

# The Increased Threat of Hospital Liability After *Munsey v. Delia*

By Eric Broutman, Esq. and Carolyn Wolf, Esq.

In 1975 the Supreme Court of United States ruled in *O'Connor v. Donaldson*<sup>1</sup> that a hospital may not involuntarily confine a psychiatrically ill patient if that patient could live safely in the community. It followed from that ruling that a psychiatric patient may be involuntarily hospitalized only where that patient presents a danger to self or others due to mental illness. In order to meet this constitutional standard, New York State allows for numerous court hearings, at statutorily required times, where a Court must determine if the dangerousness standard is met. It is the hospital's, not the patient's, obligation to request the court hearing within the statutorily defined time limits. See generally, New York Mental Hygiene Law Article 9.

This naturally begs the question: What happens if the hospital fails to request a court hearing when statutorily required to do so? Prior to 2015, a series of Appellate Courts ruled, fairly unanimously, that the appropriate remedy was an immediate hearing to determine if the patient was mentally ill and dangerous. In essence, the hospital suffered no penalty or increased potential for liability by continuing to retain a patient past a statutory deadline.

In 2015, the Court of Appeals (the highest court in the State of New York) decided the case of *Munsey v. Delia*<sup>2</sup>, which reversed course and ruled that the appropriate remedy is the patient's immediate discharge, and not an immediate hearing. The facts of *Munsey* are very instructive.

In the case, the hospital failed, for six weeks, to apply to court to seek the continued retention of a patient. The particular patient in question was quite dangerous, having struck his treating psychiatrist and other staff members on numerous occasions. The Court of Appeals concluded that the prior remedy, an immediate hearing, was not sufficient to protect the constitutional due process rights of patients, but rather the appropriate remedy is the patient's immediate discharge, regardless of the patient's clinical condition. Indeed, the discharge should occur right away, without any presentation from the psychiatrist regarding the condition of the patient, the feasibility, or safety, of immediate discharge. Plainly put, where the hospital does not timely file for a court hearing the patient will be allowed to leave the hospital, without further inquiry.

This reversal in Court remedies, going from a hearing to an immediate discharge, significantly increases the potential for liability for both psychiatrists and hospitals if the patient becomes self-injurious or injures another

after a court ordered release. In the Pre-*Munsey* world, where the hospital was allowed to conduct a hearing on the merits, the hospital and psychiatrist were absolutely insulated from future liability if the Court deemed that the patient should not be involuntarily committed, despite the evidence presented by the psychiatrist; the reason being that the Court decided to release the patient against the advice of the psychiatrist and hospital. Under present circumstances, where the patient is immediately discharged because of a simple administrative error, liability is a real possibility.

This article will discuss the increased potential for liability on the part of hospitals and psychiatrists after the *Munsey* decision and how to protect against making an error that will likely require the discharge of a patient who otherwise would not be discharged.

## Involuntary Hospitalization and Time Deadlines

Inpatients in a psychiatric hospital largely fall into two categories, voluntary and involuntary. Voluntary patients may theoretically remain in a hospital indefinitely without court approval, but if that patient requests release from the hospital, and the hospital wants to retain the patient, the hospital must submit an application for a court hearing within 3 days.<sup>3</sup>

Involuntary patients may remain in a hospital without court approval for up to 60 days, whereupon the hospital must seek court approval for continued hospitalization.<sup>4</sup> Moreover, during this time the patient may make numerous requests for a court hearing to challenge the validity of the hospitalization.<sup>5</sup> If such a request is made, the hospital must submit the request to court immediately.

## The Law Prior to *Munsey*

Prior to *Munsey* when a hospital made an error and failed to apply for a required hearing the law called for an immediate hearing to determine if the patient met the criteria for involuntary hospitalization. Specifically, the Court would hear evidence as to whether the patient was mentally ill and dangerous. The reasoning behind Courts' decisions prior to *Munsey* was that the public had such a significant interest in safety from potentially dangerous patients that it overrode the individual's interest in a timely hearing.

Considering the number of involuntary patients treated every year, hospitals are largely successful in ensuring that all required court hearings are indeed requested.

Nonetheless, errors do occur. Prior to Munsey, so long as these mistakes remained infrequent it did not present a significant issue. The Court was still required to conduct a hearing on the merits, and if the Court concluded that the patient was dangerous as a result of mental illness the Court would authorize a continued retention. On the other hand, if the Court concluded that the patient did not meet these criteria and discharged the patient, the psychiatrist and hospital was absolved of any potential liability because it was the Court that ordered the discharge. In the event a hospital continually flouted statutory deadlines that hospital could potentially lose their operating license from the Office of Mental Health, or suffer other administrative penalties.

### The Law After Munsey

After Munsey, Courts now, in most circumstances, will require the immediate release of a patient if the hospital fails to adhere to the time demands of the Mental Hygiene Law even without the Court having an opportunity to address the question of the patient's mental illness and dangerousness. In other words, it does not matter if the patient is mentally ill or dangerous. The only question is whether or not the statutory deadlines were complied with.

The Court of Appeals in Munsey held that even under the circumstances present, where the patient was flagrantly dangerous in the hospital, the appropriate remedy should have been the patient's immediate release due to the hospital's error.

While the ruling seems harsh, the Munsey Court does soften its stance somewhat by stating that there are other avenues a hospital may pursue to retain a dangerous patient where it has failed to timely apply for a court hearing. Moreover, the Court in Munsey stated that not every violation of the Mental Hygiene Law shall result in the immediate release of a patient. However, the parameters of this limiting language have not yet been defined. For instance, what violations do result in the immediate release of a patient and what violations do not? Does missing a deadline by a single day, as opposed to six weeks as was the case in Munsey, result in release? These questions remain unanswered and will require further litigation and Court rulings to fully flesh out their boundaries.

### Potential Hospital Liability

A fictitious case example can be instructive in demonstrating the potential issues that may arise since Munsey was decided. Patient, Henderson Richard, was admitted to the hospital on June 27, 2016, pursuant to Mental Hygiene Law §9.27 ("Two Physician Certificate" status). The hospital could legally retain the patient for 60 days, until August 26, 2016, without additional court approval. During his hospitalization Mr. Richard required

numerous administrations of emergency medication for agitated and threatening behavior, including threatening his treating psychiatrist with murder. Mr. Richard suffered from paranoid delusions believing that others are out to hurt him and therefore he often lashed out in perceived self-defense, hence the numerous violent episodes in the hospital. At the 60-day mark Mr. Richard's symptoms had not yet resolved, including his violent outbursts. It was the hospital's intention to continue his retention and transfer him to a long-term facility. Unfortunately though, due to an administrative error, the hospital failed to apply for Mr. Henderson's continued retention in the time required. As a result, his Mental Hygiene Legal Service attorney filed a writ of habeas corpus, a legal motion seeking his immediate release pursuant to the Court's decision in Munsey. Despite Mr. Richard's clear psychotic and violent behavior the Court ruled in Mr. Richard's favor and ordered that he be released immediately from the hospital due to the hospital's failure to apply for further retention within a certain time frame.

It is precisely this scenario that poses significant liability issues for a hospital. One could also replace the fictional Mr. Richard's violent behavior with suicidal behavior. We must then ask the question, what liability may the hospital suffer if a patient like the fictional Mr. Richard is released from the hospital due to hospital's administrative error and then harms someone in the community, or himself? The answer is potentially significant monetary damages.

It is generally understood that medical doctors owe a duty of care to their patients. However, physicians are not held liable for mistakes when the treatment offered has a proper medical foundation. A physician's duty "is to provide the level of care acceptable in the professional community in which he practices. He is not required to achieve success in every case and cannot be held liable for mere errors of professional judgment."<sup>6</sup>

Hence, while hospitals and psychiatrists will not be liable for errors made in good faith within the realm of professional judgment, it is hard to see how failing to timely apply for a court hearing and thus the court mandated release of a patient meets "the level of care acceptable in the community." It is likely that a patient released under this scenario, who then engages in self-injurious behavior or harms himself through neglect because of an inability to care for self may have a valid cause of action against the treating psychiatrist and hospital for malpractice.

As for patients who are released and then go on to harm others, the analysis is similar because the duty owed to third parties by a psychiatrist or mental health practitioner is somewhat different than that owed by a non-psychiatrist physician. For psychiatrists, the duty

owed is not only to patients but to the outside public as well where the patient is involuntarily confined.<sup>7</sup> This duty was made clear in the famous case of Tarasoff v. Regents of University of California<sup>8</sup> where a therapist was held liable for a patient's actions. The patient has been threatening to kill a college student during a therapy session and then went on to kill that very student. The Tarasoff Court concluded that the therapist had a duty to warn the student that was threatened and ultimately killed. Indeed, New York implicitly recognized the potential for liability when it amended the Mental Hygiene Law in 1984 to authorize mental health providers to warn individuals that may be in danger without violating confidentiality.<sup>9</sup>

Providing a Tarasoff type warning in a Munsey created dilemma may only be possible in limited situations, however. Only if the patient in question is fixated on a particular individual will there be someone to warn. In the more likely scenario the patient is dangerous to the public at large and not a specific individual person.

A review of verdicts and settlements in cases where hospitals and psychiatrists have been found liable for prematurely releasing a patient is instructive. In 2009, an Arizona jury awarded \$1,500,000 against a psychiatrist and hospital where they discharged who then went on to murder his grandparents. The patient was medication noncompliant and expressed a multitude of violent fantasies.

In 1994, a Missouri jury awarded the plaintiffs, the husband and children of the decedent patient, \$705,000 where the hospital discharged the patient after she was depressed and expressed suicidal statements. The patient killed herself four days after discharge.

In 1992, a North Carolina Jury awarded the plaintiffs, the decedent's parents, \$3,000,000 where the hospital discharged the patient after his insurance ran out despite the fact that the patient was still expressing suicidal statements. The patient shot himself just hours after his discharge.

To avoid liability, and to continue to treat patients that need treatment, hospitals must enhance their efforts to track the legal status of patients. The hospital must ensure that it applies for every statutory or court mandated hearing. There are law firms and outside organizations that have developed tracking and notification software to assist in these efforts and it is recommended that hospitals investigate their usefulness and viability in their own situations. Moreover, hospitals must ensure that they properly train their staff on the various time requirements in the Mental Hygiene Law, the consequences of missing those time deadlines, and how to properly apply to court for the required hearings.

But, even with more vigilant tracking software and the training of staff, mistakes will occur. Human beings simply are not perfect, no matter how hard we try. If a

hospital finds itself in a Munsey type situation, where a deadline was missed and it appears likely that a dangerous patient will be released; good practice dictates seeking counsel from experienced mental health attorneys to craft a plan that comports with Munsey to either thwart the release of the patient, or to seek the immediate readmission of the patient. This will not only avoid liability on the part of the hospital, but will also further the primary goal of the hospital, to treat the mentally ill. Recall that the Court of Appeals in Munsey stated that there are other avenues a hospital may pursue to retain a dangerous patient where it has failed to timely apply for a court hearing. Munsey stated, "it is incumbent upon the facility to commence a new article 9 proceeding in compliance with the strictures of the Mental Hygiene Law."<sup>10</sup> The key is determining what Article 9 proceedings the Court was referring to and how exactly to initiate such a proceeding.

Experienced mental health legal counsel can assist New York hospitals to retain dangerous mentally ill patients as well as provide legal counsel to avoid potentially costly liability and negative press in the event of an adverse outcome after a patient is released under these circumstances.

[REFERENCES ON PAGE 22](#)

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