

As Chair of the Massachusetts Academy of Trial Attorneys' Amicus Curiae Committee, Attorney Conley has authored or co-authored numerous friend of the Court briefs for the Supreme Judicial Court and the Appeals Court.

The following brief addressing damages for loss of enjoyment of life was submitted in *Coombes v. Florio*, No. SJC-09869. The 2007 decision by a divided Court confirmed that a doctor may be liable to someone other than his or her patient for harm caused by the doctor's failure to warn of the side-effects of any prescribed treatment. 450 Mass. 182 (2007).

STATEMENT OF THE AMICUS CURIAE

The Massachusetts Academy of Trial Attorneys ("MATA"), amicus curiae, is a voluntary, non-profit, state-wide professional association of attorneys in the Commonwealth of Massachusetts. The mission of the Academy is to preserve the American jury system; to protect the health and safety of Massachusetts families; to improve the quality of legal representation through education; to educate the public about consumer issues; to uphold the honor and dignity of the legal profession; and to uphold and defend the Constitution of the United States and the Commonwealth of Massachusetts.

MATA offers its experience and perspective to this Honorable Court as amicus curiae to assist in the resolution of the important issue raised by this appeal.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

MATA agrees with the Plaintiff-Appellant's Statement of the Case and Prior Proceedings.

STATEMENT OF FACTS

MATA asserts that the summary judgment record viewed in the light most favorable to the plaintiff, supports the plaintiff-appellant's statement of the facts which can be summarized as follows. Roland J. Florio breached the applicable physician's standard of care by failing to recommend that his patient, David E. Sacca, refrain from driving. Dr. Florio was Sacca's primary care physician, was aware that Sacca suffered a variety of debilitating medical conditions which made it unsafe to drive, prescribed for Sacca medication which would impair Sacca's ability to safely operate a vehicle, and had in the past undertaken to restrict Sacca's operation of a vehicle. As a result of the absence of guidance or warning from Dr. Florio, Sacca operated a vehicle, experienced a black-out, and drove off the road, striking and killing a pedestrian, ten-year-old Kevin Coombes.

ISSUE PRESENTED

Whether a physician who deviates from the standard of care in treatment of a patient so as to cause or contribute to the patient becoming involved in a motor vehicle accident is exempt from liability to foreseeable victim-plaintiffs (other than the patient) injured or killed in the accident.

ARGUMENT

“[A] defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.”¹

“The concept of duty ... is only an expression of the sum total of considerations of policy which lead the law to say that the plaintiff is entitled to protection.”² Because the existence of a duty finds its source in social policy and values, “the existence or nonexistence of a duty is a question of law” that is appropriately decided by the courts. Because a duty to exercise reasonable care is derived from broad societal concerns with dangers posed to the public-at-large, the duty inquiry focuses on the conduct of the defendant and the general risk of harm created by that conduct measured at the time the dangerous conduct occurs. The precise manner of how a particular plaintiff encountered the risk and the unique sequence of events leading to the incident are unimportant to the duty inquiry. While “reasonable foreseeability” is undoubtedly a precondition to the

¹ *Jupin v. Kask*, 447 Mass. at 147, quoting *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal.3d 425, 434-35 (1976)(emphasis added).

² *Jupin v. Kask*, 447 Mass. 141, 146 (2006).

imposition of a duty, what must be foreseen is simply the general risk of harm to a broad type of plaintiff flowing from the defendant's conduct.³

In this case, the question is not whether to impose *any* duty of care, but whether the physician's admittedly existing duty extends beyond the patient to protect others foreseeably injured by the patient as a result of the physician's negligence. MATA adopts rather than repeating the plaintiff-appellant's argument that a duty arises in this case under *either* a special relationship analysis⁴ or under a recognition that the plaintiff adequately alleges that substandard medical care by the defendant affirmatively contributed to the creation of the danger which resulted in the accident with claimed Kevin Coombes' life.⁵

In determining the social advisability of imposing a duty, the Massachusetts appellate courts have considered a variety of factors: the degree of risk to the public and the severity of injury that might result from the defendant's conduct, the burden and cost to the defendant by imposing a duty, the presence or absence of recognized standards to guide a jury's determination of a breach of duty, and the existence of legislative enactments as expressions of societal values and expectations similar to the safety obligations the plaintiff seeks to impose under the common law.⁶ These criteria favor recognition that Dr. Florio owed a duty to Kevin Coombes and others foreseeably harmed by Mr. Sacca's impaired driving. The high degree of risk to the public and the severity of injury that might result from presence on the highway of drivers who by virtue of physical ailments or medication are significantly impaired and/or at risk of losing consciousness are readily apparent and well-illustrated by the circumstances of Kevin Coombes'

³ See *Jupin v. Kask*, *supra* at 147, citing *Husband v. Dubose*, 26 Mass.App.Ct. 667, 669 (1988); *Herbert v. Enos*, 60 Mass.App.Ct. 817, 821 (2004)(in determining a duty, courts look to whether the "general character and probability of the injury were foreseeable").

⁴ Plaintiff-Appellant Brief at 30-34; see *Jean W. v. Commonwealth*, 414 Mass. 496, 513-14 (1993).

⁵ Plaintiff-Appellant Brief at 20-28; see also Restatement (Second) Torts § 302 (Risk of Direct or Indirect Harm: "A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature.").

⁶ *Jupin v. Kask*, *supra* at 151-54; *Remy v. McDonald*, 440 Mass. 675, 677 (2004); *Doe v. Moe*, 63 Mass.App.Ct. 516, 521 (2005).

tragic death. The burden and cost to the defendant of imposing a duty is negligible; the plaintiff does not advocate imposing on physicians any requirements, responsibilities or standards beyond those to which they are already required to conform in the treatment of their patients.⁷ Similarly, because the question does not involve imposition of additional patient-care requirements, established principles of medical negligence law already provide recognized standards to guide juries' determination of a breach of duty.

The starting point for the analysis of the defendant's duty is the assumption, based here on an adequate record, that the defendant-physician was negligent towards the patient and that the physician's negligence led to the impaired driving which caused the subject accident. This Court has already recognized the reality that causing or permitting impaired operation of a motor vehicle gives rise to a foreseeable risk of car accidents causing injury or death to other travelers.⁸ The defendant does not assert that victims like Kevin Coombes are unforeseeable plaintiffs so much as he seeks to claim for one class of litigants an unwarranted exemption from the application of established tort principles as to liability and causation.

If a mechanic negligently permits a vehicle on the road with a dangerous condition that results in an accident, there is no doubt based on ordinary principles of foreseeability that he or she would be liable for resulting harm, not only to the customer-driver, but also to passengers, other motorists, pedestrians, and others foreseeably injured as a result of the accident.⁹

Here, a defendant-physician whose negligence contributed to the vehicle's operator being on the road in a dangerous condition would have the Court limit his responsibility to harm suffered by the patient-driver. Accepting such a limitation would create a bizarre scenario in which the defendant-physician who is found to have caused the accident would be responsible for the injuries to the patient-driver, but not for injuries suffered by a passenger or other motorists or pedestrians. The defendant might be chargeable for the damage to the patient-

⁷ The record does not support the alarmist suggestion that the customary duty would entail prohibitive economic cost in the form of insurance premiums or otherwise. The magnitude of any such cost, however, would relate directly to the frequency of physician negligence of the type alleged by the plaintiffs. A higher cost would necessarily signal more prevalent negligently inflicted injury and thus demonstrate the need for accountability more than a need for immunity.

⁸ *Cimino v. Milford Keg, Inc.*, 385 Mass. 323 (1982); *Irwin v. Ware*, 392 Mass. 745 (1984).

⁹ See, e.g., *Kennedy v. U-Haul Co.*, 360 Mass. 71 (1971); *Milham v. Paul Mitrano, Inc.*, 3 Mass.App.Ct. 73 (1971).

operated vehicle, but only if the patient owned the car, and in no event would he be liable for damage to anyone else's property. Courts would have to determine whether the defendant is also exempt from liability to other third parties, such as rescuers;¹⁰ or, on the other hand, whether such liability would extend only to rescuers of the patient-driver and not to those injured while coming to the aid of other accident victims. These unproductive distinctions are reminiscent of the discredited and abandoned privity-of-contract requirement¹¹ and lack any justification in public policy.¹²

CONCLUSION

Accordingly, for all of the foregoing reasons, and for the reasons set forth in the brief of the Plaintiff-Appellant, The Massachusetts Academy of Trial Attorneys, amicus curiae, urges the Court to rule that a physician who deviates from the standard of care in treatment of a patient so as to cause or contribute to the patient becoming involved in a motor vehicle accident owes a duty of care to any person foreseeably injured or killed in the accident – *i.e.*, owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.¹³

¹⁰ See *Hopkins v. Medeiros*, 48 Mass.App.Ct. 600 (2000). Restatement (Second) Torts § 445. *Edgerton v. H.P. Welch Co.*, 321 Mass. 603, 614 (1947).

Another imponderable would be the patient-driver's right to contribution from the physician who the victim-plaintiff could not sue directly. See *Liberty Mut. Ins. Co. v. Westerlind*, 374 Mass. 524 (1978) (language of M.G.L. c. 231B, § 1, providing that when two or more persons become jointly liable in tort for same injury there shall be right of contribution among them requires that potential contributor be directly liable to plaintiff).

¹¹ See, e.g., *Swartz v. General Motors Corp.*, 375 Mass. 628 (1978); *McDonough v. Whalen*, 365 Mass. 506, 512 (1974); *Carter v. Yardley & Co.*, 319 Mass. 92 (1946).

¹² See *Jean W. v. Commonwealth*, 414 Mass. 496, 512 (1993) (“Had the motorist run down a child on his bicycle or driven off the road and into someone's living room, the negligence [of police officers who negligently failed to take the drunk driver off the road] would have been the same.”), discussing *Irwin v. Ware*, 392 Mass. 745 (1985).

¹³ *Jupin v. Kask*, 447 Mass. at 147.

Respectfully submitted,

Amicus Curiae, The Massachusetts
Academy of Trial Attorneys,

Marsha V. Kazarosian (BBO# 262670)
President,
Massachusetts Academy of Trial
Attorneys
Kazarosian Law Offices
546 Main Street
Haverhill, MA 01830-3295
978-372-7758

J. Michael Conley (BBO# 094090)
Chair, Amicus Curiae Committee,
Massachusetts Academy of Trial
Attorneys
Kenney & Conley, P.C.
100 Grandview Road, Suite 218
Post Office Box 9139
Braintree, MA 02185-9139
781-848-9891

Joseph C. Borsellino (BBO# 551192)
Gillis & Bikofsky
1150 Walnut Street
Newton Highlands, MA 02461
617-244-4300

Dated: May 4, 2007