

By Dean P. Nicastro

Physician Liability to Non-Patients: *Coombes v. Florio*, 450 Mass. 182 (2007)



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Massachusetts health care attorneys have long grappled with the potential for physician liability to third parties for injuries caused by patients. Most commonly, the physician liability to non-patients issue has arisen in the context of patient-drivers who cause injury while impaired by a medical condition or prescription medication. Recognizing the clinical and legal aspects of the problem, the Massachusetts Medical Society published guidance for physicians who treat patients whose driving acuity may be affected by the aging process or other medical considerations. (*Medical Perspectives on Impaired Driving*, © Massachusetts Medical Society, 2002). Now, in the controversial case of *Coombes v. Florio*, 450 Mass. 182 (2007), following several Superior Court decisions which wrestled with the issue, the Supreme Judicial Court has attempted to clarify the scope of a physician's duty to non-patients in Massachusetts. Yet does *Coombes* leave the issue less than fully resolved?

Except for licensed mental health professionals (see, e.g., G. L. c. 123, §36B), Massachusetts has not adopted a broad *Tarasoff*-like duty-to-warn doctrine for medicine. *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), is the landmark California case obligating a therapist to use reasonable care to protect an intended victim against the serious danger of violence presented by the therapist's patient.

Tarasoff, 551 P.2d at 340. In *Tarasoff*, a patient had confided to an examining psychologist his intention to kill plaintiffs' daughter. The parents were not warned, and their daughter was killed. The court concluded that "reasonable care" can include a duty to warn the endangered party or others likely to apprise the victim of the danger. *Id.* at 340.

The facts in *Coombes* are tragic. A 10-year-old boy died of injuries sustained when struck by an automobile driven by a 75-year-old man who was taking several prescription medications. The boy's estate sued the driver's physician for negligence, asserting that the medications had rendered the driver unable to drive safely and caused him to lose consciousness while driving. The plaintiff estate alleged further that the physician failed to warn his patient of the hazards of driving while taking the prescribed medications.

In a split decision with only six justices sitting, the Supreme Judicial Court reversed a grant of summary judgment in favor of the physician, and concluded that the physician could be liable to the plaintiff for failure to warn his patient of the risks associated with his medical treatment. On behalf of two joining justices, Justice Ireland, arguing from ordinary negligence principles, articulated this rationale: "...I believe that [the physician] owes a duty of care to all those foreseeably put at risk by his failure to warn

about the effects of the treatment he provides to his patients.” Justice Greaney, whose concurrence made for a majority decision, dissented from the “sweeping conclusion that physicians owe a legal duty of care to virtually everyone who may come in contact with one of his or her patients.” Justice Greaney would hold a physician liable to injured third parties for failing to warn a patient of dangers posed by a patient’s decision to drive while under the influence of a prescribed medication; his reasoning focused on the physician’s professional obligation to the *patient*, with its attendant benefit to third parties. Moreover, Justice Greaney’s concurrence appeared confined to the context of impaired driving, not other patient activity, such as interaction with others at home or in the workplace.

What precedent the *Coombes* case has set for the future is not entirely clear. Justice Ireland’s reasoning did not carry a majority of the Court. Further case refinement, and possibly even legislative action, may be required before lawyers can confidently advise health care providers about their liability for the consequences of medical treatment decisions suffered by unknown third parties who are not part of the provider-patient relationship. Further, because *Coombes* is a *negligence* case, and not a medical malpractice case, the availability of professional liability insurance coverage for indemnity and defense

costs may depend upon carrier decisions and policy language.

The majority result in *Coombes* drew passionate dissents from Chief Justice Marshall and Justice Cordy, each of whom viewed it as troubling and problematic for both law and medicine. Chief Justice Marshall wrote, “...the trial judge is left the unenviable task of divining from the vague generalizations of the concurring opinions the outer limits of a novel duty of physicians to third-party nonpatients.” Justice Cordy noted that “...the duty would interfere with, and distort, the highly personal, confidential physician-patient relationship, recognized since the time of Hippocrates, circa 400 B.C.”

The immediate practice lesson from this case for health care legal counsel must be to impress upon physicians and other health care provider clients the imperative to *both* treat a patient according to their best professional judgment *and* document professional advice in the patient’s chart, including any warnings about the potential danger to third parties, particularly for impaired driving. To borrow a characterization from the Chief Justice, the practical consequence of the *Coombes* decision is that health care providers must be “forever looking over their shoulders.” ■

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