

**MOLLOY V. MEIER EXTENDS GENETIC COUNSELING
DUTY OF CARE TO BIOLOGICAL PARENTS AND
ESTABLISHES THAT LEGAL DAMAGES MUST OCCUR
BEFORE A WRONGFUL CONCEPTION ACTION
ACCRUES FOR STATUTE OF LIMITATIONS PURPOSES**

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I. INTRODUCTION

Inherited genetic disorders are a well-known cause of developmental delays in children. It is, therefore, “foreseeable” to physicians treating developmentally delayed children that parents of these children will rely on the physicians’ opinions of whether a

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genetic cause exists. Accordingly in 1992, when Dr. Diane Meier, a pediatrician, discovered developmental delays in S.F., the three-year-old daughter of Kimberly Flomer (now Molloy)¹ and Robert Flomer, “accepted standards of pediatric practice” required Dr. Meier to order genetic testing,² including testing for Fragile X Syndrome, one of the most common causes of inherited mental retardation.³ The foreseeable consequences of Dr. Meier’s alleged failure to obtain Fragile X testing and the timing of those consequences provide the factual basis for a genetic counseling medical malpractice action that raises unique and challenging issues involving the legal duty of a physician to a non-patient, the accrual of a cause of action for statute of limitations purposes, and the ability of parents to bring a wrongful conception cause of action for the birth of a child with a genetic disorder.⁴ In the case of *Molloy v. Meier*, the Minnesota Supreme Court analyzed these issues following a denial of summary judgment by the district court and affirmance by the Minnesota Court of Appeals.⁵

The purpose of this note is to analyze the court’s discussion of these issues, identify questions raised by the court’s rationale and its holding, and offer suggestions on how these questions might be addressed in the future.

II. STATEMENT OF FACTS

S.F. came under the care and treatment of Dr. Diane M. Meier, a pediatrician, at an early age.⁶ When S.F. was three years old, Dr. Meier discovered that S.F. was developmentally delayed.⁷ On May 18, 1992, Dr. Meier met with Molloy, Robert Flomer, and S.F. to discuss possible causes for S.F.’s developmental delays, including the possibility of a genetic cause.⁸ As a result of that meeting, Dr. Meier agreed to order genetic tests to determine if S.F. had an inherited genetic disorder.⁹

1. Kimberly Flomer later married Glenn Molloy, and took his surname. For the sake of convenience, this article will most often refer to her simply as “Molloy.”

2. *See* *Molloy v. Meier*, 679 N.W.2d 711, 714 (Minn. 2004).

3. *Id.* n.2.

4. *See id.* at 716.

5. *Id.* at 715–16.

6. *Id.* at 713–14.

7. *Id.* at 714.

8. *Id.*

9. *See id.*

Dr. Meier's notes and her subsequent testimony establish that she intended to order chromosomal testing and testing for Fragile X Syndrome.¹⁰ Fragile X Syndrome is an "X-linked" single gene disorder.¹¹ Dr. Meier conceded "it was appropriate to test [S.F.] for Fragile X in keeping with accepted standards of pediatric practice on May 18, 1992."¹² Molloy contended that if S.F. tested positive for the genetic disorder, Molloy should have been tested as well, though Dr. Meier did not concede this.¹³

Pursuant to Dr. Meier's directions, S.F. underwent genetic testing at North Memorial Medical Center on June 17, 1992.¹⁴ Although she intended to order both chromosome and Fragile X testing, Dr. Meier testified that no testing for Fragile X was performed.¹⁵ On July 18, 1992, North Memorial's laboratory reported to Dr. Meier that the chromosome testing was "normal."¹⁶ Thereafter, Dr. Meier telephoned Molloy and Robert Flomer and advised them that the test results were "normal."¹⁷ Molloy and Flomer assumed that the Fragile X testing had been completed as well, and therefore assumed that the negative or normal test results included a negative result for Fragile X.¹⁸

In addition to examinations by Dr. Meier, S.F. was examined on June 23, 1992, by Dr. Reno Backus, a pediatric neurologist, and on April 30, 1996, by Dr. Kathryn Green, also a pediatric neurologist.¹⁹ Neither Dr. Backus nor Dr. Green recommended or ordered testing for Fragile X Syndrome.²⁰ The plaintiff identified expert testimony stating that accepted standards of medical practice under the circumstances required Dr. Backus and Dr. Green to consider a genetic cause for S.F.'s pervasive

10. *Id.*

11. A person with Fragile X Syndrome has a mutation of the DNA on the FMRI gene of the X chromosome that results in a failure of the person to make a specific protein. The absence of this protein sets in motion a cascade of biochemical events that result in the characteristics of Fragile X Syndrome. Accordingly, a child can inherit an X chromosome carrying the mutant FMRI gene from either or both parents. *See id.* at 714 n.2.

12. *Id.* at 714.

13. *Id.*

14. *Id.*

15. *Id.* n.3.

16. *Id.* at 714.

17. *Id.*

18. *Id.*

19. *Id.* at 714–15.

20. *Id.* at 715.

developmental delay and to order genetic testing, including a test for Fragile X Syndrome.²¹

Sometime after 1992, Kimberly Flomer married Glenn Molloy.²² On June 30, 1998, Kimberly Molloy gave birth to M.M., who showed signs of the same developmental difficulties as S.F.²³ M.M.'s pediatrician ordered Fragile X testing and the results were positive.²⁴ M.M.'s pediatrician then counseled Kimberly and Glenn Molloy about Fragile X Syndrome and recommended that they and other potentially affected family members receive testing.²⁵ Subsequent tests revealed that both S.F. and Kimberly Molloy tested positive for Fragile X.²⁶ Molloy commenced a cause of action against Drs. Meier, Backus, and Green on August 23, 2001.²⁷ After some discovery, defendants moved for summary judgment.²⁸

The district court denied defendants' motion for summary judgment and certified three questions to the court of appeals.²⁹ The court of appeals affirmed the district court and review was granted by the Minnesota Supreme Court.³⁰ The three certified questions were as follows:

- (a) Does a physician who allegedly fails to test for and diagnose a genetic disorder in an existing child leading to the birth of a subsequent child with that disorder owe a legal duty to the child's parents?
- (b) When does the statute of limitations begin to run pursuant to Minn. Stat. § 541.076 (2002) in a parents' medical negligence claim alleging failure to test for and diagnose a genetic disorder in an existing child leading to the birth of a subsequent child with that disorder?
- (c) Does Minn. Stat. § 145.424 prohibit parents from bringing an action alleging that they would not have conceived the subsequent child described in question (b)?³¹

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 715.

29. *Id.* at 715–16.

30. *Id.* at 713, 716.

31. *Id.* at 716.

The court of appeals used *Skillings v. Allen*³² to guide its analysis in determining whether a duty runs to the parents in this case. In *Skillings*, a physician negligently advised the parents of a minor child regarding the safety of visiting their child who was hospitalized with scarlet fever. Relying on the physician's advice, the parents visited their child, and subsequently both parents contracted scarlet fever.³³ In holding that the physician was liable for negligently advising the parents, and finding that a duty flowed from the physician to the minor patient's parents, the *Skillings* court held that the parents received negligent advice from the physician, and that it was foreseeable the parents would rely on this advice.³⁴ In *Molloy*, the court of appeals reasoned that, as in *Skillings*, there was evidence in the record that Kimberly Molloy received and relied upon direct advice from the defendants. The court noted that the genetic testing that was discussed was not ordered to benefit S.F., but to inform Molloy whether she was a carrier for the genetic abnormality.³⁵ The court concluded that the physicians involved had a duty to properly advise S.F.'s biological parents when advising about the risks of conceiving a subsequent child.³⁶

Next, the court of appeals considered the question of when the cause of action accrued. Citing *Offerdahl v. University of Minnesota Hospital & Clinics*³⁷ and *Peterson v. St. Cloud Hospital*,³⁸ the court held that it is the alleged negligence *combined* with the alleged resulting damage that determines when the cause of action accrues.³⁹ Finding that damage did not occur until conception of M.M., the court held that the cause of action accrued in September, 1997, and therefore was not time-barred by the limitations period in Minnesota Statutes section 541.076.⁴⁰ Finally, the court held that the plain language of Minnesota Statutes section 145.424 does not prohibit wrongful conception actions.⁴¹

32. 143 Minn. 323, 173 N.W. 663 (1919).

33. 143 Minn. at 324, 173 N.W. at 663.

34. 143 Minn. at 324-25, 173 N.W. at 663.

35. *Molloy v. Meier*, 660 N.W.2d 444 (Minn. Ct. App. 2003).

36. *Id.* at 453.

37. 426 N.W.2d 425, 429 (Minn. 1988).

38. 460 N.W.2d 635 (Minn. Ct. App. 1990).

39. *Molloy*, 660 N.W.2d at 455.

40. *Id.* at 456.

41. *Id.*

III. SUPREME COURT'S ANALYSIS

A. *A Physician's Duty to Inform Biological Parents About Genetic Implications of a Child's Genetic Disorder*

The issue regarding legal duty was framed as follows: Molloy argued that a physician-patient relationship existed between her and the physician defendants that "gave rise to a legal duty to warn her about the risks of becoming pregnant as a carrier of Fragile X."⁴² Molloy further argued that "even if a physician-patient relationship [could not] be established, a physician's duty to warn [non-patients] of a patient's genetic disorder arises from the foreseeability of injury."⁴³ The physicians, on the other hand, argued they owed a duty only to S.F., and such duty did not extend to any family members.⁴⁴

A medical malpractice action is based upon the principles of tort liability for negligence. To establish a prima facie case of medical malpractice for negligent medical treatment, a plaintiff must show:

- (1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct;
- (2) that the defendant in fact departed from that standard;
- (3) that the defendant's departure from that standard was a direct cause of the patient's injuries; and
- (4) legal damages.⁴⁵

Generally, the legal duty arises from the physician-patient relationship. Therefore, the existence of a physician-patient relationship is an essential element of proof in a medical malpractice action.⁴⁶ The physician-patient relationship is a fiduciary relationship in which it is foreseeable that negligent or

42. *Molloy v. Meier*, 679 N.W.2d 711, 716 (Minn. 2004).

43. *Id.* at 716-17. *See, e.g.*, *Lundgren v. Fultz*, 354 N.W.2d 25, 28-29 (Minn. 1984); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919).

44. *Molloy*, 679 N.W.2d at 717; *see also* *McElwain v. Van Beek*, 447 N.W.2d 442, 446 (Minn. Ct. App. 1989).

45. *Plutshack v. Univ. of Minn. Hosp.*, 316 N.W.2d 1, 5 (Minn. 1982); *Miller v. Raen*, 273 Minn. 109, 113, 139 N.W.2d 877, 880 (1966) (including actual loss or damage as an element of malpractice).

46. *McElwain*, 447 N.W.2d at 445 (requiring doctor to exercise a certain degree of care and skill until the end of the doctor-patient relationship).

below standard care will result in harm; thus, the existence of a duty.⁴⁷

The question whether a physician owes a duty to inform a child's biological parents about genetic implications of that child's genetic disorder was one of first impression in Minnesota.⁴⁸ The supreme court began its analysis by noting that the existence of a duty to a third party who is not a patient of the physician had been recognized in only a few Minnesota cases.⁴⁹ For example, in *Skillings*, a minor child was hospitalized with scarlet fever.⁵⁰ When the parents asked the child's physician about the nature of the disease and the risk of infection, the physician negligently informed the parents that they could safely visit their daughter in the hospital and take her home even though the disease was in its most contagious stage.⁵¹ The *Molloy* court quoted *Skillings* for the proposition that "one is responsible for the direct consequences of his negligent actions whenever he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct, he will cause injury to that person."⁵² The *Molloy* court added that "liability extends to the parents because the physician had an obligation to use due care in a situation where it was likely known that the parents would rely on the advice."⁵³

Similarly, the *Molloy* court relied upon *Cairl v. State*.⁵⁴ In *Cairl*, the court held that a treatment facility might owe a duty to warn identifiable third parties of violent propensities of a mentally disabled youth whom it released if that youth posed a specific threat to those parties.⁵⁵

Finally, the court relied upon *Lundgren v. Fultz*.⁵⁶ The facts in *Lundgren* emphasize the roles of foreseeability and control or ability

47. *Id.*

48. *Molloy*, 679 N.W.2d at 717.

49. *Id.* (citing *Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984); *Cairl v. State*, 323 N.W.2d 20 (Minn. 1982); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919)).

50. 143 Minn. at 324, 173 N.W. at 663.

51. *Id.*

52. *Molloy*, 679 N.W.2d at 717 (citing *Skillings*, 143 Minn. at 325-26, 173 N.W. at 663-64).

53. *Id.* at 717.

54. See 323 N.W.2d at 25-26 (finding a duty to warn when a specific threat is made against specific victims).

55. *Id.* at 25.

56. See 354 N.W.2d at 25.

to control in the determination of legal duty.⁵⁷ In *Lundgren*, the action was commenced by the husband of a woman who was killed by a psychiatrist's patient in a random act of violence.⁵⁸ The evidence established that the psychiatrist had treated the patient for paranoid schizophrenia that manifested itself in violent and threatening behaviors.⁵⁹ After a period of treatment including psychotropic medications, the patient appeared to be in remission.⁶⁰ At one point in the treatment process, the University of Minnesota Police Department suggested that the patient's guns be confiscated.⁶¹ The treating psychiatrist and the patient's wife agreed, and the guns were brought to the police for safekeeping.⁶² After the patient's release from treatment, he sought return of his guns from the university police.⁶³ The police contacted the psychiatrist and the psychiatrist wrote a letter stating that the patient had recovered from his mental illness and that the guns could be returned to the patient.⁶⁴ After receiving the letter, the police turned over the guns to the patient who, several months later, used one of the guns to shoot and kill the plaintiff's wife in an "unprovoked and random attack."⁶⁵

The trial court granted summary judgment, asserting that the defendant psychiatrist had no duty to control the conduct of a third person to prevent the third person from causing injury or harm to another.⁶⁶ The Minnesota Supreme Court noted that the psychiatrist had played an active role in allowing his patient to have access to the guns and, therefore, there was a genuine issue of fact as to whether the psychiatrist had the ability to control the access to the guns and whether there was foreseeable harm.⁶⁷ The court noted, "Foreseeability has been called the fundamental basis of the law of negligence. Justice Cardozo succinctly expressed the central relationship between the foreseeability of harm and the existence of a legal duty in *Palsgraf*, stating that 'the risk reasonably to be

57. *Id.* at 28 (imposing duty to control when the harm is foreseeable).

58. *Id.* at 26-27.

59. *Id.* at 26.

60. *Id.*

61. *Id.* at 27.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 26.

67. *Id.* at 28.

perceived defines the duty to be obeyed. . . .”⁶⁸ The *Lundgren* court held that close questions on foreseeability should be submitted to the jury.⁶⁹

In citing *Skillings, Cairl, and Lundgren*, the *Molloy* court recognized and followed the long established legal precedent that foreseeability of harm defines legal duty. The court also referenced an attorney malpractice case, *Togstad v. Vesely, Otto, Miller & Keefe*, noting the importance of the client’s reliance upon the advice of the attorney, and finding that there was sufficient evidence to support an attorney-client relationship because it was reasonably foreseeable that negligent advice would injure the plaintiff.⁷⁰

The *Molloy* court also found persuasive decisions from other jurisdictions that held that a physician owed a legal duty to the family of a patient who received negligent care in the field of genetics.⁷¹ The *Molloy* court found the analysis of the Supreme Court of Florida in the case of *Pate v. Threlkel* particularly helpful. There the Florida court held that a duty exists where “the prevailing standard of care creates a duty that is obviously for the benefit of certain identified third parties and the physician knows of the existence of those third parties.”⁷² Following the example of *Pate*, the *Molloy* court observed that

the legal duty of physicians will be driven, at least in part, by the standard of care in the medical profession. As this occurs, it is unlikely that the medical community will adopt a standard of care that is either unduly burdensome

68. *Id.* (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)); *see also* *Christianson v. Chicago, St. Paul, Mpls. & Omaha Ry. Co.*, 67 Minn. 94, 97, 69 N.W. 640, 641 (1896) (Mitchell, J.) (“What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent.”); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 31, 43 (4th ed. 1971).

69. *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984).

70. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980).

71. *Molloy v. Meier*, 679 N.W.2d 711, 718 (Minn. 2004) (citing *Schroeder v. Perkel*, 432 A.2d 834, 839 (N.J. 1981) (holding that where a physician failed to diagnose cystic fibrosis in a first-born child, it was foreseeable that the parents would rely on the diagnosis, leading to the conception and birth of a second child with cystic fibrosis, and consequently liability attached); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1205 (Colo. 1988) (holding the failure of a physician to diagnose a hereditary cause of blindness resulting in the conception of a subsequent child born with blindness stated a cause of action)).

72. *Pate v. Threlkel*, 661 So. 2d 278, 282 (Fla. 1995).

or unbeneficial to patients. . . . 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.⁷³

The court then held that a "physician's duty regarding genetic testing and diagnosis extends beyond the patient to the biological parents who foreseeably may be harmed by a breach of that duty."⁷⁴ In this case, the parents were of childbearing years and it was foreseeable that they would conceive another child absent the knowledge of the genetic disorder.⁷⁵ The doctors therefore owed a duty not only to S.F., but also to her parents.⁷⁶ The scope of that duty could be determined by the accepted standards of practice.

The court's holding on legal duty was limited to the biological parents.⁷⁷ The court did not address whether the duty recognized in *Molloy* extends beyond biological parents to others who foreseeably will rely on genetic testing and diagnosis and, therefore, foreseeably may be injured by the negligence in discharging the duty of care.⁷⁸

In summary, the *Molloy* court relied upon the evidence of a standard of care to test for genetic disorders under these circumstances in concluding that not only did biological parents rely upon genetic counseling under these circumstances, but that it was foreseeable that negligent counseling would result in harm. That duty is defined by the foreseeability of harm.⁷⁹

B. Genetic Counseling Action "Accrued" on Date of "Legal" Damage

The second certified question concerned the application of Minnesota Statutes section 541.076 (b). This statute provides that a medical malpractice cause of action "must be commenced within four years from the date the cause of action accrued."⁸⁰ *Molloy* commenced her cause of action in August of 2001, more than four

73. *Molloy*, 679 N.W.2d at 719.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 720.

78. *Id.*

79. *Id.*

80. MINN. STAT. § 541.076 (b) (2002).

years after S.F.'s last treatment by any of the defendants, but within four years of the date of M.M.'s conception and birth.

Minnesota courts have long applied the so-called "termination of treatment" rule to establish when a cause of action accrues.⁸¹ The termination of treatment rule recognizes that where the negligence is a failure to properly diagnose and treat a condition, it may be difficult to determine when in the course of treatment the physician breached a duty.⁸² Under those circumstances, the courts have applied the termination of treatment rule and have held that a medical malpractice cause of action will not accrue until the patient ceases treatment with the defendant physician.⁸³ Essentially, under this rule, it is assumed that the negligent conduct of the physician occurred on the last date of treatment unless the plaintiff's injury was caused by a discrete, identifiable act.⁸⁴ The defendant physicians advocated application of the termination of treatment rule, arguing that the Molloy's action was therefore time-barred.⁸⁵

However, Minnesota courts have also held that a cause of action does not "accrue" until it may be brought without dismissal for failure to state a claim upon which relief may be granted.⁸⁶ As stated in *Offerdahl*, "[a]lleged negligence coupled with the alleged resulting damage is the gravamen in deciding the date when a cause of action accrues."⁸⁷ An example of the application of this rule is *Peterson v. St. Cloud Hospital*.⁸⁸ In that case, a pathologist negligently analyzed a specimen from a brain tumor and concluded that the specimen was malignant.⁸⁹ Several weeks later, the patient began chemotherapy and radiation therapy.⁹⁰ Several months later, however, it was determined that the pathologist was

81. See *Grondahl v. Bulluck*, 318 N.W.2d 240, 243 (Minn. 1982); *Schmitt v. Esser*, 178 Minn. 82, 86, 226 N.W. 196, 197 (1929).

82. See *Offerdahl v. Univ. of Minn. Hosp. & Clinics*, 426 N.W.2d 425, 429 (Minn. 1988) (citing *Swang v. Hauser*, 288 Minn. 306, 180 N.W.2d 187, 189 (1970)).

83. See *Grondahl*, 318 N.W.2d at 243; *Schmitt*, 226 N.W. at 197.

84. See *Offerdahl*, 426 N.W.2d at 429.

85. *Molloy v. Meier*, 679 N.W.2d 711, 720 (Minn. 2004).

86. *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 152-53, 158 N.W.2d 580, 584 (1968).

87. 426 N.W.2d at 429 (applying the holdings of *Dalton* in the medical malpractice context).

88. 460 N.W.2d 635 (Minn. Ct. App. 1990).

89. *Id.* at 637.

90. *Id.*

in error and that the patient did not have a malignant condition.⁹¹

The patient commenced a medical malpractice action against the pathologist.⁹² At the time the action was commenced, the statute of limitations for medical malpractice actions was two years from the date the cause of action accrued.⁹³ The plaintiff commenced his action more than two years after the date of the misdiagnosis but less than two years after the date he began chemotherapy treatment.⁹⁴ The court of appeals held that the patient sustained no harm until the date of chemotherapy and, therefore, the cause of action did not accrue until that date.⁹⁵ Prior to the date of chemotherapy, the plaintiff's cause of action would not have survived a motion to dismiss for failure to state a claim.⁹⁶

Relying upon the rationale of *Offerdahl* and *Peterson*, Molloy argued that there was no harm until M.M. was conceived and, therefore, the cause of action did not accrue until that date.⁹⁷ Stated another way, any action commenced by Molloy prior to the date of M.M.'s conception would have not survived a motion to dismiss for failure to state a claim upon which relief may be granted.⁹⁸

The supreme court's analysis in *Molloy* essentially treated the task as one of statutory construction. The statute provided that the cause of action "must be commenced within four years from the date the cause of action accrued."⁹⁹ The *Molloy* court reasoned: "An action does not 'accrue' until it may be brought without dismissal for failure to state a claim upon which relief may be granted."¹⁰⁰ "According to Webster's Dictionary, 'accrue' is defined as 'to come into existence as an enforceable claim: vest as a right.'"¹⁰¹ "In the context of a malpractice action, the action accrues when the plaintiff establishes each of the four elements of negligence."¹⁰²

91. *Id.*

92. *Id.*

93. MINN. STAT. §§ 541.01, 541.07(1) (1988).

94. *Peterson*, 460 N.W.2d at 637.

95. *Id.* at 639.

96. *See id.*

97. *Molloy v. Meier*, 679 N.W.2d 711, 720 (Minn. 2004).

98. *Id.*

99. *Id.* at 721 (quoting MINN. STAT. § 541.076(b) (2002) (emphasis added)).

100. *Id.* (citing *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 152-53, 158 N.W.2d 580, 584 (1968)).

101. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 13 (3d ed. 1961)).

102. *Id.* (citing *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn.

The four elements of negligence are duty, breach of duty, causal harm, and legal damages.¹⁰³ The *Molloy* court observed that even though “there is no dispute that the alleged breach of duty occurred on the last date of treatment for each physician . . . the cause of action will not accrue until plaintiff has suffered some injury, so the question is: What is the injury and when did it occur?”¹⁰⁴ It was Molloy’s claim that the harm occurred at the date of conception and that all damages occurred on or after that date.

The defendant doctors cited *Fabio v. Bellomo*,¹⁰⁵ arguing that in a case of misdiagnosis, the action accrues on the date of the misdiagnosis.¹⁰⁶ *Fabio* raised the accrual issue in the context of the repeated failure of a physician to diagnose breast cancer in his patient. Understanding the facts in *Fabio* are crucial to understanding its holding. The plaintiff in *Fabio* treated with the defendant, Bellomo, from 1977 until 1986.¹⁰⁷ The plaintiff alleged that on one occasion between 1982 and 1984 and on another occasion, March 10, 1986, plaintiff had complained of a lump in her left breast.¹⁰⁸ On both occasions, defendant Bellomo told plaintiff “not to worry” because the lump was a fibrous mass.¹⁰⁹ After March 10, 1986, Dr. Bellomo retired and plaintiff switched her care to another physician.¹¹⁰ In 1987, that physician recommended a mammogram and thereafter diagnosed a breast cancer that had metastasized to four lymph nodes.¹¹¹ The plaintiff offered expert testimony that Dr. Bellomo had departed from accepted standards of practice in failing to offer mammography at the time the plaintiff had complained of a lump prior to 1984 and in 1986.¹¹² In addition, expert testimony established that the cancer had “more probably than not” spread from the breast to the lymph nodes between 1984 and 1987.¹¹³ However, the plaintiff failed to offer any evidence that her cancer would recur or that she

1982)).

103. PROSSER, *supra* note 68, at 143–45.

104. *Molloy*, 679 N.W.2d at 721.

105. 504 N.W.2d 758 (Minn. 1993).

106. *Molloy*, 679 N.W.2d at 720.

107. *Fabio*, 504 N.W.2d at 760.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 761.

had a diminished life expectancy.¹¹⁴ Therefore, even after diagnosis and treatment, it was “more probable” that the plaintiff was cured of her cancer.¹¹⁵

The plaintiff commenced a timely action alleging negligence for the misdiagnosis on March 10, 1986.¹¹⁶ Prior to trial, plaintiff sought to amend her complaint to include an allegation of negligence for the misdiagnosis that occurred prior to 1984.¹¹⁷ The district court denied the motion to amend.¹¹⁸ The supreme court affirmed the district holding that examination of the breast before 1984 was not part of a continuing course of treatment and the motion to amend should be denied because more than two years had passed.¹¹⁹ The implication of the holding was that the statute of limitations began to run on the date of misdiagnosis. However, the court did not address if or when any legal damage had occurred. There was an absence of proof on the extent of legal damages and, therefore, denial of plaintiff’s motion to amend was not an abuse of discretion.¹²⁰ Importantly, the *Fabio* court did not decide, and did not even address, whether “some damages,” the ongoing presence of cancer cells, was enough for the cause of action to accrue.

Returning to *Molloy*, the defendants cited *Fabio* for the proposition that “some damage occurs as ‘a matter of law’ when the physician fails to make a correct diagnosis and recommend the appropriate treatment.”¹²¹ The *Molloy* court accepted this proposition in its attempt to distinguish the holding in *Molloy* from the holding in *Fabio*:

We agree with the conclusion of the court of appeals on this point. The misdiagnosis in *Fabio* caused the plaintiff immediate injury in the form of a continually growing cancer, which became more dangerous to the plaintiff each day it was left untreated. The action accrued at the time of misdiagnosis because some damage occurred

114. *Id.* at 763.

115. *Id.*

116. *Id.* at 760.

117. *Id.*

118. *Id.* at 761.

119. *Id.* at 762. The statute of limitations for malpractice actions was two years at that time. MINN. STAT. § 541.07 (1986).

120. *Fabio*, 504 N.W.2d at 762.

121. *Molloy v. Meier*, 679 N.W.2d 711, 721 (Minn. 2004) (citing *Fabio*, 504 N.W.2d at 762).

immediately. In the case of failure to diagnose Fragile X, however, the error does not directly damage the patient and but for the fact that she conceived another child, Molloy would have suffered no damage. . . .¹²²

The court reasoned that a claim based on negligence in failing to diagnose a genetic condition in a child accrues on the date of conception of a subsequent child because no damage occurs until that date.¹²³ In *Molloy*, M.M. was conceived in September 1997 and the action was commenced in August 2001, falling within the four-year statute of limitations.¹²⁴

The attempt to distinguish *Molloy* and *Fabio* is based on a misunderstanding of the holding in *Fabio* and results in a different definition of “accrued” as used in Minnesota Statutes section 541.076, depending on whether the action involves a failure to diagnose a genetic condition (“legal” damage is required) or a failure to diagnose cancer (only “some” damage, the presence of cancer cells, is required). The “some” damage definition of accrual in the delay of diagnosis of cancer cases is, however, directly contrary to the holding in *Leubner v. Sterner*,¹²⁵ a tumor’s “unchecked growth” is not considered legal damages unless there is also proof that it is more probable than not that plaintiff will not survive her cancer because of the “unchecked growth.”¹²⁶

In most cases involving a misdiagnosis of cancer, no “legal” damage occurs until the passage of time causes the patient’s prognosis to change from a probability of survival (with timely treatment) to a probability of death (with delayed treatment).¹²⁷ *Leubner* very clearly held that a negligent misdiagnosis case does not exist until some legal damage occurs even though the presence of cancer cells in the patient’s body causes “some harm” on the date of misdiagnosis.¹²⁸ Accordingly, there is an inconsistency in the definition of accrual in a misdiagnosis of cancer cause of action. A plaintiff in such a case must establish legal harm, as defined by

122. *Id.* at 722.

123. *Id.*; see *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 174–75 (Minn. 1977).

124. *Molloy*, 679 N.W.2d at 722.

125. 493 N.W.2d 119 (Minn. 1992).

126. *Id.* at 121.

127. See, e.g., *Leubner v. Sterner*, 493 N.W.2d 119 (Minn. 1992).

128. *Id.* at 121; see also *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 154, 158 N.W.2d 580, 585 (1968) (quoting *Brush Beryllium Co. v. Meckley*, 284 F.2d 797, 800 (6th Cir. 1960) (cause of action accrues when plaintiff sustains *some* damage)).

Leubner, in order to survive a motion to dismiss for failure to state a claim for relief. In contrast, a defendant bringing a motion for summary judgment based upon the statute of limitations would only have to establish “some damage,” the presence of cancer cells. In *Molloy*, the supreme court tacitly approved the “some damage” rule of accrual without analyzing whether plaintiff sustained “legal damage” as defined by *Luebner*.¹²⁹

IV. IMPLICATIONS OF *MOLLOY*

A. *Legal Duty*

The holding in *Molloy* recognizes a legal duty on the part of a physician ordering genetic tests, and extends that duty to the patient’s biological parents who are in the child-bearing years.¹³⁰ The court specifically reserved for another time, however, the issue of whether the duty extends to other relatives.¹³¹ Clearly, the existence of the Fragile X gene in a child could have genetic implications for other relatives such as siblings of the child’s biological parents. Applying the foreseeability of harm rule, one could argue that it is foreseeable that other relatives would be harmed by negligence in performing the genetic counseling role. The *Molloy* decision raises such questions as whether the duty extends to other relatives, and whether the duty is satisfied by advising the biological parents of all genetic implications.

Perhaps these issues will be determined by the standards of practice that develop in response to *Molloy*. If physicians who perform genetic testing establish a standard of care of notifying biological parents, following the court’s rationale in *Molloy*, the duty would then be limited to biological parents. In the alternative, this is an issue that might be appropriate for legislation. Following the 1984 decision of *Lundgren v. Fultz*,¹³² and the 1982 decision of *Cairl v. State*,¹³³ the legislature enacted Minnesota Statutes section 148.975. This statute defines the duty to warn a third party of a violent threat made by a patient¹³⁴ and also established that a

129. *Molloy*, 679 N.W.2d at 721–22.

130. *Id.* at 719–20.

131. *Id.* at 720.

132. 354 N.W.2d 25 (Minn. 1984).

133. 323 N.W.2d 20 (Minn. 1982).

134. MINN. STAT. § 148.975, subd. (2) (2004).

practitioner had immunity if he or she made a good faith effort to warn against or take precautions against a patient's violent behavior.¹³⁵ In the genetic counseling arena, such legislation could identify the scope of the duty and provide that the duty is satisfied by providing the information to a defined class of relatives such as the parents and siblings of the patient. Such legislation would have to take into account the potential privacy issues as well.¹³⁶

B. Statute of Limitations

The *Molloy* court's holding that the cause of action does not accrue until conception could result in a timely action being commenced several years after the medical treatment ended. Accordingly, concerns regarding stale claims and the ability to provide an adequate defense will exist. Perhaps a solution to this issue would be a statute of repose that would require any such claims be commenced within a certain number of years of the date treatment terminated.

An equally perplexing problem created by *Molloy* is reconciling the difference between "accrual" of an action for failure to diagnose a genetic condition and "accrual" of an action for failure to diagnose cancer. The application of the rule that a cause of action does not accrue until "legal" damage occurs would require the court to overrule *Fabio* and modify its suggestion that "some" damage, the unchecked growth of cancer, is sufficient for accrual for statute of limitations purposes. Instead, the court would need to hold that an action arising from a delay in the diagnosis of cancer will not accrue until the patient sustains the legal damages as set forth in *Leubner*. That is, there can be no accrual until the patient's prognosis changes from a probability of survival to a probability of death.

135. MINN. STAT. § 148.975, subd. (8) (2004).

136. The Health Insurance Portability and Accountability Act (HIPAA), passed by Congress in late 1996, includes patient privacy protections designed to safeguard the security and confidentiality of health information. Health Insurance Portability and Accountability Act, 42 U.S.C. §§ 1320a-7c to -7e (1996). The legislation does not restrict the ability of doctors and other health care providers to share information that is required for patient treatment. *Id.* If legislation were passed requiring the distribution of the results of genetic testing to an identified class, providers would be well advised to provide notice to their patients on the potential use of their identifiable medical information and their rights in this regard.

V. CONCLUSION

The *Molloy* decision breaks new ground in Minnesota by determining that medical practitioners who perform genetic testing owe a legal duty of care to persons other than the patient being tested. That duty now extends to biological parents of the patient. In addition, the *Molloy* court adopts a definition of accrual that looks to the date actual legal harm occurs. Unfortunately, the court's attempt to distinguish *Fabio* has created uncertainty. This uncertainty will require further analysis by the supreme court in future decisions.