor in uncertainty as to whether their actions exposed them to statutory liability. Suppose two physicians discuss a patient on a coffee break, comparing professional assessments of whether the patient is a danger to himself or others, and opining to each other that they really should do something about him at some point. Would statutory liability arise? What if the conversation happens during a physician's group meeting? Consider a physician who asks a nurse in passing to fill out the paperwork needed to initiate an involuntary mental health examination, but later reconsiders. Is she on the hook? What if the physician who gave such an instruction did not change her mind, but

simply failed to sign the paperwork or did not ensure its delivery? What if one of the physicians has concerns about the patient, but does not voice them? What if one physician believes that the patient is a danger to himself or others, but the other physician believes that it is too soon to make that assessment? Who wins the tie?

Absent a bright-line rule, a statute designed as a shield to protect the due process rights of the mentally ill would be transformed, weaponized as a sword against health care providers. The MHPA was enacted in 1976 to move away from the indeterminate, involuntary hospitalization of the mentally ill to a community-based treatment model that vested the mentally ill with the right to reject psychiatric treatment as long as they were not a danger to themselves or others.[2] To this end, the MHPA established the rights and responsibilities of the mentally ill and the obligations of health care providers to ensure that the dangerously mentally ill receive necessary treatment. *See* 50 P.S. § 7102 ("Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed."). The limited-immunity provision of Section 114 is consistent with the policy to afford adequate treatment to mentally ill individuals in the least restrictive environment.[3]

The MHPA does not preclude imposition of common law liability upon physicians who treat mentally ill individuals. The cause of action created by the MHPA applies to only a portion of the relief that may be sought for actionable conduct arising from the treatment of a mentally ill patient who harms a third party. Liability resulting from a failure to warn or, more broadly, a failure to protect a third party from a patient is available at common law. *See Emerich v. Philadelphia Ctr. for Human Dev., Inc.,* 720 A.2d 1032, 1037 n.5 (Pa. 1998) (observing that "a duty to warn is subsumed in this broader concept

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[2] *See Farago v. Sacred Heart Gen. Hosp*. 562 A.2d 300, 302 (Pa. 1989).

[3] *See Allen v. Montgomery Hosp.*, 696 A.2d 1175, 1178 (Pa. 1997).

of a duty to protect"). Here, as elsewhere, the common law generally lives apart from any particular statutory language.

The judiciary's task in cases of statutory interpretation differs markedly from its role in cases brought under the common law. In the former, courts endeavor to construe and apply the plain meaning of the measures enacted by the General Assembly, *see* 1 Pa.C.S. §§ 1501-1991. Our mission in cases invoking the common law is decidedly different. Advancement and exposition of the common law is one of this Court's organic and inherent powers.[4] The common law "develops incrementally, within the confines of the circumstances of cases as they come before the Court."[5] "Causes of action at common law evolve through either directly applicable decisional law or by analogy and distinction."[6]

Common-law duties are phrased broadly; they must be weighed and applied to a never-ending succession of cases.[7] There is no general duty in the law of torts to protect third parties from harm. *See Emerich*, 720 A.2d at 1036. But a well-settled exception exists at common law where the defendant stands in a special relationship to the actor or the third party. *Id*. at 1036. Our precedents establish beyond peradventure that mental health professionals can stand in such a relationship.

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4 *See, e.g., Villani v. Seibert*, 159 A.3d 478, 503 (Pa. 2017) (Donohue, J., dissenting); *Tincher v. Omega Flex, Inc*., 104 A.3d 328, 352 (Pa. 2014) (noting that "its equitable powers afford the Court the authority to modify the common law forms of action to the right involved").

5 *Maloney v. Valley Med. Facilities, Inc.*, 984 A.2d 478, 489–90 (Pa. 2009).

6 *Tincher*, 104 A.3d at 352.

7 *See, e.g., Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232, 1246 (Pa. 2012)*; Alderwoods, Inc. v. Duquesne Light Co.*, 106 A.3d 27, 42 n.17 (Pa. 2014) (noting that expansions and contractions of legal duties are carefully considered on a developed record capable of supporting essential policy-based judgments).

The first case to hold that mental health professionals sometimes have a duty to protect third parties from harm caused by their patients was the California Supreme Court's landmark decision in *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976). Tatiana Tarasoff was killed by a psychological outpatient, Prosenjit Poddar. *Id.* at 339. Tatiana's parents filed a lawsuit against Poddar's psychologist, asserting that Poddar had confided to his psychologist his intention to kill Tatiana. *Id.* at 340. Although Poddar did not name Tatiana, the context of the threat rendered Tatiana a readily identifiable subject. *Id*. at 341. No one warned Tatiana. *Id.* at 340. The defendants argued that there was no duty to warn. *Id*. The court rejected this defense: "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." *Id.*

In *Emerich*, this Court adopted *Tarasoff* and, for the first time, imposed a duty upon Pennsylvania health care providers to convey information to at-risk third parties. 720 A.2d at 1040. This Court explained:

> We believe that the *Tarasoff* decision and its progeny are consistent with, and supported by, Pennsylvania case law and properly recognize that pursuant to the special relationship between a mental health professional and his patient, the mental health professional has a duty to warn a third party of potential harm by his patient.

Id. at 1037. This Court held, however, that a duty to warn arises only in limited circumstances. *Id*. at 1040 (predicating the duty to warn upon the existence of a specific and immediate threat of serious bodily injury that has been communicated to the professional by the patient regarding a specifically identified or readily identifiable victim).

The *Emerich* Court did not particularize the circumstances in which an unnamed victim is readily identifiable such that the duty to warn is triggered. But the Court observed that the California Supreme Court had limited its holding in *Tarasoff* to identifiable victims,

rejecting the argument that there was a duty to warn the public at large of threats to unidentified persons in a particular neighborhood. *See Thompson v. County of Alameda*, 614 P.2d 728, 738 (Cal. 1980).

In *Maas v. UPMC Presbyterian Shadyside*, 234 A.3d 427, 429 (Pa. 2020), this Court considered the duty of mental health treatment providers to warn individuals who might be the subjects of patients' threats. In *Maas*, the patient repeatedly told his physicians and therapists that he would kill an unnamed "neighbor." The patient carried out his threat, killing an individual who lived on the same floor of his forty-unit apartment building. *Id.* Applying the prerequisite to the imposition of duty articulated in *Emerich*, this Court held that the health care providers had a duty to warn "readily identifiable" victims. *Id.* at 439. Because the patient had communicated threats against "a neighbor," the defendants should have realized "on a moment's reflection," *see Tarasoff*, 551 P.2d at 345 n.11, that the patient was targeting residents of his apartment building, including the victim, who resided on the same floor. *Maas*, 234 A.3d at 439.

The "readily identifiable victim" prerequisite to the imposition of a common law duty may explain the absence of a common law claim in this case. In their amended complaint, the Leights premised liability upon the MHPA, asserting that UPP (acting through its various physicians) should have "take[n] [John Shick] to Western Psych for an involuntary emergency examination and immediate treatment" or completed an application for involuntary commitment. Am. Compl., ¶¶ 321, 322. Apparently misunderstanding the amended complaint to allege a duty in tort to warn or protect Leight from Shick, UPP and UPMC disputed the existence of this duty at common law.

The Leights responded by clarifying that they did not allege that UPP and UPMC breached a common law duty to warn, but that liability was premised solely upon the

MHPA.[8] Accordingly, this case presents only a statutory claim under the MHPA, not a common law claim premised upon a failure to warn.

Nevertheless, in advocating their position here, UPP and UPMC are not content to rest upon the plain language of the MHPA. The defendants also invite the Court to consider that the Leights are attempting to create a new cause of action that contravenes the clear "public policy" of the Commonwealth. Appellees' Br. at 41. To develop this argument, UPP and UPMC rely upon precedent pertaining to the common law duty to warn. Although it may be necessary and appropriate to consider such policy concerns in the context of a common law claim, considerations of public policy are wholly unnecessary and ill-advised for courts engaged in statutory interpretation. Wisely, the Majority ignores the defendants' invitation to embark upon a voyage into the sea of "public policy." The "public policy" implicated in this case is solely the one prescribed by the General Assembly in the MHPA.

In contrast to statutory causes of action, courts are often called upon, in cases at common law, to mine the policy that underlies our precedents and doctrines. At common law, a legal duty exists only if the court declares it to exist, and such declarations are jurisprudential, and thus, yes, "policy." Dean Prosser saw it thus:

> These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we

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[8] Br. in Support of Pl.'s Prelim. Objs. to Prelim. Objs. of Def., at 3.

> endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

Sinn v. Burd, 404 A.2d 672, 681 (Pa. 1979) (quoting William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 14-15 (1953)). As we have explained, "[i]n determining the existence of a duty of care, it must be remembered that the concept of duty amounts to no more than 'the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection' from the harm suffered."[9] Thus, the defendants' invocation of common law public policy considerations is inapt in this statutory interpretation case. Such considerations are foreign to the judicial interpretation of legislative enactments.[10]

Although, for the reasons discussed by the Majority, UPP and UPMC are not liable under the MHPA, the facts of the case indicate that UPP and, more broadly, UPMC, mismanaged Shick's treatment. As the Leights allege, Shick's prior treatment records, as well as the documentation generated each time that a UPP physician provided medical services to Shick, went into his electronic medical records, which were available to all other treating UPP physicians. Every time that Shick was seen, the treating physician should have been aware of both the contents of Shick's medical records and the repeated concerns recorded therein regarding Shick's mental health and the danger he may have posed to himself and others.

Shick's prior medical record revealed that, in 2005, he was involuntarily committed due to his physicians' belief that Shick suffered from severe mental illness which caused him to be a danger of immediate harm to himself and others. In 2008, Shick brandished

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[9] *Mazzagatti v. Everingham*, 516 A.2d 672, 678 (Pa. 1986) (quoting *Leong v. Takasaki*, 520 P.2d 758, 764 (Haw. 1974)).

[10] *See, e.g., Feleccia v. Lackawanna College*, 215 A.3d 3, 13–14 (Pa. 2019) (examination of common law duties is not necessary in cases involving the application of existing statutory duties).

a knife toward emergency personnel and police, and was again involuntarily committed. A year later, Shick attacked an airport security officer with a flashlight, and was involuntarily committed again. Shick's discharge from these commitments was premised upon the hope that Shick would voluntarily medicate and treat his mental illness, lest Shick become dangerous to himself and others.

Once Shick moved to Pittsburgh, his treating physicians observed and recorded the many instances in which they believed Shick to be: noncompliant with medications; psychotic; delusional; and even threatening. The medical record includes forty-seven calls and letters by Shick to UPMC's Shadyside Family Health Center ("Shadyside Family"), hospital emergency rooms, urologists, pain managers, and nephrologists, for nonexistent or exaggerated self-diagnosed physical symptoms that were actually psychiatric in nature.

For example, on January 10, 2012, a gastroenterologist observed Shick's threatening interactions with physicians. On January 19, Shick became verbally abusive and threatening toward a family practice physician. On February 10, 2012, Drs. Kirby and Weiner of Shadyside Family observed Shick threatening them and office staff with a baseball bat, causing the physicians to request security personnel to remove Shick from the premises and resulting in Shadyside Family declining to provide continuing care to Shick. Staff in other UPMC offices reported seeing Shick carrying a baseball bat, and UPMC Shadyside Hospital security personnel reported an altercation with Shick in which they were compelled to draw their guns. On February 25, 2012, a UCLA gastroenterologist emailed one of Shick's treating physicians about a letter that Shick had sent complaining about his UPP physicians, which caused the UCLA gastroenterologist to fear for the safety of UPP personnel.

UPP treating physicians recognized that Shick was a danger to himself and others. In February 2012, Dr. Weiner acted on this recognition by calling UPMC's Resolve Crisis Team, resulting in the dispatch of a mobile unit to Shick's apartment in order to take Shick to WPIC for a wellness check and possible commitment. When the mobile team arrived, Shick refused to open the door. Because the mobile team personnel were unsuccessful in contacting Dr. Weiner, they simply left. The Resolve Crisis Team suggested that Dr. Weiner go to WPIC directly and fill out the involuntary commitment forms. A Shadyside Family staff member called the crisis team to find out how to initiate the process of involuntary commitment, but neither Dr. Weiner, Dr. Kirby, nor anyone else took further action. A Resolve mobile unit again went to Shick's apartment, this time at the behest of Shick's mother, but Shick again declined to cooperate.

These physicians clearly believed that Shick posed a danger to himself or others, and documented their concerns in Shick's file. It should have been apparent to all of Shick's treating physicians that Shick would not cooperate with a voluntary mental health examination and that the only viable option was involuntary treatment. Although none of these professionals initiated the statutory process outlined in the MHPA to have Shick involuntarily examined, the facts as averred establish that the treating physicians of UPP and UPMC knew or should have known, based upon their own observations and their review of Shick's medical record, that Shick was severely mentally ill and posed a danger to himself or others. Although the medical record demonstrates UPP's collective concern, as well as the health care providers' collective failure to act on this concern, the only concrete action that UPP physicians took with regard to Shick occurred when Shadyside Family informed Shick that it would no longer provide his medical care.

Unfortunately for the Leights, however, there is no liability under the MHPA where a patient clearly warrants an involuntary emergency examination but the treating

physicians fail to effectuate commitment. We do not write the statutes. We interpret and apply them.

Based upon the facts alleged by the Leights, the trial court rightly dismissed the MHPA claim on preliminary objections. The plain language of the MHPA does not support liability under these facts.