

Does a Doctor Owe a Duty of Care to a Non-Patient?

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I. Introduction

Does a doctor owe a duty of care to a person that is not his patient? Under certain circumstances, yes. This issue arose in a medical malpractice case that is currently pending trial in Nashua Superior Court concerning the wrongful death of Kyle Tucker, a 44-year-old mother of four, who died after acquiring an infectious disease from her husband while he was hospitalized under the care of the defendant, Dr. Joseph Hou. The plaintiffs sued Dr. Hou claiming that the medical standard of care required him to strongly encourage Kyle to seek evaluation from her primary care physician or the hospital emergency department for the purpose of receiving prophylactic antibiotic therapy to protect her against her husband's highly infectious disease.

Dr. Hou moved for summary judgment, arguing that he did not owe a duty of care to Mrs. Tucker because he did not have a physician-patient relationship with her while she was being exposed to her husband's contagious illness. In the context of infectious diseases, however, courts—including our Supreme Court—have recognized that a medical care provider treating a contagious patient owes a duty of care to one who was foreseeably at risk of acquiring the illness. In accordance with this precedent and the plaintiffs' objection to the defendant's motion, Judge Temple denied the defendants' motion, finding a genuine issue of fact related to Dr. Hou's assumption of a duty with respect to Mrs. Tucker. This article will discuss the circumstances of this recent dispute and explain the governing law as affirmed in Judge Temple's order.

II. Relevant Facts

Kyle's husband, Chad, was hospitalized at Southern New Hampshire Medical Center on February 3, 2015 and came under the care of the defendant, Dr. Hou, a critical care physician. On that day, Dr. Hou suspected that Chad was suffering from strep pneumonia. Kyle told Dr. Hou that everyone in the house had been sick with cough and congestion and Dr. Hou noted that various family members had been sick with upper respiratory infections. The next day, Dr. Hou received confirmation that Chad had an invasive Group A strep infection, which Dr. Hou knew was an infectious disease capable of being transmitted person-to-person. Dr. Hou was aware that the most likely means of transmission was coughing, but also knew that the disease could be spread through saliva and mucous.

Dr. Hou was also aware that Chad was married because his wife was present at the bedside throughout the time Dr. Hou was attending to Chad at Southern New Hampshire Medical Center on February 3 and 4. Since Kyle was married to Chad and resided with him, Dr. Hou realized that Kyle had been exposed to husband and was at risk of catching the invasive Group A strep infection from him. Dr. Hou conceded during his deposition that he knew Kyle was at risk for exposure. Dr. Hou testified that he does not know whether it was his responsibility to have told Kyle that she had an increased risk of catching the infection her husband had. He acknowledged that he could have spoken with colleagues to get input on this but he did not do so. Instead, Dr. Hou told Kyle that she should seek evaluation if she developed symptoms.

III. Relevant Law

A. New Hampshire

New Hampshire law does not require a physician-patient relationship as a necessary precursor to a negligence duty of care, as Dr. Hou argued in his motion for summary judgment. Our Supreme Court rejected this contention more than a hundred years ago in Edwards v. Lamb, 69 N.H. 599 (1899). In Edwards, the court held that the wife of an infected patient could maintain a negligence suit against her husband's doctor when she was harmed after the doctor told her that there was no danger that she might contract her husband's infection. According to the court:

The situation was such that she needed the advice of a physician. This the defendant knew. He knew of her danger and negligently advised her as to it, and she was injured by following his advice. That when he advised her he assumed the obligation to use due care in so doing, is not open to doubt.

Id., 69 N.H. at 599. The Edwards court further explained that, even though the physician's contractual relationship was with the plaintiff's husband, the physician "still owed her the non-contractual duty to use care in the performance of such of his services as concerned her personally." Id., 69 N.H. at 600.

Seven years later, our Supreme Court held that a hospital can be liable for failing to warn a student nurse that the patient she was attending to had an infectious disease. Hewett v. Woman's Hospital Aid Association, 73 N.H. 556 (1906). The student nurse did not have a physician-patient relationship with the attending doctor or the hospital. Thus, Hewett reinforces the legal principle that a physician-patient relationship is not a requirement for the imposition of a duty of care where the patient has a contagious disease.

In Hewett, the attending physician was told by the State bacteriologist that the patient suffered from diphtheria. Id., 73 N.H. at 556. The physician had doubts about that diagnosis so she did not inform the plaintiff, a student nurse, who was assigned to care for the patient. Id. The plaintiff contracted the disease a few days later and sued the doctor and hospital. The trial court declined to issue directed verdicts in favor of the defendants and they appealed following verdicts in favor of the plaintiff. On appeal, the Supreme Court affirmed and explained that if the hospital had notice of the contagious character of the patient's disease "it was its duty, acting as ordinarily prudent men would have acted under the same circumstances, to disclose the danger to the nurse who was ignorant of its existence." Id., 73 N.H. at 567-68.

More recently, the court held that a doctor and hospital could be held liable under New Hampshire common law for failing to warn a phlebotomist that a patient presented a risk of violence. Powell v. Catholic Medical Center, 145 N.H. 7 (2000). This proved once again that, under New Hampshire law, the absence of a physician-patient relationship does not relieve a physician from his ordinary duty of reasonable care to those foreseeably at risk.

B. Other Jurisdictions

New Hampshire law is consistent with the great weight of authority elsewhere. In a recent Oregon case, the Oregon Supreme Court explained "[a] physician may be required to warn a patient's family members about the risks of a contagious disease because doing so protects the interests of the family members, not because doing so protects the interests of the patient." Tomlinson v. Metro. Pediatrics, L.L.C., 2018 Ore. LEXIS 100 at *28 (Ore. February 8, 2018).

Other courts have reached the same conclusion. For example, in Hofmann v. Blackmon, 241 So.2d 752 (Fla.App. 1970), rev. denied, 245 So.2d 257 (Fla. 1971), the court reversed summary judgment in favor of a physician who failed to diagnose his patient's tuberculosis, which was subsequently acquired by the patient's young son. The court explained that "once a contagious disease is known to exist a duty arises on the part of the physician to use reasonable care to advise and warn members of the patient's immediate family of the existence and danger of the disease." Id., 241 So.2d at 753. The Hofmann court rejected the defendant's argument that this duty should not be extended to the treating physician since he never actually diagnosed his patient with tuberculosis. Id. According to the court, that argument would "reward the doctor for failing to discover that which a finder of fact may determine was within his professional ability to discover and, therefore, was his duty to discover." Id.

Thus, the court held:

a physician owes a duty to a minor child who is a member of the immediate family and living with a patient suffering from a contagious disease to inform those charged with the minor's well being of the nature of the contagious disease and the precautionary steps to be taken to prevent the child from contracting such disease . . .

Id. The court emphasized that “the duty is not negated by the physician negligently failing to become aware of the presence of such a contagious disease.” Id.

The Tenth Circuit has similarly held that “[a] physician may be found liable for failing to warn a patient’s *family, treating attendants, or other persons likely to be exposed to the patient*, of the nature of the disease and the danger of exposure.” Gammill v. United States, 727 F.2d 950, 954 (10th Cir. 1984) (emphasis in original).

More recently, following a thorough review of cases such as Hofmann, Gammill, and Edwards, the Tennessee Supreme Court unanimously held that a physician treating a patient has “an affirmative duty to warn identifiable third persons in the patient’s immediate family against foreseeable risks emanating from [the] patient’s illness.” Bradshaw v. Daniel, 854 S.W.2d 865, 872 (Tenn. 1993).

C. Black Letter Law

Black letter authorities agree as well:

It is the duty of a physician who is attending a patient afflicted with a contagious or infectious disease to exercise care in advising and warning members of the family and others who are liable to exposure of the existence and nature of the danger from the disease, to avoid doing any act which would tend to spread the infection, and to take all necessary precautionary measures to prevent its spread to other patients attended. A physician who fails to give such warning is negligent, and is liable in damages to any person injured as the direct and proximate result of his negligence.

70 C.J.S., Physicians and Surgeons §48.

Liability to nonpatients has . . . been imposed when the physician fails to use reasonable care to discover and reveal that his patient has a contagious disease . . . that may represent harm to others.

Dobbs, *et al*, 2 *The Law of Torts* §289.

IV. Parties' Arguments

Defense counsel moved for summary judgment, arguing that the plaintiffs' claim against Dr. Hou failed as a matter of law without citing a statute, case, or any legal authority whatsoever that even suggests that the absence of a statutory physician-patient relationship prevents the recognition of a duty of care. In support of their position that the plaintiffs' claims against Dr. Hou failed because Kyle Sue Tucker was not Dr. Hou's patient, defense cited to N.H. RSA 329:1-c, which defines a "Physician-Patient Relationship" as a medical connection between a licensed physician and a patient that includes an in-person or face-to-face 2-way real-time interactive communication exam, a history, a diagnosis, a treatment plan appropriate for the licensee's medical specialty, and documentation of all prescription drugs including name and dosage. N.H. RSA 329:1-c. Defense contended that no physician-patient relationship existed between Dr. Hou and Kyle because Dr. Hou did not examine, diagnose, or treat Kyle.

The plaintiffs objected to the defendant's motion, citing the aforementioned case law and black letter legal authority, arguing that the law demonstrates that the alleged absence of a physician-patient relationship between Dr. Hou and Kyle does not immunize Dr. Hou from liability under the facts of this case.

In the defense's reply to the plaintiffs' objection, defense counsel attempted to distinguish the Tucker case from governing New Hampshire Supreme Court precedent arguing that Edwards did not apply because the Tucker case involves a failure to act, rather than positive action by Dr. Hou. The plaintiffs' explained in their surreply that this was not true because Dr. Hou did not stay silent in the face of the dangers to which he knew Kyle was exposed. According to the plaintiffs' expert, Dr. Hou gave Kyle woefully inadequate advice and assumed a duty of care when he provided that incorrect medical advice. The plaintiffs also argued that even if Dr. Hou's negligence could be characterized as a failure to act, there is nothing in Edwards, or any other New Hampshire case to suggest that a physician cannot owe a duty of care to a loved one exposed to a contagious disease under these circumstances.

The defense also attempted to distinguish the Tucker case from Hewett and Powell by pointing out factual differences but failed to explain the significance of those differences. The defense failed to recognize that the plaintiffs cited to those cases because they represent other instances in which our Supreme Court upheld liability in cases where there was no physician-patient relationship. This is significant because the defendants' sole argument was that they could not be liable in the absence of a physician patient relationship. The plaintiffs maintained that since New Hampshire law does not limit a physician's duty of care to those with whom he has a statutorily defined physician-patient relationship, there was no basis for summary judgment.

V. Judge Temple Correctly Denied the Defendants’ Motion for Summary Judgment

In its decision, the Court first analyzed whether a doctor can owe a duty to a non-patient. Ricki Bachman et al v. Joseph Hou, M.D., et al, Hillsborough Cty. Super. Ct. No. 226-2027-CV-0079 (2018). The court found that Edwards stands for the proposition that when a physician provides advice to non-patient family members, he undertakes an affirmative act that gives rise to a duty to carry out that care. In light of this holding, the court found that “the defendants’ legal argument—that the absence of a physician-patient relationship between Dr. Hou and Mrs. Tucker precluded him from having a duty to her—misses the mark.” Id. The court explained that “although such a relationship *may have been sufficient* to give rise to such duties, *it was not necessary.*” Id. (emphasis added).

The court also found that it was clear that Dr. Hou could have assumed a duty to educate Mrs. Tucker about her risk of exposure and the precautions to take in light of her exposure by voluntarily undertaking the duty through his own positive actions. The court next analyzed the record to determine whether there was factual support evidencing that Dr. Hou undertook positive actions to educate Mrs. Tucker. Citing excerpts from Dr. Hou’s deposition testimony in which he stated that he educated Mrs. Tucker about her risk of developing Group A strep and told her to seek evaluation if she developed symptoms, the court found that there is a genuine issue of fact related to Dr. Hou’s assumption of a duty to educate Mrs. Tucker about her risk of exposure to Group A strep and the appropriate precautions to take due to that risk.

VI. Conclusion

This decision represents the most recent in an unbroken line of New Hampshire case that rejects the notion that a doctor does not owe a duty in the absence of a physician-patient relationship. Instead, the court’s order recognizes that a physician may owe a duty to non-patient family members of the physician’s patient.