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In This Issue...

Physician Liability to Kidney Donors

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Despite recurring shortages of organs for transplant procedures, there have been ongoing advances in connection with these operations. In particular, the donation of a kidney for transplantation into a relative is becoming increasingly common. Sometimes the circumstances leading to and requiring such a procedure involve an iatrogenic act. Accordingly, a physician or health care provider may face a malpractice or tort claim not only from the patient but also from the patient's relative or other person with whom there has been no physician-patient relationship. This setting raises questions of duty, foreseeability, and proximate cause that evoke memories of the classic law school case of *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

Without question, there are times when physicians may owe a duty to individuals who are not their patients. For example, in *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981), parents alleged that a doctor's failure to diagnose cystic fibrosis, a hereditary disease, in their first child until she was four and a half years old deprived them of an informed choice whether to have additional children. When the diagnosis was finally made, the parents were a month away from the birth of their second child who also inherited the disorder.

Among the issues presented to the New Jersey Supreme Court on appeal was whether the pediatrician who treated and failed to diagnose cystic fibrosis in the first child for over four years owed a duty *to the parents* to diagnose and inform them of their child's condition. *Id.* at 62, 432 A.2d at 838. The court determined that such a duty existed on two discrete grounds: the unique parental bonds with their infant child and the responsibility for parents to provide medical care to their children. *Id.* at 65, 432 A.2d at 839–40.

continued on page 5

FROM THE EDITOR

Get Involved

In this issue John Zen Jackson and Leonardo M. Tamburello explore liability issues that are emerging with the increase in organ transplantation. Specifically, they examine what liability physicians may owe to kidney donors. In the second article, Steve A. Schwarm provides a primer to defense counsel on what HIPAA means to the practitioner. Much has been written about HIPAA, but Mr. Schwarm provides a concise summary of what defense counsel needs to know about HIPAA privacy.

As always, I am looking for volunteers. If you are interested in writing an article, helping develop topics of interest, or assisting in editing this newsletter, please feel free to contact me at: Mr. Philip L. Willman, Moser and Marsalek, P.C., 200 North Broadway, Suite 700, St. Louis, Missouri 63102, (314)244-2278 or pwillman@moser.com.

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Physician Liability, from page 1

Disclosure of genetically transmissible conditions is another area in which a physician may have a duty to warn non-patients known to be at risk. *Safer v. Pack*, 291 N.J. Super. 619, 627, 677 A.2d 1188, 1192 (App. Div.), *certif. denied*, 146 N.J. 568, 683 A.2d 1163 (1996). In *Safer*, plaintiff was an adult who sued her deceased father's physician, alleging that he owed her a duty to warn based upon her father's death from a hereditary form of cancer. Relying on *Schroeder*, the Appellate Division held that the physician owed that plaintiff a duty to warn her of an increased cancer risk from "genetic causes." 291 N.J. Super. at 626, 677 A.2d at 1192–93.

However, the courts considering this issue in reported opinions have quite uniformly held that physicians do not owe organ donors any duty, even if the physicians' alleged malpractice resulted in the need for a transplant with a foreseeable impact on a third person. This was the conclusion in *Sirianni v. Anna*, 285 N.Y.S.2d 709 (N.Y. Sup. Ct. 1967). The court considered a case in which a mother had donated one of her kidneys to her son because of the negligent surgical removal of both of the son's kidneys. The court rejected the asserted cause of action for negligence because the duty was to the son and not the mother, who had acted voluntarily to donate her kidney. *Id.* at 712.

Similarly, in *Moore v. Shah*, 458 N.Y.S.2d 33 (N.Y. App. Div. 1982), the court addressed whether a kidney donor had a cause of action against a doctor whose allegedly negligent diagnosis had caused the father's kidney failure, thus requiring transplantation. The court found that since the plaintiff was never the defendant's patient, the defendant did not have a duty to him. It declined to extend the duty to persons other than patients who might conceivably be affected by the physician's negligence. *Id.* at 35.

In *Ornelas v. Fry*, 727 P.2d 819 (Ariz. App. 1986), the court rejected the existence of a cause of action on behalf of the sister who donated a kidney. It found that there was no "physician/patient relationship or any other legal theory which would give rise to any legal duty" on the part of the physician. *Id.* at 824.

The cause of action was also rejected by the Michigan courts in *Malik v. William Beaumont Hosp.*, 423 N.W.2d 920 (Mich. App. 1988), *appeal denied*, 431 Mich. 875 (1988). There a brother donated a kidney for his sister. The court found no relationship and no duty as to the brother. 423 N.W.2d at 924–25. The Missouri Court of Appeals considered the issue in *Petersen v. Faberman*, 736 S.W.2d 441, 442–43 (Mo. Ct. App. 1987), with the same conclusion of no cause of action based on the lack of a relationship between the donor mother and the doctor who had allegedly treated the donee son in negligent fashion.

A Pennsylvania trial court dismissed a complaint seeking recovery on behalf of a kidney donor. In *Hiles v. Steinbrink*, 1991 WL 320001 (Pa. Com.Pl. 1991), an obstetrician was sued for the negligent monitoring of a fetus during the patient's pregnancy. At birth the child had complications with both kidneys and underwent a variety of treatments eventually leading to a transplant procedure with his father as the donor. Part of the court's analysis involved a consideration of whether a reasonable obstetrician would have foreseen the decision of the father to relinquish a kidney as a possible or probable consequence of the failure to properly monitor the development of the fetus. The court went beyond foreseeability and considered the policy determinations presented by the circumstances of organ donation:

> Extending the prospect of recovery to a class of plaintiffs whose common characteristic is the voluntary relinquishment of a body part raises profound ethical, moral and practical issues. Any decision in this regard would necessarily require extensive inquiry into the present state of medical science and answers to a number of compelling questions. Should liability extend to injuries suffered by the entire class of body part donors or should it be restricted to parents and siblings or within some other degree of consanguinity? Perhaps there is a subclass of claimants whose members, because of some unusual anatomical or perhaps genetic characteristic, are significantly more likely to be called upon as a donor. Should the circumstances surrounding an ostensibly voluntary decision to relinquish an organ or body part be a consideration? Is the degree to which the transplant is medically necessary a factor? [*Id.* at *3.]

The court did not address these questions because it concluded that "the current state of the law does not encompass a cause of action for damages

associated with the voluntary relinquishment of a body part for purposes of transplantation." *Id.*

Most recently, the issue of recoverability was addressed in the context of a father's claim for donating a kidney for the benefit of his daughter. In *Dabdoub v. Ochsner Clinic*, 802 So.2d 651 (La. App. 2000), the court considered the public policy issues and "how far the original obligation should be extended." *Id.* at 654. Since the plaintiff was never a patient of the defendants, the court concluded "that the law does not impose upon doctors, in this situation, a duty to non-patients." *Id.*

In considering the issue presented by kidney donations, the courts have generally rejected the analogy to the duty of care to warn third persons of a danger posed by a physician's patient. Such a duty is recognized in New Jersey and elsewhere. *See, e.g., McIntosh v. Milano*, 168 N.J. Super. 466, 483–85, 403 A.2d 500, 508–09 (Law Div. 1979); *accord, Tarasoff v. Regents of Univ. of Cal.*, 131 Cal. Rptr. 14, 24, 551 P.2d 334, 344 (Cal. 1976). *But see Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 80–81 (Iowa 2002). The courts have reasoned in those circumstances there was a special relationship with the dangerous person and the third party was reasonably identified or identifiable. It would be extraordinary that the usual patient would be characterized as a dangerous person and ordinarily family members who voluntarily are prepared to donate their kidneys are total strangers to the defendant physician. *See Malik v. William Beaumont Hosp., supra,* 423 N.W.2d at 924–25.

On the other hand, where the transplant process itself was negligently performed, recovery has been permitted not only by the patient undergoing the transplant but also the donor. In *Siebe v. Univ. of Cincinnati*, 766 N.E.2d 1070 (Ohio Ct. Cl. 2002), suit was brought by the husband of a kidney transplant patient who died as a result of negligent post-operative monitoring. The patient's brother also asserted a claim. The court stated that the donor brother had signed a surgical consent "on condition that defendant would perform its duties in a non-negligent manner." It concluded that having undergone a painful and serious operation in order to save his sister's life, this plaintiff was "in the unique position of being involved in [the patient's] surgery" and lost use of his left kidney as a proximate result of the defendant's negligence entitling him to damages. *Id.* at 1079. The Ohio court did not address any of the other decisions rejecting a cause of action on behalf of an organ donor.

A voluntary organ donation has also been analyzed as an intervening volitional act that, even in the face of a duty, precludes civil liability because of the lack of proximate cause. The New York court in *Sirianni* reasoned:

> The premeditated, knowledgeable and purposeful act of this plaintiff in donating one of her kidneys to preserve the life of her son did not extend or reactivate the consummated negligence of these defendants. The conduct of the plaintiff herein is a clearly defined, independent, intervening act with full knowledge of the consequences. [285 N.Y.S.2d at 710.]

Likewise, other cases have held that because the donors acted voluntarily, even if a duty exists, there is no proximate cause between the alleged negligence and the resulting harm. *Dadoub, supra*, 802 So.2d at 654 (finding no proximate cause because the donor "voluntarily assumed the harm, the loss of his kidney, with full knowledge of the consequences that would follow"); *Malik, supra*, 423 N.W. 2d at 924 (making clear that "[e]ven if we accepted... [plaintiff's] argument that defendants owed him a duty, we would hold that he voluntarily agreed to give up his kidney... Therefore, defendants' conduct did not proximately cause... [him] to lose his kidney."); *Ornelas, supra*, 727 P.2d at 825 (holding that "appellant agreed to donate (and thus to lose) [sic] the kidney... Under these circumstances, absent an allegation that her consent was not informed, her claimed injury is not redressable as a matter of law").

Fortunately, the absence of ongoing health problems is the usual outcome of kidney donors. Since at least the mid-1980s there have been a number of studies to establish and confirm the long-term safety of kidney donation. For example, in an article by Najarian *et al.*, "20 years or more of follow-up of living kidney donors," 340 Lancet 807, 809 (1992), the authors concluded that "renal transplant donors are not at increased risk for development of renal failure." The same group of physicians from Minnesota subsequently published an additional report in Johnson *et al.*, "Long-Term Follow-Up of Living Kidney Donors: Quality of Life after Donation," 67 Transplantation 717 (1999). They stated that "the results of this study are overwhelmingly positive and have

encouraged us to continue living donor kidney transplants." Most recently, there was a review published by Ramcharan *et al.*, "Long-Term (20–37 Years) Follow-Up of Living Kidney Donors," 2 Am. J. of Transplantation 959 (2002), with a conclusion that the data "contradicts the concept that donor longevity may be limited." There is a real and acute period of surgery and post-operative recovery. This fact limits the extent of exposure and may also be used to rebuff recognition of a cause of action for wrongful kidney donation.