

## Duty to Warn – Primary Care

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A physician owes a duty of reasonable care, under ordinary negligence principles, to *everyone foreseeably put at risk* by the doctor's failure to warn a patient of the potential side effects of treatment including unidentifiable injured parties.<sup>1</sup> In the 2007 case of *Coombes v. Florio*, Sacca became primary care physician Florio's patient in 1999. He was diagnosed with several disorders including asbestosis, chronic bronchitis, emphysema, and hypertension. In 2000, he developed lung cancer with metastasis to his lymph nodes. Dr. Florio warned Sacca that it would not be safe for him to drive during his treatment for cancer. Sacca obeyed the warning and did not drive until the fall of 2001, when treatment for his lung cancer concluded. At that time Dr. Florio advised Sacca that he could safely resume driving, but did not warn the patient of any potential side effects (drowsiness, dizziness, lightheadedness, fainting, altered consciousness, and sedation) of his medications, Oxycodone, Zaroxolyn, Prednisone, Flomax, Potassium, Paxil, Oxazepam, and Furosemide. On March 22, 2002, Sacca lost consciousness while driving his automobile. The car left the road and hit a boy, Kevin Coombes, who was standing on the sidewalk with a friend. Kevin died from his injuries. Sacca, the patient, died four months after the accident. Before the accident occurred Sacca reported no side effects from the medication and had no trouble driving. Sacca's last visit to Dr. Florio before the accident was on January 4, 2002. At that visit, Dr. Florio did not discuss potential side effects and gave no warning about driving. Kevin's estate sued Dr. Florio for negligently prescribing medication without telling his patient Sacca about the possible side effects and without warning him not to drive. The plaintiff's expert medical witness testified (1) that when used in combination Sacca's drugs have the potential to cause "additive side effects" that could be more severe than side effects resulting from separate use, (2) that the sedating effects of these drugs can be more severe in older patients, and (3) that the standard of care for a primary care physician includes warning elderly or chronically ill patients about the potential side effects of these drugs, and their effect on a patient's ability to drive.

The trial court granted summary judgment for Dr. Florio, ruling that he could not be held liable to non-patient third parties. The Massachusetts Supreme Court reversed, stating that the duty to warn arises "when the side effects in question include drowsiness, dizziness, fainting, or other

effects that could diminish a patient's mental capacity." One *foreseeable risk* of a patient's driving is that he or she might injure others. The Court held that a physician owes a duty of reasonable care to *everyone foreseeably put at risk* by his failure to warn of the side effects of his treatment of a patient. Courts in other states, including Hawaii and Maine, have reached similar conclusions. Some states disagree, and still others limit the doctor's liability to third parties to situations in which the physician was directly administering the medications, a distinction the Massachusetts court rejected.

Other treatment situations with foreseeable risk of unreasonable harm to non-patients include, for example, patients with severe contagious disease such as AIDS, homicidal mental patients, and certain genetic disorders. *Predictive genetic testing* presents unique issues in the legal and ethical debate concerning disclosure of information within the physician-patient relationship. A duty to disclose information to family members has been found when the disclosure is likely to result in the ability to mitigate the damaging effects of the genetic disorder.

The imposition of liability for failure to warn a patient rests on a physician's superior knowledge of the risks (to the patient and to others) involved, and the physician's professional responsibility to ensure that a patient understands the risks involved in taking prescribed medications, including off-label use. The learned intermediary (Physician) rule insulates drug companies who generally have no duty to warn the patient directly, and there obviously could be no broader duty to warn the public at large.

In 1976, the California Supreme Court ruled in Tarasoff that once a psychotherapist determines, or pursuant to his professional standards reasonably should have determined, that a patient presents a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the *foreseeable victim* from that danger.<sup>2</sup> In 1983, the Michigan Appellate Court stated that there was a duty to warn non-patient but limited the duty only to potential victims who are *readily identifiable*.<sup>3</sup> However, the majority of states follow the Lipari Court which limited the therapist's liability to those persons *foreseeably endangered by the negligent conduct*, but did not limit it to persons whose literal identity could have been known to the hospital's staff.<sup>4</sup> Therefore, as a general rule, a defendant physician owes a duty of care to all persons who are foreseeably

endangered by the physician's conduct with respect to all risks which make the conduct unreasonably dangerous.<sup>5</sup>

In 1990, the Supreme Court of Oklahoma adopted the "Tarasoff Doctrine".<sup>6</sup> The Court stated that a duty to warn arises if (1) a special relationship exists between the physician and the patient that imposes a duty upon the physician to control the patient's conduct, or (2) a special relationship exists between the physician and the other injured non-patient which gives to the non-patient a right to protection. The psychotherapist/patient relationship has been found to be a sufficient basis for imposing a duty on the therapist and the hospital for the benefit of persons foreseeably injured by a released patient.

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<sup>1</sup> *Coombes v. Florio*, 877 N.E.2d 567 (Mass. 2007)

<sup>2</sup> *Tarasoff v. Regents of Univ. of California*, 17 Cal.3d 425, 131 Cal. Rptr. at 25, 551 P.2d at 345 (1976).

<sup>3</sup> *Davis v. Lhim*, 124 Mich. App. 291, 335 N.W.2d 481, 489 (1983).

<sup>4</sup> *Lipari v. Sears, Roebuck & Co.*, [795 P.2d 519] 497 F. Supp. 185, at 195 (D.Neb. 1980).

<sup>5</sup> *Soutear v. United States*, 646 F. Supp. 524 (E.D.Mich. 1986)

<sup>6</sup> *Wofford v. Eastern State Hospital*, 1990 OK 77, 795 P.2d 516