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The Liability of Health Care Providers to Third Parties Injured by a Patient

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The Liability of Health Care Providers to Third Parties Injured by a Patient

By: Samuel D. Hodge, Jr.*
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Abstract

Duty of care is a critical component of any negligence claim necessary to establish liability. It is well recognized at common law that a physician owes a duty to advise a patient but is not mandated to take affirmative measures outside the physician-patient relationship to protect a third-party. Health care providers may also be responsible for oversight, or the failure to safeguard a patient, due to a special relationship they undertake, such as failing to properly diagnose or recommend an appropriate treatment plan. Recently, the courts have struggled over whether public policy and fairness require the expansion of the law to impose liability upon health care providers for injuries sustained by third parties caused by patients in motor vehicle accidents.

Various theories are advanced to establish liability, such as the physician being negligent by violating a statute created to protect the public through negligence per se, establishing prima facie negligence, or offering evidence of carelessness. A clear court consensus has failed to emerge whether the common law should be expanded in favor of responsibility. This article will provide a brief history of the efforts to enlarge physician liability to third parties. It will then focus on the cases that have arisen against physicians by a third party injured in a motor vehicle accident related to a patient's medical condition or medication side-effects. This is a dilemma confronting the courts on a regular basis.

K.R. was a troubled soul who suffered from depression, recreational drug use, and questionable seizures.¹ Several physicians prescribed various pharmaceuticals, some of which are known to cause drowsiness.² She was told not to drive, but this was not a significant concern because her boyfriend took her

1. K.R. is the driver's initials who caused the accident, and a pseudonym to protect her confidentiality because of a civil commitment. *Bland v. K.R.*, No. A-1837-18T1, 2020 WL 2510361, at *1 n.3 (N.J. Super. Ct. App. Div. May 15, 2020).

2. *Id.* at *4.

everywhere.³

On the day in question, K.R. saw a mental health counselor and reported that she had “a history of blackouts and some seizure episodes.”⁴ K.R. was referred for a substance abuse evaluation and diagnosed with depression and “many medical issues.”⁵ The patient left the facility, went to work, and then met a friend at a restaurant; as she was driving home, she drifted into the opposite lane of travel and struck the plaintiff’s car, causing severe injuries.⁶ K.R. pled guilty to unsafe driving, and the injured motorist sued a variety of parties including K.R.’s healthcare providers.⁷ The pleading alleged that the physicians were negligent in not reporting the woman to the New Jersey Motor Vehicle Commission because she had recurrent episodes of unconsciousness, or impairment of driving abilities.⁸ The relevant statute provides that any physician treating a patient for convulsive seizures, recurrent periods of unconsciousness, or motor coordination impairment must report that determination to the Director of the Division of Motor Vehicles within twenty-four hours.⁹

The trial judge dismissed the complaint noting that the statute does not provide a private cause of action but merely imposes a fine on the offending physician.¹⁰ That failure to report a seizure was also not the proximate cause of the accident.¹¹ The New Jersey Appellate Court agreed and opined that foreseeability is a critical component of a cause of action for negligence.¹² Once this element is established, the court must consider the fairness and policy considerations involved in deciding whether the imposition of a duty is warranted.¹³ This determination is fact-specific and must lead to a fair and proper disposition of the case.¹⁴ However, a violation of the statute

3. *Id.*

4. *Id.* at *3.

5. *Id.*

6. *Id.* at *1.

7. *Id.*

8. *Id.*

9. See N.J. REV. STAT. § 39:3-10.4 (2014).

10. *Bland*, 2020 WL 2510361, at *5.

11. *Id.*

12. *Id.* at *6.

13. *Id.*

14. *Id.*

offers no foundation for a claim of negligence against a medical care professional; it also does not generate a separate basis for a common law claim for medical negligence.¹⁵

This 2020 appellate court decision is just one of the latest attempts to overturn the law that fails to extend a physician's duty to an injured third party who is not a patient. For decades, this controversy has smoldered as the medical and legal communities struggle over whether policy and fairness considerations mandate the expansion of the law to impose liability upon a healthcare provider for injuries sustained by a third party that were foreseeable.

The first deviation of the rule occurred in 1976 when a California court imposed a duty upon a mental health professional to a third person when the analyst learned that a patient would harm a specific person.¹⁶ The next shoe to drop involved the expanded liability of a physician to a third party after exposure to a communicable disease due to the doctor's failure to report the positive results or the doctor's negligent explanation of the test's outcome.¹⁷ The most recent attempt to expand a physician's liability involves injuries sustained by innocent third parties in motor vehicle accidents due to a medical condition of or a medication prescribed to the offending driver.¹⁸ This article will provide a brief history of the efforts to enlarge physician liability to third parties. It will then focus on an analysis of the cases that have arisen to overturn the common law doctrine of no liability to a third party injured by a patient in a motor vehicle accident, in which the side-effects of medication played a role.

I. INTRODUCTION

The threshold question in a negligence case is whether there was a duty owed. The claimant must demonstrate both the requirement of and breach of a duty owed to the plaintiff by the offending party, therefore creating tort liability.¹⁹ It is well

15. *Id.* at *7.

16. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

17. *E.g., Doe v. Cochran*, 210 A.3d 469 (Conn. 2019).

18. *Burroughs v. Magee*, 118 S.W.3d 323 (Tenn. 2003).

19. *Collective Asset Partners LLC v. Schaumburg*, 432 S.W.3d 435, 440 (Tex. App. 2014).

recognized at common law that a physician owes a duty to advise a patient, but is not mandated to take affirmative measures outside the physician-patient relationship to shield a third-party.²⁰ Physicians may also be liable for oversight, or the failure to safeguard a patient, due to a special relationship of care they undertake, such as failing to correctly diagnose or recommend a proper treatment plan. The usual criterion for assessing a physician's actions is the appropriate medical care standard.²¹ As noted in *Rebollal v. Payne*:

A physician and a health-related facility owe a duty of care to their patients and to persons they knew or reasonably should have known were relying on them for this service to the patient. However, the physician or health-related facility does not undertake a duty to the public at large.²²

The duty to be responsible for malpractice to the patient is based upon an expressed or implied contract that the physician would treat the patient with the appropriate and necessary professional skill.²³ For example, physicians frequently deliver medical services in situations that do not always result in a doctor-patient relationship.²⁴ The classic example is the independent medical examination, whereby the physician examines a person on behalf of an insurance carrier or defense attorney.²⁵ Doctors also conduct physicals at an employers' request or assess applicants' health for life and disability insurance policies.²⁶ Most states fail to recognize a doctor-patient relationship in these contexts and will not allow the examinee to sue the presiding physician for malpractice.²⁷ This is demonstrated in *Smith v. Radecki*, where the Alaska Supreme Court did not permit the plaintiff to pursue a medical

20. Seebold v. Prison Health Servs., 57 A.3d 1232, 1238 n.6 (Pa. 2012).

21. *Id.* at 1247.

22. Rebollal v. Payne, 536 N.Y.S.2d 147, 148 (N.Y. App. Div. 1988).

23. 3 SUMM. PA. JUR. 2D TORTS *Physician's Liability to Third Person* § 37:54, Westlaw (database updated Jan. 2021).

24. Samuel D. Hodge, Jr. et al., *A Guide to the Independent Medical Examination*, 25 ALB. L.J. SCI. & TECH. 339, 341 (2015).

25. *Id.*

26. *Id.*

27. *Id.* at 348.

malpractice claim against an independent medical examiner (“IME”) doctor for failing to discover the underlying cause of his back problems.²⁸ The defendant determined there were no permanent injuries related to the work-related incident, advised against additional treatment, and suggested psychological therapy and weight loss.²⁹ About one year later, an MRI disclosed a sacral cyst that was compressing the nerves at the base of his spine.³⁰ The employee sued the doctor for medical malpractice for failing to diagnose and treat his back.³¹ The lawsuit was dismissed, and the appellate court affirmed this decision.³² The court ruled that the physician could not be held liable because, as there was no doctor-patient relationship, there was no corresponding duty of care.³³

II. DUTY OWED BY MENTAL HEALTH PROFESSIONALS

The scope of a patient’s right to confidentiality has been the subject of debate since the time of Hippocrates, with some advocating for complete disclosure and others pressing for unconditional secrecy.³⁴ After all, confidentiality fosters open discussions between parties that are protected from disclosure.³⁵ The foundations of this secrecy and the duty owed to a third party in a mental health setting were rocked in the 1976 seminal decision of *Tarasoff v. Regents of the University of California*.³⁶ This matter involved a patient who informed a University psychotherapist that he would kill a woman he encountered at a dance class when she returned from another country.³⁷ The University police briefly detained that individual at the therapist’s request, but later released him after he promised to keep away from the young woman.³⁸ Tragically, he followed

28. Smith v. Radecki, 238 P.3d 111, 112 (Alaska 2010).

29. *Id.* at 113.

30. *Id.* at 112.

31. *Id.*

32. *Id.* at 114, 117.

33. *Id.*

34. See Ahmad Adi & Mohammad Mathbout, *The Duty to Protect: Four Decades After Tarasoff*, AM. J. PSYCHIATRY 6, 6 (2018).

35. See *id.*

36. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

37. *Id.* at 339.

38. *Id.*

through on his threat and murdered the young woman upon her return to the country.³⁹

A lawsuit was instituted by the young woman's parents claiming that the mental health worker had a duty to warn the woman of the imminent danger posed by the patient.⁴⁰ The defendant maintained that confidential communication is vital to mental health treatment, and any information revealed during a meeting must be held in the strictest confidence.⁴¹ The court disagreed and determined the policy supporting confidential discussions must acquiesce in favor of disclosure when necessary to prevent immediate harm to a third party; the privilege of protection must terminate when a public peril starts.⁴² As the court noted:

[W]henever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.⁴³

The court opined that it will depart from the standard tort principles only upon offsetting factors such as the foreseeability of harm to a third party, the extent of certainty that the victim suffered injury, the relationship between the assailant's conduct and the harm posed/suffered, the moral blame attached to that conduct, "the policy of preventing future harm," the scope of the burden to the wrongdoer, and the significance to the community of enforcing a duty to exercise care with resulting liability for the breach.⁴⁴ As noted in both the Restatement (Second) of Torts⁴⁵ and Prosser on Torts,⁴⁶ there is an exception to the general rule of no liability to a third person when the mental health professional stands in some special relationship to either the

39. *Id.*

40. *Id.*

41. *Id.* at 346.

42. *Id.* at 347.

43. *Id.* at 342 (citation omitted).

44. *Id.* at 358.

45. RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1965).

46. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).

patient whose actions must be controlled or in a relationship to the foreseeable victim of that conduct.⁴⁷

This duty to warn is dubbed the “Tarasoff Rule” and requires mental health workers to exercise “reasonable care” to notify the authorities or warn possible victims should they learn that a patient presents a threat to a third person.⁴⁸ The duty to protect third parties has broad implications, and the holding reinforces the principle that a doctor’s obligation of confidentiality is not absolute.⁴⁹ The California legislature subsequently refined the reach of *Tarasoff* by enacting a law which imposes no financial responsibility against a psychotherapist who fails to warn an individual who is threatened by aggressive conduct unless the patient informs the therapist of a serious threat of physical harm against a reasonably identifiable victim.⁵⁰

This particular decision has become one of the most discussed cases in modern tort law, and the courts and legislatures have broadly embraced it as the basis for creating an obligation upon mental health professionals to “warn, control, and/or protect potential victims of their patients who have expressed violent intentions.”⁵¹ An increased focus on this duty has recently emerged due to the mass shootings in Aurora, Colorado and Newtown, Connecticut. For example, New York has enacted legislation that imposes a mandatory obligation on mental health professionals to report whenever they think patients may present a risk to themselves or others.⁵² Further, such professionals are not subject to liability for the failure to

47. *Tarasoff*, 551 P.2d at 343.

48. *Adi & Mathbout*, *supra* note 33, at 6.

49. *Id.*

50. *See* CAL. CIV. CODE § 43.92 (West 2012). This statute further states that no monetary liability shall arise against a psychotherapist who, under the circumstances of subsection (a) of the statute, discharges their duty to protect by making a reasonable effort to notify the victim(s) and a law enforcement agency. *Id.* In 2004, the California Court of Appeals extended the *Tarasoff* holding to cases where a member of the patient’s family told the therapist that the patient has made a serious threat against a third person. *Ewing v. Goldstein*, 15 Cal. Rptr. 3d 864 (Cal. Ct. App. 2004).

51. Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98 (1994).

52. *See Mental Health Professionals’ Duty to Warn*, NAT’L CONF. STATE LEGISLATURES (Oct. 12, 2018), <https://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx>; N.Y. MENTAL HYG. LAW § 9.46 (McKinney 2013).

report this type of conduct if they act “in good faith” and if the police are permitted to remove firearms from the patients’ possession.⁵³

The range of disclosure requirements among the various states is astounding.⁵⁴ Twenty-three jurisdictions have statutorily required reporting laws,⁵⁵ eleven states must warn at common-law,⁵⁶ ten states (and Washington D.C.) are permissive concerning the duty to warn,⁵⁷ and six states offer no guidance regarding the *Tarasoff* warnings.⁵⁸

III. THE SECOND WAVE OF CASES ESTABLISHING A DUTY TO WARN

Many lawsuits have been filed since *Tarasoff* with the goal of expanding health care providers’ liability to third parties. These efforts have received mixed success, but a few areas have gained traction. At the root of many of these cases is a policy associated with social and economic considerations. As noted by Dean Prosser in his description of proximate or legal causation:

Once it is established that the defendant’s conduct has in fact been one of the causes of the plaintiff’s injury, there remains the question whether the defendant should be legally responsible for what he has caused. Unlike the fact of causation, with which it is often hopelessly confused, this is essentially a problem of law. It is sometimes said

53. N.Y. MENTAL HYG. LAW § 9.46(b), (d).

54. See Olga Gorshkalova & Sunil Munakomi, *Duty to Warn*, NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Sept. 5, 2020), <https://www.ncbi.nlm.nih.gov/books/NBK542236/>.

55. Jurisdictions in this category include Arizona, California, Colorado, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Tennessee, Utah, Virginia, and Washington. *Id.*

56. Jurisdictions in this category include Alabama, Delaware, Georgia, Hawaii, Iowa, North Carolina, South Carolina, Pennsylvania, South Dakota, Vermont, and Wisconsin. *Id.*

57. Jurisdictions in this category include Alaska, Connecticut, Washington D.C., Florida, Illinois, New York, Oregon, Rhode Island, Texas, West Virginia, and Wyoming. *Id.*

58. Jurisdictions in this category include Arkansas, Kansas, Maine, Nevada, New Mexico, and North Dakota. *Id.*

to be a question of whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that this becomes essentially *a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred*.⁵⁹

This thought process has led to the extension of liability to a third party when the defendant has a special relationship with either the individual whose actions need to be controlled or the defendant is in a relationship with the target of the conduct, which affords the victim a right to protection.⁶⁰

A. Communicable Diseases

The duty to warn has been recognized by the courts in the context of contagious diseases, in which a cause of action has been allowed by a third party who has been injured by the doctor's actions.⁶¹ It is a basic principle that individuals owe a duty to employ reasonable care to abstain from conduct that will foreseeably injure others.⁶² Many infectious diseases can be transmitted through normal behaviors, and individual members of society may be particularly susceptible to exposure and unfavorable health consequences.⁶³ This risk has resulted in a physician being held liable to those infected by a patient if the physician negligently fails to properly diagnose an infectious process or has identified the malady but neglects to warn others within the foreseeable range of exposure to the disease.⁶⁴

59. Vattimo v. Lower Bucks Hosp., Inc., 465 A.2d 1231, 1233 (Pa. 1983) (quoting WILLIAM L. PROSSER, LAW OF TORTS (4th ed. 1978)).

60. See generally Emerich v. Phila. Ctr. for Hum. Dev., Inc., 720 A.2d 1032 (Pa. 1998).

61. See *id.* at 1038.

62. Doe v. Linder Constr. Co., 845 S.W.2d 173, 178 (Tenn. 1992).

63. See Steven J. Alles, *Duty to Warn in Pennsylvania*, PA. STATE BD. MED. (June 2011), <https://www.dos.pa.gov/ProfessionalLicensing/LicensingServices/2011/MedicineJune2011-2.pdf>.

64. See *id.* at *2; Gammill v. United States, 727 F.2d 950 (10th Cir. 1984).

The proper way of fulfilling this obligation to warn, and avoiding liability, is influenced by appropriate reporting and privacy laws. Some maintain that the patient's confidentiality is best safeguarded through indirect warnings provided to the health department. However, this method may be unproductive in states where the health agency does not warn those exposed to communicable diseases such as HIV.⁶⁵ A human immunodeficiency virus presents a particular problem because the danger of contact is well-defined and direct, but people may be hesitant to be tested if they know somebody will inform acquaintances.⁶⁶ As a result, case law imposes a duty to issue a warning to prevent harm to others.⁶⁷

Doe v. Cochran provides an example of this situation.⁶⁸ In this case, the court ruled that a doctor who incorrectly tells a patient that he does not have a sexually transmitted disease may be liable to the patient's partner for the resulting harm when the physician is aware that the person requested testing for the direct benefit of that partner.⁶⁹ As noted, a person owes a duty to act with "due care in one's affirmative conduct with respect to all people, insofar as one's negligent actions may foreseeably harm them."⁷⁰ Based upon the Restatement (Second) of Torts:

One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results . . . to such third persons as the actor should expect to be put in peril by the action taken.⁷¹

65. See Edward P. Richards & Katharine C. Rathbun, *Warning Third Parties*, in *LAW AND THE PHYSICIAN: A PRACTICAL GUIDE* (1993) (ebook).

66. See Laura Lin & Bryan A. Liang, *HIV and Health Law: Striking the Balance Between Legal Mandates and Medical Ethics*, 7 *AM. MED. ASS'N J. ETHICS* 687, 688 (2005).

67. See *id.*

68. *Doe v. Cochran*, 210 A.3d 469 (Conn. 2019).

69. *Id.* at 472.

70. *Id.* at 478.

71. *Id.* at 481 (citing RESTATEMENT (SECOND) OF TORTS § 311 (AM. L. INST. 1965)).

In this case, the partner was a foreseeable victim of the physician's negligence to an identifiable person.

This ruling is consistent with several other jurisdictions that have found a medical professional's obligation to accurately diagnose and properly inform a patient who has an infectious disease encompasses not only the patient but also third persons who may foreseeably develop that disease from the patient.⁷² This principle is not draconian or unforeseeable. Many courts have long found that health care providers owe a duty of care to members of the infected patient's immediate family.⁷³

In the context of HIV, state laws are inconsistent as to whether a patient's status can be shared with others. Several jurisdictions have laws dealing with notifying contacts of HIV exposure, and certain health departments mandate that if a patient declines to report a companion who may have been exposed, the physician must inform the appropriate governmental agency of any partner of whom the doctor is aware.⁷⁴ Some states also have laws requiring a duty to warn, thereby mandating disclosure by the health care provider to others known to be at substantial danger for future HIV transmission from patients identified as being infected.⁷⁵

In *Estate of Amos v. Vanderbilt University*, a woman received blood transfusions during surgery, but she was never told the transfusion could expose her to the HIV virus.⁷⁶ Subsequently, the patient gave birth to a daughter infected with HIV who died from complications related to the virus. The woman and her husband subsequently filed suit against the hospital, the defendant's summary judgment motion was granted, and an appeal followed.⁷⁷ The appellate court noted a

72. *Id.* at 485; see 61 AM. JUR. 2D *Physicians, Surgeons and Other Healers* § 226, Westlaw (database updated Feb. 2021); Lawrence O. Gostin & James G. Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 37 (1998); Tracy A. Bateman, *Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient*, 3 A.L.R. 5th § 2(a) (1992); 43 AM. JUR. PROOF OF FACTS 2D *Physician's Failure to Protect Third Party From Harm by Nonpsychiatric Patient* § 3, Westlaw (database updated Nov. 2020).

73. See *Cochran*, 210 A.3d at 485.

74. Lin & Liang, *supra* note 64, at *2.

75. *Id.*

76. *Est. of Amos v. Vanderbilt Univ.*, 62 S.W.3d 133, 135 (Tenn. 2001).

77. *Id.* at 135–36.

recognized concept that “a physician may owe a duty to a non-patient third party if the physician’s negligence causes reasonably foreseeable injuries to the third party.”⁷⁸ In finding for the plaintiffs, the court stated that the duty envisioned is to warn the patient of the HIV risk in order for the patient to take proper measures to avoid transmission of the virus to both her husband and child.⁷⁹ The defendant’s breach of that duty resulted in the reasonably foreseeable injuries incurred by the deceased infant.⁸⁰

B. Genetic Risks

Genetic testing has implications beyond the patient, such as disclosing valuable health information to the person’s relatives.⁸¹ The failure to share inheritable genetic information may “lead to harm, particularly when knowledge could result in avoidance, treatment, or prevention of a genetic condition or in significant changes to reproductive choices or lifestyle.”⁸² A physician’s duty to inform at-risk relatives of a genetically transmittable disease is a troubling question confronting physicians who order these tests.⁸³

Generally, there is no duty on the part of a doctor to warn family members of a genetic characteristic unless the patient expressly gives permission because another family member would be considered a “third party.” This need to protect genetic information relates back to the Hippocratic Oath and is reinforced by the Health Insurance Portability and Accountability Act.⁸⁴

Recent events have caused the medical profession to reconsider traditional ideas of confidentiality and move in favor of disclosure. At-risk relatives have an obvious concern in

78. *Id.* at 138.

79. *Id.*

80. *Id.*

81. See Samuel D. Hodge, Jr., *Does a Physician Have a Duty to Inform At-Risk Relatives of a Positive Genetic Test When the Patient Refuses to Allow That Disclosure?*, 16 J. HEALTH & BIOMEDICAL L. 127, 127–52 (2020).

82. Sara Taub et al., *Managing Familial Risk in Genetic Testing*, 8 GENETIC TESTING 356, 358 (2004) (weighing duty to disclose against obligation to protect patient confidentiality).

83. See Hodge, Jr., *supra* note 79, at 128.

84. *Id.* at 135.

learning about their health risks, particularly those traits that can be reduced through preventive care.⁸⁵ Florida became the first state to consider genetic information disclosure to a non-patient in *Pate v. Threlkel*.⁸⁶ The court framed the issue as whether “a physician owe[s] a duty of care to the children of a patient to warn the patient of the genetically transferable nature of the condition for which the physician is treating the patient?”⁸⁷ The facts reveal that a patient was examined for medullary thyroid carcinoma, a genetically transferable disease. A few years later, the patient’s daughter was discovered to have the same illness.⁸⁸ As a result, the child sued the physicians who had treated her mother, asserting that they knew or should have known the patient’s children had the potential of inheriting the dangerous malady and that the doctor had an obligation to warn the offspring.⁸⁹ The physicians moved to dismiss the lawsuit, maintaining that the plaintiff did not have a doctor-patient relationship with them, so they had no duty to inform her.⁹⁰ The lower court concurred and dismissed the claim.⁹¹ It found that no duty existed because the plaintiff was not in the foreseeable zone of risk, and the rules of privity applied.⁹²

This determination was reversed on appeal.⁹³ The court opined that a duty is established if a reasonably prudent physician would have informed the patient of a genetically communicable illness for which the doctor was treating the person.⁹⁴ In this matter, the standard of care was germane to both the patient and her children, who were identifiable third parties within the zone of danger.⁹⁵ However, the court stated the duty to warn was satisfied by telling the patient of the risk.⁹⁶

85. *Id.* at 138.

86. *Pate v. Threlkel*, 661 So. 2d 278, 282 (Fla. 1995) (“[I]n any circumstances in which the physician has a duty to warn of a genetically transferable disease, that duty will be satisfied by warning the patient.”).

87. *Id.* at 279; see Hodge, Jr., *supra* note 79, at 128.

88. *Pate*, 661 So. 2d at 279.

89. *Id.*

90. *Id.* at 279–80.

91. *Id.*; Hodge, Jr., *supra* note 79, at 143–44.

92. *Pate*, 661 So. 2d at 279–80.

93. *Id.* at 282.

94. *Id.* at 280–82.

95. *Id.* at 282.

96. *Id.*

It noted that its decision should not be construed to require the physician to warn at-risk children of the problem.⁹⁷ After all, patients are expected to tell their family members about genetic information.⁹⁸

New Jersey addressed this issue in *Safer v. Estate of Pack*.⁹⁹ The physician in question treated the plaintiff's father years earlier for retroperitoneal cancer, resulting in a total colectomy.¹⁰⁰ Subsequently, the father developed ulcerative adenocarcinoma with metastases that caused his death.¹⁰¹ Years later, the plaintiff suffered from abdominal pain and was found to have a cancerous blockage of the colon requiring surgery and chemotherapy.¹⁰² A review of the father's medical records showed that he had the same cancerous malady.¹⁰³ The daughter instituted a suit against her father's doctor, claiming that the physician had a duty to warn those relatives at risk of developing the problem since early scrutiny could have prevented the inherited cancer outcome.¹⁰⁴

The appellate court ruled that a physician is mandated to disclose a genetic condition to those at risk.¹⁰⁵ This duty applies to the patient and immediate family members who might be adversely affected by the breach of that duty. However, the ruling's impact must be considered in view of ensuing legislation passed in New Jersey that provides that genetic information may not be revealed except in specific situations such as for purposes of a criminal investigation, to ascertain paternity, and when authorized by a court order.¹⁰⁶ The statute does not provide for the sharing of genetic information with at-risk relatives without consent.¹⁰⁷

The cases involving the disclosure of genetic information

97. *Id.* at 282.

98. *Id.*

99. *Safer v. Est. of Pack*, 677 A.2d 1188 (N.J. Super. Ct. App. Div. 1996).

100. *Id.* at 1189.

101. *Id.* at 1190.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1193.

106. *See* N.J. STAT. ANN. § 10:5-47 (West 1996) (setting conditions for disclosure of genetic information).

107. *Id.*

continued with the Minnesota matter of *Molloy v. Meier*.¹⁰⁸ In this litigation, the court was again asked to consider the disclosure of genetic information.¹⁰⁹ This malpractice lawsuit concerned the defendants' failure to find a genetic abnormality in the plaintiffs' daughter, thereby causing the parents to have a second child with the same illness.¹¹⁰ The doctor was asked to run genetic tests but did not perform the full complement of diagnostic aids.¹¹¹ The parents then inquired about whether another child's birth would produce an offspring that would be mentally delayed, and they were told that the odds of this occurring were slim.¹¹²

Based upon that advice, the plaintiffs had another baby who showed developmental difficulties.¹¹³ Additional testing was positive for Fragile X syndrome, and the parents sued the defendants asserting that the doctors failed to obtain the proper tests, mistakenly noting that the first child had been fully tested, and failed to inform the plaintiffs about the possibility of passing along an inheritable genetic abnormality to subsequent children.¹¹⁴ The defendants moved to dismiss the complaint, asserting that they did not owe a duty to the patient's family.¹¹⁵

The court framed the issue on appeal as follows: "Does a physician who allegedly fails to test for and diagnose a genetic disorder in an existing child leading to the birth of a subsequent child with that disorder owe a legal duty to the child's parents?"¹¹⁶ The court found in favor of the plaintiffs and noted that genetics affects more than just the patient.¹¹⁷ Both the parents and child benefit from appropriate testing, and each can be injured by a mistake. Therefore, a physician's duty regarding genetic testing goes beyond just the patient and extends to the biological parents who may be foreseeably harmed by a violation of that duty.¹¹⁸ The defendants should have anticipated that

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

109. *See Hodge, Jr.*, *supra* note 79, at 146.

110. *Molloy*, 679 N.W.2d at 713–14.

111. *Id.* at 714.

112. *Id.*

113. *Id.* at 715.

114. *Id.*

115. *Id.*

116. *Id.* at 716.

117. *Id.* at 719.

118. *Id.*

parents might wish to have another child because of the lack of information about a positive genetic disorder.¹¹⁹

The duty to disclose a genetic risk to a third person is similar to the liability imposed against a physician for failing to inform non-patient family members about the harm linked to a patient with a contagious disease.¹²⁰ As noted in *Molloy v. Meier*, the court found that “genetic testing and diagnosis does not affect only the patient. Both the patient and her family can benefit from accurate testing and diagnosis.”¹²¹

C. Independent Medical Examinations

Jurisdictions have varied approaches in ascertaining whether an independent medical examiner owes a duty of care to the examinee. This issue of duties owed is significant because it affects whether a claimant can maintain a malpractice or other professional negligence suit against the independent examiner who was not hired by the patient.¹²² Most jurisdictions hold no doctor-patient relationship is formed, but some courts have ruled that an IME doctor owes the patient a limited duty i.e., that a doctor-patient relationship does exist.¹²³

The American Medical Association (“AMA”) started the ball rolling when it opined that a physician who conducts an isolated examination of a person’s health or disability for an employer, business, or insurer should be found to have created a limited patient-physician relationship.¹²⁴ The AMA further noted that this limited relationship obliges physicians to tell the patient about important health information and suggests that they follow up with their own physician.¹²⁵ However, the IME is not obliged to treat the individual like they would handle their

119. *Id.*

120. *See* Hodge, Jr., *supra* note 79, at 150.

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

122. *See* Hodge, Jr., *supra* note 79, at 149.

123. Hodge, Jr. et al., *supra* note 23, at 342.

124. Am. Med. Ass’n, Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations, Opinion 10.03 (Dec. 1999), *available at* <https://www.patrickmalonelaw.com/useful-information/legal-resources/attorneys/legal-resources-attorneys-injured-clients/american-medical-association/> (explaining that “isolated assessment[s] of an individual’s health” for a third party creates a “limited patient-physician relationship”).

125. *Id.*

patients.¹²⁶ The AMA also reported that the physician must inform the examinee of any abnormalities and other significant findings discovered as the result of the physical, including making sure that the patient comprehends the issue.¹²⁷ Nevertheless, courts have not uniformly adopted the AMA's opinion.¹²⁸

Some states do not have a bright-line standard about an IME's duty to examinees. Instead, they have found that an independent examiner owes a limited duty that does not rise to the doctor-patient relationship's standard duty.¹²⁹ For example, the Virginia Supreme Court allowed a plaintiff to defeat a motion to dismiss a medical malpractice claim against an examiner.¹³⁰ In *Harris v. Kreutzer*, the plaintiff sustained a brain injury in an automobile accident and sued the other driver.¹³¹ The trial judge ordered Harris to undergo an independent medical examination to assess the extent of her brain injury.¹³² The doctor was a clinical psychologist, and it was claimed that he was verbally abusive to the plaintiff and accused her of faking the injuries.¹³³ Ms. Harris filed a malpractice suit, and the Virginia Supreme Court ruled that the negligent performance of a physical or mental independent medical examination provides a possible cause of action.¹³⁴ It was alleged that the doctor knew that her psychological disorder would be exasperated if she were verbally mistreated during the exam.¹³⁵ Her claim was premised on the allegation that the doctor intentionally aggravated her pre-existing problems, which he knew of, and as a result of his behavior during the examination, her health significantly deteriorated.¹³⁶ The court

126. *Id.*

127. *Id.*

128. *See Smith v. Radecki*, 238 P.3d 111, 115–16 (Alaska 2010) (discussing the various approaches state courts have taken to the AMA rule).

129. *See Hodge, Jr. et al., supra* note 23, at 344.

130. *Harris v. Kreutzer*, 624 S.E.2d 24 (Va. 2006).

131. *Id.* at 29–30 (explaining that there “has not been [a] uniform” method for determining whether a physician owes a duty to a patient in a court ordered medical examination).

132. *Id.* at 27.

133. *Id.*

134. *Id.* at 33.

135. *Id.* at 27.

136. *Id.*

determined that an independent medical examination does not establish the traditional doctor-patient relationship, but rather a limited relationship; “[t]he recognition of a limited relationship preserves the principle that the IME physician has undertaken limited duties but that he has done so in a situation where he is ‘expected to exercise reasonable care commensurate with his experience and training.’”¹³⁷

Both Texas and Minnesota courts hold that the independent physician owes a limited duty to an examinee to perform the examination correctly without causing further harm to the patient.¹³⁸ Likewise, New Jersey has determined that an IME owes a duty to the claimant if the physician is examining a specific complaint.¹³⁹ The Fifth Circuit has opined that a doctor hired by a third party to perform an examination must tell the patient of a potentially life-threatening issue discovered during the physical.¹⁴⁰ The Ninth Circuit has determined that an IME has a duty under Washington law to notify those examined of abnormal test findings, even in the absence of the doctor-patient relationship.¹⁴¹

A handful of jurisdictions find that an IME establishes a doctor-patient relationship sufficient for a malpractice claim against a physician.¹⁴² For instance, the Fifth Circuit Court of Appeals found that Louisiana law created a doctor-patient relationship.¹⁴³ In *Green v. Walker*, the decedent’s estate filed a claim after the patient died from lung cancer.¹⁴⁴ The facts show that the deceased had an annual physical, a condition of his job.¹⁴⁵ The physician found the man to be in good health and allowed him to continue working.¹⁴⁶ A year later, he was diagnosed with lung cancer and subsequently died.¹⁴⁷ The

137. *Id.* at 31 (quoting *Dyer v. Trachtman*, 679 N.W.2d 311, 316 (Mich. 2004)).

138. See Hodge, Jr. et al., *supra* note 23, at 344–45.

139. *Reed v. Bojarski*, 764 A.2d 433, 442–43 (N.J. 2001) (holding that pre-employment medical exams created a duty).

140. *Green v. Walker*, 910 F.2d 291, 296 (5th Cir. 1990).

141. *Daly v. United States*, 946 F.2d 1467, 1470 (9th Cir. 1991).

142. See Hodge, Jr. et al., *supra* note 23, at 345–47.

143. *Green*, 910 F.2d at 296.

144. *Id.* at 292.

145. *Id.*

146. *Id.*

147. *Id.*

lawsuit was premised upon the physician's failure to diagnose the deceased's lung cancer at the employee-mandated evaluation.¹⁴⁸ The defendant filed a motion to dismiss the claim because there was no doctor-patient relationship.¹⁴⁹ The Fifth Circuit disagreed and opined:

We therefore now hold that when an individual is required, as a condition of future or continued employment, to submit to a medical examination, that examination creates a relationship between the examining physician and the examinee, at least to the extent of the tests conducted. This relationship imposes upon the examining physician a duty to conduct the requested tests and diagnose the results thereof, exercising the level of care consistent with the doctor's professional training and expertise, and to take reasonable steps to make information available timely to the examinee of any findings that pose an imminent danger to the examinee's physical or mental well-being.¹⁵⁰

The Kansas courts have found that a doctor hired to conduct an independent medical examination must not cause harm during the physical and must use her best judgment in treatment while relying on her skill and experience.¹⁵¹ In Maryland, a claimant must demonstrate that a doctor-patient relationship was established to maintain a malpractice claim.¹⁵² The leading case in Maryland held that a doctor-patient relationship is established, "only . . . as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill and the patient will pay for such treatment."¹⁵³

In *Webb v. T.D.*, the Montana Supreme Court ruled that a

148. *Id.*

149. *Id.* at 292–93.

150. *Id.* at 296.

151. *See* *Smith v. Welch*, 967 P.2d 727, 736 (Kan. 1998).

152. *Dingle v. Belin*, 749 A.2d 157, 164 (Md. 2000).

153. *Id.*

patient could sue her IME doctor for malpractice.¹⁵⁴ The court framed the issue as “whether a physician who performs a medical examination of an individual at the request of a third party has a duty of care to the examinee and, if so, what is the scope of that duty?”¹⁵⁵ The plaintiff hurt her spine in a work-related incident and was treated by a chiropractor and physical therapist.¹⁵⁶ The defendant was the only medical doctor she saw, and her job’s insurance company employed the physician.¹⁵⁷ That individual ordered a CT scan to determine whether the worker had a herniated disk and was told that she did not and could return to work.¹⁵⁸ The claimant went back to her job only to herniate a disc, which caused physical limitations.¹⁵⁹ The worker filed a malpractice claim against the defendant, who moved to dismiss the lawsuit arguing that he was not employed to provide any treatment and therefore did not owe a duty because there was no doctor-patient relationship.¹⁶⁰

The Montana Supreme Court disagreed and found that when a person is mandated, as a condition of employment, to submit to an examination, that physical examination establishes a doctor-patient relationship, at least to the degree of the tests conducted.¹⁶¹ This connection creates a duty upon the doctor to perform the tests and diagnose the results, using the care consistent with the doctor’s professional training and expertise.¹⁶² That duty is not the same as that which is owed in the standard doctor-patient relationship, but will be ascertained on a case-by-case basis.¹⁶³ This means that the physician must exercise reasonable care to discover conditions that pose an imminent danger to the patient’s health, take the necessary steps to inform the patient of those conditions, and properly notify the patient of his or her status after the examination with

154. *Webb v. T.D.*, 951 P.2d 1008, 1014 (Mont. 1997) (holding that Montana law imposed a duty on a doctor performing an IME).

155. *Id.* at 1009.

156. *Id.*

157. *Id.* at 1009–10.

158. *Id.* at 1010.

159. *Id.*

160. *Id.*

161. *Id.* at 1014.

162. *Id.* at 1013–14.

163. *Id.* at 1014.

advice appropriate to the doctor's profession.¹⁶⁴

IV. PHYSICIAN'S LIABILITY FOR INJURIES CAUSED BY PATIENTS IN ACCIDENTS

Informed consent is a critical aspect of shared decision-making and necessitates that a patient be informed of the advantages, risks, and alternatives to any medical procedure. This process, which has become part of both the law and practice of every physician, helps a patient determine whether to proceed with the proposed treatment.¹⁶⁵ The doctrine's basis is the ethical idea of patient autonomy and fundamental human rights.¹⁶⁶ The principle is based upon the benefit that surfaces from a person's active involvement in the decision-making process about their health.¹⁶⁷ This participation is helpful because it aids in preventing treatment that a patient believes is disadvantaged or unwarranted.¹⁶⁸

Informed consent has recently gained traction as a way to require healthcare providers to warn patients of the side effects of dispensed or prescribed medications.¹⁶⁹ The courts have uniformly recognized the principle as a way to establish a duty of care owed to the patient that will give rise to tort liability.¹⁷⁰ However, there is a growing trend to apply the concept to a non-patient third party to show that a physician was negligent by violating a statute created to protect the public through negligence per se, establishing prima facie negligence, or offering evidence of carelessness.¹⁷¹ In other words, just as safety laws create a duty that protects injured parties, informed consent may be used to show a duty owed by a healthcare provider to a patient that could be applied towards third parties

164. *Id.*

165. See Samuel D. Hodge, Jr. & Maria Zambrano Steinhaus, *The Ever-Changing Landscape of Informed Consent and Whether the Obligation to Explain a Procedure to the Patient May Be Delegated*, 71 ARK. L. REV. 727 (2019).

166. *Id.* at 727–28.

167. *Id.* at 729.

168. *Id.*

169. See 43 AM. JUR. PROOF OF FACTS 2D *Physician's Failure to Protect Third Party From Harm by Nonpsychiatric Patient* § 1, Westlaw (database updated Nov. 2020).

170. *Id.*

171. *Id.*

injured by that patient.¹⁷² This is demonstrated by a series of cases dealing with physician liability to a third party injured by a patient-driver who was impaired by a medical problem or prescription drugs.¹⁷³

These matters usually involve control and foreseeability issues, and the “cases lend themselves to a public policy analysis.”¹⁷⁴ The courts like to apply a balancing test when confronting questions about expanding a physician’s liability to a third party. This requires the court to evaluate the probability of injury in similar matters, to weigh the doctor’s burden to guard against liability, and to examine the possible concerns of putting that burden on the doctor.¹⁷⁵ The courts will also consider the concept of fairness; an unreasonable risk is present if “the foreseeable probability and gravity of harm posed by defendant’s conduct outweigh the burden upon the defendant to engage in alternative conduct that would have prevented the harm.”¹⁷⁶ When it comes to prescribing drugs, the obligation to inform a patient of the risks related to taking medication while operating a motor vehicle presents little to no burden upon a doctor when associated with the degree of harm that the warning may prevent to a third party.¹⁷⁷

Overall, courts are split over whether to extend a physician’s liability in these cases. The soundest situation for establishing a duty of care for medication, epilepsy, and similar conditions occurs when the doctor creates an unreasonable risk to a third party by negligently risking harm to the patient. This is demonstrated by a patient who is permitted to operate a car, but because of the physician’s issuance of unneeded or unsuitable medication, the driver becomes drowsy and strikes the plaintiff’s vehicle. Some courts have recognized a duty of

172. *Id.*

173. See Dean P. Nicastro, *Physician Liability to Non-Patients*: Coombes v. Florio, 450 Mass. 182 (2007), 52 BOS. BAR J. 20 (2008).

174. Reply Brief of Appellee at 27, Taylor v. Smith, 892 So. 2d 887 (Ala. 2004) (No. 1011673).

175. See *id.*; Lance v. Senior, 224 N.E.2d 231 (Ill. 1967); Boyd v. Racine Currency Exch., Inc., 306 N.E.2d 39 (Ill. 1973).

176. Campbell C. Steele, Comment, *Torts-Burroughs v. Magee: The Tennessee Supreme Court Extends a Physician’s Duty to the Motoring Public to Warn Patients of the Effects of Taking Medication While Driving but Declines to Extend a Duty to Third Parties for Negligent Prescription Decisions*, 35 U. MEM. L. REV. 173, 176–77 (2004) (citations omitted).

177. See *id.* at 195.

care to a third party in such situations.¹⁷⁸ Likewise, the healthcare provider may be liable for carelessly failing to discover a patient's epilepsy, to warn the medicated patient against driving, or to inform the patient-driver the contraindicated drug given by a doctor incapacitates when driving.¹⁷⁹ While a physician may owe a duty to foreseeable third persons to inform a patient of the "risks of driving while under the influence of [] prescribed drugs," that obligation is not always owed to foreseeable third persons when electing to prescribe pharmaceuticals to a patient.¹⁸⁰ Needless to say, physicians and medical organizations are strenuously opposed to the expansion of liability to cover third parties injured because of medication use by patients,¹⁸¹ and several courts agree with this position.¹⁸² Some jurisdictions merely refuse to extend liability to non-patients.¹⁸³ Others opine that creating a duty to non-patients will create a conflict between a physician's responsibilities to a patient and obligations to third parties.¹⁸⁴ However, these positions are not applicable when the doctor's duty of care requires an identical diagnosis or treatment that would also be safer for society members.¹⁸⁵ In such a case, there is neither a clash of allegiance nor any further imposition upon the doctor; she fulfills her obligation to a third person when she meets her duty to the patient.¹⁸⁶

Most individuals handle prescription medication with care. Pharmaceuticals have side effects because of their chemical structure that may influence a person's capacity to engage in

178. See DAN B. DOBBS ET AL., *THE LAW OF TORTS* 149–52 (2d ed. 2011) (discussing § 289 regarding the risk to strangers when physicians fail to properly warn or treat their patients).

179. See *id.*; see also *Taylor v. Smith*, 892 So. 2d 887 (Ala. 2004); *Cheeks v. Dorsey*, 846 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 2003) (methadone allegedly issued to patient already on drugs, causing an incapacity that resulted in a car accident that killed the plaintiff's decedent and her child).

180. *Burroughs v. Magee*, 118 S.W.3d 323, 333–35 (Tenn. 2003).

181. See Chris Mazzolini, *Physician Found Liable for Malpractice for Patient He Never Treated*, MED. ECON. (May 14, 2019), <https://www.medicaleconomics.com/view/physician-found-liable-malpractice-patient-he-never-treated>.

182. See *id.*

183. DOBBS ET AL., *supra* note 176, at 150–52.

184. *Id.*

185. *Id.*

186. *Id.*

activities.¹⁸⁷ These adverse reactions can range from nausea to the inability to operate a car or heavy equipment.¹⁸⁸ To minimize these effects, patients must be warned about significant safety concerns and side effects that create a risk.¹⁸⁹ This information allows patients to choose whether to take the drug at a particular time or ensure they are used correctly. But who should assume the obligation of providing patients with this information?¹⁹⁰ The courts are split as to that question and lean towards a middle position of either making physicians responsible or placing the burden on patients themselves.¹⁹¹ Litigation in which courts have had to decide a physician's liability to a non-patient generally involves motor vehicular accidents and includes circumstances where a medicated patient negligently uses a car and causes an accident.¹⁹²

A. Cases That Have Allowed Recovery

Courts that have allowed recovery tend to look at foreseeability as a key component in establishing a duty of care, or they state public policy is the overriding consideration making a physician responsible for the actions of the patient.

1. Alabama

The Alabama Supreme Court found that a duty was owed to an injured third party in a motor vehicle accident in *Taylor v. Smith*.¹⁹³ The facts demonstrate that Ms. Ennis visited the defendant's clinic for treatment of an opiate addiction.¹⁹⁴ She was given methadone, but random testing showed that the

187. See Cherie N. Wyatt, *Driving the Center Line: Missouri Physicians' Potential Liability to Third Persons for Failing to Warn of Medication Side Effects*, 46 ST. LOUIS. U. L.J. 873 (2002).

188. See Carol DerSarkissian, *Drug Side Effects Explained*, WEBMD (Mar. 7, 2020), <https://www.webmd.com/a-to-z-guides/drug-side-effects-explained#1>.

189. See Michael Bihari, *Why You Should Pay Attention to Black Box Warnings on Medication*, VERYWELLHEALTH (Mar. 1, 2020), <https://www.verywellhealth.com/black-box-warnings-1124107>.

190. See Wyatt, *supra* note 185, at 873.

191. *Id.*

192. *Id.*

193. *Taylor v. Smith*, 892 So. 2d 887, 897 (Ala. 2004).

194. *Id.* at 889.

patient was still using drugs.¹⁹⁵ Following a treatment session, the patient left the clinic and drove home.¹⁹⁶ Her car crossed into the opposite lane of travel and struck the automobile containing the plaintiff.¹⁹⁷ A suit was filed by plaintiff against defendant-physician, claiming the defendant owed a duty to the plaintiff under ordinary negligence principles to not allow his impaired patient, who could not operate a motor vehicle responsibly, to be discharged.¹⁹⁸

The court noted that based upon the distance and frequency the patient traveled to the clinic and her continued drug abuse, a car accident was reasonably foreseeable.¹⁹⁹ Thus, the issue was whether the head of a drug-treatment center owed a duty to a non-patient who was hurt in an accident with the patient when it was reasonably foreseeable that an accident can occur from the physician's failure to use due care in giving methadone to the patient.²⁰⁰ In finding liability, the court stated "every person owes every other person a duty imposed by law to be careful not to hurt him," and the court has often recognized a foreseeable duty to third parties based on a "obligation imposed in tort to act reasonably."²⁰¹ The court then examined other jurisdictions that imposed such a duty on doctors to benefit non-patient members of the driving public.²⁰² As was explained:

The possibility (or perhaps what could be called a *threat*) that in some case or cases in the future some therapists may choose not to accept some potential patients for therapy in their private practice . . . should not forever preclude victims of torts . . . referable to the breach of duty of such therapists from being *without any remedy whatever*.²⁰³

195. *Id.* at 890.

196. *Id.*

197. *Id.*

198. *Id.* at 890–91.

199. *Id.* at 892.

200. *Id.*

201. *Id.* at 893 (quoting *Berkel & Co. Contractors, Inc. v. Providence Hosp.*, 454 So. 2d 496, 502 (Ala. 1984)).

202. *Id.* at 893–95.

203. *Id.* at 896 (quoting *Gooden v. Tips*, 651 S.W.2d 364, 372 (Tex. App. 1983)).

The alleged “nature of the defendant’s activity,” and the issuing of methadone on an outpatient basis without taking appropriate safeguards, “[are] affirmative act[s],” which place the administering doctor directly in the foreseeable results; this element, by itself, provides the incentive for imposing a duty.²⁰⁴

2. Hawaii

The Hawaii Supreme Court issued a mixed ruling in *McKenzie v. Hawaii Permanente Medical Group, Inc.*²⁰⁵ It determined a doctor did not owe a duty to a third party injured from prescribing medication that is not a controlled substance.²⁰⁶ However, a duty is imposed upon a physician to someone other than the patient to warn the patient a drug may affect that person’s driving capabilities if the patient could not have reasonably known the risk.²⁰⁷ This decision, which has been discussed by other jurisdictions, involved a patient who had a fainting episode from medication issued by the defendant while operating a car that struck the minor plaintiff.²⁰⁸

The defendant argued that he owed no duty to the plaintiff because she was not his patient and that there was no special relationship with the patient that would require him to control that person’s behavior.²⁰⁹ The plaintiff countered that the pertinent issue is foreseeability, and public policy requires physicians to be held accountable for their prescribing practices.²¹⁰ Under the Restatement (Second) of Torts, the defendant could be liable to the plaintiff because it is foreseeable that the patient would drive after taking negligently issued medication, subjecting them to harm.²¹¹ However, the Restatement merely describes a form of negligent conduct; it

204. *Id.* at 896–97.

205. *McKenzie v. Haw. Permanente Med. Grp., Inc.*, 47 P.3d 1209 (Haw. 2002).

206. *Id.* at 1221.

207. *Id.* at 1210.

208. *Id.*

209. *Id.* at 1211–12.

210. *Id.* at 1212.

211. *Id.* at 1213 (citing RESTATEMENT (SECOND) OF TORTS § 302 (AM. L. INST. 1965)).

does not create a legal duty.²¹²

In ascertaining whether a duty is owed, the court must weigh the policy considerations that favor each party. The plaintiff asserts that the fair distribution of the costs of harm and the need for objective compensation to those injured requires that health care providers owe a duty to non-patient third parties hurt due to negligent prescribing practices.²¹³ However, prescribing decisions require a weighing of the benefits and risks to a patient.²¹⁴ In this regard, the threat of litigation should be sufficient to dissuade negligent prescribing decisions.²¹⁵ Setting aside issues involving controlled substances, the court opined that “a physician does not owe a duty to non-patient third parties injured in an automobile accident caused by the patient’s adverse reaction to a medication negligently prescribed by the physician . . . where the negligence involves prescribing decisions.”²¹⁶

As for a physician’s negligent failure to warn a patient of a drug’s dangerous side-effects, such a warning could potentially avoid substantial harm to third parties. “There is ‘little [social] utility in failing to warn patients about the effects of a drug or condition that are known to the physician but are likely to be unknown to the patient.’”²¹⁷ Balancing the factors involved in imposing a duty to warn about the dangers of medication, logic imposes upon physicians, for the benefit of third parties, a duty to tell their patients that a drug may impair their driving ability “when such a duty would otherwise be owed to the patient.”²¹⁸ Factors to ponder in deciding whether the reasonable patient should have known of the risk include (1) understanding the risk as between laypersons and doctors; (2) whether the patient has previously taken the drug and/or suffered adverse effects; and (3) whether a warning would otherwise have been useless.²¹⁹

212. *Id.* at 1213–14 (citing RESTATEMENT (SECOND) OF TORTS § 302).

213. *Id.* at 1212.

214. *Id.* at 1216.

215. *Id.*

216. *Id.* at 1218.

217. *Id.* at 1219 (quoting *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998)).

218. *McKenzie*, 47 P.3d at 1221.

219. *Id.* at 1222.

3. Indiana

Indiana has considered the issue of physician liability to third parties on several occasions. In *Cram v. Howell*, the Indiana Supreme Court reversed the Indiana Court of Appeals, holding that a physician owes no duty to a third person allegedly harmed by the doctor's treatment of a patient.²²⁰ Years earlier, the court found that no malpractice liability was established against a physician who had prescribed anabolic steroids to a patient who developed a toxic psychosis from the drug that caused him to shoot a third party.²²¹ The court used a balancing test to make this determination.²²² Generally, physicians do not owe a duty to a non-patient injured by the doctor's treatment of a patient. However, this pronouncement does provide physicians with complete immunity against third person claims. Liability may attach under the proper factual situation.²²³ The case presented facts that implied the defendant had actual knowledge that his immunizations caused a recurrent loss of consciousness in the patient.²²⁴ This knowledge makes it likely that the patient, if permitted to drive, would injure a third party.²²⁵ From a public policy point of view, the defendant should have observed his patient for an appropriate time period before allowing him to leave the office, and the physician failed to warn the patient of the risks linked to operating a vehicle in such a state.²²⁶

This logic was reinforced in *Manley v. Sherer*.²²⁷ In that case, the plaintiff was involved in a car accident when the defendant's patient lost consciousness while driving because of a medical condition and pharmaceuticals prescribed by the physician.²²⁸ While the plaintiff had no special relationship with the defendant, it was reasonably foreseeable that the patient could lose consciousness while driving and pose a danger to

220. *Cram v. Howell*, 680 N.E.2d 1096, 1096 (Ind. 1997).

221. *Id.* at 1097 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1997)).

222. *Id.* at 1097 (citing *Webb*, 575 N.E.2d at 997)).

223. *Id.* at 1097–98.

224. *Id.* at 1098.

225. *Id.*

226. *Id.*

227. *See Manley v. Sherer*, 960 N.E.2d 815 (Ind. Ct. App. 2011).

228. *Id.* at 819.

others with her medical condition and prescribed medication.²²⁹ Public policy considerations also warrant the imposition of a duty to warn since it will benefit both similarly-situated patients and third parties who may encounter those patients on the highway.²³⁰

4. New York

New York considered a physician's liability to a third party in *Davis v. South Nassau Community Hospital*.²³¹ This matter involved a patient who was given a narcotic pain-killer by the defendant without notice that the medication could impair her ability to drive.²³² Soon after she left the defendant's facility, while allegedly impaired by the drug, she was involved in an accident when she struck a bus driven by the plaintiff.²³³ The court phrased the issue as to whether the defendant owed a duty to the plaintiff to warn the patient that the drugs the physician gave her either impaired or could have impaired her ability to operate a motor vehicle properly.²³⁴

In finding that such a duty exists, the court noted that it has "historically proceeded carefully and with reluctance to expand an existing duty of care."²³⁵ However, in limited situations, the court has enlarged the duty of a treating physician to include a third party whose personal injury stemmed from the doctor's performance of the duty of care owed to the patient.²³⁶ In this matter, the physician's "relationship with . . . the tortfeasor . . . place[s] [him] in the [most advantageous] position to [safeguard] against the risk of harm."²³⁷ When one weighs the elements "such as the expectations of the parties and society . . . tilts in favor of establishing a duty running from defendants to plaintiffs under the facts alleged in this case."²³⁸ Giving the drug

229. *Id.* at 822.

230. *Id.* at 822–23.

231. *Davis v. S. Nassau Communities Hosp.*, 46 N.E.3d 614 (N.Y. 2015).

232. *Id.* at 616.

233. *Id.*

234. *Id.*

235. *Id.* at 619 (citation omitted).

236. *Id.* at 621.

237. *Id.* at 622 (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001)).

238. *Id.*

at issue without warning the patient about the medication's ability to confuse created a danger affecting every motorist in the patient's locale.²³⁹ The physician is the only party who could have delivered an appropriate admonition of the effects of that prescription.²⁴⁰ Therefore, the defendant had an obligation to the plaintiff to warn the patient that the medication reduced her ability to safely operate a car.²⁴¹

5. South Carolina

Hardee v. Bio-Medical Applications of South Carolina, Inc. involved a patient who was returning home from dialysis when he lost control of her car and collided with the plaintiff.²⁴² It was alleged that the defendant failed to inform the patient of the ill effects from the dialysis treatment—he was suffering from low blood sugar at the time the patient left the defendant's office, and the medical staff failed to complete the normal post-treatment tests before releasing the individual.²⁴³

The court reversed the defendant's grant of summary judgment and found that a doctor-patient relationship is not necessary in every claim against a medical provider, and a physician's malpractice in treating a patient may provide the foundation of such an action by a third person in limited circumstances.²⁴⁴ A physician has a duty to warn of the risks involved with medical care. A medical provider who offers treatment which may adversely influence a patient's abilities owes a duty to avoid harm to the patient and to reasonably identifiable third parties by notifying the patient of the risks before dispensing treatment.²⁴⁵ Therefore, if the physician knew that the patient could suffer harmful effects subsequent to dialysis, the defendant owed a duty to a third party to warn the patient of the dangers of driving.²⁴⁶

239. *Id.*

240. *Id.*

241. *Id.*

242. *Hardee v. Bio-Medical Applications of S.C., Inc.*, 636 S.E.2d 629, 630 (S.C. 2006).

243. *Id.*

244. *Id.* at 632.

245. *Id.* at 631–32.

246. *Id.* at 632.

6. Tennessee

Burroughs v. Magee involved a fatal motor vehicle accident when a truck driver ran a stop sign and collided with the plaintiff's car.²⁴⁷ Mrs. Burroughs was seriously injured, and her husband was killed.²⁴⁸ The day before the incident, the truck driver had visited the defendant for persistent headaches, and the doctor had prescribed various medications that depress the nervous system and affect a person's ability to drive.²⁴⁹ The plaintiffs sued, claiming that the defendant was negligent in failing to properly review the truck driver's medical history outlined in the medical chart.²⁵⁰ It was asserted that: (1) the truck driver had a known history of Soma abuse, an addictive and potentially dangerous muscle relaxer, and the physician was negligent in prescribing that medication; and (2) the defendant negligently failed to warn his patient against operating a vehicle while taking the drug.²⁵¹ The trial court granted the defendant's motion for summary judgment, and the matter ended up before the Tennessee Supreme Court.²⁵²

The court used a complex analysis to determine that the defendant owed a duty to the plaintiffs to warn his patient of the dangers of driving while under the influence of the prescribed medication.²⁵³ However, it then found that the physician had no duty to the plaintiffs in the determination of whether to give the medications to the patient.²⁵⁴ The court applied a multiple pronged approach in reaching its decision.²⁵⁵ The first step is to determine the foreseeability of the harm.²⁵⁶ The defendant's office was well aware of the patient's abuse of prescription drugs, as evidenced by the comments in the medical records.²⁵⁷ Therefore, the accident was foreseeable.²⁵⁸ The second factor is

247. *Burroughs v. Magee*, 118 S.W.3d 323, 325 (Tenn. 2003).

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 327.

252. *Id.*

253. *Id.* at 331–33.

254. *Id.* at 335.

255. *Id.* at 331–33.

256. *Id.* at 331.

257. *Id.* at 332.

258. *Id.*

“the possible magnitude of the potential harm or injury[.]”²⁵⁹ As demonstrated by accidents involving intoxicated drivers, “the possible magnitude of the potential harm or injury” that might happen from not warning a patient of the potential side-effects of medication on a patient’s ability to drive safely is substantial.²⁶⁰ The third element is “the importance or social value of the activity engaged in by defendant[.]”²⁶¹ The providing of medical care is of the utmost importance both to the patient and to society.²⁶² The next factor is “the usefulness of the conduct to defendant[.]”²⁶³ There is no benefit to the patient in failing to follow a warning about the medication.²⁶⁴ The last consideration is “the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct[.]”²⁶⁵ The most straightforward approach would be to warn the patient of the medication’s side-effects on the patient’s capacity to safely operate a car.²⁶⁶ These factors’ totality demonstrates that the defendant owed a duty to both the patient and injured third parties concerning the danger to operate a vehicle safely while taking the drugs.²⁶⁷

The court then examined whether the defendant owed a duty to the plaintiffs as members of the motoring public in formulating the decision to issue the medication to the patient.²⁶⁸ This question can only be answered by considering public policy factors. The judges looked at similar cases in Indiana and Hawaii that declined to find that a doctor owed a non-patient plaintiff a duty of care.²⁶⁹ After all, the doctor’s primary loyalty must be to the patient.²⁷⁰ Forcing a physician to predict a patient’s behavioral reaction to a drug and to

259. *Id.* (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 332–33.

265. *Id.* at 333.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at 334–35.

270. *Id.* at 334.

consider possible plaintiffs would divide that fidelity.²⁷¹ The physician's duty must remain with the patient when medication is prescribed.²⁷² Likewise, doctors and patients must contemplate factors like "cost-effectiveness, and availability of insurance coverage in prescribing decisions."²⁷³ Weighing the social utility of pharmaceuticals and the many issues that must be considered in prescribing choices, existing tort law should be enough to discourage careless prescribing decisions.²⁷⁴ Imposing a duty to warn may decrease the risk to third parties, but there is no rational, sound, or persuasive justification to add the risk of tort liability to non-patient third parties injured in car accidents.²⁷⁵

7. Utah

B.R. ex rel. Jeffs v. West presented the issue of whether a physician owed a duty to a non-patient to exercise reasonable care in providing medication that poses "a risk of injury to third parties."²⁷⁶ This tragic matter involved a nurse practitioner who gave her patient a cocktail of medications which were in his system at the time he shot and killed his wife.²⁷⁷ The "[d]efendant[] [maintained] that healthcare providers owe no duty to a [third party] who has been injured by a patient unless . . . the provider has custody or control of the patient, or where the physician is on notice that the patient is uniquely dangerous to [identified] third parties."²⁷⁸

The court noted that cases in the state demonstrate that a healthcare provider is not obligated to control a patient's independent conduct.²⁷⁹ Such cases also do not support the defendant's position that a healthcare provider may negligently prescribe medication that results in a patient harming a third party.²⁸⁰ A doctor-patient relationship is not necessary to

271. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991)).

272. *Id.*

273. *Id.*

274. *Id.* at 335.

275. *Id.*

276. *B.R. ex rel. Jeffs v. West*, 275 P.3d 228, 229 (Utah 2012).

277. *Id.* at 229–30.

278. *Id.* at 230–31.

279. *Id.* at 233.

280. *Id.*

support a physician's duty to a third person.²⁸¹ There are other factors that impose a duty upon a physician to use care when prescribing medication.²⁸² Generally, there is a duty to exercise reasonable care when involved in conduct that creates a risk of harm to others, including a health care provider prescribing drugs to a patient.²⁸³ After all, the doctor is better positioned to use reasonable care in prescribing medication so that patients do not pose an unreasonable risk of injury to others.²⁸⁴ While prescribing medication has substantial social value, pharmaceuticals' utility is not enough to justify the disavowal of a duty to use proper care in prescribing them.²⁸⁵

B. Cases That Have Not Allowed Recovery

Most cases that refuse to impose liability do so because there is no privilege between the doctor and injured third party, and the courts refuse to expand physician liability to third parties on public policy grounds.²⁸⁶

1. Connecticut

Connecticut ruled that a physician does not owe a duty to an injured third party in *Jarmie v. Troncale*.²⁸⁷ The defendant is a gastroenterologist who treated a patient for hepatic encephalopathy.²⁸⁸ That individual lost consciousness and crashed into the plaintiff's vehicle causing significant injuries.²⁸⁹ Suit was filed against the physician, claiming he failed to warn the patient not to drive.²⁹⁰ The claim was dismissed and upheld on appeal.²⁹¹

The plaintiff asserted that the duty to inform was owed and

281. *Id.* at 233–34.

282. *Id.* at 234.

283. *Id.*

284. *Id.* at 236–37.

285. *Id.* at 237.

286. *Id.* at 231–32 (citing *Webb v. Univ. of Utah*, 125 P.3d 906, 909 (Utah 2005)).

287. *Jarmie v. Troncale*, 50 A.3d 802, 826 (Conn. 2012).

288. *Id.* at 804.

289. *Id.* at 805.

290. *Id.*

291. *Id.* at 805, 828.

that applying the rule to injured third parties is consistent with state law.²⁹² The defense countered that Connecticut does not recognize a duty owed to unidentifiable members of society.²⁹³ The court agreed with the defense and noted the state's law does not support such a claim because the plaintiff was an "unidentifiable victim, [thus] public policy considerations counsel against it, and there is no consensus among courts in other jurisdictions, which have considered the issue only rarely."²⁹⁴ "Absent a special relationship" dealing with custody or control, no duty is present to safeguard a third party from the actions of another; in fact, the Connecticut courts have used restraint when given the chance to extend a health care provider's obligation to those not their patients.²⁹⁵ Even if it was foreseeable that the patient might have caused an accident, the plaintiff was not part of an identifiable group of victims.²⁹⁶ Finally, imposing liability on physicians under the circumstances would establish a considerable risk of influencing conduct in undesirable ways because it would obstruct the doctor-patient relationship and cause increased lawsuits.²⁹⁷

2. Florida

In *Werner v. Varner, Stafford & Seaman, P.A.*, the plaintiff was hurt in a rear-end car accident when his vehicle was struck by an individual who suffered a seizure while driving.²⁹⁸ The plaintiff sought to find the doctor liable for his failure to warn the patient to avoid driving while taking anti-epileptic medication.²⁹⁹ The court ruled there could be no viable cause of action because the plaintiff was "neither known nor identifiable to [the defendant]" and was merely a member "of the driving public at large."³⁰⁰ Even if the court assumed the doctor had a duty to warn his patient, there is no allegation that physician's

292. *Id.* at 809.

293. *Id.*

294. *Id.* at 810.

295. *Id.* at 810–11.

296. *Id.* at 813.

297. *Id.* at 816.

298. *Werner v. Varner, Stafford & Seaman, P.A.*, 659 So. 2d 1308, 1309 (Fla. Dist. Ct. App. 1995).

299. *Id.*

300. *Id.* at 1310.

failure to warn the patient not to operate her car while medicated proximately caused the incident.³⁰¹ The complaint itself failed to contain any allegations that the accident happened while the patient was medicated or that the physician had the duty to warn his patient not to drive because of his epileptic condition.³⁰²

3. Georgia

In 2020, Georgia addressed the issue in *Stanley v. Garrett* and found that no duty was created to a third person because that individual was not a patient of the physician.³⁰³ The facts reveal the defendant was treating a patient for alcoholism; that person then killed the plaintiff in a motor vehicle accident while intoxicated.³⁰⁴ Suit was filed against the physician for negligence in treating the patient and failing to prevent him from driving despite meeting with him a few hours before the collision.³⁰⁵ The court disagreed and noted there is no legal duty “to control the conduct of third persons to prevent them from causing physical harm to others.”³⁰⁶ More specifically, a physician has no duty to exercise control over another unless there is a special relationship between the actor and another creating a duty upon the actor to control that individual’s actions to benefit a third person.³⁰⁷

This determination requires a two-part test: (1) the doctor must have control over the patient; and (2) the physician must have known that the patient was expected to cause harm to others.³⁰⁸ Nevertheless, absent the legal ability to impose restrictions on the patient’s liberty, no duty to control arises.³⁰⁹ There is also nothing in Georgia law that would allow the doctor to commit the patient for involuntary treatment because the

301. *Id.* at 1311.

302. *Id.*

303. *Stanley v. Garrett*, 848 S.E.2d 890, 895–96 (Ga. Ct. App. 2020).

304. *Id.* at 892.

305. *Id.* at 892–93.

306. *Id.* at 894 n.13 (citing *SecureAlert, Inc. v. Boggs*, 815 S.E.2d 156, 161 (Ga. Ct. App. 2018)).

307. *Id.* at 894 (citation omitted).

308. *Id.* at 894–95 (citation omitted).

309. *Id.* at 895 (citing *Houston v. Bedgood*, 588 S.E.2d 437, 440 (Ga. Ct. App. 2003)).

patient was under the influence of alcohol.³¹⁰ A malpractice claim also mandates there must be a doctor-patient relationship with the claimant; that relationship is not present with a third party who is injured by the actions of the patient.³¹¹

The decedent's estate sued the psychiatrist who was treating the driver for alcoholism and depression.³¹² The facts show that the patient had consumed alcohol both before and after an emergency meeting with the defendant on the day of the accident.³¹³ The plaintiff alleged that the physician was negligent in his treatment and owed a duty to prevent the patient from driving that day.³¹⁴

The Georgia Court of Appeals upheld the dismissal of the claim and noted that as a general rule, there is no duty to "control the conduct of third persons to prevent them from causing physical harm to others."³¹⁵ The plaintiff pointed to no precedent to support the assertion that a physician must start involuntary treatment of a patient any time there is reason to think a patient is under the influence of alcohol.³¹⁶ Implicitly, the plaintiff asserts that the court should construe the state's involuntary treatment statute as analogous to a dram-shop act but for physicians.³¹⁷ However, the court has previously refused to find that the duty of a health care provider to the public is similar to that imposed upon alcohol providers.³¹⁸ Georgia law also requires physician-patient privity to bring a malpractice claim, and it is undisputed that the decedent third party was not the defendant's patient.³¹⁹

4. Iowa

In *Kolbe v. State*, the Iowa Supreme Court found a physician owed no duty to the public because of a patient's negligent

310. *Id.* at 895–96.

311. *Id.* at 894.

312. *Id.*

313. *Id.*

314. *Id.* at 892–93.

315. *Id.* at 894 n.13 (citing *SecureAlert, Inc. v. Boggs*, 815 S.E.2d 156, 161 (Ga. Ct. App. 2018)).

316. *Id.* 895.

317. *Id.*

318. *Id.*

319. *Id.* at 895–96.

driving.³²⁰ The plaintiff was struck while riding his bicycle by a man operating a car with significant vision impairment; the defendants were two physicians who had notified the Department of Transportation several years apart that the motorist could drive with restrictions.³²¹ The trial judge granted the physicians' summary judgment motion, and this appealed followed.³²²

The main issue on review was:

whether a physician owes a duty to persons not within the physician/patient relationship. Specifically, [the court focused on] whether physicians owe a duty to unknown third parties when rendering an opinion to the Iowa Department of Transportation regarding a patient's competency to drive.³²³

The court cited the Restatement (Second) of Torts and noted no duty exists to control the actions of a third party to stop him from inflicting harm to another unless: "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."³²⁴

The plaintiffs claimed that the certifying physicians had a duty to protect the public from any danger the motorist presented to others.³²⁵ The court retorted that not only is there a lack of privity, but there is no special relationship between the physicians and the plaintiffs "that is sufficiently close and direct to support a legal claim against the physicians for [their] injuries."³²⁶ Furthermore, the defendants were not responsible for issuing the driver's license.³²⁷ That determination was

320. *Kolbe v. State*, 661 N.W.2d 142, 150 (Iowa 2003).

321. *Id.* at 144–45.

322. *Id.* at 145.

323. *Id.*

324. *Id.* at 146 (quoting RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1965)).

325. *Id.*

326. *Id.*

327. *Id.* at 147.

rendered by the Iowa Department of Transportation, and the opinions of the doctors were only one factor in that decision.³²⁸ From a public policy point of view, it is not the physician's responsibility to safeguard all third parties who might come into contact with a physician's patient. Forcing a duty upon health care providers under the circumstances would intrude upon the physician's main responsibility—treating the patient.³²⁹ Doctors must be permitted to satisfy their obligations to a patient without apprehension of third-party liability claims for a patient's actions over which they have no control.³³⁰

5. Kansas

In *Calwell v. Hassen*, the Kansas Supreme Court was asked to decide whether a physician owed a duty to an injured bicyclist arising from his failure to warn the patient not to drive.³³¹ The plaintiff was injured in an accident when a woman who suffered from drowsiness fell asleep while driving.³³² The defendant treated her for the sleep disorder and never informed the patient that she should refrain from operating an automobile.³³³ The Court of Appeals found that under § 315 of the Restatement (Second) of Torts, the doctor-patient relationship established a "special relationship" and "there may have been a duty to warn [the patient] not to drive."³³⁴

The Kansas Supreme Court reversed this determination.³³⁵ Not one of its prior rulings involved a "special relationship" between a doctor and patient.³³⁶ In this case, the special relationship is between the doctor and the patient, not the doctor and injured plaintiff.³³⁷ Furthermore, the patient already knew of her sleeping problem and understood that she should pull over

328. *Id.*

329. *Id.* at 149 (citing *Est. of Witthoeft v. Kiskaddon*, 676 A.2d 1223, 1225 (Pa. Super. Ct. 1996)).

330. *Id.* 150.

331. *Calwell v. Hassan*, 925 P.2d 422, 424 (Kan. 1996).

332. *Id.*

333. *Id.*

334. *Id.* at 427 (citing RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1965)).

335. *Id.* at 435.

336. *Id.* at 429.

337. *Id.* at 431.

if she felt drowsy while driving.³³⁸ There was also no showing that the medication given to the patient caused or aggravated her drowsiness problem.³³⁹

Just providing care to another does not by itself create liability. That care must be such that the physician should recognize it as being needed to protect a third person.³⁴⁰ The court refused to impose a duty upon physicians to warn a patient of something the person already knows. The defendant did nothing to increase the risk of harm, so no duty was owed the plaintiff.³⁴¹

6. Massachusetts

Massachusetts has a bifurcated position in that it imposes a duty upon the physician to third parties injured from medication use but not from liability related to the treatment of a medical condition.³⁴² This dual position is explained in *Medina v. Hochberg*,³⁴³ which involved a patient who suffered a seizure while driving and struck the plaintiff as he was exiting his car.³⁴⁴ The injured plaintiff sued the treating doctor asserting that he owed a duty to the patient to control his behavior because a special relationship of doctor-patient existed.³⁴⁵ In the alternative, it was alleged that the physician violated the duty owed to the plaintiff by failing to warn the patient not to drive.³⁴⁶

The court ruled that the defendant did not owe a duty to the plaintiff under ordinary negligence principles.³⁴⁷ It also refused to extend the narrow principle announced in *Coombes v. Florio*,³⁴⁸ that a doctor “owes a limited duty to third parties, foreseeably at risk from a patient’s decision to operate a motor vehicle, to warn the patient of the known side effects of

338. *Id.*

339. *Id.*

340. *Id.* at 432 (citing RESTATEMENT (SECOND) OF TORTS § 324A (AM. L. INST. 1965)).

341. *Id.* at 434.

342. *Medina v. Hochberg*, 987 N.E.2d 1206, 1208 (Mass. 2013).

343. *Id.* at 1208.

344. *Id.* at 1207.

345. *Id.* at 1207–08.

346. *Id.*

347. *Id.* at 1208.

348. *Coombes v. Florio*, 877 N.E.2d 567 (Mass. 2007).

medications the physician has prescribed that might impair the patient's ability as a motorist."³⁴⁹ In some matters, a physician may have a duty to warn a patient of the dangers attendant to their treatment.³⁵⁰ This would include telling the person of symptoms reasonably likely to occur from treatment that would make it unsafe to engage in activities such as driving.³⁵¹ The duty of care may also mandate that a health care provider notify a patient of the side effects of medication if it is determined that such information is necessary to the patient's making an informed decision.³⁵² However, the court will not extend the duty owed by physicians to the members of the public who may be harmed by a patient due to an underlying medical problem that the doctor is treating.³⁵³ Imposing such a duty would mandate warning patients about the risks related to driving based on any number of pre-existing health issues, none of which relate to the doctor's active treatment of the patient.³⁵⁴ From a public policy and cost-benefit analysis, "weighing the benefits of such a duty against the countervailing costs of intruding into the highly personal, confidential physician-patient relationship" militates against imposing liability.³⁵⁵

7. New Jersey

In *Vizzoni v. B.M.D.*, the New Jersey court declined to find that a prescribing physician "owes a duty to warn their patients of adverse side effects of medications for the benefit of third parties."³⁵⁶ This matter involved a fatal motor vehicle accident caused by the defendant's patient whose negligent driving was the result of prescription medication.³⁵⁷ The health care provider argued that he owed no duty to the decedent because

349. *Medina*, 987 N.E.2d at 1208 (citing *Coombes*, 877 N.E.2d at 567).

350. *Id.* at 1210.

351. *Id.* (citing *Vasa v. Compass Med., P.C.*, 921 N.E.2d 963, 965–66 (Mass. 2010)).

352. *Id.* (citing *Cottam v. CVS Pharmacy*, 764 N.E.2d 814, 820 (Mass. 2002)).

353. *Id.*

354. *Id.* at 1211–12.

355. *Id.* at 1212–13.

356. *Vizzoni v. B.M.D.*, 212 A.3d 962, 969 (N.J. Super. Ct. App. Div. 2019).

357. *Id.* at 965.

she was not a readily identifiable victim.³⁵⁸ The trial judge agreed and opined that “many substances could render a driver sleepy and all of them are clearly marked with those kinds of warning[s].”³⁵⁹ This decision was upheld on appeal, where the court focused on foreseeability and fairness.³⁶⁰ The appellate court noted that New Jersey courts have acknowledged the obligation of a mental health professional to take reasonable actions to safeguard a readily recognizable victim placed in harm’s way by their patient.³⁶¹ However, the court believed the proper “question is whether the defendant had a duty to act for the benefit of another but failed to do so.”³⁶² The law requires a practitioner who issues medication that impairs the patient’s abilities thereby placing third parties at risk, to use reasonable care in making that decision, but that is not the issue.³⁶³ The proper inquiry is whether the consequences of giving medication was foreseeable to the prescriber.³⁶⁴ The court answered this question by ruling that no reasonable fact-finder could conclude that the drug caused the patient to strike the opposing car.³⁶⁵ This decision was supported by reference to Massachusetts and Hawaii cases that found a prescribing physician cannot be found responsible for an injury caused by a patient unless the drug itself caused the harm.³⁶⁶

In 2020, the New Jersey court reaffirmed this holding in *Bland v. K.R.*, when it ruled that its reporting statute for seizures does not create an independent cause of action for negligence against a physician.³⁶⁷ The law merely establishes a mechanism for physicians to report to the Bureau of Motor Vehicles, a driver who suffers from seizures.³⁶⁸

358. *Id.* at 967.

359. *Id.* at 969.

360. *Id.* at 977.

361. *Id.* at 972.

362. *Id.* at 973.

363. *Id.* at 974.

364. *Id.*

365. *Id.* at 979.

366. *Id.* at 978 (citing *Coombes v. Florio*, 877 N.E.2d 567 (Mass. 2007); *McKenzie v. Haw. Permanente Med. Grp., Inc.*, 47 P.3d 1209 (Haw. 2002)).

367. *Bland v. K.R.*, No. A-1837-18T1, 2020 WL 2510361, at *7–8 (N.J. Super. Ct. App. Div. May 15, 2020).

368. *Id.* at *7.

8. North Dakota

The North Dakota Supreme Court entertained the question in 2019 and found that a physician has no duty to a third party due to the doctor's failure to warn a patient about the risks of driving linked to a medical condition.³⁶⁹ In *Cichos v. Dakota Eye Institute, P.C.*, a man drove his truck on a highway when he struck a horse-driven trailer killing one of five passengers and injuring others.³⁷⁰ Suit was filed against the truck driver, who then assigned his malpractice claim against the eye doctor to the plaintiffs.³⁷¹ The issue was framed as "whether a physician in North Dakota owes a duty to third parties to warn a patient regarding vision impairments to driving."³⁷² The facts show that the driver was legally blind, and a doctor at the defendant's clinic issued a certificate of blindness and told the patient not to drive.³⁷³ Several weeks later, another doctor employed by the defendant examined the man and said that his vision had improved and told him that he could drive with restrictions.³⁷⁴ The plaintiffs claimed that while his vision had gotten better, it was still below the minimum vision required to operate a vehicle and that the defendant owed a duty to the injured parties to warn the patient about the status of his vision.³⁷⁵ However, whether to impose a physician's duty to an injured third party who is not a patient is a controversy that has smoldered as the medical and legal communities struggle over whether policy and fairness considerations mandate the expansion of the law to impose liability upon a health care provider for injuries sustained by a third party that are foreseeable.

The court denied the claim and noted that they were unimpressed with the cases cited by the plaintiffs because they involved the administering of medication to patients.³⁷⁶ This dispute merely involved an eye examination.³⁷⁷ In the cases around the country dealing with the issue, the courts are split

369. *Cichos v. Dakota Eye Inst., P.C.*, 933 N.W.2d 452, 459 (N.D. 2019).

370. *Id.* at 454.

371. *Id.* at 455.

372. *Id.* at 454.

373. *Id.* at 454–55.

374. *Id.* at 455.

375. *Id.*

376. *Id.* at 458–59.

377. *Id.* at 454–55.

on whether a duty is owed.³⁷⁸ The North Dakota court was persuaded by the cases that found no third party duty existed on public policy grounds.³⁷⁹ Those decisions were then summarized and adopted without much additional explanation other than the court's concluding that "a physician has no duty to third parties arising from the physician's failure to warn a patient about driving risks resulting from the patient's medical condition."³⁸⁰

9. Oklahoma

In *Tucker v. Lam*, a woman was injured in the doctor's parking lot by a patient placed in her car by a member of the physician's staff allegedly knowing she was incapable of driving.³⁸¹ The patient then struck the plaintiff with her automobile in a lot. The lawsuit against the physician was premised upon "her status as an invitee under principles of common law premises liability."³⁸² In denying the plaintiff's claim, the court noted that "[j]ust because the defendant has created a risk which harmed the plaintiff . . . does not mean that, in the absence of some duty to the plaintiff, the defendant will be held liable."³⁸³

Oklahoma law acknowledges that an individual "may have a duty to an injured party where a special relationship exists between that person and the third person."³⁸⁴ This will occur when the defendant has "special knowledge about the third person and control over that third person," and the defendant has power over some subject related to that third person; or because of a special situation that "reasonably give[s] notice to that person relative to a third person."³⁸⁵ In this matter, the defendant had no control over the patient.³⁸⁶ Therefore, the proper issue is "whether special circumstances existed that

378. *Id.* at 455.

379. *Id.*

380. *Id.* at 459.

381. *Tucker v. Lam*, 313 P.3d 1011, 1012 (Okla. Civ. App. 2013).

382. *Id.* at 1013.

383. *Id.* (citation omitted).

384. *Id.* at 1014 (citation omitted).

385. *Id.* (quoting *J.S. v. Harris*, 227 P.3d 1089, 1094 (Okla. Civ. App. 2009)).

386. *Id.*

reasonably gave [the defendant] notice that” the plaintiff would be harmed from the patient’s driving her car.³⁸⁷ The fact that the patient was unsteady on her feet did not put the defendant on notice that she would cause an accident.³⁸⁸ Many people drive a vehicle despite limitations that make it difficult to walk.³⁸⁹ Therefore, no evidence existed that placed the defendant on notice that circumstances were present that would impose a special duty on the defendant to protect the plaintiff from the harm caused by the patient.³⁹⁰

10. Pennsylvania

Several Pennsylvania decisions have refused to impose liability on physicians for failure to stop impaired patients from driving.³⁹¹ For example, in *Estate of Witthoeft v. Kiskaddon*, the issue was whether an ophthalmologist might be held liable to a third person where the physician failed to notify his patient or the Department of Transportation of the patient’s limited vision, and the individual then injured another while driving.³⁹² The court refused to impose a duty upon the physician under the Pennsylvania Motor Vehicle Code or Regulations, noting that neither “expressly or implicitly provide” for a private cause of action for the failure to report a vision problem.³⁹³ The Code only requires physicians and others to supply the state with information on those diagnosed as having a medical condition determined to affect a person’s ability to drive.³⁹⁴ That notification then triggers a state investigation “and possible further action to suspend the driver’s license.”³⁹⁵

As to whether the reporting statute impliedly provides a private remedy is subject to a three-part analysis: (1) “does the statute create a . . . right in favor of plaintiff;” (2) “is there any indication of [a] legislative intent” to create a private remedy;

387. *Id.*

388. *Id.* at 1015.

389. *Id.*

390. *Id.*

391. See 3 WEST’S PA. PRAC., TORTS: LAW AND ADVOCACY *Liability of Physicians to Non-Patients* § 7.6, Westlaw (database updated Dec. 2020).

392. *Est. of Witthoeft v. Kiskaddon*, 733 A.2d 623, 624 (Pa. 1999).

393. *Id.* at 626 (citing 75 PA. STAT. AND CONS. STAT. § 1518(b) (West 2004)).

394. *Id.*

395. *Id.*

and, (3) is it harmonious with the purposes of the law to “imply such a remedy for the plaintiff?”³⁹⁶ The statute’s intent is to obtain information about licensed drivers rather than any association between third parties and physicians. One may maintain that a private remedy would inspire physicians to notify the Driver’s Bureau of any disorders, but that policy concern is better left to the legislature.³⁹⁷ An independent cause of action is inconsistent with the “purpose or spirit of the Motor Vehicle Code.”³⁹⁸ Also, “[i]t may be reasonably foreseeable that a patient exposed to an infectious and communicable disease . . . will injure a third party unless properly informed to prevent the spread of the disease.”³⁹⁹ However, it is an unreasonable expansion of duty and foreseeability to expand a doctor’s duty to a patient and “hold a physician liable to the public at large” based upon the facts of this case.⁴⁰⁰ This is particularly true when a physician “did not cause or aggravate a medical condition that affected the patient’s driving,” and the patient is aware of that medical condition.⁴⁰¹ An injured third party is simply not a foreseeable victim that the court will recognize, nor extend foreseeability outside the point of recognition, for to do so will make liability boundless.⁴⁰² The court “will not countenance” this result.⁴⁰³

11. Texas

A Texas court in 1983 determined that under the proper circumstance, a physician may owe a duty to use reasonable care to safeguard the driving public “where the physician’s negligence in diagnosis or treatment of a patient contributes to plaintiff’s injuries.”⁴⁰⁴ However, that ruling was subsequently modified in *Helms v. Gonzalez*, which involved a fatal car accident when a methadone patient fell asleep at the wheel.⁴⁰⁵

396. *Id.* (citation omitted).

397. *Id.* at 627 (citing 75 PA. STAT. AND CONS. STAT. § 1518(b)).

398. *Id.*

399. *Id.* at 630.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Gooden v. Tips*, 651 S.W.2d 364, 369 (Tex. App. 1983).

405. *Helms v. Gonzalez*, 885 S.W.2d 535, 537 (Tex. App. 1994).

The victims filed suit against the doctor who treated the addict but the evidence revealed that the defendant fulfilled his duty to warn of the drug's side effects, including insomnia, drowsiness, and faintness, and dizziness.⁴⁰⁶ Therefore, the defendant satisfied his duty to warn the patient about the side effects of methadone, the physician had no obligation to stop the patient from driving, and he was not negligent in connection with the car accident.⁴⁰⁷

Likewise, in *Praesel v. Johnson*, the Texas Supreme Court found no duty existed to warn an epileptic patient not to operate a car or to report the patient's condition to the state's licensing authority.⁴⁰⁸ Physicians are permitted but not required to notify the Department of Public Safety or the Medical Advisory Board of the identity of a patient "whom the physician has diagnosed as having a disorder specified in a rule of the Department."⁴⁰⁹ However, the patient's license is not automatically revoked.⁴¹⁰ "The Board can recommend that a driver be permitted to retain a license even if there has been a seizure within three years."⁴¹¹ Therefore, the law offers no sensible reason for imposing a negligence per se standard for "failing to report an epileptic seizure to state licensing authorities."⁴¹²

In deciding whether to compel a common-law obligation, the court will consider the "social, economic, and political questions and their application to the facts at hand."⁴¹³ Balancing the usefulness of issuing a warning to a patient not to drive who already knows that he suffers from seizures "against the burden of liability to third parties . . . is incremental but that the consequences of imposing a duty [upon a physician] are great."⁴¹⁴ The accountability for the proper use of a vehicle should stay primarily with the driver, who can determine whether it is appropriate to drive after a disorder has been diagnosed and

406. *Id.*

407. *Id.*

408. *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998).

409. *Id.* at 394 (quoting TEX. HEALTH & SAFETY CODE ANN. § 12.096(a) (West 2001)).

410. *Id.* at 395.

411. *Id.* (citing 37 TEX. ADMIN. CODE. § 15.58 (1976)).

412. *Id.* at 396.

413. *Id.* at 397 (citation omitted).

414. *Id.* at 398.

seizures have happened.⁴¹⁵ Therefore, the court will not impose on doctors a duty to third parties to warn an individual with epilepsy not to operate a car.⁴¹⁶

V. CONCLUSION

Duty of care is a critical component of any negligence claim to create liability. It is well recognized at common law that a physician owes a duty to advise a patient but is not mandated to take affirmative measures outside the physician-patient relationship to protect a third-party. Health care providers may also be responsible for oversight, or the failure to safeguard a patient, due to a special relationship of care they undertake, such as failing to correctly diagnose or recommend a proper treatment plan. Recently, the courts have struggled over whether public policy and fairness require the expansion of the law to impose liability upon a health care provider for injuries sustained by a third party that are foreseeable.

The first deviation from the common law occurred when the court imposed a duty upon a mental health professional to a third person when the analyst learns that a patient will harm a specific person.⁴¹⁷ This was followed by an expansion of liability when a third party is exposed to a communicable disease due to the doctor's failure to report the positive results or negligently explain the test's outcome. The courts have occasionally found that doctors owe a duty to inform third parties of a genetic trait possessed by a relative or hold independent medical examiners liable for those they examine on behalf of an insurance company, employer or attorney.

The most recent attempt to expand physician liability involves injuries sustained by innocent third parties in motor vehicle accidents due to a patient's medical condition or adverse medication reaction. Various theories are advanced to establish liability, such as the physician was negligent by violating a statute created to protect the public through negligence per se, establishing prima facie negligence, or offering evidence of carelessness. No clear consensus has emerged as to whether the common law should be expanded in favor of responsibility. Most

415. *Id.*

416. *Id.*

417. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

cases that refuse to impose liability do so because there is no privity between the doctor and injured third party, or they refuse to create a duty to third parties on public policy grounds. Courts that have allowed recovery look at foreseeability as a critical consideration in establishing a duty of care or feel that public policy is the overriding factor that makes a physician liable for the patient's actions.

These assaults on the common law will not abate. Litigation is a way of life and enterprising attorneys will continue to advance theories in an attempt to find physicians liable to third parties as the result of the misconduct of their patients. As the split in the court rulings show, the proper determination is in the eyes of the beholder and there are valid points in both positions.