Law and the Public's Health

MOLLOY V MEIER AND THE EXPANDING STANDARD OF MEDICAL CARE: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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This installment of *Law and the Public's Health* examines a recent medical liability decision, *Molloy v Meier, et al.*[1] and its implications for public health policy and practice with respect to policy reforms in the field of newborn genetic testing and reporting. As science transforms medical care and public health policy, modern legal concepts of professional liability come into play as well. This link between scientific advances and professional liability is a critical one, as public health agencies plan for and adopt new policies in response to scientific breakthroughs.

THE MOLLOY DECISION

Molloy arose (as many liability actions do) as the result of allegedly substandard medical practice. In *Molloy,* parents sued several pediatricians, arguing that because of their negligent failure to properly test one of their children for genetic abnormalities and report the results, they gave birth to another child with the same genetic condition. The failure to test and report involved a three-year-old child with apparent developmental disabilities. Fearing that the problem was genetic and concerned about the health of future children, Mrs. Molloy asked the family pediatrician to perform genetic tests and discuss the results with her; the physician did so but failed to order Fragile X testing, even though the test was in widespread use in diagnosing developmental delay in children. A second physician, a pediatric neurologist, also failed to perform the test, as did a third neurologist, even though it was clear that the test had never been performed.

Mrs. Molloy gave birth to a third child, who, upon showing signs of delay, was tested properly and was found to have Fragile X. Molloy and her daughter were then tested, and the results showed they both carried the genetic disorder. Molloy then filed suit against her daughter's physicians, alleging negligence in their treatment of both her and her daughter. Specifically, Molloy claimed medical negligence in failing to order the Fragile X test for her daughter, failing to properly read the lab results and counsel her, mistakenly reporting that Fragile X had been performed, and failing to provide proper counseling regarding the risk of passing on an inheritable genetic abnormality.[2]

The Minnesota Supreme Court held that the pediatricians' duty ran to both the mother and the child and that their failings amounted to a failure of their duty to warn her of reasonably foreseeable risks. The facts showed that the pediatrician understood that Mrs. Molloy was asking for the tests, not simply for her daughter's sake, but for her own need for such information in the context of future procreation. In this context, the physician had a professional/patient relationship with both the child and the mother and understood that the testing was being undertaken to benefit both of them. (Indeed, the primary pediatrician admitted in her deposition that parents must always be told about genetic abnormalities in their children.) For this reason, the Court concluded, "a physician's duty regarding genetic testing and diagnosis extends beyond the patient to biological parents who foreseeably may be harmed by a breach of that duty."[3] The court also held that the Molloys' claim was not barred by the statute of limitations or by the language in a state law prohibiting wrongful life and wrongful death actions.[3]

In fact, the extension of the legal duty of care beyond just the level of care received by the patient is not as radical as it might seem; indeed, the ruling is consistent with a classic common law doctrine known as the "duty to warn." Where the patient under a health professional's care is a minor child, the professional's duty to warn of the implications of a child's health conditions extends to the child's parents. Furthermore, according to the Minnesota Supreme Court, this is true even where the condition is not an infectious disease, but one in which the failure to warn could foreseeably lead to harm to others. In this sense, a genetic abnormality in a child falls within the "range of apprehension" that the duty to warn concept in medical negligence law is intended to protect.[4] In sum, physicians have a duty to counsel the biological parents of children affected by a genetic disorder because of its obvious implications for future childbearing.

The legal duties which arise from advances in genetic screening will become an ever more important issue with the advances now underway in the area of automatic newborn screening. The notion of screening newborns for disease is not a new one. But with technological advancements in screening processes and the unfolding of new genetics research almost daily, the battery of tests *routinely* recommended for newborns continues to expand. While most states require eight or fewer newborn screens, some states mandate the screening for 36 different genetic and metabolic disorders.[5,6] Moreover, the March of Dimes is calling for 30 separate newborn screens to be performed in every state.[7] The trend favors the expansion of newborn screens and is reflected in federal law as well. Support for the expansion of genetic screening is now part of the Public Health Service Act.[8]

IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

The Molloy decision rests on classic common law principles, and while the facts may have presented the Minnesota Supreme Court with a novel situation, the decision also makes clear that the Court rested its reasoning on well-established common law principles having to do with the relationship between physicians and the parents and families of minor children. As a result, the decision could have come in any state which adheres in whole or in part to common law

principles as part of its professional liability legal framework (virtually all states).

For this reason, as genetic testing and reporting programs are developed, part of the development of this important advance in public health policy should be intensive outreach and education to pediatric health care providers, not only to ensure their familiarity with the tests and the clinical aspects of testing, but their knowledge and understanding regarding the importance of complete testing in accordance with the state protocol and careful counseling.

It is also important to stress that whether or not a state affirmatively adopts testing as an official public health standard is not dispositive as to the medical liability issue. That is, even if a state does not adopt genetic testing in newborns as an official public health policy, medical professionals may be liable for failure to properly test and counsel, regardless of whether they are asked to conduct the tests. If a reasonable pediatrician knows (or should know) that certain genetic tests are both available and accepted as a means of diagnosing (as genetically based) certain identified physical or mental health conditions in infants and children, the physician arguably has a legal duty to offer to provide or arrange for the tests and counsel the child's biological family regarding the importance of the tests. If the family accepts or seeks tests, then the physician has a duty to conduct the tests in a reasonably competent manner and report the results to the family.

This is an evolution in liability. In earlier times, physicians were under no duty to counsel parents on the risk of genetic abnormalities in offspring unless the physicians knew or should have known that the parents were in a high risk group for the disease.[9] As the science evolved and the link between adult genetic abnormalities and offspring became clear, the standard of care moved to a new level, with a requirement that physicians counsel their adult patients on the potential consequences of childbearing and recommend disclosure to their families.[10] From there the duty evolved still further, to require the counseling of family members regarding preventive care upon identification of abnormal genetic information in a family member.[11] *Molloy* now takes the duty one step further to include the counseling of the biological parents of the tested child. All of these evolutionary points have their basis in the duty of health professionals to warn of foreseeable risks.

Many questions evolve from this new level of liability. In addition to ensuring that physicians understand the potential for liability and the importance of offering tests and counseling families, underlying public health policy questions emerge. Should there be a standard battery of tests and standardized informing and counseling information? Given the variation in living arrangements among children today, whom should health professionals be expected to inform? What are the elements of proper counseling? What consequences should be considered legally foreseeable in a recovery action? Finally, and perhaps most importantly, what is the proper role for public health in assuring that the emerging science of genetic testing is most effectively made available to families and conducted in a high quality fashion?

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4. Molloy 679 N.W.2d at 719-20 (citing cases).
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