

## MEDICAL LIABILITY UPDATE

### New Arizona case expands a physician's duty to a patient

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Traditionally, a formal physician-patient relationship must exist before a duty of care may be imposed on a physician. In a medical malpractice action, the plaintiff (patient) must first show that the physician had a duty to protect the patient from injury or harm.

The physician-patient relationship is established with an agreement by a physician to treat a patient. Once the relationship is established, the law imposes a "duty" on the physician to use proper care and skill in treating the patient. A breach of the duty—providing care that is below the standard of care—satisfies an initial requirement of a medical malpractice claim.

In 2000, the Arizona Court of Appeals held in *Diggs v. Ariz. Cardiologists, Ltd.* that a formal physician-patient relationship need not exist before a duty may be imposed on a physician. In *Diggs*, a cardiologist who had not seen the patient was held to owe a duty when the cardiologist advised an emergency department physician regarding the patient's care; knowing that the ED physician would rely on the advice. The lesson of *Diggs* is that the absence of a physician-patient relationship does not preclude a duty to a patient depending upon the circumstances.

Unfortunately, *Diggs* did not provide much guidance for future cases on the circumstances that would be considered to establish a duty.

The trend of expanding a physician's legal obligations and exposure to liability regarding duty continues in 2004 with the Arizona Supreme Court decision in *Stanley v. McCarver*. The court ruled that Dr. McCarver owed the patient a duty under circumstances in which there was not a traditional physician-patient relationship. In the *Stanley* case, the prospective employee was sent by her employer for a pre-employment chest x-ray to evaluate for tuberculosis. The x-ray was interpreted by Dr. McCarver, who was an independent contractor for the facility where the x-ray was done. The report by Dr. McCarver noted abnormalities. The report was sent to the x-ray facility and then forwarded to the prospective employer. The employer, in breach of its own policy, failed to provide the report to the prospective employee, who months later was diagnosed with lung cancer. The employee brought a medical malpractice action against Dr. McCarver alleging that he breached his duty to her by failing to directly inform her of the abnormal chest x-ray findings.

Dr. McCarver responded to the allegation that, since the plaintiff was not his patient in the circumstance of the pre-employment chest x-ray interpretation, no formal physician-patient relationship had been established and, therefore, he owed her no legal duty. The trial court agreed and dismissed the case. The plaintiff appealed to the Court of Appeals who reversed

the trial court's decision. The Arizona Supreme Court then reviewed the case and agreed with the trial court that there was no formal physician-patient relationship.

However, the Supreme Court went further and held that Dr. McCarver owed a "duty" to the prospective employee. The court reasoned that a duty may arise from a "special relationship" that may find its basis "in contract, family relations, or undertakings." The court reasoned that, under the circumstances, there was a "sufficient relationship" to make it reasonable public policy to impose a duty on the physician.

The Arizona Court ruling is consistent with the rulings of courts in other jurisdictions that have imposed a duty on a physician in the absence of a traditional physician-patient relationship. The court cited examples of other rulings that found a duty for physicians performing annual employee physical examinations; interpreting employee chest x-rays; performing insurance examinations; and performing independent medical examinations for litigation. Courts reason that such circumstances create a relationship sufficient to give rise to a duty of care in performing an examination and in reporting the results.

Similarly, the Arizona Supreme Court noted that the person being examined or evaluated has a "reasonable expectation" that the "expert" physician will warn of dangers he identifies as a result of the evaluation. Although the Arizona Court of Appeals, in *Hafner v. Beck*, held that a psychologist who performed an independent medical examination on a workers compensation claimant owed no duty to the examinee because no physician-patient relationship existed, this 1995 ruling is now open to question and would likely be overturned today. Citing *Stanley* as part of the trend of expanding the traditional physician-patient relationship and rejecting the holding in *Hafner*, the Michigan Supreme Court recently ruled that an independent medical examination creates a "limited" physician-patient relationship giving rise to a limited duty to the patient.

There is no judicial or statutory bright line statement on which a physician may find guidance on whether he or she owes a duty to the patient, particularly to report findings. The *Stanley* court noted that the judicial focus for imposing a duty is on the sufficiency of the relationship. For instance, some courts, when deciding whether to impose a duty, consider a number of factors, including the burden of preventing harm. Consequently, in our opinion, a physician may assume that a duty exists for any service provided to a patient. The more difficult question is the extent of the duty.

The *Diggs* and *Stanley* decisions, along with the examples of cases from other courts that were favorably relied upon, indicate that a physician who provides a "curbside" consult, interprets an employment chest x-ray, or performs an examination or diagnostic testing as part of an insurance, litigation or workers' compensation matter may no longer assume that he or she need only provide a report to the party making the request.

In *Stanley*, the court only ruled that the radiologist owed a duty. It did not rule that the radiologist breached his duty by failing to report his findings to the patient. Instead, this issue was remanded to the trial court and, ultimately, will be determined by the jury after considering expert testimony. Thus, Dr. McCarver will be able to present expert testimony that he met his duty to the patient by correctly interpreting the chest x-ray and reporting his findings to the x-ray facility, which in turn provided the report to the employer.

Similarly, in other circumstances, experts will establish whether, for example, a consultant discharges his or her duty by providing the findings to the referring physician, rather than directly to the patient. The same considerations will apply in other circumstances such as independent medical examinations, employment physicals, and the like.

In other words, did the physician take reasonable steps under the circumstances in performing the exams and then reporting the results?

A traditional physician-patient relationship is no longer necessary for a physician to owe a duty to a patient. Instead, if there is a sufficient relationship, or nexus, between the patient and the physician, a court will hold a duty exists. The extent of the physician's duty to the patient, however, is a matter to be determined by clinical standards of practice.

With regard to the extent of any duty to report findings, we recommend that physicians consider the source of the referral, the method and who will report the findings to the patient. This is particularly important when, as in Stanley, a physician reports abnormal findings that may affect a patient's health. A consultant, whether physically examining and/or interpreting diagnostic tests, should consider who will communicate the results to the patient and by what method.

In some circumstances, a consultant may rely upon the referring physician to communicate with the patient. It is prudent to document this expectation and, if the patient is seen, to also advise the patient to contact the referring physician. Document any communication with the referring physician and/or the patient. In other circumstances, where there is no ordering physician, it may be prudent to request the patient's address in order to send a copy of the report. It may also be prudent to request that the referring physician or source communicate the results, and/or confirm that the results have been communicated to the patient.

The Mutual Insurance Company of Arizona has sample forms for documentation in order to track referrals or consultation requests. The forms may be accessed directly from the web site, [www.mica-insurance.com](http://www.mica-insurance.com), or by contacting the Risk Management Hotline at 800-352-0402 or 602-808-2137.

Communication is a critical component of the art and science of medicine. A properly performed evaluation may not be enough if there is a breakdown in the communication chain with the patient. For this reason everyone in the chain of communication may have a duty to either communicate directly with the patient or ensure that someone else communicates with the patient.

#### Footnotes

To establish a case of medical malpractice once a duty is owed, a plaintiff must establish breach of the duty and that the breach proximately caused injury and plaintiff's damages. See A.R.S. §§ 12-563 and 12-561(2).

92 P.3d 849 (2004).

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198 Ariz. 198, 8 P.3d 386 (App. 2000).

Under Arizona's workers' compensation statutes, an examining physician chosen by an employer has a legislatively imposed duty to communicate findings to the employer, insurer and the Industrial Commission. See A.R.S. §§ 23-908 and 23-1026.

*Medical Liability Update is a regular feature in AZMed. It is written by staff of the Risk Management Department of the Mutual Insurance Company of Arizona (MICA). Questions? Call 602-956-5276. This particular article was written by Paul J. Giancola, attorney with the Phoenix law firm, Snell & Wilmer.*