

Medical Malpractice Update

Edna L. McLain
Tressler LLP, Chicago

The Impact of Gun Violence on Hospitals and the Expansion of the Duty to Protect Patients

According to a study published in the American Journal of Medicine, the United States homicide rate is seven times higher than in other countries, and more than two-thirds of the homicides in the United States are firearm-related. *See*, Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared With Other High-income OECD Countries*, 2010, 129 AM. J. MED. 266 (2016). Further, the Centers for Disease Control's National Center for Health Statistics shows the rate of firearm-related deaths increased over the last two years. *See*, Centers for Disease Control and Prevention National Center for Health Statistics, <https://www.cdc.gov/nchs/nvss/vsrr/mortality-dashboard.htm#> (last visited Jul. 18, 2018). Hospitals and healthcare providers are on the front lines in more ways than simply treating patients with firearm-related injuries. Now, hospitals are the scenes where firearm-related incidents occur, involving injuries to patients, personnel and members of the public, often resulting in death.

Following a shooting of one of its own physicians by a patient in 2010, a group of Johns Hopkins physicians conducted a review of reported hospital-related shootings nationwide from 2000 to 2011 and identified at least 154 hospital-related shooting events. Gabor D. Kelen, *Hospital-Based Shootings in the United States: 2000-2011*, 60 ANN. EMERG. MED. 790 (2012). They found that the majority (59%) of these shootings occurred inside the hospital either in the emergency department or patient rooms. *Id.* at 792.

In this environment, what duty, if any, is a hospital under to prevent firearm-related incidents at their facilities? Is it reasonably foreseeable that a patient, employee or member of the public may possess a firearm and use it to injure himself or others? Should hospitals have written policies and procedures concerning firearms? If so, what should these policies and procedures say? What impediments do hospitals face in trying to prevent firearm-related incidents on their premises?

These questions were recently addressed in the Illinois Appellate Court Second District's opinion in *Coleman v. Provena Hospitals*, 2018 IL App (2d) 170313. In *Coleman*, the appellate court held that a patient's firearm-related death following an exchange of gunfire with police officers inside a hospital was foreseeable and that the plaintiff sufficiently established proximate cause against the hospital for purposes of a wrongful death claim.

In November of 2006, Johnnie Russell, the decedent, was admitted to Provena Mercy Medical Center (Provena) in Aurora, Illinois. *Coleman*, 2018 IL App (2d) 170303, ¶ 3. The decedent suffered from Dilantin toxicity, altered mental stability, paranoid personality and other medical conditions. *Id.* ¶ 7. Provena personnel evaluated and recommended him for admission to the behavioral health unit. *Id.* ¶ 5. Before his transfer to the behavioral health unit the following morning, a nurse discovered the decedent had a gun. *Id.* ¶ 1. This culminated in a standoff with the Aurora Police Department (APD) lasting several hours, during which the decedent was shot and killed.

The decedent's sister and administrator of his estate, Dorothy Coleman (the plaintiff), initially filed a wrongful-death action against the APD and Provena in federal district court, which she voluntarily dismissed. *Id.* The plaintiff re-filed her cause of action in the circuit court of Kane County, where she alleged that Provena's agents and employees "were

aware of [the decedent's] mentally defective condition and prior psychiatric history, but failed to conduct a reasonable search" during his admission to determine whether he possessed any contraband that could cause harm to himself or others. *Id.* ¶ 3.

Provena answered the complaint, asserting comparative negligence as an affirmative defense. *Id.* ¶ 4. Specifically, Provena alleged that the decedent "came to Provena Mercy Medical Center of his own accord carrying an inherently dangerous weapon, namely a gun." *Id.* The plaintiff failed to answer the affirmative defense.

Provena proceeded to file the first of three dispositive motions in the tortured procedural history of this case. Provena initially moved for summary judgment, arguing no evidence existed that its acts or omissions proximately caused the decedent's death. *Id.* ¶ 5. The trial court denied the motion, noting evidence existed that Provena was aware of the decedent's "paranoid, psychotic, and aggressive behavior," that his psychiatric history included threats to use a firearm and kill his neighbors, that he had been sedated at least once upon admission due to aggression with staff that prompted the recommendation to transfer to the behavior unit, and that he had been required to remove his clothing which was not searched for contraband. *Id.* The court found this evidence presented a genuine issue of material fact whether Provena's conduct was a proximate cause of the decedent's death. *Id.*

Following the denial of its first motion for summary judgment, Provena filed a motion to deem its affirmative defense admitted, which was granted. *Id.* ¶¶ 5-6. Provena then moved for judgment on the pleadings, arguing that, because the affirmative defense had been deemed admitted, the plaintiff could not establish Provena's conduct was the proximate cause of Russell's death. *Id.* ¶ 6. The trial court granted Provena's motion, which was appealed. *Id.*

In reversing the trial court's grant of Provena's motion for judgment on the pleadings, the Illinois Appellate Court, Second District, assigned error to the trial court's finding that the allegations of Russell's mental state had been admitted. *Coleman*, 2018 IL App (2d) 170303, ¶ 7-9. The second district remanded for further proceedings, and on remand, Provena filed its third dispositive motion. *Id.* ¶¶ 7, 10. Provena filed another summary judgment motion, arguing that the plaintiff failed to present evidence to support proximate cause. *Id.* ¶ 10. Provena argued the plaintiff presented no evidence the decedent had the gun when he was admitted and that it was just as plausible the decedent obtained the gun sometime later. *Id.* In response, the plaintiff relied on expert deposition testimony from Timothy Hawkins, stating Provena failed to follow its written policy for patients admitted to the behavioral health unit to search for contraband, which should have been followed *throughout the medical center*. *Id.* Hawkins testified that if the hospital staff had followed this policy at the time of the decedent's admission, the gun would have been found and confiscated, preventing his death the following day. *Id.*

The trial court found the plaintiff's argument was too speculative and granted Provena's summary judgment motion, finding there was no evidence that a search would have revealed the weapon as there was no evidence when the gun came into the decedent's possession. *Id.* ¶ 11. The plaintiff appealed the ruling, arguing a question of fact as to whether the gun would have been recovered during a proper search precluded summary judgment. *Id.* ¶ 14. Defendant maintained summary judgment was properly entered because its actions did not proximately cause Russell's death, it owed no duty to protect him from his own criminal acts, and that the plaintiff could not recover damages based on the decedent's own criminal acts. *Id.*

Dealing first with the issue of duty, the appellate court found Provena forfeited this argument by not raising it in its motion for summary judgment. *Id.* ¶ 17. Regardless, the court found no merit in Provena's argument, reiterating "[i]t has long been recognized, however, that hospitals are under a duty to exercise reasonable care to protect their patrons from harm." *Id.* Additionally, based on the existence of a written policy at Provena to search all persons going into the

behavioral health unit, it was reasonably foreseeable that a person could be injured if the policy were not followed, and since the plaintiff's expert testified there was no reason why this policy should not exist hospital-wide, the plaintiff had sufficiently established a duty owed by Provena to the decedent to protect him from harming himself and others. *Id.* ¶¶ 19-20.

As to proximate cause, the court pointed out it previously ruled the plaintiff was deemed to have admitted the decedent had the gun on his person when he was admitted to Provena. *Id.* ¶ 21. Therefore, it concluded the trial court improperly speculated that the gun may have been obtained after his admission, which was also contrary to the law of the case. *Id.* Further, the testimony from the plaintiff's expert that the decedent would not have died if the gun had been found and removed by Provena's staff during a proper search created a genuine issue of fact as to causation. *Id.* ¶ 22.

The court also found unpersuasive Provena's arguments that it could not be liable for the decedent's death because the APD's actions were the superseding proximate cause of his death. *Id.* ¶ 25. The court noted that if Provena could "reasonably foresee the intervening act, that act will not relieve the defendant of liability." *Id.* Again, citing Provena's written policy to search behavioral health patients, the court concluded the inherent reason for such a policy was to protect patients from harming themselves or others; therefore, it was reasonably foreseeable to Provena that failing to conduct a search could lead to the decedent being harmed. *Id.* "That the defendant could not necessarily foresee the specific harm that would befall Russell is of no significance." *Id.*

Finally, Provena relied on *Reed v. Witvoet*, 311 Ill. App. 3d 735, 740 (3d Dist. 2000), to argue that the decedent's criminal actions prevented the plaintiff from recovering damages against it. However, the court again found Provena forfeited the argument by not raising it in its summary judgment motion. *Coleman*, 2018 IL App (2d) 170313, ¶ 26. Further, the court found Provena's arguments and reliance on *Reed* without merit. *Id.*

In *Reed*, a deceased minor's parents were found unable to recover damages against the defendant who had employed their child with their permission in violation of the Child Labor Law (820 ILCS 205/19 (West 1992)). *Reed*, 311 Ill. App. 3d at 73. However, while the parents' damages were barred, the decedent's other wrongful death beneficiary—a brother—was not barred from recovering damages. *Id.* Because there was nothing in the record to suggest the plaintiff in *Coleman* gave the decedent the gun, especially since the plaintiff was deemed to have admitted that the decedent himself brought it with him to the hospital, she was not barred from pursuing recovery for the wrongful death of her brother. *Coleman*, 2018 IL App (2d) 170313, ¶ 28. Therefore, the court reversed the trial court's ruling granting Provena's summary judgment and remanded the case, for a second time, to the trial court for further proceedings.

The *Coleman* decision expanded a written policy specific to behavioral health patients to all patients admitted to the hospital. According to the limited information provided in the decision, Provena had a written policy to search patients when admitted to the behavioral health unit and had a written policy entitled "Custody of Firearms Presented at Provena Mercy Center" that dictated how a firearm should be confiscated. *Id.* ¶ 10. It is unclear from the decision whether the decedent had been admitted to the behavioral health unit at the time of this incident. However, because the plaintiff's expert testified Provena "should have adhered to that policy throughout the medical center," presumably the decedent had not been admitted to behavioral health at the time of the shooting. *Id.*

It is troubling that the court did not consider the consequences of placing the burden upon the hospital to search all patients it admits. It is one thing to search patients admitted to a behavioral health unit for contraband that they could use to harm themselves or others, but it is another to search every patient admitted to every unit for contraband. There are practical problems of requiring such searches, including which staff members would perform the searches, how the

searches would be done, whether there is enough trained staff to conduct the searches and what to tell patients coming to the hospital about the searches.

Also, searching patients is only part of the problem. As shown by the review done by Johns Hopkins, hospital-related shootings are also committed by visitors and even employees, so will hospitals have to start searching everyone in the hospital for contraband upon entering the building? How would such searches be done when the Johns Hopkins review also concluded that only 49 percent of the incidents may have been prevented by metal detector screenings? Kelen, at 792. How do you incorporate metal detectors into every exit and entrance point into a hospital? What is the cost not only for the equipment and personnel, but also the intangible costs of inconvenienced or dissatisfied patients, visitors and employees, who feel their privacy may be unnecessarily invaded?

We must keep in mind the *Coleman* decision, and its expansion of the duty to protect, resulted from a motion for summary judgment, where the reviewing court construes the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the opponent, and generally does so under a *de novo* standard of review. Through this lens, it is understandable why the court found genuine issues of material fact existed to preclude summary judgment as to proximate cause. However, the language of the decision and the arguments proffered by the plaintiff raise concerns about the extent to which a hospital's duty to safeguard patients and the public from harm may be expanded as it relates to firearms and other weapons. The question is at what cost do we place this burden on hospitals and whether hospitals are able to bear it.

Practice Tips

Hospital administration and legal counsel should review all written policies and procedures concerning patient searches following *Coleman* and determine:

- Is there a written policy and procedure requiring searches for contraband sufficiently limited to specific units and categories of patients?
- If there is no written policy, should there be one?
- What category of patients and units should the policy apply to?
- Is the staff working in those units aware of the policy and procedure?
- Is the unit adequately staffed to conduct searches?
- What members of the staff should conduct searches?
- Is the staff sufficiently trained to handle searches?

Coleman is an example of how having a written policy can be a double-edged sword. Provena had a policy specific to patients admitted to the behavioral health unit, yet the plaintiff's expert stated the policy should be applied hospital-



wide and criticized Provena's staff for either failing to do a search or doing one inadequately. If Provena had no policy or procedure at all, plaintiff's expert likely would have criticized the hospital for lacking a written policy. What is a hospital to do? Unfortunately, there is no easy answer to that question, but if the incidence of hospital-related shootings increases along with the national trend, this may not be the last lawsuit we see touching on these issues.

About the Author

Edna L. McLain is a partner at *Tressler LLP* in Chicago. She focuses her litigation practice on defense of corporate clients in toxic tort and general liability cases, as well as the defense of nursing homes nurses, and other medical personnel in medical negligence cases. She has she successfully argued an appeal before the Second District Appellate Court. In addition, she has tried seven medical negligence cases and obtained six defense verdicts. Ms. McLain obtained her law degree from St. Louis University School of Law and earned her B.A. from University of Illinois at Urbana-Champaign.

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