

***Molloy v. Meier* – The Supreme Court of Minnesota Finds a Duty to Warn Parents Regarding a Child’s Genetic Testing and Diagnosis**

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Confidentiality lies at the core of the doctor-patient relationship. In order to identify the most appropriate treatment option, a doctor must have access to full information about the patient’s condition. Because medical information might be used to a patient’s detriment in other contexts, such as employment, patients are unlikely to seek medical care if they believe this information will be divulged to third parties. As a result, the duty of confidentiality has been enshrined in both case law and statute as a primary component of the therapeutic relationship.¹

While the duty may be relatively straightforward in situations where the information at issue affects only the patient, absolute confidentiality is more difficult to justify in situations where there are potential repercussions for other people. For this reason, a variety of exceptions to the duty have been recognized, such as where a patient has a highly communicable disease or otherwise poses a threat to the health and safety of others.² However, these exceptions may not permit disclosures that do not fit the threat/communicable disease model.³

Genetic information is such an example. Information from genetic tests may be highly relevant to third parties, ranging from family members who could be at risk for the same conditions to insurance companies that might prefer not to insure individuals who might develop certain hereditary conditions. Because of the highly sensitive and

immutable nature of this information, courts have been hesitant to sanction widespread disclosure.

In *Molloy v. Meier*, the Supreme Court of Minnesota recently held “that 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.”⁴ Kimberly Molloy sought treatment on behalf of her developmentally delayed three-year-old daughter, S.F., from Dr. Diane M. Meier. When initial tests did not reveal the source of the problem, Dr. Meier had a discussion with Molloy and the child’s father (Robert Flomer) concerning the possible causes for the delay, including genetic causes. At that time, Molloy informed the doctor that she had a mentally retarded half-brother and asked her to perform genetic tests. Dr. Meier’s notes indicated that she planned to order chromosomal testing and genetic-level testing for “Fragile X” syndrome (a leading hereditary cause of mental retardation).

While the chromosomal testing revealed no abnormalities, for reasons that have not been explained the Fragile X test was never performed. Dr. Meier informed the parents that the test results were negative, but did not mention the failure to perform the Fragile X test. Shortly thereafter, S.F. was referred for consultation to Dr. Reno Backus, who diagnosed her with a pervasive developmental delay of unknown origin. When Molloy inquired about the chances of giving birth to another child with the same problem, Dr. Backus responded that S.F.’s condition was not genetic in origin and that the risk was extremely small. At the time, Dr. Backus was aware that chromosomal testing had been ordered but did not know the results.

Several years later, S.F. was treated by Dr. Kathryn Green. Dr. Green was aware of Molloy's half-brother, but did not order the Fragile X test herself; she testified that she had assumed that the test had been performed and had yielded a negative result.

Meanwhile, Molloy remarried and gave birth to a son. When the son showed signs of the same difficulties as his half-sister S.F., his physician ordered Fragile X testing – which turned out to be positive. Subsequent tests revealed that both Molloy and S.F. carried the genetic disorder.

Molloy and her second husband sued all three doctors, alleging that they were negligent in the care and treatment of S.F. by failing to order the Fragile X testing, failing to properly read the tests that were performed, mistakenly reporting that the Fragile X test had been performed, and failing to provide counseling regarding the risk of passing on the genetic abnormality to other children. The district court denied the defendants' motions for summary judgment, holding that they owed a duty to S.F.'s biological parents. The district court then certified several questions to the court of appeals, which affirmed that the defendants owed a duty to Molloy.⁵

Drawing on the few cases in which such a duty of care had been imposed – including cases from other jurisdictions involving genetic conditions – the Supreme Court of Minnesota affirmed. Acknowledging the “practical reality . . . that genetic testing and diagnosis does not affect only the patient,” the court stated, “The standard of care thus acknowledges that families rely on physicians to communicate a diagnosis of the genetic disorder to the patient's family. It is foreseeable that a negligent diagnosis of Fragile X will cause harm not only to the patient, but to the family of the patient as well.”⁶ Noting that the defendants should have foreseen that Molloy might conceive

another child unless advised of the genetic disorder, the court found sufficient evidence in the record to withstand the motion for summary judgment.

Molloy may be an unusual case in that there was a clear breakdown in the testing procedure, as well as clear inadequacy of the medical records on which subsequent physicians relied. Yet the court's acknowledgement of the unique potential for genetic information to affect the lives of family members suggests that other states will soon face these same issues. It remains to be seen whether other courts will follow Minnesota's lead in extending the doctor's duty of care regarding genetic testing beyond the minor patient – and whether such a duty can be restricted to biological parents rather than to other blood relatives (an issue the Minnesota court chose not to address).⁷

¹ See, e.g., Tex. Occ. Code Ann. § 159.002 (setting forth confidentiality of communications between physicians and patients); *Doe v. Marselle*, 675 A.2d 835 (Conn. 1996) (applying statutory protection for confidentiality of AIDS testing information).

² See, e.g., Tex. Occ. Code Ann. § 159.003 & 159.004 (setting forth exceptions to confidentiality rule in litigation and other contexts); *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976) (holding that psychotherapists may be liable for failing to exercise reasonable care to protect third parties to whom they know or should know their patients present a serious danger of violence).

³ See, e.g., *Praesel v. Johnson*, 967 S.W.2d 391 (Tex., 1998) (holding that physicians do not have a common law duty to third parties to warn epileptic patients not to drive).

⁴ 679 N.W.2d 711, 719 (2004).

⁵ The court of appeals also held that the statute of limitations began to run at the time of the second child's conception, and that the cause of action was not barred by a Minnesota statute prohibiting wrongful life and wrongful birth actions. *Molloy v. Meier*, 660 N.W.2d 444, 455 (Minn. Ct. App. 2003)

⁶ 679 N.W.2d at 719.

⁷ See *id.* at 720. In other parts of the opinion, the court affirmed that the cause of action accrued on the date *Molloy* conceived her son, rather than the date of S.F.'s last treatment, and that *Molloy*'s "wrongful conception" cause of action could be distinguished from the wrongful death and wrongful birth actions prohibited under Minnesota law. *Id.* at 722 (statute of limitations) & 723 (construing Minn. Stat. § 145.424).