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KIRK v. MICHAEL REESE HOSP. & MEDICAL CENTER: THE TREATMENT OF A THIRD PARTY PLAINTIFF IN A MEDICAL CONTEXT

INTRODUCTION

There is a definite tension between the medical and legal professions when it comes to imposing liability in a medical malpractice setting. Various factions of the legal profession are willing to increase potential liability in the medical field by expanding the scope of the duty imposed upon health care defendants. However, the medical industry has moved to restrict the circumstances in which a duty will be found and liability will exist. The case of Kirk v. Michael Reese Hosp. & Medical Center illustrates the conflict between these opposing views.

In Kirk, the Illinois Supreme Court held that it would not accept the lower court's attempt to impose liability upon the medical industry without a showing of the existence of a relationship between the parties to the lawsuit. The Illinois Supreme Court chose to halt any expansion of health care liability regardless of the potential foreseeability of harm. The court found this position to be appropriate in view of the legislative intent to protect the health care industry in light of the current "medical malpractice crisis."

This Casenote will demonstrate that the Illinois Supreme Court's stance in Kirk may be interpreted as a declaration that the medical industry should be protected at all costs. This view could be applied to potential areas of liability not yet addressed by case law or statute. Thus, the danger of uncertainty exists as to how the lower courts will decide future cases in light of this decision.

I. BACKGROUND

The concepts of negligence and strict liability provide the two primary ways in which third parties may impose liability against members of the medical industry. To differentiate between each cause of action, it is helpful to explore each theory of liability separately and examine the relation of

1. See infra notes 195-96 for some of the arguments for and against imposing liability upon the medical field in the wake of an alleged "medical malpractice crisis."
4. 117 Ill. 2d at 531, 513 N.E.2d at 399.
5. Id. at 527, 513 N.E.2d at 397.

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each theory to the relevant parties involved in the lawsuit. Also, it is important to note the influence the legislature has on a court’s decision-making process in cases which involve a member of the health care field.

A. Negligence

Negligence is one of the most prevalent concepts in tort law. The traditional elements needed to establish a cause of action for negligence are: 1) The defendant is under a duty or obligation to conform to a standard of conduct or to take reasonable care so as to guard against creating unreasonable risks for others; 2) The defendant breaches that duty by failing to conform to the standard of conduct required of him; 3) The defendant’s conduct causes the harm; and, 4) The defendant’s conduct is the proximate or legal cause of the harm.

The same basic elements must also be established to prove a cause of action when a member of the medical industry, particularly a physician or a hospital, is involved in a negligence action. Many cases turn upon the issue of duty in determining whether a cause of action exists. If no duty exists between the two parties, the person harmed will have no cause of action, regardless of the alleged wrong committed by the defendant.

The question of whether a duty exists is a question of law for the court to decide, while problems of negligence, damages, and causal relation are questions of fact which the jury decides. Duty has been defined as “an obligation to which the law will give recognition and effect, to conform to some standard of conduct toward another.”


7. See supra note 6.

8. A causal connection between the harm created and the defendant’s conduct must be premised upon a factual basis. D. Dobbs, supra note 6, at 97; Prosser & Keeton, supra note 6, § 30, at 165.

9. Although a defendant’s conduct may have actually resulted in another’s harm, the law may provide that the defendant should not be held liable because considerations of public policy would counsel against the imposition of liability. D. Dobbs, supra note 6, at 97; Prosser & Keeton, supra note 6, § 30, at 165.


13. Id. at 13. Dean Prosser characterized the determination of duty as “shifting sands” having “no fit foundation.” Id. at 15.

14. “Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question.” Id. at 15.
A court should consider many factors in determining whether or not to establish a duty. For example, one commentator has suggested that courts look to administrative, economic, prophylactic, equitable, and ethical or moral factors when making this determination. Another commentator has suggested that courts should examine history, conceptions of morals and justice, social ideas, and convenience in administration of the rule in determining who should bear the loss.

The Illinois Supreme Court has established criteria to determine whether a duty exists in a given situation. While the court has held that the foreseeability of harm is a major factor in this determination, foreseeability is not the sole factor the court considers. The court will also look to "the likelihood of injury, the magnitude of guarding against it and the consequences of placing that burden upon the defendant" in making a duty determination. Many commentators and courts have been quick to point out that foreseeability alone is not a sufficient reason for a court to impose a duty upon a defendant. For instance, in Lance v. Senior, the plaintiff brought suit for the injury of his nine year old hemophiliac son who had swallowed a needle while an overnight guest at the defendant's home. The Illinois Supreme Court dismissed the negligence claim against the defendant, finding that the imposition of a duty upon the defendant would be unjustified, given the minimal risk of such an event occurring.

The Illinois Supreme Court noted that when viewing an event through a hindsight approach, almost any situation can be found to be foreseeable. Thus, a duty will not be imposed upon a defendant based upon foreseeability alone. Rather, the court will look to "the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant" as other factors it must take into account.

15. Green, supra note 11, at 1034.
17. Lance v. Senior, 36 Ill. 2d 516, 224 N.E.2d 231 (1967). See also M. POLELE & B. OTTLEY, ILLINOIS TORT LAW 396 (1985) (criteria considered in determining duty are: foreseeability that conduct would result in harm; likelihood of injury; magnitude of burden in guarding against the harm; consequences of imposing the burden; public policy; and social requirements).
18. Lance, 36 Ill. 2d at 519, 224 N.E.2d at 233.
19. Id.
22. Id. at 517, 224 N.E.2d at 232.
23. Id. at 519, 224 N.E.2d at 233.
24. Id. See also Mieher v. Brown, 54 Ill. 2d 539, 301 N.E.2d 307 (1973). In Mieher, the
1. Physician Negligence

Physician negligence, more commonly known as medical malpractice, requires that the plaintiff establish elements similar to those found in a normal negligence action. Illinois courts have determined that the plaintiff must prove the defendant owed the plaintiff a duty, that the duty was breached, and that this breach was the proximate and actual cause of the plaintiff's injury.

a. Duty of care

Courts take different approaches when determining whether or not a duty exists. Some jurisdictions take the view that a physician's duty of care arises only when a physician-patient relationship exists between the parties involved. Thus, no cause of action for medical malpractice may be maintained without first establishing that a contract-based physician-patient relationship exists. However, Illinois does not follow this approach, which incorporates a privity requirement. To impose a duty upon a physician in Illinois, the courts require "weighing the factors of foreseeability of subsequent occurrences, the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." This view is exemplified in Davis v. Weiskopf. In Davis, the plaintiff was diagnosed as having a giant cell lesion upon his knee which suggested a potentially more serious condition. The plaintiff, never informed of the results of the tests, was referred to another physician. However, he cancelled his appointments with the referred physician who then refused to treat the plaintiff. As a result of not obtaining treatment for the lesion, the plaintiff's leg was amputated. The plaintiff brought suit against both physicians. The Illinois Appellate Court reversed the decision of the trial court and allowed recovery against the second physician even though he

Illinois Supreme Court refused to impose liability upon the manufacturer of a truck involved in a collision with another car. The court held that even if the injury involved was foreseeable, public policy and social requirements did not impose a duty upon the manufacturer to design a vehicle to protect against extraordinary accidents.

27. See supra note 26.
29. Id. at 506, 439 N.E.2d at 61.
30. Id.
31. Id.
32. Id.
33. Id. at 507, 439 N.E.2d at 61.
34. Id.
neither treated nor medically advised the plaintiff. The court rejected the defendant’s argument that no patient-physician relationship existed. Instead the court turned to other factors to establish that a duty existed on the part of the physician. In its evaluation, the court found that the defendant-physician was aware of the plaintiff’s potentially serious condition. Due to this knowledge and his lack of prompt medical attention the resulting injury was likely and foreseeable. The court also found that the burden of preventing this injury was minimal because prevention could have been accomplished simply by sending the plaintiff a letter advising him of his condition and recommending that he see another physician as soon as possible.

b. Breach of duty and the standard of care

Once a duty has been found to exist between the physician and the patient, the patient must next prove the physician breached this duty. The patient must show it was the physician’s conduct that led to the injury, and that this conduct fell below the standard of care ordinarily exercised by a physician in good standing. Generally, three views exist as to how the standard of care should be determined. These are the “national” standard, the “same community” standard, and the “same or similar community” standard.

The “national” standard compares the physician’s conduct to the standard of care required of any physician in the country. In the “same community” standard, a physician’s actions are compared to those of another reasonably well-qualified physician in the same community. Finally, the “same or similar community” standard, employed by Illinois courts, compares the physician’s skill and care to that ordinarily used by a reasonably well-qualified physician in that community or in a similar community. This standard was originally adopted to protect rural physi-

35. Id. at 512-13, 439 N.E.2d at 64-65.
36. See supra note 28 and accompanying text for a list of factors the court uses to determine if a duty should exist.
38. Id.
39. PROSSER & KEETON, supra note 6, § 32, at 187. See also M. POLELLE & B. OTTLEY, supra note 17, at 437.
40. D. Dobbs, supra note 6, at 314.
41. One argument asserted against the application of the “national standard” is that it works harsh results in its application to physicians in small towns who might not have access to the latest equipment. D. Dobbs, supra note 6, at 314. But see PROSSER & KEETON, supra note 6, § 32, at 188 (some courts have accepted the national standard due to “[the] improved facilities of communication, travel, availability of medical literature, or the like.”).
42. The major problem existing with the application of this standard is the well known reluctance of physicians to testify against one another. This situation is intensified in jurisdictions following the “same community” standard if the locale is of small size or one in which physicians are familiar with one another. PROSSER & KEETON, supra note 6, § 32, at 188.
43. M. POLELLE & B. OTTLEY, supra note 17, at 440.
cians who lacked access to major medical centers and continuing medical education. Today, however, the Illinois courts are less willing to adhere strictly to the "same or similar community" standard given the advances in communication and education. Furthermore, the fact that a practice is "usual" or "customary" with regard to a community does not in itself always insulate a defendant from a negligence claim. As in other areas, courts have held that an action considered to be usual or customary can nonetheless be negligent.

c. Causation

The final issue to be addressed in a negligence action is that of causation. To prove causation the plaintiff must establish two things. First, he must prove that the defendant's breach of duty was the cause-in-fact of his injury. Second, he must prove that the same breach was also the proximate cause of his injury.

In the area of medical malpractice, foreseeability plays an extremely important role in the determination of both duty and proximate cause. In Nichelson v. Curtis, the plaintiff sued both her obstetrician and a pediatrician who were present during the delivery of her child. Prior to the child's birth, the plaintiff and her husband had discussed with the obstetrician the possibility that the plaintiff should be sterilized following the birth. They agreed to the procedure, but conditioned their acceptance upon the birth of a healthy child. The pediatrician present at the birth knew nothing about this precondition to the plaintiff's sterilization.

At birth, the child was found to have a cleft palate and the potential for other defects. Immediately after the child's birth, the obstetrician

44. Id. (citing Stogsdill v. Manor Convalescent Home, Inc., 35 Ill. App. 3d 634, 343 N.E.2d 589 (2d Dist. 1976) as holding that locality rule was justified by difference between technology and training available in urban as compared to rural communities).

45. Id. (citing Chamness v. Odum, 80 Ill. App. 3d 98, 399 N.E.2d 238 (5th Dist. 1979), where expert from urban center was allowed to testify against chiropractor practicing in small town).

46. See The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932) (although it was not general custom for tugboats to have radios for communicating hazardous weather conditions, reasonable prudence dictated that they should have been installed and failure to do so was an act of negligence).

47. Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965) (custom of industry is evidence of standard of care but not conclusive), cert. denied, 383 U.S. 946 (1966); Lundahl v. Rockford Memorial Hosp. Ass'n, 93 Ill. App. 2d 461, 464, 235 N.E.2d 671, 674 (3d Dist. 1968) (fact that treatment was usual or customary would not preclude finding of negligence where customary procedure might constitute negligence).

48. M. Polelle & B. Ottley, supra note 17, at 441.

49. Id.

50. Id.


52. Id. at 102, 452 N.E.2d at 884.

53. Id.

54. Id.

55. Id. at 102-03, 452 N.E.2d at 885.
asked the pediatrician to inform the plaintiff’s husband of the child’s condition and to ask him if he should continue with the sterilization procedure. The plaintiff’s husband, unsure of what to do, was brought into the operating room to talk to the obstetrician, after which he consented to the sterilization procedure.

The child died six weeks after delivery and the mother brought suit. In her suit, the plaintiff alleged that the pediatrician had a duty to provide her husband with a full explanation of the child’s health, possible birth defects, and alternatives to sterilization. She further alleged that the defendant-pediatrician had breached his duty and was the proximate cause of her injury.

The court held that a physician-patient relationship was not necessary in order to impose liability, provided the evidence showed that the defendant-pediatrician had voluntarily assumed a duty to the plaintiff. The court found that the pediatrician had not assumed such a duty, since he was not informed or advised of the agreement made between the plaintiff and her obstetrician. Furthermore, the court found that the defendant’s actions were not the proximate cause of the plaintiff’s injuries. The court refused to impose liability upon the defendant for his failure to inform the plaintiff’s husband without previously having known of the precondition to the plaintiff’s sterilization. The court viewed this as imposing liability upon the defendant for the remote and unforeseeable consequences of his actions.

2. Hospital Negligence

Many of the same rules and theories used in medical malpractice actions against individuals also apply to medical malpractice actions against hospitals. The differences that exist are primarily in the areas of the hospital’s duty and the evaluation of the standard of care by which the hospital will be judged.

a. Duty of care

The hospital’s obligation to review and supervise its staff physicians and its obligation to use reasonable care in selecting physicians are issues the
courts have faced in the duty analysis. The principal Illinois case in this area is Darling v. Charleston Community Memorial Hosp. In Darling, the plaintiff was an 18 year old student who had broken his leg while playing in a college football game. He was taken to the defendant-hospital's emergency room, where the emergency room physician placed his leg in a cast. Three days later, the cast was removed after numerous complaints of pain from the plaintiff. Because the cast had been applied improperly, it was necessary to amputate the plaintiff's leg. The plaintiff brought suit against the defendant-hospital, alleging negligence by the hospital in allowing the emergency-room physician to perform this orthopedic work. The plaintiff alleged further negligence in the hospital’s failure to require the physician to subject his orthopedic procedures to review so as to bring them up to date. Furthermore, the plaintiff claimed that the hospital medical staff failed to adequately supervise his case because no consultation was required after complications arose. Finally, the plaintiff alleged that the hospital was responsible for the negligence of the nursing staff, who failed to note the changes in the plaintiff’s toe color after his leg was cast. The Illinois Supreme Court held that the hospital was liable for negligence for failing to perform each of the following: require the physician to consult with other members of the medical staff skilled in this type of procedure; review the treatment given to the plaintiff; and require that consultants be called in as needed.

Many courts have interpreted Darling broadly and found hospitals liable for negligent supervision of an attending physician’s professional acts. Other Illinois courts have relied on Darling to hold that liability can be placed upon hospitals for negligently granting medical staff privileges to physicians who were later judged to be incompetent. A distinction has arisen in the latter cases with regard to when a hospital will be held liable for the negligence of a physician who uses its facilities. Liability will not be imposed in situations in which the physician is considered to be an

66. J. Smith, Hospital Liability § 3.01 (1987).
67. 33 Ill. 2d 326, 211 N.E.2d 253 (1965).
68. Id. at 328, 211 N.E.2d at 255.
69. Id.
70. Id.
71. Id. at 329, 211 N.E.2d at 256.
72. Id.
73. Id.
74. Id.
75. Id. at 333, 211 N.E.2d at 258.
76. J. Smith, supra note 66, § 3.03[1][b].
77. Id. See also Pickle v. Curns, 106 Ill. App. 3d 734, 739, 435 N.E.2d 877, 881 (2d Dist. 1982) (hospital has a duty to know the qualifications and standard of performance of its physicians; it is a breach of this duty of care to hospital's patients to allow a physician to practice on its premises who hospital knows or should know is unqualified or negligent).
78. J. Smith, supra note 66, § 3.03[3][a] (discussing distinction between physician acting as employee and physician acting as independent contractor).
independent contractor. However, liability will attach where the physician is considered an employee of the hospital.\textsuperscript{79} The case of \textit{Johnson v. St. Bernard Hosp.} illustrates the distinction between an independent contractor and an employee.\textsuperscript{80}

In \textit{Johnson}, the decedent was rushed to the hospital's emergency room after an automobile accident.\textsuperscript{81} He was initially treated by the emergency room physician and was then placed under the care of another physician.\textsuperscript{82} Later, the decedent was examined by a third physician employed by the hospital to take patient history.\textsuperscript{83} The primary physician requested a consultation from the hospital staff's orthopedic surgeon, who refused, and no other orthopedic specialist was consulted.\textsuperscript{84} As a result, the patient died from a pulmonary embolism caused by a hip fracture.\textsuperscript{85}

The administrator of the decedent's estate brought survival and wrongful death actions against the physicians and the hospital.\textsuperscript{86} The court found that the hospital could be held liable for the negligent actions of a physician employed and salaried by the hospital, who worked under the direction of the hospital staff.\textsuperscript{87} However, the court stated that the hospital could not be held liable for the acts of a physician who simply rendered medical care as an independent agent; a physician acting in this capacity was outside the control of the hospital.\textsuperscript{88} The court held that the actions of the emergency room physician fell under this independent contractor exception.\textsuperscript{89}

b. Breach of duty and the standard of care

The determination of whether a breach of duty occurs depends upon whether the hospital adheres to the standard of care required of it. The standard of care by which a hospital is judged parallels that which is used to evaluate physicians. The "national," "same community," and "same

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 709, 399 N.E.2d 198 (1st Dist. 1979).
\item \textit{Id.} at 711, 399 N.E.2d at 200.
\item \textit{Id.} at 714, 399 N.E.2d at 204. \textit{See also} \textit{Johnson v. Sumner}, 160 Ill. App. 3d 173, 513 N.E.2d 149 (3d Dist. 1987) (hospital held liable under a respondeat superior claim by establishing a principal-agent relationship in the medical setting; relationship was found to exist, provided physician's actions were under hospital's control and payment made to physician for services rendered to patients was also made to hospital).
\item \textit{Id.} at 710, 399 N.E.2d at 200.
\item \textit{Id.} at 713, 399 N.E.2d at 201.
\item \textit{Id.} at 715, 399 N.E.2d at 203. \textit{See also} \textit{Hoke v. Harrisburg Hosp., Inc.}, 281 Ill. App. 247, 252 (4th Dist. 1935) (early case involving hospital liability in regard to negligent physician conduct resulting in x-ray burns inflicted upon a patient; "the principal test as to whether one is an employee or an independent contractor lies in the degree of control retained and exercised by the person for whom the work is being done . . . ").
\end{enumerate}
or similar community standards are the criteria used to evaluate a hospital’s standard of care. In addition, the Illinois Supreme Court in Darling v. Charleston Community Memorial Hosp., went further and held that the standard of care associated with hospitals could also be determined by the state’s licensing regulations, accreditation standards, and a hospital’s own by-laws.

c. Causation

A plaintiff must establish two elements in order to succeed with a medical malpractice claim against a hospital. First, he must prove that the defendant’s breach of duty was the cause-in-fact of his injury. Second, he must prove that the same breach was the proximate cause of his injury. Thus, in defining the actual and proximate cause for the patient’s injury, the court will apply the same criteria to both physician malpractice claims and those claims brought against a hospital.

3. Negligence With Regard to Third Party Plaintiffs

The general duty which requires a party to refrain from harming others may also include the obligation to control or attempt to prevent certain actions of third parties. This area of liability deals with the concept of duty and turns on whether the courts choose to impose such a duty upon a defendant for the injury caused to a third party. Unless the existence of a duty can be established, there will be no cause of action in negligence.

The next section will deal primarily with duty, because the other elements of negligence (breach of duty, standard of care, and causation) with regard to third party liability follow the same pattern as any other negligence claim. Because of the myriad factors used by courts to determine duty, it is helpful to look at a variety of situations involving third party plaintiffs when deciding whether a duty will be imposed. The courts have not always found that a duty exists between defendants and third party plaintiffs.

90. See supra notes 39-47 and accompanying text. See also J. Smith, supra note 66, § 4.02[3]-[6].
91. 33 Ill. 2d 326, 211 N.E.2d 253 (1965).
93. M. Polelle & B. Ottley, supra note 17, at 441.
94. Id.
95. PROSSER & KEETON, supra note 6, § 56, at 383.
96. See supra notes 17-24 and accompanying text.
97. In those cases where courts have found a duty to extend to third party plaintiffs, the factor of foreseeability appears to be the common denominator. See Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986) (state has a duty to protect extremely violent parolee’s foreseeable victims, even though they were not specifically identifiable when that parolee was allowed to return to his small isolated community without any adequate supervision and subsequently killed his stepdaughter, her boyfriend and another woman); Orrico v. Beverly Bank, 109
4. Third Party Plaintiffs in a Medical Setting

A well known case which involves a third party relationship in a medical setting is the California Supreme Court's decision in *Tarasoff v. Regents of Univ. of Cal.*[^98] In *Tarasoff*, the defendant was a university hospital psychologist actively involved in the treatment of a patient.[^99] Although the patient had verbally expressed to the defendant-psychologist his desire to kill the decedent, the psychologist took no significant action to warn the victim or to restrain the patient.[^100] After the patient killed the decedent, the victim's heir brought suit against the defendant-psychologist, as well as the university.[^101]

The court found that the psychologist owed a duty to the victim. The court based this duty on the existence of a special relationship between the psychologist and his patient.[^102] Because the resulting action was foreseeable, and this special relationship existed between the parties, the psychologist

[^99]: *Id.* at 430, 551 P.2d at 339.
[^100]: *Id.* at 431, 551 P.2d at 339-40.
[^101]: *Id.* at 431, 551 P.2d at 340.
[^102]: *Id.* at 433, 551 P.2d at 342-43.
had a duty to exercise reasonable care to protect the potential victim from his patient's conduct.\textsuperscript{103}

Although the existence of some type of special relationship appears to be a prerequisite to finding liability in a third party context, the exact knowledge of the victim's identity is not always required. This is exemplified by the case of \textit{Gooden v. Tips}.\textsuperscript{104} In \textit{Gooden}, a patient was given Quaalude, a sedative-inducing drug. Her physician failed to warn her not to drive while taking this medication.\textsuperscript{105} As a result, the patient lost control of her car and collided with the plaintiffs' car. The plaintiffs subsequently brought suit against the physician who prescribed the drug.\textsuperscript{106}

Deciding for the plaintiffs, the court found that while a duty did exist, it was only a limited duty.\textsuperscript{107} The court held that this limited duty required that the physician give a warning concerning the medication.\textsuperscript{108} The duty did not require the physician to actively control or prevent his patient from driving.\textsuperscript{109}

Another case in accord with \textit{Gooden} is \textit{Kaiser v. Suburban Transp. Sys.}.\textsuperscript{110} In \textit{Kaiser}, the defendant-physician also prescribed medication to his patient, a bus driver, without warning him of its tranquilizer-like effects.\textsuperscript{111} As a result, the driver lost control of his bus and injured the plaintiff-

\textsuperscript{103} Id. at 434, 551 P.2d at 353. See Myers v. Quesenberry, 144 Cal. App. 3d 888, 193 Cal. Rptr. 733 (1983). The Myers court allowed a plaintiff to recover against two physicians for injuries the plaintiff received when the physicians' patient lost control of her car and struck the plaintiff. Because the physicians were aware that their patient was experiencing severe physical and emotional difficulties, they were negligent in failing to warn her not to drive. Thus, the court extended the class of potential plaintiffs to include the general public, finding that "under the circumstances where warning the actor is a reasonable step to take in the exercise of the standard of care applicable to physicians, liability is not conditioned on potential victims being readily identifiable as well as foreseeable." Id. at 888, 893, 193 Cal. Rptr. at 733, 738. But see Thompson v. County of Alameda, 27 Cal. 3d 741, 747, 614 P.2d 728, 734 (1980) (California Supreme Court would not allow liability to be placed upon the county for the release of a juvenile offender having violent propensities towards young children and subsequently killed plaintiffs' son; Tarasoff v. Regents of the Univ. of Cal. distinguished by holding that plaintiffs had no direct or continuing relationship with county such that county placed plaintiffs' son in danger and furthermore decedent was not considered to be a foreseeable or readily identifiable target of juvenile offender's threats). Accord Furr v. Spring Grove State Hosp., 53 Md. App. 474, 454 A.2d 414 (1983) (court chose not to impose liability upon state mental hospital for its failure to detain one of its patients who murdered the plaintiff's son; no duty existed since the victim was not "readily identifiable").

\textsuperscript{104} 651 S.W.2d 364 (Tex. Ct. App. 1983).
\textsuperscript{105} Id. at 365.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 372.
\textsuperscript{108} Id. at 370.
\textsuperscript{109} Id. See Welke v. Kuzilla, 144 Mich. App. 245, 375 N.W.2d 403 (1985) (defendant-physician liable to plaintiff in a wrongful death action where physician, without any warning given to his patient, injected her with unknown substance, which resulted in patient losing control of her car and killing the decedent).
\textsuperscript{110} 65 Wash. 2d 461, 398 P.2d 14 (Wash. 1965).
\textsuperscript{111} Id. at 462-63, 398 P.2d at 15.
passenger. The Washington Supreme Court held that the plaintiff had a valid cause of action. The court reasoned that the physician had a duty to warn his patient, especially given his patient’s occupation and the potential danger to others.

A similar case which also involved the imposition of a duty on a physician is Freese v. Lemmon. There, the physician was actively involved in the treatment of a patient known to have had previous episodes of seizures. While driving, the patient suffered a seizure, lost control of his car, and caused injury to the plaintiff-pedestrian. The plaintiff brought suit against the physician for failure to diagnose the cause of the first seizure and to learn of the potential for reoccurrence. Furthermore, the plaintiff alleged that the defendant-physician acted negligently in failing to advise his patient not to drive. The Iowa Supreme Court found that the plaintiff alleged a valid cause of action against the physician.

While some courts have limited the duty imposed upon defendants in the area of third party lawsuits, others have expanded the group of potential plaintiffs who can bring such a suit. This situation is illustrated in the case of Renslow v. Mennonite Hosp. In Renslow, the plaintiff’s mother had been negligently administered the wrong type of blood 13 years prior to the plaintiff’s birth. This sensitized the mother’s blood, causing physical injury to the unborn plaintiff’s in utero development and subsequent birth.

The mother brought suit on behalf of the minor-plaintiff against both the physician and the hospital, seeking damages for the injuries sustained. She alleged that the defendants were guilty of negligent conduct as well as

112. Id.
113. Id. at 468-69, 398 P.2d at 18-19.
114. Id. at 464, 398 P.2d at 10.
116. Id. at 578.
117. Id. at 577-78.
118. Id. at 578.
119. Id.
120. Id. at 579-80. See Duvall v. Goldin, 139 Mich. App. 342, 362 N.W.2d 275 (1984). In Duvall, the plaintiffs were injured when their car was struck by another car driven by the defendant-physician’s epileptic patient. A valid cause of action was found to exist against the physician. The court held that the physician had a duty to protect individuals who were endangered by his patient’s conduct and that this duty was breached by the defendant’s failure to warn his patient not to drive. See also Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521 (Tenn. 1980) (defendant-physician negligently conducted physical examination of driver for plaintiff-trucking company; physician could be liable for injuries resulting when that driver collided with another vehicle resulting in the plaintiff paying for the damages to those injured). But see Davis v. Mangelsdorf, 138 Ariz. 207, 673 P.2d 951 (1983) (recovery not allowed against defendant-physician for car accident caused by one of his epileptic patients because the physician had last treated patient 17 years prior to the accident).
121. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).
122. Id. at 349, 367 N.E.2d at 1251.
wilful and wanton misconduct due to their involvement in the administration of the blood transfusion. The Illinois Supreme Court ruled in favor of the plaintiff, choosing to extend the duty of care to the plaintiff who had not yet been conceived at the time the defendants' negligent acts had taken place. The court stressed that it was not looking solely to foreseeability to determine whether or not a duty should attach in this situation. Rather, it looked to policy considerations and held that medical technology existed at that time which would mitigate or prevent this type of prenatal harm. The court felt that "sound social policy requires the extension of duty in this case."

B. Strict Products Liability

Products liability involves liability imposed upon those who supply or are in some way associated with defective goods or products which are used by others and subsequently result in harm to the user. In products

123. Id.
124. Id. at 354, 367 N.E.2d at 1256.
125. Id. at 351, 367 N.E.2d at 1253.
126. Id. at 353, 367 N.E.2d at 1255.
127. Id. While the court felt comfortable extending duty in this case, it did so only on a prospective basis. Therefore, this decision only applied to cases arising out of future conduct. Id. at 354, 367 N.E.2d at 1256.
128. PROSSER & KEETON, supra note 6, § 95, at 677. There are four possible theories of recovery available today to plaintiffs who wish to bring a products liability claim. These theories are:
1) Strict liability in contract for breach of an express or implied warranty.
2) Negligence liability in contract for breach of an express or implied warranty that the product was designed in a workmanlike manner.
3) Negligence liability in tort based upon physical harm to persons and tangible things.
4) Strict liability in tort based upon physical harm to persons and tangible things.

Id. at 678. This discussion will be limited to the theory which deals with strict liability in tort.

The concept of products liability was foreign to early tort law. The first case to address the issue was that of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). In Winterbottom, the defendant contracted with the Postmaster-General to supply and maintain mail coaches. The plaintiff was a mail-service employee who was injured when a coach broke down due to a "certain latent defect." Id. at 109-10, 152 Eng. Rep. at 402-03. The plaintiff brought suit against the defendant to recover for his injuries. Even though the court acknowledged that a claim was possible, it did not find that the plaintiff was in the proper position to pursue it. Id. at 115, 152 Eng. Rep. at 405.

The court found that a claim did exist based in contract or tort law, but that the only person able to bring such a claim was the Postmaster-General. Id. Since the plaintiff never contracted with the defendant, he lacked privity. Thus, without privity between the parties recovery was prohibited. In making his decision, Lord Abinger discussed the policy considerations involved. He stated that if the court did not impose the privity requirement, a flood of litigation would result. Id. at 114, 152 Eng. Rep. at 405.

This original view of privity as a prerequisite to products liability claims was eventually eliminated in the landmark case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). In MacPherson, the defendant, Buick Motor Co., manufactured an automobile which it delivered to its dealer, who in turn sold it to the plaintiff's husband. While the couple was out driving, the car collapsed due to a defect in one of the wooden spokes in the wheel. As a result, the plaintiff
liability cases, a main concern is deciding what type of defect exists. Dean Prosser classified defects into three categories:

1) a manufacturing defect, which is a flaw in that particular product itself, present at the time the defendant sold it; 129
2) a defect in the actual design of the product; 130 and,
3) a failure by the producer of the product to adequately warn of a risk or hazard associated with the product's design. 131

A discussion of all three of these types of defects is beyond the scope of this Casenote. However, the third class of defects, inadequate warning, is relevant to questions of liability in two areas of the health care industry: pharmaceutical manufacturing and hospital care.

1. Strict Liability in Relation to Pharmaceutical Manufacturers

When applying a strict liability theory to drugs, 132 the pertinent source of reference is the Restatement. 133 The Restate-

and her husband were both injured and subsequently brought suit against the defendant-manufacturer. Id. at 383, 111 N.E. at 1051. The defendant claimed as its defense that no privity existed between the parties, because the only privity was between the defendant and the car dealer based upon their sales contract. In writing for the court, Judge Cardozo rejected this defense. Id. at 385, 111 N.E. at 1053.

Cardozo held that the defendant could not hide behind the privity claim because the manufacturer knew that this product would be used by persons other than the dealer. Furthermore, it would be wrong for the defendant to claim it only had a legal duty to protect the car dealer against the hazards associated with this defective product. Id. The manufacturer assumed a responsibility to the consumer which did not rest upon the contract, but instead arose from the purchase of the car coupled with the foreseeability of harm which could occur to the user if the product was defective. PROSSER & KEETON, supra note 6, § 96, at 683. Hence, the privity requirement was eliminated in products liability cases. The general rule today is that a manufacturer or dealer has a responsibility to the ultimate consumer. This liability is based solely upon the fact that the manufacturer has dealt with a product which is likely to come into the hands of another and which will cause injury if it is defective. Id. See Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (Illinois Supreme Court eliminated privity as a requirement in negligence claim). See also M. POLELLE & B. OTTLEY, supra note 17, at 553.

129. PROSSER & KEETON, supra note 6, § 99, at 695.
130. Id. at 698.
131. Id. at 697.

132. In discussing drugs or pharmaceutical products this Casenote's main focus will be upon prescription or ethical drugs. While some of the concepts discussed may also apply to drug products sold directly to the consumer, the discussion will be limited to those products which can only be obtained pursuant to a physician's prescription order.

133. Special Liability of Seller of Product for Physical Harm to User or Consumer:
1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   a) the seller is engaged in the business of selling such a product, and
   b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
2) The rule stated in subsection 1) applies although
requires that a plaintiff seeking to recover under a theory of strict liability must have been the "ultimate user or consumer." Additionally, in a typical strict liability case involving a product, the three elements needed to establish a cause of action are: 1) the injury or damage resulted from a condition of the product; 2) the condition made the product unreasonably dangerous; and, 3) the condition existed at the time the product left the manufacturer's control.

In particular, pharmaceutical products fall under the direct guise of the drafters' comment k.

k.) Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended use and ordinary use. These are especially common in the field of drugs. Such a product, properly prepared, and accompanied by the proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new and experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.


134. RESTATEMENT (SECOND) OF TORTS § 402A (1966) [hereinafter RESTATEMENT (SECOND)].

135. M. POELE & B. OTTLEY, supra note 17, at 579. The case of Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974), illustrates this proposition. In Winnett, a child was injured when her fingers became caught in the conveyor belt of her grandfather's farm forage wagon. As a result, the victim's mother brought suit against the manufacturer of the device based upon a theory of strict liability. Id. at 8, 310 N.E.2d at 2. The Illinois Supreme Court ruled for the defendant-manufacturer, finding that the manufacturer's liability only extended to those individuals to whom injury from a defective product was reasonably foreseeable and only in those situations where the product was being used for the purpose for which it was intended or for which it could reasonably and foreseeably be used. Id. at 10, 310 N.E.2d at 4. Thus, to establish a valid claim under a theory of strict liability, the plaintiff would have to be the ultimate user or consumer, as well as a party whose injury was foreseeable.

136. Suvada, 32 Ill. 2d 621, 210 N.E.2d 187. While these three elements appear to have little resemblance to elements typically associated with a negligence claim, the infusion of comment k adds an interesting element into this analysis. See, e.g., Comment, An Escape from Strict Liability: Pharmaceutical Manufacturers' Responsibility for Drug-related Injuries under Comment k to Section 402A of the Restatement (Second) of Torts, 23 DUQ. L. REV. 199, 213 (1984) ("While
In a products liability case, the main focus of the court is upon the product and whether it is defective. When dealing with drugs, however, courts often shift their focus from the product and concentrate instead upon the reasonableness of the warnings accompanying the product. In doing so, commentators have concluded that the analysis involved is no longer characteristic of a typical products liability case where strict liability governs. Instead, this approach incorporates a negligence analysis.

In Illinois, a duty to warn with regard to drugs was addressed in the case of Woodill v. Parke, Davis & Co. In Woodill, the parents of a minor brought suit against a pharmaceutical manufacturer to recover for injuries suffered by their child during its fetal development. The manufacturer's drug, Pitocin, was administered to the mother to induce uterine contraction and caused various birth defects. In its analysis, the Illinois Supreme Court held that to impose liability on the drug manufacturer for its failure to warn of the drug's dangers, the plaintiff must show that the pharmaceutical manufacturer knew or should have known of these dangers. Therefore, liability would not exist unless negligence could be found on the part of the drug manufacturer in failing to learn of the dangers involved with its product and failing to provide adequate warnings to compensate for such dangers.

A unique feature of drug warnings, as opposed to warnings accompanying other products, is that the United States Food and Drug Administration has established certain criteria for these warnings. Many courts, however, view these government warnings as simply providing the minimum standard.

137. The text of Comment k reads:

The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

138. "Dean Prosser has said when a products liability case involves the question of reasonable warning, the liability is not distinguishable from that which would be found in an ordinary negligence case." Keeton, Products Liability—Drugs and Cosmetics, 25 VAND. L. REV. 131, 138 (1972). See also Basko v. Sterling Drug Inc., 416 F.2d 417 (2d Cir. 1969) (in situations involving a question of failure to warn, concepts of negligence and strict liability are virtually identical).

139. 79 Ill. 2d 26, 402 N.E.2d 194 (1980).
140. Id. at 27, 402 N.E.2d at 195.
141. Id. at 30, 402 N.E.2d at 198.
142. As in any situation involving a person having special knowledge in a field or profession, the pharmaceutical manufacturer is considered to be an expert in its field and courts attribute to it both actual and constructive knowledge of its product, and any potential adverse reactions arising from that product. Note, The Liability of Pharmaceutical Manufacturers for Unforeseen Adverse Drug Reactions, 48 FORDHAM L. REV. 735, 749 (1980).
Consequently, compliance with these standards may not be sufficient to immunize the manufacturer from liability when a claim is brought for failure to warn.144

The primary distinction associated with prescription pharmaceutical products is that the physician's role is interjected into the use of the product. The majority of states require only that the pharmaceutical manufacturers warn the prescribing physician and not the ultimate drug user. This is referred to as the "learned intermediary rule."145 Here, the physician acts as the patient's agent by receiving various warnings and information on the patient's behalf.146 It is then up to the physician to decide which warnings he will give to the patient.

Various justifications have been articulated for the learned intermediary rule. First, the physician is the most logical conduit for the warning associated with the drug because he is familiar with the drug's risks as well as his patient's needs.147 Second, if detailed warnings were given directly to the patient, they might either be misinterpreted or be so difficult to understand as to be incomprehensible to the patient.148 Third, the physician is in a better position than the pharmaceutical manufacturer to know the needs of a particular patient.149 Fourth, the patient usually relies heavily on his physician's expertise to make decisions.150 Not only can a physician articulate a warning to a patient, but he can answer any questions the patient may have regarding the drug.151 Finally, it is believed that it is virtually impossible for pharmaceutical manufacturers to comply with the duty of direct warning since there is no sure way to reach the patient.152

Physicians may obtain warnings in a variety of ways.153 The physician may consult the Physician's Desk Reference or refer to a product's advertisements.

144. Id. See also MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 140, 475 N.E.2d 65, 70-71 (Mass. 1985) (compliance with FDA requirements, though admissible to demonstrate lack of negligence, not conclusive on this issue).

145. For an in-depth treatment of the learned intermediary rule see Comment, Products Liability: The Continued Viability of the Learned Intermediary Rule as it Applies to Product Warnings for Prescription Drugs, 20 U. RICH. L. REV. 405, 406-07 (1986) [hereinafter Comment, Learned Intermediary Rule]. See also Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966) (first case to articulate learned intermediary rule).


147. Comment, Learned Intermediary Rule, supra note 145, at 413.

148. Id.

149. Id.

150. Id.

151. Id.


153. A physician is able to obtain such warnings as well as other information concerning pharmaceutical products by consulting with any one of the following: the Physician's Desk Reference (PDR), the product's package label or inserts, letters provided to the physician from the pharmaceutical manufacturers, advertisements, and salespersons. Britain, supra note 146, at 385.
However, the availability of other sources of information will not always suffice to absolve the pharmaceutical manufacturer from liability if the manufacturer fails to provide warnings. Three exceptions have emerged to circumvent the protection afforded pharmaceutical manufacturers under the learned intermediary rule. The first exception involves the so-called "watering down" of the warnings associated with the drug product. The warning provided must be strong enough to trigger appropriate caution. If the pharmaceutical manufacturer knows that its warning is being widely disregarded, the warning will be viewed as inadequate and the manufacturer may be subject to liability. Furthermore, even the clearest, most complete and comprehensive warning will be considered inadequate if it can be shown that the manufacturer dissipated or eroded the effectiveness of the warning through its overpromotion of the drug.

The second exception to the learned intermediary rule involves cases of mass immunizations. The learned intermediary rule can only apply in cases where a physician prescribes or dispenses drugs. If the physician is not present, the drug manufacturer cannot claim the defense of the learned intermediary rule. Since no physician is involved, there can be no individualized medical assessment of the risks and benefits associated with administering a drug during a mass immunization procedure.

154. As a general rule, if a pharmaceutical manufacturer fails to provide a warning, regardless of whether or not the physician would have read it, the manufacturer will not be relieved of its liability for failing to warn of the risk associated with the drug. Id. at 402. See also Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966) ("The sole issue was whether appellant [pharmaceutical manufacturer] negligently failed to make reasonable efforts to warn appellee's [patient's] doctors. If appellant did so fail, it is liable regardless of anything the doctors may or may not have done. If it did not so fail, then it is not liable for appellee's injury."). But see Stanback v. Parke, Davis & Co., 657 F.2d 642, 645 (4th Cir. 1981) (pharmaceutical manufacturer insulated from liability for failure to give warnings associated with a swine flu vaccine because physician was already aware of risks associated with the drug).

155. Note, The Liability of Pharmaceutical Manufacturers for Unforeseen Adverse Drug Reactions, 48 Fordham L. Rev. 735, 752 (1980) ("proper warning must adequately state the risk"); warning may be adequate if a stronger warning would be incorrect).

156. See supra note 155 (clearest and most comprehensive warning will be deemed inadequate if manufacturer knows it is being disregarded).

157. Id. See also Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 107 Cal. Rptr. 45, 507 P.2d 653 (1973) (drug manufacturer failed to provide adequate warnings due to its "watering down" of those warnings by overpromotion of the drug to medical profession).

158. Comment, Learned Intermediary Rule, supra note 145, at 414.

159. Id.

160. Id.

161. Id. at 405, 415. See Davis v. Wyeth Laboratories, 399 F.2d 121 (9th Cir. 1968) (pharmaceutical manufacturer not immune from liability for injuries arising when its polio vaccine was administered on a mass immunization scale without physician present). See also Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir.) ("[T]he manufacturer of a prescription drug who knows or has reason to know that it will not be dispensed as such a drug must provide the consumer with adequate information so that he can balance the risks and benefits of a given medication himself."), cert. denied, 419 U.S. 1096 (1974). But cf. Boruski v. United States, 803
The final exception to the learned intermediary rule arises in cases involving oral contraceptives. In *MacDonald v. Ortho Pharmaceutical Corp.*, the victim was injured due to a stroke allegedly caused by her continued use of the defendant's birth control pills. The court held that in the case of oral contraceptives, the manufacturer had a duty to warn the users directly. It was not relieved of liability simply by providing the physician with the warnings associated with the drug. The court stressed that, due to the unique nature of the product, its imposition of liability upon the pharmaceutical manufacturer was limited to oral contraceptives.

2. **Strict Liability in Relation to Hospitals**

Typically, hospitals are not held strictly liable when defective products are used in the administration of health care services. The Illinois Supreme Court, however, has taken a different approach and imposes a strict liability theory upon hospitals if they administer defective products to their patients. This is exemplified in the case of *Cunningham v. MacNeal Memorial Hosp.* In *Cunningham*, the defendant-hospital gave a blood transfusion contaminated with a hepatitis virus to a patient who subsequently contracted the disease. The patient brought suit against the hospital based upon strict liability. She alleged that the blood was a defective product, which the hospital sold to her in an unreasonably dangerous condition. The Illinois Supreme Court ruled in favor of the plaintiff, finding that the doctrine of strict liability applied. The court considered blood to be a product. Furthermore, the product was considered to be defective because it was contaminated. The court

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F.2d 1421 (7th Cir. 1986) (information form adequately disclosed foreseeable risks associated with a mass swine flu immunization such that it insulated pharmaceutical manufacturer from liability regardless of whether patient chose to read form).

164. *Id.* at 134, 475 N.E.2d at 67.
165. *Id.* at 138, 475 N.E.2d at 70.
166. *Id.*
167. *Id.* The court also stressed the fact that oral contraceptives differed from other prescription medications due to four factors: the substantial risks associated with the product's use; the feasibility of direct warnings by the manufacturer to the user; the limited participation of the physician in such cases because prescriptions are usually given on an annual basis with no more follow up accorded the patient; and the fact that the oral communication between the patient and physician may be insufficient, alone, to apprise the user of the dangers associated with the product. *Id.*
170. *Id.* at 445, 266 N.E.2d at 898.
171. *Id.*
172. *Id.*
173. *Id.* at 457, 266 N.E.2d at 904.
174. *Id.* at 447, 266 N.E.2d at 899.
175. *Id.* at 456, 266 N.E.2d at 904.
was unimpressed with the defendant's claim that at the time of the plaintiff's injury, there was no way to test for the hepatitis virus. It found that the doctrine of strict liability focuses upon the product's defect, not upon the knowledge of the manufacturer or supplier. In imposing liability, the court was careful to distinguish the situation at hand from cases involving drugs. The court reasoned that drugs are inherently dangerous products even when properly prepared. However, in Cunningham, it was not improper preparation but impurity that caused the blood to be defective. The court's decision was based, in part, on social policy. It found that because hospitals constitute one of the biggest industries in this country and profit from the sale of blood, they should also incur the liability associated with any injury caused by tainted blood supplies.

Attempts have also been made to impose strict liability upon hospitals in cases involving x-radiation treatment. In Dubin v. Michael Reese Hosp., the plaintiff-patients were overexposed to x-radiation, which resulted in the development of malignant tumors. The Illinois Supreme Court found that this action was an error in the professional judgment of the party administering the x-radiation treatment. The court rejected the plaintiffs' strict liability claim, finding that the product was not in itself defective. For the most part, Illinois courts have refused to impose strict liability upon hospitals in x-radiation cases regardless of whether x-radiation is considered to be a product.

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176. Id. at 453, 266 N.E.2d at 902.
177. Id. at 53-54, 266 N.E.2d at 902.
178. Id. at 450, 266 N.E.2d at 903-04. While drugs fell under comment k of the Restatement (Second) of Torts § 402A, blood did not. See supra note 133.
179. 47 Ill. 2d at 456, 266 N.E.2d at 904.
180. Id. at 457, 266 N.E.2d at 904.
181. Id. But see Brody v. Overlook Hosp., 66 N.J. 448, 332 A.2d 596 (1975) (per curiam) (blood transfusions should be treated like drugs and therefore the Restatement (Second) of Torts § 402A comment k should apply).

While the Illinois Supreme Court was willing to impose strict liability upon hospitals in cases involving defective blood, the Illinois General Assembly enacted legislation shortly after the Cunningham decision which held that hospitals could not be held strictly liable for injuries caused by blood transfusions. J. Smith, supra note 66, § 10.01[3].

182. 83 Ill. 2d 277, 415 N.E.2d 350 (1980).
183. Id. at 280, 415 N.E.2d at 351.
184. Id. at 281, 415 N.E.2d at 352.
185. Id. See also Greenberg v. Michael Reese Hosp., 83 Ill. 2d 282, 415 N.E.2d 390 (1980) (claim in strict liability would not be permitted in case involving x-radiation, but plaintiffs allowed to proceed with claims based upon theories of negligence and res ipsa loquitur).
186. J. Smith, supra note 66, § 10.02[3][b]. Just as with hospitals, physicians will not be held liable on a theory of strict liability for administering a defective product while rendering health care services. Prosser & Keeton, supra note 6, § 104, at 720. See also Carmichael v. Reitz, 17 Cal. 3d 958, 95 Cal. Rptr. 381 (1971) (physician was not retailer of drugs and thus could not be held under a theory of strict liability in tort).
3. **Strict Liability in Relation to Third Party Plaintiffs**

Third party plaintiffs must follow the same criteria established for a normal strict liability claim in order to establish a valid claim. The third party plaintiffs must have been the ultimate user or consumer, as well as a party whose injury was foreseeable.\(^\text{187}\) If this standard is not met, no prima facie case can be established.

The case of *Bobka v. Cook County Hosp.* involved a third party plaintiff alleging a strict liability claim against a manufacturer.\(^\text{188}\) In *Bobka*, the defendant was a manufacturer of protective fire clothing. The plaintiff’s father was a fireman who, when exposed to an oil storage tank explosion, suffered severe burns due to the defective condition of the manufacturer’s clothing.\(^\text{189}\) The hospital requested that the plaintiff donate large segments of her skin for her father’s skin grafts. The plaintiff experienced discoloration and scarring of her skin at the sites where she donated skin to her father for his operation.\(^\text{190}\) The plaintiff subsequently brought suit against the protective clothing manufacturer for the injury sustained while undergoing this skin graft procedure.\(^\text{191}\)

The court dismissed the plaintiff’s claim, finding that it was not reasonably foreseeable that the defendant-clothing manufacturer should be liable to a third party who voluntarily submitted to the skin graft surgery so as to aid the person injured by its product.\(^\text{192}\) The court was not willing to impose liability because the plaintiff was not the consumer or ultimate user of the defendant’s product and because the resulting injury was not foreseeable.

**C. Statutory Reform in the Medical Field and its Potential for Influencing Court Decisions**

There is a belief today that society is facing a medical malpractice crisis.\(^\text{193}\) This view has been bolstered in Illinois by recently passed medical malpractice legislation and the subsequent finding by the Illinois Supreme Court that the legislation was constitutional.\(^\text{194}\) The debate still continues as to whether the protection afforded the health care industry is appropriate. Various commentators have taken the position that the medical industry has been very profitable and does not need additional protection against potential mal-

\(^{187}\) See *supra* notes 134-35 and accompanying text.

\(^{188}\) 97 Ill. App. 3d 351, 422 N.E.2d 999 (1981).

\(^{189}\) *Id.* at 351-52, 422 N.E.2d at 1000.

\(^{190}\) *Id.*

\(^{191}\) *Id.*

\(^{192}\) *Id.* at 354, 422 N.E.2d at 1002.

\(^{193}\) See *infra* note 196.

\(^{194}\) *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986) (constitutionality of Illinois' medical malpractice reform legislation upheld, even though it was debatable if, in fact, medical malpractice crisis did exist).
practice claims.\textsuperscript{195} Others have taken the position that using legislation to limit the liability upon health care providers is justified.\textsuperscript{196}

Regardless of the rationale for such legislation, a main concern is how this type of legislation will influence the courts in their decision making processes. For example, in approving the proposed medical malpractice reform legislation in Illinois, the Illinois Supreme Court did not consider whether the legislation was justified. Instead, it simply confined its analysis to deciding whether the legislation was constitutional and "not whether it [was] wise as well."\textsuperscript{197} This position demonstrates the judiciary's great deference to the legislature on this issue.

Other state courts have taken a less deferential view toward the passage of medical malpractice legislation. This is illustrated in the case of Myers v. Quesenberry.\textsuperscript{198} In Myers, a personal injury action arose involving the plaintiff and a driver who lost control of her car due to a diabetic attack.\textsuperscript{199} The plaintiff brought suit against the driver's physicians, claiming that they negligently failed to warn their patient not to drive while she was in an uncontrolled diabetic condition, a condition complicated by her recent miscarriage.\textsuperscript{200} The court found that the plaintiff had a valid cause of action

\begin{thebibliography}{10}
\bibitem{195} For example, according to a 1982 estimate combined annual net profit of physicians, hospitals, and drug manufacturers was over $21,000,000,000. Plaintiff-Appellee's Brief at 17, Kirk v. Michael Reese Hosp. & Medical Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987), cert. denied, 108 S. Ct. 1077 (1988) (Nos. 62700-704). See also J. KELNER & R. KELNER, Medical Malpractice: Is There a Crisis? N.Y.L.J., Feb. 8, 1984, at 1, 6, col. 2 (New York State Bar Association report found that: "An objective view leads inescapably to the conclusion that there is, in fact, no medical malpractice crisis and that the tort liability system is hardly the core factor in the malpractice problem").

\bibitem{196} Other commentators have gone as far as to allege that the medical insurance lobby has been using questionable accounting practices in an attempt to help pass medical malpractice legislation. P. Pazer, Outgoing President's Message, 18 TRIAL LAWYER'S QUARTERLY, Summer-Fall 1987, at 3.

\bibitem{197} For example, one Illinois House of Representative Member's view was that medical malpractice lawsuits "have caused a crisis of affordability in malpractice insurance to the point where every citizen of Illinois pays through their healthcare bills for these lawsuits. Additionally, patterns of specialists leaving the practice of medicine and students not even considering entry into high risk specialties causes grave concern . . . ." Amicus Brief of the Illinois Hospital Association and Metropolitan Chicago Healthcare Council at 10, Kirk v. Michael Reese Hosp. & Medical Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987), cert. denied, 108 S. Ct. 1077 (1988) (Nos. 62700-704) (quoting General Assembly, House Debate, June 18, 1985, at 1-2). See also Comment, New York's Medical Malpractice Insurance Crises—A New Direction for Reform, 14 FORDHAM URB. L. J. 773 (1986) (insurance companies have become less willing to insure medical practitioners because of sharp and continual increases both in the number of malpractice suits being brought and the size of damage awards and settlements). But see Comment, Medical Malpractice Statutes: Special Protection for a Privileged Few?, 12 N.KY L. REV. 295, 310 (1985) ("[P]hysicians, using threats and scare techniques have pushed state legislatures into enacting poorly thought-out legislation in an almost hysterical atmosphere") [hereinafter Comment, Special Protection].

\bibitem{198} Bernier, 113 Ill. 2d at 230, 497 N.E.2d at 769.

\bibitem{199} 144 Cal. App. 3d 888, 193 Cal. Rptr. 733 (1983).

\bibitem{200} Id. at 890-91, 193 Cal. Rptr. at 734.
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only insofar as the defendant-physicians had a duty to warn the driver of the danger. However, the physicians did not have a duty to control her conduct.\(^{201}\) In imposing liability upon the physicians, the court addressed the issue of the medical malpractice crisis. The court concluded that while the state's medical malpractice legislation addressed various facets of medical malpractice claims, it did not change the types of actions a plaintiff could bring against a physician. Thus, the court found that the changes brought about by the malpractice legislation were "procedural and economic, not substantive."\(^{202}\)

II. THE KIRK DECISION

James Kirk was injured while riding in a car driven by Daniel McCarthy.\(^{203}\) Prior to the accident, McCarthy was a psychiatric patient at Michael Reese Hospital, where his physician administered two prescription drugs to him.\(^{204}\) No one had warned McCarthy of the adverse effects, such as drowsiness, associated with these drugs and that this effect would be intensified by the use of alcohol.\(^{205}\) Upon discharge from the hospital, McCarthy consumed an alcoholic drink.\(^{206}\) Later in the day, McCarthy allegedly lost control of a vehicle in which the plaintiff was a passenger; the car left the roadway and struck a tree, injuring Kirk.\(^{207}\)

Kirk brought suit against McCarthy, his physicians, Michael Reese Hospital, and the pharmaceutical manufacturers of the drugs McCarthy was given.\(^{208}\) Kirk alleged that the physicians, the hospital, and the drug manufacturers acted negligently in failing to adequately warn McCarthy of the drugs' effects and this, in turn, led to Kirk's injury. In addition, Kirk brought a strict liability action against the hospital and the drug manufacturers, alleging that the drugs were in an unreasonably dangerous condition because the manufacturers had failed to adequately warn of the drugs' potential effects.\(^{209}\) Kirk also brought suit against McCarthy, alleging negligence in the operation of the car.\(^{210}\)

The trial court dismissed all counts except the one against McCarthy.\(^{211}\) The appellate court reversed, finding that all the defendants had a duty to adequately warn McCarthy about the drugs and that this duty extended to

\(^{201}\) Id. at 894, 193 Cal. Rptr. at 739.
\(^{202}\) Id. at 893, 193 Cal. Rptr. at 738.
\(^{204}\) Id.
\(^{205}\) Id. at 514-15, 513 N.E.2d at 391.
\(^{206}\) Id. at 514, 513 N.E.2d at 390.
\(^{207}\) Id. at 514-15, 513 N.E.2d at 391.
\(^{208}\) Id.
\(^{209}\) Id. at 515, 513 N.E.2d at 391.
\(^{210}\) Id.
\(^{211}\) Id.
cover members of the public who may be injured as a proximate cause of the manufacturers' failure to adequately warn.212 Aside from the negligence theory, the court also employed a strict liability analysis to find both the hospital and the drug manufacturers liable to Kirk.213

The Illinois Supreme Court reversed the appellate court and reinstated the judgment of the trial court.214 The Illinois Supreme Court took the position that Kirk could not bring suit because he was not within the class of persons to whom a duty of care was owed by either the physicians or the hospital.215 This lack of physician-patient relationship precluded his claim against the defendants.216 The court also found that no strict liability claim existed against the hospital and the drug manufacturers.217 Because the drug manufacturers could not have foreseen the injury, they were absolved of liability.218 Regarding the hospital, the court found that it owed no duty to Kirk, because he was merely a passenger in McCarthy's car and not a patient of the hospital or a user of the drug products.219

In a separate opinion, Justice Simon concurred with the court's decision regarding the hospital's liability, but disagreed regarding the physicians' and drug manufacturers' liability.220 He believed that the plaintiff had a valid claim against these defendants for failure to adequately warn of the drugs' dangerous propensities.221 Justice Simon found that the physicians' liability was grounded in basic concepts of negligence, and that their failure to warn resulted in injury to a foreseeable class of persons.222 Furthermore, he noted that this additional liability would create no extra burden upon physicians with regard to precautionary measures since all a physician would have to do to avoid liability would be that which was already expected of him.223 Regarding the strict liability claim against the pharmaceutical manufacturers, Justice Simon believed that the court erred in dismissing the plaintiff's claim based upon the learned intermediary rule.224 He believed that the issue of whether the warnings given by the pharmaceutical companies were adequate was best left to the "trier of facts."225

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212. Id.
213. Id. at 515-16, 513 N.E.2d at 399.
214. Id. at 519, 513 N.E.2d at 399.
215. Id. at 532, 513 N.E.2d at 399.
216. Id.
217. Id. at 522-23, 513 N.E.2d at 394.
218. Id. at 521, 513 N.E.2d at 394.
219. Id. at 522-24, 513 N.E.2d at 394-95.
220. Id. at 533, 513 N.E.2d at 399 (Simon, J., dissenting).
221. Id. at 534, 513 N.E.2d at 400 (Simon, J., dissenting).
222. Id. (Simon, J., dissenting).
223. Id. at 537, 513 N.E.2d at 401 (Simon, J., dissenting). Physicians are expected to inform their patients of the side effects of prescription medication.
224. Id. at 538, 513 N.E.2d at 402 (Simon, J., dissenting).
225. Id.
III. Analysis

When discussing the Illinois Supreme Court's decision in *Kirk v. Michael Reese Hosp. & Medical Center*,\(^{226}\) the case should be viewed in its component parts as they relate to the parties involved. The case's central issue deals with whether a third party plaintiff has a valid cause of action against various members of the medical industry for their alleged failure to adequately warn. The pivotal matter concerns the duty element and whether that duty extends from the defendants to the plaintiff in this case.

While the appellate court was content to simply view the duty associated with the defendants as a single issue common to all of the defendants,\(^{227}\) the Illinois Supreme Court took the correct approach by analyzing separately the duty pertaining to each group of defendants. In a medical context, it is essential that each defendant in a multiple defendant case be treated differently because, although all defendants are in the medical field, each defendant owes a different duty. Just as a nurse's duty will differ from that of a physician's, so too will a hospital's differ from a drug manufacturer's or a physician's. The analysis of this case must, therefore, be divided accordingly.

A. The Physician's Duty and the Third Party Plaintiff

In *Kirk*,\(^{228}\) the Illinois Supreme Court found that no duty existed which extended from the physicians to the plaintiff, James Kirk. Thus, the physicians could not be held liable for Kirk's injuries due to their failure to warn their patient, Daniel McCarthy.\(^{229}\) The court based its decision on various reasons. First, in making its duty analysis, the court found that, as a general rule, the issue of whether a duty exists is a question of law to be decided solely by the court.\(^{230}\) Second, the court found that the duty could be determined by looking at various factors. While foreseeability is one important factor, a duty determination must take other factors into account, such as the probability of injury occurring, the hardship of guarding against the injury, and the consequences of placing that burden upon the defendant.\(^{231}\)

Third, the court addressed the importance of a relationship between the parties involved in this type of suit. The Illinois Supreme Court was uncomfortable imposing liability upon any potential defendant. Instead, the court required that to establish a duty, the plaintiff had to have had a physician-patient relationship with the defendant-physician\(^{232}\) or some type of "special relationship" with the physician.\(^{233}\) However, the court provided that a

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Footnotes:

229. *Id.* at 532, 513 N.E.2d at 399.
230. *Id.* at 525, 513 N.E.2d at 396.
231. *Id.* at 526, 513 N.E.2d at 396.
232. *Id.* at 528, 513 N.E.2d at 397.
233. *Id.*
limited duty to warn could exist if the plaintiff was a "specifically identifiable potential victim," and not simply a member of the general public. Members of the general public are considered to be an "indeterminate class of potential plaintiffs." In Kirk, the court did not find the plaintiff to be a "specifically identifiable potential victim," but rather a member of the general public.

The final reason the Illinois Supreme Court used to deny the existence of a duty dealt with recently passed legislation. In light of the state's enactment of medical malpractice reform legislation, the court found that public policy and social requirements mitigated against finding such a duty to exist.

In Kirk, various consistencies as well as inconsistencies arose in the court's analysis. First, there is no controversy concerning the court's application of the steadfast rule that a determination of duty is a question of law and, therefore, an issue for the courts to decide.

Likewise, the various factors the court used to determine whether a duty existed have been well established by previous Illinois case law. Instead, it is the third and fourth reasons the court used which have engendered some debate.

The third reason the court used to justify its decision is the importance of a relationship between the parties involved. While a physician-patient relationship is present in the majority of lawsuits where a physician is a defendant, this is not always the situation. For example, in the case of Davis v. Weiskopf the court allowed the plaintiff to bring a claim against a defendant-physician where the plaintiff had been referred to the physician but never had any type of contact.

In making its determination, the Illinois appellate court stressed that a physician-patient relationship was not a necessary prerequisite to establishing a cause of action. The court found that the normal determination of duty should guide its decision of whether to impose a duty upon the defendant.

The concept of a "special relationship" between the plaintiff and the physician is an ambiguous one. Its genesis is found in the case of Renslow v. Mennonite Hosp. There, the Illinois Supreme Court held that a physician who had negligently administered a blood transfusion to the plaintiff's mother 13 years earlier had a duty to the plaintiff, as well as to her mother for the harm caused to the plaintiff at birth. The "special relationship"
found to exist was that between the mother and the plaintiff. Here, the
court again stressed the notion that foreseeability alone was not the sole
determining factor, but that "sound social policy" required that duty be
extended.

In light of *Renslow*, one may speculate as to whether the court would
have come to a different decision in *Kirk* had the plaintiff been related to
McCarthy. For example, if Kirk had been McCarthy's son, would this now
place him in the class of those having a "special relationship"? Likewise, if
Kirk was McCarthy's fiancee and they were on the way to be married the
day of the accident, could it be said that Kirk could only have a claim if
the accident had occurred after the marriage ceremony was completed? If
these examples illustrate the court's position, then it appears that the court
has a rather narrow view as to who may recover, and only those related by
blood would have a valid cause of action.

Based on *Renslow*, one may draw even more narrow boundaries as to
whom a duty could extend. For example, what if McCarthy was a woman,
and as a result of the car accident she gave birth to deformed children?
Here it would appear that the court might assert that under *Renslow* only
these children could bring claims against the physicians prescribing the
medication to their mother. Thus, the court may in effect be saying that the
"special relationship" found in *Renslow* only applies to that relationship
between a mother and her unborn children.

In any of the hypothetical scenarios above, the court's precedent could
provide another court with the ability to construe the scope of duty narrowly.
The logic of some of the distinctions the court draws and the court's
consideration of the equities appear to be somewhat wanting. Regardless of
whether a "special relationship" exists, the party involved in such an accident
still suffers an injury through the same set of events. The negligence on the
part of the physicians is no less, nor the injuries any easier to bear, simply
because the injured party was not related to the patient in some way.

In making its decision, the Illinois Supreme Court indicated that a plaintiff
may recover without having any type of relationship, provided that at the
time of the injury he was a "specifically identifiable potential
" In
taking this view, the court acknowledged that a limited duty to warn does
exist, but only in situations in which the victim can be readily identified.
This view is illustrated by the Minnesota Supreme Court decision of *Cairl
v. State*, which the Illinois Supreme Court referred to in *Kirk*. In *Cairl,*
a mentally retarded youth with a propensity to start fires was released into
the care of his mother for Christmas vacation. While there, he started a fire
at his mother's apartment which resulted in the death of his sister and the

246. *Id.* at 357, 367 N.E.2d at 1255.
247. *Id.*
249. 323 N.W.2d 20 (Minn. 1982).
250. 117 Ill. 2d at 519, 513 N.E.2d at 399.
The destruction of surrounding residences. The youth's mother and other apartment tenants brought suit against the state, alleging that the state had been negligent in releasing the youth. The plaintiffs also alleged that the state had breached its duty to the plaintiffs by failing to warn them of the youth's dangerous propensities. The Minnesota Supreme Court ruled in favor of the state. The court found that a duty to warn only existed when specific threats were made against specific victims. Therefore, since the youth did not pose any more of a danger to the plaintiffs than he did to any other member of the public, the court held that there was no duty to warn. Based on the outcome of this case, the view of the Illinois Supreme Court is that unless the defendants could see that Kirk, specifically, would be riding in McCarthy's car at the time of the accident, he could not recover.

While the court chose to limit potential plaintiffs to only those who are "specifically identifiable," it also acknowledged that other jurisdictions had taken a more liberal view as to potential plaintiffs in an action similar to the one found in Kirk. Even in light of these other decisions, the court believed its decision to limit potential plaintiffs could be justified on the basis of public policy.

The final reason the Illinois Supreme Court relied on in support of its decision not to impose a duty upon the defendant-physicians is somewhat controversial. The court referred to Illinois' recent enactment of medical malpractice legislation. From this, the court concluded that the legislature's goal was to reduce damages against the medical profession. Therefore, the court determined that to expand physicians' liability to third parties would not be in keeping with this goal.

While the court may be justified in deferring to the legislature in certain situations, its deference here is unjustified. Aside from the heated debate as
to whether such legislation is merited, the courts should not be swayed blindly by the passage of legislation. This particular legislation was passed with specific provisions in mind. For the court to construe the statute broadly so as to enter into any matter concerning the medical industry is contrary to the legislature's intent. If the court were to follow this paternalistic view toward the medical industry, any subsequent lawsuits pertaining to liability in areas where it has not yet been established could be barred. For example, technological advances in the medical field which are potentially dangerous could be insulated from liability. The court could, in effect, use this statute as a type of "talisman," so as to justify its decision to favor the medical industry in any upcoming lawsuits.

In actuality, the court did use this talisman to diffuse one of the plaintiff's strongest arguments. The plaintiff asserted that all that the physician would have to do to avoid liability would be to give a warning in regard to the dangers associated with a drug. Thus, there would be no requirement that the physician physically control or prevent the actions of the patient. Rather, the physician would only be held liable for not giving a warning to his patient, which was something he was already required to do. The Illinois Supreme Court rejected the appellate court's position that the innocent victims rather than the wrongdoers need protection. Instead, the court claimed that to impose liability even in these limited circumstances would still result in a potential increase in liability against the health care profession. This argument was in conflict with the General Assembly's goal of reducing liability. It is essential that the court not lose sight of the legislature's goals and desires. However, it is equally as important that the judiciary not lose sight of its role. The judiciary is a separate entity and not merely a "rubber stamp" for the legislature. The system of checks and balances must not be abandoned simply because the issue may not be of constitutional proportion.

259. See supra notes 193-96 and accompanying text.
261. But see the discussion of Myers v. Quesenberry, 144 Cal. App. 3d 888, 193 Cal Rptr. 733 (1983), supra notes 198-202 and accompanying text. A California court found that even with the passage of state medical malpractice legislation, the belief was that the legislation was to effect the law only procedurally and economically as opposed to substantively. Myers, 144 Cal. App. 3d at 888, 193 Cal Rptr. at 733.
262. 117 Ill. 2d at 519, 513 N.E.2d at 399.
263. Id.
265. 117 Ill. 2d at 519, 513 N.E.2d at 399.
266. If the Illinois Supreme Court did wish to comply with the legislature's intent while still imposing a duty upon the physicians in Kirk, it could have done so by taking the approach used by a Texas court in Gooden v. Tips, 651 S.W.2d 364, 366 n.1 (Tex. Ct. App. 1983). For details
B. The Hospital's Duty and the Third Party Plaintiff

In Kirk, the Illinois Supreme Court found that Michael Reese Hospital had no duty which extended to the third party plaintiff. The hospital's failure to warn its patient, Daniel McCarthy, did not subject it to liability for the injuries of the plaintiff. The first reason the court used to support this decision dealt with the warning itself and the physician's role in its conveyance. The second reason concerned the unique relationship which exists between a physician and a hospital and how that relationship affected liability. The final reason pertained to the court's application of its duty analysis.

The court first discussed the fact that warnings given to a patient regarding the use of prescription drugs are a function delegated to the physician rather than the hospital. This theory appears to be consistent with the court's acceptance of the learned intermediary rule, given the fact that a physician is in the best position to evaluate his patient's needs and to decide which warnings are most appropriate. The relationship between a doctor and a patient is considered to be very confidential and private. To place the hospital in the position of a participant in this relationship may hinder, rather than promote, the benefits associated with this relationship.

The second reason the court used to justify absolving the hospital from any liability dealt with the working relationship which exists between hospitals and physicians. Generally, a hospital will not be liable for the acts of a physician unless the physician is an employee of the hospital. However, in some circumstances, the hospital may incur liability for the acts of a physician considered to be an independent contractor. This will result if the hospital grants the physician medical privileges and he is later found to be incompetent. Thus, in Kirk, the court found that the defendant-physicians were not employees, but rather independent contractors. Therefore, it would be contrary to past precedent to impose liability upon the hospital for the actions of independent parties who were found to be competent.

of this case see supra notes 104-09 and accompanying text. The Illinois Supreme Court could have distinguished the action in Kirk from that of a typical medical malpractice action by holding that, because no physician-patient relationship was established between the plaintiff and the defendant-physicians, this was not a medical malpractice claim. Thus, the concerns associated with the medical malpractice crisis would not apply.

268. Id. at 515, 513 N.E.2d at 395.
269. Id.
270. Id. at 517, 513 N.E.2d at 396-97.
271. Id. at 515, 513 N.E.2d at 395.
272. In Kirk, the Illinois Supreme Court finally adopted the learned intermediary rule, even though the lower courts in Illinois had previously been using it. Id. at 513, 513 N.E.2d at 393. See supra notes 145-67 and accompanying text for a discussion of the learned intermediary rule.
273. See supra notes 66-89 and accompanying text.
274. See supra notes 76-77 and accompanying text.
275. 117 Ill. 2d. at 515, 513 N.E.2d at 395.
The final reason the Illinois Supreme Court used to justify its decision concerned its analysis of the situation under its duty determination test. Under this view, the court took the position that the injury involved was not foreseeable to the hospital. The plaintiff failed to allege that the hospital's employees either knew, or should have known that the warnings regarding the medications were not given by the physicians to McCarthy. The Illinois Supreme Court's view in this regard is correct. A hospital assumes that any of the physicians using its facilities will act as reasonable practitioners and provide warnings when needed. It is not the hospital's job to search out every potential error a physician could make and take steps to prevent it. If the error is one the hospital employees knew or should have known about, this would place responsibility upon the hospital. If the error is known and poses a potential danger to the patient, then the hospital should be held liable if it refuses to take steps to rectify that threat to its patient.

The court next addressed the unreasonableness of the burden on the hospital and concluded that to hold the hospital liable for all the harmful acts committed by its released patients would place an unreasonable burden upon the institution. This statement in itself is ambiguous. The plaintiff in Kirk was not looking for the hospital to be an absolute insurer of all the harms caused by its patients. Rather, he asserted that the hospital should be held liable only for its negligent actions which led to the third party's injuries. Thus, the court appears to brush aside the plaintiff's claim in Kirk with its reasoning that a hospital should not be held liable as to all acts wrongfully committed by its former patients.

Finally, the court again discussed the recently enacted medical malpractice legislation to justify its decision on social and public policy grounds. For the same reasons discussed above, concerning physicians, this argument has some merit. Still, it is far from being an overwhelming reason for refusing to find the hospital liable.

C. The Pharmaceutical Manufacturers' and Hospital's Relation to the Third Party Plaintiff Under the Guise of Strict Liability

276. This duty analysis focuses not only upon the foreseeability of the injury occurring but also on the "likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." Id. at 516, 513 N.E.2d at 396. See supra notes 17-19 and accompanying text for other cases using this same type of duty analysis.
277. 117 Ill. 2d at 516, 513 N.E.2d at 396.
278. Id. at 516, 513 N.E.2d at 396.
280. 117 Ill. 2d at 516, 513 N.E.2d at 396.
281. Id. at 517, 513 N.E.2d at 397.
282. See supra notes 259-66 and accompanying text.
I. The Pharmaceutical Manufacturers' Liability

The Illinois Supreme Court found that the plaintiff had failed to state a cause of action regarding the pharmaceutical manufacturers' liability. While the court was willing to concede that failure to warn of a product's dangerous propensities may serve as a basis to hold the manufacturer strictly liable in tort, the court found that the situation in Kirk did not rise to the level in which liability should be imposed. The court based its decision upon the learned intermediary rule and the foreseeability aspect of the case.

The court stressed that the situation involving pharmaceutical products differs from a typical products liability case. Here, the drug manufacturer's warning is to be distributed only to the physician and not directly to the ultimate consumer. Thus, it is the physician's medical judgment which comes into play as to which warnings are ultimately passed on to the patient. Because the pharmaceutical manufacturers had no duty to assure that warnings were distributed to the patient, they likewise could not be held liable for their failure to warn a non-patient.

On its face, the court's opinion took a logical approach. The warnings must be distributed to the physician, therefore, it is completely up to the physician to decide which warnings will be distributed to the patient. The only flaw in the court's analysis was its failure to address the substance of the warnings which the pharmaceutical manufacturers provided. As the dissent pointed out, the court merely dismissed the plaintiff's claim against the drug makers without ever addressing the issue of whether the warnings by the pharmaceutical manufacturers to the physicians were in fact accurate. No evidence was given as to whether the warnings could have been insufficient or "watered down." While the court's approach may have been correct with regard to its substantive application of the learned intermediary rule, procedurally, the approach taken by the court is questionable. As Justice Simon discussed in his dissent, the issue of whether the warnings provided by the pharmaceutical manufacturers were adequate was not a question of law, but rather one to be judged by the trier of facts. Consequently, by not allowing this portion of the case to be litigated, the plaintiff was denied his opportunity to prove that these warnings were inadequate. Thus, the court dismissed this portion of the case rather than address the case on the merits as to whether the warnings were adequate.

284. Id. at 512, 513 N.E.2d at 391-92.
285. Id. at 513, 513 N.E.2d at 393.
286. Id. at 514, 513 N.E.2d at 394.
287. See supra notes 145-67 and accompanying text for a discussion of the learned intermediary rule.
288. 117 Ill. 2d at 522, 513 N.E.2d at 402 (Simon, J., dissenting).
289. See supra notes 155-57 and accompanying text for a discussion of an exception to the learned intermediary rule which exists when a drug product is overpromoted or its warnings are widely disregarded.
290. 117 Ill. 2d at 522, 513 N.E.2d at 402 (Simon, J., dissenting).
Regarding the foreseeability aspect of the claim against the pharmaceutical manufacturers, the court followed the holding in *Winnett v. Winnett*. The *Winnett* court held that strict liability will be applied only where persons injured by the defective product may reasonably be foreseen and only in situations where the product was used for the purpose for which it is intended or for which it is reasonably foreseeable that it may be used. The court concluded that under *Winnett*, it was not plausible that the pharmaceutical manufacturers should have reasonably foreseen the events that occurred, that is, that their drugs would be administered by the physicians without any warnings given, that the patient would be discharged from the hospital, consume alcohol, drive and then lose control of his car which in turn would result in injury to the plaintiff-passenger. Therefore, given the improbability of injury to the plaintiff, the court felt justified in dismissing the strict liability claim against the pharmaceutical manufacturers rather than allowing a jury to determine the question of foreseeability. While the court's approach appears to be justified, one problem does arise in its analysis. In tort law, actions are measured by the reasonable man standard. The problem arises in that depending upon how an event is presented, the view of whether the event is foreseeable can change. The court appears comfortable in discussing the foreseeability factor with regard to the specific occurrences of the particular case. For example, the pharmaceutical manufacturers could not have reasonably foreseen that their drugs would be administered by the physicians without any warnings given, that the patient would be discharged from the hospital, consume alcohol, drive and then lose control of his car which in turn would result in injury to the plaintiff-passenger. These statements are, in themselves, couched in specificity. If one was to narrowly construe the court's position, foreseeability could be precluded in almost any situation in which the injured party encountered a number of arguably ordinary experiences. For example, is it so unforeseeable to the pharmaceutical manufacturers that a patient might not be given a warning as to the sedative effects of a drug and that this failure to warn results in the patient's involvement in a car accident in which another party

291. 117 Ill. 2d at 513, 513 N.E.2d at 393 (relying on *Winnett v. Winnett*, 57 Ill. 2d 7, 310 N.E.2d 1 (1974)). See supra note 135 for a discussion of the case.
292. 117 Ill. 2d at 513, 513 N.E.2d at 393.
293. *Id.* at 514, 513 N.E.2d at 394.
294. *Winnett*, 57 Ill. 2d at 11, 310 N.E.2d at 5 ("Questions of foreseeability are ordinarily for a jury to resolve . . . but where the facts alleged in a complaint on their face demonstrate that the plaintiff would never be entitled to recover, that complaint is properly dismissed."). See also *Kirk*, 117 Ill. 2d at 513, 513 N.E.2d at 393.
295. PROSSER & KEETON, supra note 6, § 32, at 173.
296. 117 Ill. 2d at 514, 513 N.E.2d at 394.
297. Of course, this is not to say that superseding intervening conduct by other parties cannot be a defense. Rather, the court's approach appears to be unfair in that it requires the injured party's actions to be known to the defendant with some type of specificity before a valid cause of action can exist.
is harmed? Of course, this is not to say that foreseeability should be the sole determining factor upon which to impose liability. However, the court's treatment of and reliance on the foreseeability factor in this set of circumstances is ill-conceived.

2. The Hospital's Liability

The Illinois Supreme Court also found that the plaintiff failed to state a cause of action against the hospital. In making its determination, the court followed almost the same reasoning it used to absolve the pharmaceutical manufacturers of liability. The Illinois Supreme Court referred to the learned intermediary rule and held that it is the physician who is in the best position to deliver warnings to the patient. Also, the court indicated that the pharmaceutical manufacturers are only required to provide information to the physicians and not to other health professionals in the hospital because it is the function of the physician to prescribe medication.

One of the main concerns the court had in making its decision not to hold the hospital liable involved past precedent in the field of strict liability as applied to hospitals. The court analogized the situation in Kirk to cases involving injury caused by x-radiation. In those cases, the court found that the injury caused by the x-radiation was due not to a defect associated with the product, but rather due to an error in judgment on the part of the physician involved. Likewise, in Kirk, the court concluded it was physician error which resulted in the injury. The drugs, like the x-radiation, were not inherently defective, but rather, it was the method in which they were administered that resulted in the harm. Accordingly, the hospital and the pharmaceutical manufacturers were absolved of liability.

The court's view is proper in light of the approach that Illinois takes in relation to the Restatement and how the Restatement distinguishes the strict liability approach as applied to drug cases from that applied to other products. Thus, just as pharmaceutical manufacturers would be absolved of any liability, provided that proper warnings were distributed to the physi-

298. 117 Ill. 2d at 514, 513 N.E.2d at 394.
299. Id. See supra notes 145-67 and accompanying text.
300. 117 Ill. 2d at 515, 513 N.E.2d at 395. One argument that can be made against the court's assertion that only physicians have access to drug information is that pharmaceutical manufacturers will often provide similar drug information to other health professionals, such as nurses and pharmacists. Even if no information was sent directly, the package insert accompanying each prescription drug would suffice to inform the health care practitioner as to which warnings he should convey to the patient.
301. Id. at 515, 513 N.E.2d at 394-95.
302. Id. See supra notes 182-86 and accompanying text.
303. But see Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970) (strict liability claim was appropriate against hospital which administered defective blood since contaminated blood was considered to be a defective product). For a more in-depth discussion of this case, see supra notes 169-81 and accompanying text.
304. Restatement (Second), supra note 133, at § 402A comment k.
The Illinois Supreme Court's decision in Kirk is correct insofar as it found no liability for the hospital and the pharmaceutical manufacturers. However, while the court reached the correct result, it used the wrong means to obtain it. The court was justified in turning to the learned intermediary rule, but erred in not actually considering the merits of the warnings pertaining to the drugs. Rather than acting as a "trier of fact," so as to test the sufficiency of the warnings, the court assumed the warnings were sufficient.\textsuperscript{305}

The court erred in its decision not to impose liability on the physicians. The physicians in this case acted negligently towards their patient, McCarthy. In so doing, they set in motion a dangerous situation which foreseeably culminated in injury to an innocent third party (Kirk). To impose liability upon a physician would not result in any great burden to the profession, given that the means to avoid liability would be minimal. To avoid liability, all a physician would have to do would be to give a warning to his patient, an act which is already required of him. While it may be true that this approach would increase the number of plaintiffs who can bring an action against a particular physician, it would be more equitable to require that a negligent physician incur the cost of his mistake than to require a totally innocent plaintiff to absorb the costs.

IV. IMPACT

A. The Practical Effect of the Kirk Decision

The Illinois Supreme Court's decision could have effects which reach beyond the scope of the facts of Kirk. The Kirk court narrowly construed the scope of liability of the medical profession. This is exemplified by the court's concern with the recently passed malpractice legislation and the court's interpretation of the legislative intent.\textsuperscript{306} Depending upon how the lower courts interpret the Illinois Supreme Court's decision in Kirk, the result could be an overall change in the way in which the medical industry is treated in Illinois.

The Kirk case could result in lower courts limiting the types of actions which could be brought against medical defendants. The Kirk court did not see the plaintiff's claim as a typical negligence or strict liability claim and therefore would not allow it to be presented to a jury.\textsuperscript{307} Likewise, the lower courts may view this as an indication of the Illinois Supreme Court's unwillingness to accept any new, creative or novel approaches in imposing

\textsuperscript{305} See supra notes 288-90 and accompanying text.
\textsuperscript{306} 117 Ill. 2d at 517, 513 N.E.2d at 396-97 (1987).
\textsuperscript{307} Id. at 519, 513 N.E.2d at 399.
liability upon the medical industry. If this approach is taken, plaintiffs will have difficulty establishing a successful claim where the claim departs from established case law. The Illinois Supreme Court's decision in Kirk may trigger a change in the treatment the medical industry receives in the Illinois courts. The court's decision may be viewed as a signal to the lower courts to provide greater judicial protection for the medical industry. In light of the perceived legislative goal "to reduce the burden existing in the health professions as a result of the perceived [medical] malpractice crisis," lower courts may place a greater burden upon the plaintiff in an action simply because the defendant is in the medical field.

The final result which may evolve from the Illinois Supreme Court's decision in Kirk may be a lowering of standards throughout the medical industry. If the medical industry is under the impression that the Illinois courts are becoming more defense oriented, there will be less incentive to take precautionary measures to protect potential victims. Therefore, rather than pursuing research or taking additional steps to safeguard patients and others that may be affected, those in the medical field may simply choose to provide the minimum level of care which has already been established.

B. The Legal Effect of the Kirk Decision

The Illinois Supreme Court's decision in Kirk could be interpreted in two ways. First, it could be narrowly construed to stand for the proposition that the court will not allow a third party plaintiff to recover from a health care

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308. This fear of expanding liability in the medical field was expressed by the defendant-hospital in its argument that "if a duty is recognized in this case there would be no logical or just stopping point and the new liability would be urged in all kinds and manner of claims by unknown parties . . . ." Defendant-Appellant's Brief at 14, Kirk v. Michael Reese Hosp. & Medical Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987), cert. denied, 108 S. Ct. 1077 (1988) (Nos. 62700-704).

309. 117 Ill. 2d at 517, 513 N.E.2d at 397.

310. Such an argument was made by the plaintiff when it contended that the medical malpractice legislation "did not grant special privileges to the medical industry . . .[and] did not grant absolute immunity to the medical industry either from malpractice or strict tort liability." Plaintiff-Appellee Brief at 96, Kirk v. Michael Reese Hosp. & Medical Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987), cert. denied, 108 S. Ct. 1077 (1988) (Nos. 62700-704). See also Amicus Brief of Illinois Trial Lawyer's Association at 5, Kirk, supra ("[P]roviding such a special privilege for doctors, drug manufacturers and hospitals would provide society with nothing in return. Therefore such discrimination in favor of these groups is not warranted . . . [i]n the innocent victims need the protection, not the doctors, hospitals, or drug manufacturers."). But see Amicus Brief of the Illinois Hospital Association and Metropolitan Chicago Healthcare Council at 9, Kirk, supra ("[T]he Governor's task force reported that 'Illinois is accelerating through the first stages of a crisis in medical malpractice and today stands on the edge of a medical system that is beginning to deteriorate dramatically.'").

311. See Comment, Special Protection, supra note 196, at 301 (Mr. Robert Cartwright of the American Trial Lawyers Association described benefits associated with medical malpractice litigation by quoting 1974 Health, Education and Welfare legislative report which stated that: "At the present time medical malpractice litigation is clearly the most significant external pressure prompting physicians to practice quality medicine.").
professional when he is not a patient or involved in a special relationship with that patient. Thus, the court’s decision would apply only to situations having a fact scenario similar to *Kirk*.

The Illinois Supreme Court’s decision in *Kirk* could be broadly construed to apply to all cases involving the medical industry. Here, the lower courts would be put on notice to avoid expanding liability where a health care defendant is involved. Furthermore, the courts would be encouraged to take a more protectionist attitude toward the medical field. This construction would be based upon the Illinois Supreme Court’s perception that the legislature’s view regarding the “medical malpractice crisis” must be considered in all such judicial decisions. Thus, the end result would be a bias on the part of the Illinois courts in favor of defendants associated with the health care field.

V. CONCLUSION

The Illinois Supreme Court’s approach in *Kirk* exemplifies a protectionist attitude by the court towards the medical field. The court in this case was unduly influenced by the character of the parties involved. Public policy decisions and an approach to imposing liability should not turn on the desires of the health care industry or those of a potential victim. In a given case, all factors must be examined and social and individual benefits must outweigh the burdens before liability is imposed. It is essential that lower courts weigh all relevant factors before imposing or refusing to impose liability. A court should not harbor a predisposition because one of the parties to a suit is an actor in a particular industry.

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