I don't have to tell you that

Laurance Jerrold
Brooklyn, NY

Romanelli v Jones, 2017 NY Slip Op 50306(U) presented some interesting analogies to orthodontics. The plaintiff was a doula; for those of you who don't know what that is, Wikipedia defines it as "…a birth companion, birth coach or post-birth supporter, a non-medical companion who supports a birthing woman by providing continuous care before, during, or after childbirth in the form of information, physical support, and emotional support." In this case, her third child was due shortly. Her first 2 babies, twins, had been delivered via cesarean section, and she wanted to give birth naturally, by vaginal birth after cesarean (VBAC). The court filings show that she harbored a healthy "distrust of the 'male merchants' who dominate the field of obstetrics," and who use a "male lens through which both laymen and male obstetricians that personify the medical-industrial model of childbirth view childbirth."

> Analogy, part 1: A patient who previously underwent orthodontic treatment and who experienced subsequent relapse, and who now, years later, is seeking retreatment, essentially views and distrusts the orthodontic establishment as a bunch of guys who provide treatment that doesn't hold up.

The plaintiff, therefore, sought out a midwife to facilitate an at-home vaginal delivery. The midwife explained the risks involved and even provided the plaintiff with Internet links to NIH information concerning the dangers of at-home VBAC. She also provided an informed consent form, which the plaintiff decided to edit and re-write to her liking. The edits pertained to the plaintiff's views regarding the safety of at-home delivery.

> Analogy, part 2: The patient is now deciding between retreatment by an orthodontist or at-home do-it-yourself orthodontics. She is an intelligent 40-year-old who has degrees in both theater and psychology (as was the plaintiff in the real case) but carries some personal biases. She came to you to take advantage of your "free screening" in order to get an idea of the relative complexities involved in her case. What she was really doing was attempting to rationalize utilizing at-home aligner therapy.

What makes *Romanelli* especially interesting to us is the involvement of an intermediary. The first defendant was the midwife, and the intermediary, a physician who practiced maternal-fetal medicine, was the second defendant. During the at-home birth, the mother suffered a ruptured uterus. She died, and the baby was stillborn.

> Analogy, part 3: Our patient decided on at-home aligner therapy, and during the course of her unmonitored therapy, she ultimately suffered iatrogenic damages: root resorption, periodontal compromise, temporomandibular dysfunction (pick one; this is like one of those stories I read my grandkids, you get to decide what happens next).

The physician intermediary was a consultant; he did not have hospital privileges; he did not engage in delivering babies, nor did he recommend methods of delivery. His practice was solely devoted to performing prenatal ultrasounds and prepartum obstetric physical examinations and tests; and if he discovers fetal abnormalities, he reports them to the obstetrician or midwife. The plaintiff had instructed the doctor that she did not want to be informed about any of the baby's characteristics such as sex, weight, etc.

> Analogy, part 4: Our patient was instructed by the aligner manufacturer to send in whatever records they requested, and they would be reviewed by an "intermediary" dentist who would then determine whether or not she was a suitable candidate and who would prescribe a set of aligners to address her needs. The intermediary would never actually examine or treat the patient but would only be involved in the review of her records and okay the proposed tooth movement.

As it turns out, the plaintiff was 9 days past her due date when she went for another ultrasound. The baby at this point was estimated to be 10 lbs 9 oz. All other examinations and test results were normal. The doctor informed the midwife of the baby's size and warned her to proceed with caution. The midwife disagreed with the doctor and his interpretation of the ultrasound,

Chair, Division of Orthodontics, and Program Director, Orthodontics and Dentofacial Orthopedics, NYU Langone Hospital, Brooklyn, NY.
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instead relying on the "Leopold Method" that employed hand measurements to gauge the baby's size and weight; her conclusion was that the baby weighed 7 lbs 12 oz which was deemed to be within normal size thus negating any concerns of uterine compromise. The midwife testified that she tried to discuss the baby's "macrosomic" size with the plaintiff and advised her of several possible complications associated with a large baby being delivered by VBAC, but the plaintiff refused to yield to any concerns. The court's opinion then described, in detail, a minute by minute recitation of the plaintiff going into labor at home, calling emergency services, and ultimately, her death along with the stillborn fetus.

The lawsuit's main action charged both the midwife and the intermediary with carelessly and negligently rendering medical and nursing care. The defense, of course, denied these assertions and claimed the affirmative defense that the plaintiff was contributorily negligent. The intermediary moved that the case against him be dismissed by asserting that he never rendered any medical treatment and his part in the case was limited to performing prenatal tests and passing on the information to the midwife who was attending to the plaintiff. The plaintiff responded that the intermediary owed her a duty of care to inform her of his findings and his concerns as well as his assessment of the dangers associated with VBAC at home, and that had he done so, the plaintiff would have heeded that advice, would have delivered in a hospital setting resulting in an outcome would have been drastically different. The intermediary responded that even if he had been asked for his opinion, which he was not, he would not have expressed an opinion because he did not engage in at-home deliveries or VBAC as they were outside of his areas of both his expertise and his practice. What follows is the intermediary doctor's trial testimony, which of course was refuted by the plaintiff's expert who held a diametrically opposed view as to the intermediary's obligations to the plaintiff.

> For the most part, the plaintiff's allegations consist of various iterations of the contention that I should have tried to dissuade [her] from attempting a home birth with a nurse-midwife by informing her of the various risks of her plan. However, the standard of care does not require me to inform her of such risks. I was not the medical provider primarily handling…the pregnancy and was not requested by the patient or her certified midwife to give my input into the method and place of the delivery, including arrangements in the event emergency arose. Significantly, under no circumstances was I to be the healthcare provider who was going to perform the delivery…Furthermore, the records show that [the midwife] presented to [the plaintiff] both verbally and in writing, the risks of going forward with a home delivery, and…advised her to have delivery at a hospital which she rejected.
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> The standard of care provides that there should be respect for patient autonomy. A patient should be allowed to accept increased levels of risk, provided that they are informed of such a potential increase in risk and management alternatives by the person managing the pregnancy or performing the delivery, which was done here. Outside consultants, such as myself, performing limited services who are not part of the delivery team need not conduct an independent investigation into whether the patient was adequately informed or the credentials of the patient's other providers.

The plaintiff's husband testified that had he and the plaintiff been told of the dangers he would have insisted she deliver at a hospital and he is sure his deceased wife would have followed the advice.

The court in fashioning its decision noted that summary judgment is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue. Summary judgment decisions are not about determining the truth or credibility of acts but whether there is an issue that needs to be determined at trial. The evidence presented to the court is viewed in the light most favorable to the party opposing summary motion. Thus, the issue here was that the defendant claimed and submitted proof that he had no duty to advise the plaintiff of the risks of VBAC via at-home delivery. Also, that even if he had such a duty, the breach of it did not cause her death. The plaintiff now had the burden to prove otherwise. The court held that the plaintiff did not meet this burden. The court opined that because of the limited nature of the intermediary's practice he did not owe plaintiff any duty to conform to any standard of care because he was not engaged to provide any medical treatment other than prenatal testing. He was, merely a consultant who transmitted whatever information he derived to the plaintiff's health care provider. The court stated:

> In order to reach any discussion about deviation from accepted medical practice, it is necessary to establish the existence of a duty. A physician's duty to a patient may be limited by the nature and type of services rendered. Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient. (Cits. Omit.)

In other words, consultants are engaged to perform examinations and tests and report their findings to the

treating doctor. They do not render care or advice to the patient. As there was no doctor-patient relationship established other than for the limited purpose of prenatal testing, there could be no duty owed relative to the delivery process, methodology, or venue in which the delivery took place. If there is no duty owed to conform to a given standard of care than there can be no case.

The court, however, did not end there. It found that even if a duty of care had been owed, the breach of that duty must, by law, be the proximate cause of the injury sustained. The evidence clearly showed that the plaintiff had a long-standing aversion to medical intervention that was supported by her acts and her writings. She rejected the informed consent form and edited it to her liking, she rejected the National Institutes of Health information given to her by the midwife, she mandated that she not be informed about the baby's weight and size, and she refused to go to the hospital the first time an emergency services call was placed. The court stated that "it would be manifestly unfair and impermissible to heap responsibility for the horrific outcome on [the intermediary] who played no role in her obstetric care, when the outcome, as harsh as it sounds, was the direct result of [the plaintiff's] avoidance of relevant information."

The court granted the motion to dismiss the case in favor of the defendant intermediary.

COMMENTARY

Our hypothetical patient was referred to you by her dentist. She is coming to ask your opinion about retreating her orthodontic relapse. One of the reasons she is in your office is because you offer a free screening. Many of us do this in the belief that it acts as a "loss leader" and will draw patients into the office. Once they meet you and your staff they will be so charmed and positively overwhelmed that of course they will move forward with full records and treatment. However, some patients are shoppers, and our hypothetical patient was one of them. She was there in part to "interview you" but also to elicit information.

She tells you she is interested in retreatment of her anterior imbrications. You take a panoramic film, perform a superficial clinical examination, discuss what you see, and present her with your opinion and her options. Then, out of left field, she hits you with "I'm thinking of using one of these do-it-yourself aligner therapies, will they work for me?" What, if anything, do you say?

Suppose she is not referred by her general dentist but by a neighbor you treat. Upon meeting her, she tells you she merely wants you to take orthodontic records, which of course she is willing to pay for, as she plans on sending them to the aligner company that she is going to use to straighten her teeth. Do you have an obligation to tell her anything about the risks involved with do-it-yourself orthodontics? Whether or not to take the records for her is a different issue.

Suppose you have decided, for whatever reasons make sense to you, to become an "intermediary orthodontist." You sign a contract with a do-it-yourself aligner company to review a patient's records, develop a treatment plan, approve the proposed tooth movement, etc. Do you believe there should be an affirmative obligation on your part, aside from any informed consent information the aligner company is imparting to the patient, for you to inform the patient as to your thoughts concerning the treatment you are prescribing and recommending?

The answers may vary wildly depending upon your ethical compass; however, from a legal standpoint they will all probably boil down to the same thing. If it can be shown that a doctor-patient relationship came into existence as a result of your interactions with the patient, then you will owe that patient a duty to conform to an established standard of care, whatever the experts determine that duty to be. It may be the duty of a consultant, as in *Romanelli,* or of a practitioner offering a second opinion. It may be the duty of one rendering professional treatment to the patient whether directly or by indirect means. Whether there is a duty owed and what that duty is, all depends on the specific facts relating to exactly what you did or did not do and the expectations of the parties.

In the near future, this area may get much cloudier before the fog lifts and the horizon becomes clear. Not only will these issues relate to the do-it-yourself marketplace, but they will apply to teleorthodontics as well. There is a brave new world before us, and one can rest assured that there will be cases with horrific consequences that are experienced as we attempt to sort things out.

The judge in *Romanelli* concluded the court's opinion with the following statement.

> This case is indeed a tragedy. More so, because [the plaintiff] might have spared herself and her unborn son an untimely death had she not been so intent on achieving the experience of vaginal birth. Unfortunately for all concerned, her fervent beliefs that the experience would enhance her life with her unborn son cost both of them theirs.

I wonder how many patients will be injured in the quest for accessible and affordable orthodontics such that their desire for straight teeth winds up, costing them units or segments of the very dentition they wanted to enhance?