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Expert Analysis

Court Expands Medical Providers' Liability to Third Parties

A decision last month from New York's Court of Appeals should be of considerable concern to hospitals, physicians, and any other providers of health care services that prescribe or administer sedatives or pain-killing substances to their patients. In *Davis v. South Nassau Communities Hospital*,[1] the court broke with decades of its own jurisprudence and held that a hospital, physician, and physician assistant who failed to warn a patient about prescribed medication that could impair her ability to drive a car could be held liable to a third party injured as a result of the patient's impairment.

By **Francis J. Serbaroli**

Background

Lorraine A. Walsh was treated in the emergency room at Long Island's South Nassau Communities Hospital by a physician and physician assistant employed by Island Medical Physicians, P.C. (Island Medical), a hospital contractor. As part of the treatment, Walsh was intravenously administered an opioid narcotic painkiller and a benzodiazepine drug (a sedative) without being warned that the medication impaired or could impair her ability to drive safely.

Shortly after leaving the hospital, the automobile that Walsh was driving crossed a double yellow line and struck a vehicle driven by Edward Davis, who was injured in the accident. Davis and his wife sued the hospital, the physician and physician assistant, and Island Medical for damages, asserting causes of action for medical malpractice, and negligent hiring and training of the medical personnel involved. (The patient, Walsh, filed a separate lawsuit against the hospital and the medical professionals.)

The defendants moved to dismiss the complaint, arguing that the plaintiffs failed to state a cause of action for medical malpractice because the complaint failed to plead the existence of a duty of care, and the existence of a physician-patient relationship between plaintiffs and defendants. Plaintiffs opposed the motion and cross-moved inter alia for leave to amend the complaint to add a cause of action for negligence, claiming the defendants owed them a duty of care based upon defendant's administration of medication to Walsh and their allegedly negligent discharge of Walsh from the hospital.

The Nassau County Supreme Court dismissed the plaintiffs' complaint and denied leave to amend their complaint to add a negligence claim.[2] The Appellate Division unanimously affirmed.[3] The Court of Appeals, after granting leave to appeal,[4] reversed the Appellate Division's decision in a 4-2 ruling.

'Davis' amounts to a sharp departure from decades of precedents defining the scope of the duty of care between health-care providers and the patients to whom they provide care.

The majority opinion, written by Judge Eugene M. Fahey, began with an analysis of whether the defendants owed a legally recognized duty of care to the plaintiffs. Fahey reviewed the significant body of Court of Appeals' decisions dealing with the duty of care, particularly in the context of medical treatment. In most of these cases, the court had declined to recognize any special relationship or broad duty of care extending from physicians past their patients to individual members of the community, and thereby declined to recognize a duty to "an indeterminate, faceless, and ultimately prohibitively large class of plaintiffs, as opposed to a 'known and identifiable group.'" In the Davis case, however, the court found that the defendants' relationship with Walsh placed them in the best position to protect against the harm that she perpetrated:

> Here, put simply, to take the affirmative step of administering the medication at issue without warning Walsh about the disorienting effect of those drugs was to create a peril affecting every motorist in Walsh's vicinity. Defendants are the only ones who could have provided a proper warning of the effects of that medication. Consequently, on the facts alleged, we conclude that defendants had a duty to plaintiffs to warn Walsh that the drugs administered to her impaired her ability to safely operate an automobile.

Judge Fahey then proceeded to attach three "observations" to his conclusion. First, he wrote, the cost of this new duty for physicians and hospitals should be "a small one" since they need only simply warn the patient of the dangers of the medication, and it is already the physician's responsibility to advise the patient of the medication's risks and possible side effects. As such "… we merely extend the scope of persons to whom the physician may be responsible for failing to fulfill that responsibility." In his second observation, he attempted to clarify how this new risk obligation could be met:

> …defendants and those similarly situated may comply with the duty recognized herein merely by advising one to whom such medication is administered of the dangers of that medication. Indeed, this case is not about preventing Walsh from leaving the Hospital, but ensuring that when Walsh left the Hospital, she was properly warned about the effects of the medication administered to her.

Fahey's third observation was that the court's decision "should not be construed as an erosion of the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care."

Lastly, Fahey found that the plaintiffs' motion for leave to serve an amended complaint asserting a cause of action sounding in negligence was properly denied, given that the "medical intoxication" in plaintiffs' proposed new cause of action bears a substantial relation to the medical treatment administered by the defendants, and therefore sounded in medical malpractice rather than in negligence.

Dissent

In a forceful dissent, Judge Leslie E. Stein reviewed the court's own precedents to the effect that the foreseeability of harm does not define a duty of care but merely determines

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the scope of the duty once it is determined to exist. In the current case, she explained, "Davis was an unidentified and unknown stranger to defendants' physician-patient relationship with Walsh" and therefore they owed no duty of care to Davis to warn or prevent Walsh from driving. She continued:

> In New York, a physician's duty to a patient, and the corresponding liability, may be extended beyond the patient only to someone who is both a readily identifiable third party of a definable class, usually a family member, and who the physician knew or should have known could be injured by the physician's affirmative creation of a risk of harm through his or her treatment of the patient [citations omitted].
>
> …defendants owed no legal duty to Davis—or any other member of the public who may have come into contact with, and been harmed by Walsh after her discharge—to warn Walsh against, or prevent her from, driving [citations omitted].

Stein stated that the majority's decision "eviscerates" the precept set forth in the long line of precedents holding that a physician owes a duty of care only to the patient and not to the community at large:

> …the duty imposed by the majority upon defendants here extends to any motorist, pedestrian, bicyclist, or other injured member of the public who come into contact with any of defendants' innumerable patients.

She then proceeded to detail four factors that she stated were "conspicuously absent" from careful consideration by the majority. First, the duty of care owed by a hospital or physician to a patient arises from "the personal, private, and individualized relationship between the two parties," and that until this decision, such providers of medical services would not have expected to be held accountable to the public at large—with whom they have no relationship—for decisions arising from their treatment of individual patients.

Second, she wrote, the expansion of a physician's duty of care to the general public will neither create any additional social benefit, nor render it more or less likely that the patient will even heed a warning not to operate a motor vehicle. Third, she observed, extending to a third party a physician's duty of care adversely interferes with the physician-patient relationship, the physician's duty of undivided loyalty to the patient, and the paramount consideration that the physician should have in the patient's health and well-being:

> Extending a physician's duty beyond the patient to a boundless pool of potential plaintiffs, creates a very real risk that a physician will be conflicted when deciding whether, and to what extent, medication should be administered and under what circumstances specific warning should be issued.

She illustrated some of these potential problems:

> For example, a physician may become overly cautious in prescribing necessary medications so as to avoid potential liability. Similarly, instead of giving only those warnings a physician truly believes to be warranted in a particular case, the physician may inundate a patient with excessive detail about potential, but unlikely, risks associated with a medication in order to insulate him or herself from liability, thus distracting the patient from the most significant risks and side-effects. Worse yet, these warnings may devolve into a general practice of physicians handing out pro-forma lists of potential side-effects that patients will cursorily sign prior to the administration of medications, ultimately resulting in fewer educated patients and less informed consent. While a physician may be ethically bound to refrain from allowing considerations of liability to influence his or her treatment decisions, it is naïve, at best, to assume that the immeasurable liability that will result from the imposition of a duty owing to countless non-patients will have no impact upon a physician's exercise of professional judgment.

The fourth factor cited by Judge Stein is that the expansion of liability to include all members of the public "will likely have a substantial financial impact on the medical profession and the availability of competent medical care throughout the state," and result in more litigation and higher malpractice insurance premiums. She noted that this expansion of physician liability could include not only pain medications, but other medications such as those causing a stomach ache that distracts a driver or a rash of itchiness that causes the driver to release the steering wheel and lose control.

Judge Stein, dissenting in 'Davis,' observed that extending to a third party a physician's duty of care adversely interferes with the physician-patient relationship, the physician's duty of undivided loyalty to the patient, and the paramount consideration that the physician should have in the patient's health and well-being.

Lastly, Stein addressed plaintiffs' claim that it was unfair to allow Walsh to recover against the defendants for failing to warn her not to drive, while precluding Davis from obtaining the same recovery for his injuries. She noted that in most cases, car accident victims have health and motor vehicle coverage for medical treatment of their injuries, and can pursue recovery against the patient/driver who caused the accident. She concluded:

> While an injured party may occasionally be deprived of compensation by the absence of a duty in scenarios like the one here, I cannot agree with the majority that the possible benefits to be gained by creating a liability owing from physicians to every person who might potentially be injured by a patient—benefits which are not identified by the majority—outweigh the costs.

Analysis

This is a troubling decision for a number of reasons. It amounts to a sharp departure from decades of carefully crafted precedents by the Court of Appeals defining the scope of the duty of care between health-care providers and the patients to whom they provide care. The court's broad re-definition of the duty of care is likely to result in significant costs in terms of judgments and settlements in personal injury cases, higher medical malpractice premiums, and higher medical costs arising from physicians practicing "defensive medicine" (i.e. ordering or prescribing—or not ordering or prescribing—tests, procedures or medications out of concern over being sued).

As is so often the case when courts are unfamiliar with or do not fully appreciate the complexities of the practice of medicine, the majority appears not to have taken into account the logical extension of its findings. There is no question that Walsh should have been advised by her caregivers not to operate a motor vehicle after receiving these particular medications. However, no one can say whether Walsh, under medication, would have fully understood that advice or whether she would have followed that advice. Had Walsh not comprehended the advice, or even if she had indicated that she comprehended that she should not drive but had gone ahead and driven her car and had the same accident, the plaintiffs would doubtless assert that the hospital's and physician's newly expanded duty of care to the general public would include taking steps to admit her as a patient or otherwise taking steps to restrain or prevent her from driving her car.

This decision potentially affects all hospitals, clinics, physician practices, and other providers of health-care services in New York that provide any kind of medication that can affect a patient's cognitive abilities or ability to drive a car, operate machinery, etc. All such providers should be certain to document in the patient's record that the patient was advised about and understood their warnings and disclosures regarding the effects of such medications, and activities in which the patient should not engage.

1. 24 NY3d 1197 (Dec. 16, 2015).
2. 2012 NY Slip Op. 31969 (U) (Supreme Court, Nassau County 2012).
3. 119 AD3d 512 (2d Dept. 2014).
4. 24 NY3d 905 (2014).