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Duty To Warn In Pennsylvania

Understanding the Physician's Legal Obligation to Prevent the Spread of Communicable Diseases to Third Parties Within the Foreseeable Orbit of Risk

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Introduction

Physicians who practice in Pennsylvania diagnose and treat patients with infectious diseases regularly. Understanding the route of transmission, period of communicability, incubation period, and treatment options for many pathogens are part of standard medical training and practice. It is well-described that most infectious organisms can be spread to others through common human activities, and that certain populations may be at increased risk of exposure and adverse health outcomes. Currently, there is no statutory regulation in Pennsylvania that addresses a physician's duty to warn patients about the potential transmission of their communicable illnesses to protect third parties. However, there have been cases decided by the Supreme and Superior Courts in Pennsylvania who found that physicians do in fact have a duty to protect third parties within the foreseeable orbit of risk of harm, thus establishing common law precedence.

The main objective of this article is to raise awareness among the clinical community in Pennsylvania of this duty to warn by describing the rationale and implications of two Pennsylvania court decisions. The first involves the provision of inaccurate guidance to prevent transmission of hepatitis B virus (HBV) to a sexual partner after an occupational exposure, which introduces the concept of foreseeable orbit of risk of harm by the Pennsylvania Supreme Court. The second case involves failure to provide information on the infectious nature of Cytomegalovirus (CMV) to protect the unborn child of a close contact. Foreseeable orbit of risk will be further defined as previously described by the Pennsylvania Supreme and Superior Courts, to provide clinicians with a framework for the

recognition of when the duty to warn may apply during routine clinical practice.

Information contained in this article was derived from research conducted by legal experts at the University of Pittsburgh Center for Public Health Practice and Philadelphia Department of Public Health, that addressed practitioners' ability to provide preventive medication to third parties during a public health emergency (e.g., antiviral medications to household contacts of an influenza patient). It is not meant to be an extensive review of all relevant case decisions in Pennsylvania, and therefore is based on the case reports of the Supreme and Superior Courts and above mentioned research.

The Pennsylvania courts found that the notion to warn to protect third parties is beneficent and relies on the medical knowledge of practicing physicians as a key source of accurate information. Moreover, this duty shapes clinical practice toward a more population focused approach, favorably decreasing incidence of communicable diseases in the community, and reducing legitimate actions against healthcare providers. Consideration of this duty comes at a time when healthcare reform emphasizes reducing preventable illnesses and complications, improving patient outcomes, and stresses a more judicious use of medical resources. Therefore the duty to warn needs to be contemplated seriously as an integral component of the standard of care by the Pennsylvania State Medical Board and its affiliate organizations.

Both rulings found that a duty existed between the physicians and the third parties, even though a physician-patient relationship did not exist. In Pennsylvania, the standard of medical practice under routine circumstances (non-emergency) for services including medical evaluation, counsel, and treatment require a physician-patient relationship. It has been interpreted that providing the above medical services to persons where no physician-patient relationship exists is against accepted medical practice as defined by the

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Medical Board of Pennsylvania. Therefore, the notion that a duty exists to third parties in this context, absent a physician-patient relationship, is unfamiliar and potentially problematic to most practicing clinicians in Pennsylvania.

The concept of the duty to warn to protect third parties is contemplated individually by each state. Public health legal experts acknowledge a lack of case law in Pennsylvania that addresses harm to third parties from communicable diseases. However, this article presents two relevant cases that begin to set a standard for the protection of persons lacking professional medical knowledge from preventable illnesses and severe consequences. As such, case law in Pennsylvania provides compelling guidance for future actions within the state. Delaware absolves physicians of this duty whereas New York has established case law that supports this responsibility (failure to provide information on infectiousness of tuberculosis following a positive occupational chest x-ray resulting in infection of spouse). Out of state rulings while not considered law in Pennsylvania become advisory and therefore are worth some attention when courts are faced with infectious disease issues that are complex, variable, and previously unexplored. In light of this, it behooves the clinician to further consider their role in the prevention of communicable illnesses beyond their patients at the time of care.

Many details related to the core of these issues are not fully described in the court decisions and leave areas for additional consideration and refinement. This article also discusses where guidance on the duty to warn is lacking or unclear (e.g., dependence on a definitive diagnosis, general public understanding about common infectious illnesses, considerations for reportable diseases), and outlines what future discussions and direction need to occur to make clear to physicians their duty to third parties. These judgments do not address a duty to protect third parties who may have already been exposed to a communicable disease before the time of the patient encounter; this information pertains only to future exposures. Finally, the court deliberations described here explicitly pertain to physicians, however the issues related to the provision of clinical services in this article may apply to all licensed medical practitioners in Pennsylvania.

Introducing the Duty to Warn and Accuracy of Warning: Transmission of HBV to Sexual Partners Following Occupational Exposure

In 1990, the Superior Court of Pennsylvania (appellate level) found that physicians who treated a young female phlebotomist potentially infected with hepatitis B positive patient had a duty to warn to prevent secondary transmission to at-risk third parties. In *Dimarco v. Lynch Homes-Chester County Inc.* the sexual partner, who the treating physicians knew about, became infected after the phlebotomist's physicians failed to warn her to take necessary preventive actions long enough to assure that she had not contracted the disease. The Pennsylvania Supreme Court also reviewed this case and held that: "When a physician treats a patient who has been exposed to, or who has contracted a communicable and/or contagious disease, it is imperative that the physician give his or her patient the proper advice about preventing the spread of the disease". The court reasoned that: "Physicians are the first line of defense against the spread of communicable diseases, because physicians know what measures must be taken to prevent the infection of others". The court further held: "Such precautions are taken not to protect the health of the patient, whose well-being has already been compromised, rather such precautions are taken to safeguard the health of others. Thus, the duty of a physician in such circumstances extends to those 'within the foreseeable orbit of risk of harm.'"

In addition to identifying that a duty to warn third parties exists and that sexual partners fall into the class of foreseeable orbit of risk, this court also clarified that the information imparted to patients must be accurate to prevent disease transmission. The court stated: "If a third person is in that class of persons whose health is likely to be threatened by the patient, and if erroneous advice is given to that patient to the ultimate detriment of the third person, the third person has a cause of action against the physician, because the physician should recognize that the services rendered to the patient are necessary for the protection of the third person." This statement obligates physicians to have a working knowledge of the routes of transmission, at-risk populations, and correct preventive actions of potentially all communicable diseases and to actively provide this information to patients upon treatment.

In its review of this case, the PA Supreme Court upheld the opinion of the Superior Court who determined that the duty to warn third parties exists and rests with the medical profession who understand the infectious nature and adverse outcomes of communicable diseases. The Supreme Court further opined that physicians must provide accurate information to

prevent infection, and have an understanding and awareness of a class of persons at increased risk. Failure to do so subjects clinical practices in Pennsylvania to litigation. While most physicians possess knowledge of more common infectious diseases, specialists in infectious diseases, infection control and public health, are more likely to understand such detailed information on a wide variety of pathogens.

Clarifying the Duty to Warn, Public Awareness of the Disease and At-risk Populations: CMV Transmission and Pregnant Women

In 1995 the Pennsylvania Superior Court (appellate level) deliberated a case brought by a woman who delivered a son infected with CMV, who died at two months of age from the disease. During gestation, this woman contracted CMV from an infant daughter of a close friend while providing routine infant care. The mother of the infant girl initially diagnosed with CMV did not receive any information about the infectious nature of CMV from her daughter's treating physicians, nor did she receive information on methods of decreasing the spread of CMV to others including avoidance of people at greater risk for severe illness. Because of this, her daughter continued to have close contact with her female friend of child-bearing age who contracted CMV after becoming pregnant. After review of the previous case involving hepatitis B, the Superior Court of Pennsylvania upheld that the treating physicians did have a duty to warn the infant girl's mother to protect persons within the foreseeable orbit of risk of harm from CMV infection. In reference to pregnant women, the court reasoned that the treating physicians should have known: "that a class of persons very likely to come in contact with a young mother and her new baby were at risk, and that the risk was deadly."

The expectation that physicians warn patients with all communicable diseases and the potential liability for spread of these diseases was challenged during the deliberation of this case. The magnitude of this responsibility was addressed as the court made the distinction between common illnesses where the public has some general understanding, from less common illnesses where specific information about risks and methods of transmission are more exclusively understood by medical professionals. The court stated: "In the case of viruses such as the flu or the cold, such information is common knowledge. In contrast where certain risks regarding the spread of certain diseases may only be known within the medical profession, it is essential that correct information be disseminated by the physician" (three specific diseases received

mention: AIDS, hepatitis [assumed infectious types though not specified], CMV). A comprehensive understanding of those communicable diseases that necessitate a warning, as opposed to those that are generally understood by the public, has not been developed in this context.

Exploring Foreseeable Orbit of Risk and Patient Approaches

In both of these cases, the courts provided examples of populations within the foreseeable orbit of risk respective to the index patients. The case involving hepatitis B transmission included sexual partners at-risk; information that is often known when conducting a thorough history, and therefore likely known by the treating physician. In the case where CMV was transmitted to a pregnant woman, the ruling infers that physicians make less certain judgments about the type of people their patients would likely have close contact (e.g., new mothers associating with other women likely to conceive). This variation causes ambiguity when considering at-risk populations, and would best be refined by a review of public health recommendations to control the spread of reportable diseases and conditions.

Foreseeable orbit is a term used by the courts and is interpreted as an awareness of persons who the physician knows about, conceivably suspects, or where some hypothetical relationship may exist where future activities could occur during the period of communicability with the index patient. The statement that describes an awareness of deadliness in the CMV case infers that the orbit of risk must include third parties who have a higher likelihood of contracting the disease and more importantly would suffer severe or fatal outcomes. This may seem like a large volume of information for practitioners to know and obtain during the patient encounter where a communicable disease is suspected. The following is a non-inclusive list of general categories to consider when thinking through specific disease parameters important for constructing appropriate patient warnings.

Method of transmission to third parties: This is pathogen dependent and is well described for most infectious organisms. These include 1) Close contact (e.g., household, daycare), 2) Fecal-oral (e.g., food handlers, healthcare, daycare attendees, household contacts), 3) Blood borne (e.g., healthcare, intravenous drug users, sexual partners), 4) Lesion/direct contact (e.g., sexual partners, sports team members/other close activities, shared personal items).

At-risk third party populations: Also pathogen dependent, this is a core feature when considering foreseeable orbit of risk and applies to people who are likely to be affected by the method of transmission or who are at increased risk for illness and severe disease. Unvaccinated populations including infants and young children are at increased risk as related to vaccine preventable diseases. Other vulnerable populations may include people with underlying medical conditions including immune compromise, pregnant women, and the elderly. Occupational and recreational exposures need also be considered here (healthcare, agriculture, veterinary, school/daycare, sexual partners).

Period of Communicability: This is important as the orbit of risk should only include activities when the index patient is capable of spreading the disease. This is also organism dependent and must consider when in the duration of illness the patient exists at the time of the clinical encounter. This information is necessary when providing accurate time periods for preventive measures.

Activities to reduce transmission: Based on the disease, preventive measures may include exclusion from work, school, and other select activities, avoidance of at risk populations or close contacts, isolation, abstinence, increased hand washing and other hygienic activities, cough etiquette, and appropriate handling of infectious material.

Communicable Diseases and Public Health

The categories listed above are basic public health considerations for disease control routinely practiced by state and local health departments. However, the precedence set in these court rulings should influence clinical practice to adopt a public health (population-based) focus when addressing patients with infectious diseases. Many, but not all, communicable diseases are reportable by law to the appropriate public health authority in Pennsylvania. Both the Supreme and Superior Courts in the rulings above inferred that reportable diseases because they are reportable by law, confer a duty on physicians to protect third parties, and thus further obligate clinicians to counsel patients to protect at risk populations. Reporting notifiable diseases is mandatory and elicits some follow up by state and local health departments. While reporting notifiable diseases is always good practice, it is unclear whether this absolves physicians from providing the appropriate warning to protect third parties. Neither court decision addressed this as sufficient warning. Moreover, public health follow up does not apply to

non-reportable diseases (e.g., CMV, Parvo virus B19, coxsackie viruses, Epstein-Barr Virus) therefore physicians need to integrate the duty to warn into routine practice regardless of whether the disease is reportable.

Another complication that needs consideration is whether the duty to warn exists if the disease has not been definitively diagnosed. Both cases above relied on conclusive pathogen-specific tests to confirm the diagnosis. Does the duty to warn apply when dealing with a patient with a suspect or probable communicable disease but no conclusive test? This has not been described previously in the legal review. From a public health standpoint, protection of third parties should occur when a disease is highly suspected or suspected enough that the clinician prescribes a specific treatment (e.g., macrolide antibiotic for suspect pertussis). Further interpretation by lead public health authorities in the Commonwealth should occur to clarify this issue.

Conclusions and Recommendations

While no statutory law exists in Pennsylvania that defines a clinician's duty to counsel patients with communicable diseases to protect third parties, case law demonstrates that this duty does exist and failure to provide preventive information accurately is actionable. This duty draws on a physician's oath of beneficence by acting within a window of opportunity to prevent illness and death to vulnerable populations. The obligation is imposed on physicians because they possess an understanding of communicable diseases and the appropriate actions to decrease transmission for many uncommon illnesses not typically understood by the general public.

To synthesize the large volume of information relevant to protecting third parties for all communicable diseases, public health and relevant health professional organizations could collaborate to develop a resource tool that describes these recommendations. This information could be provided in a web-based Learning Management System (LMS), presented at statewide conferences for continuing medical education, and condensed into a user-friendly pocket guide for clinicians to use during clinical practice.

In closing, this article introduces the concept of the duty to warn to Pennsylvania practitioners, and reviews the state of this concept as currently set by legal precedence. It is not meant to steer physicians away from identifying at-risk individuals related to their patients, rather to provide information, to clarify the issues, and to offer support for clinicians to practice with confidence when counseling patients on reducing

disease transmission. Additional action is required to further refine and integrate this standard and its recommendations to reach the goal of decreasing incidence of communicable illnesses.

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