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Note

Jones v. Chicago HMO: The Illinois Supreme Court Gives the HMO Industry a Rude Awakening

Maura F. Forde*

I. INTRODUCTION

Medical bills in the United States are growing at more than twice the rate of inflation.¹ As a result, America's health care market has been transformed.² Out of necessity, Americans have become significantly more dependent on health maintenance organizations ("HMOs"),³ and they are abandoning the traditional "fee-for-service" method of paying for medical care in exchange for this less expensive alternative.⁴ With

* J.D. expected May 2001.

1. Robert J. Herrington, *Herdrich v. Pegram: ERISA Fiduciary Liability and Physician Incentives to Deny Care*, 71 U. COLO. L. REV. 715, 715 (2000).

2. Barbara A. Noah, *The Managed Care Dilemma: Can Theories of Tort Liability Adapt to the Realities of Cost Containment?*, 48 MERCER L. REV. 1219, 1219 (1997).

3. An HMO is a system of managed care in which subscribers pay a set fee in return for health care benefits or medical care from physicians. Domenick C. DiCicco, Jr., *HMO Liability for the Medical Negligence of Member Physicians*, 43 VILL. L. REV. 499, 500 (1998). The aim of an HMO is to provide basic quality health care at a low cost. *Id.* HMOs are a "hybrid of insurance, cost control mechanisms, and medical delivery." Barry R. Furrow, *Managed Care Organizations and Patient Injury: Rethinking Liability*, 31 GA. L. REV. 419, 425 (1997). In the U.S., enrollment in HMOs increased from 36.5 million in 1990 to 67.5 million in 1996. Kevin P. Quinn, S.J., *Viewing Health Care as a Common Good: Looking Beyond Political Liberalism*, 73 S. CAL. L. REV. 277, 281 n.10 (2000). This figure is approximately one in four Americans. *Id.* Approximately 2.5 million Illinois residents are HMO subscribers. David McKinney, *HMO Reforms Signed into Law: Patient's Rights Bill Will End Gag Clauses*, CHI. SUN-TIMES, Aug. 21, 1999, at 12, available at 1999 WL 6553330. This figure is one in every five Illinois residents. Allison Kaplan, *Group Says HMO Complaints Soaring*, CHI. DAILY HERALD, May 12, 1999, at 9, available at 1999 WL 17439451. In addition, the cost of HMOs is between ten and forty percent less than traditional plans in which a patient pays for each individual service rendered. Herrington, *supra* note 1, at 715. More than 75% of the physicians in the country see patients through some form of managed care organization, including HMOs. Noah, *supra* note 2, at 1219.

4. Under this traditional "fee-for-service" system, a doctor is paid per visit, based on the services provided. Jan Crawford Greenburg, *Court Spares HMOs From U.S. Suits: Justices Say Industry Would Be Put At Risk*, CHI. TRIB., June 13, 2000, § 1, at 1, available at 2000 WL 3674082. In fact, in passing the Health Maintenance Act of 1973, Congress intended to "create

their cost-saving financial incentives, HMOs have flourished in the wake of an explosion in the cost of traditional medical care.⁵

In spite of this boom in the HMO industry, HMOs and the quality of medical care they provide have been under attack in recent years.⁶ A controversy has emerged around the managed care industry, raising questions about whether HMOs can keep medical costs down, while at the same time ensuring that subscribers receive proper care.⁷ Subscribers are growing more concerned that HMOs are putting "profits ahead of medical-care decisions,"⁸ and the media has brought to the public's attention "horror stories" of delay and denial of coverage.⁹ This attention has propelled HMO reform into the political arena, as advocates of a so-called "patients' bill of rights" bring their concerns to the attention of judges and political leaders.¹⁰ In response to this

an alternative to the increasing cost of 'fee-for-service' doctors." Jonathan Turley, *Court Strikes Healthy Balance on HMOs*, WALL ST. J., June 13, 2000, at A26, available at 2000 WL 3032762.

5. Herrington, *supra* note 1, at 715. Today there are more than 600 HMOs nationwide. James Bartimus & Christopher A. Wright, *HMO Liability: From Corporate Negligence Claims for Negligent Credentialing and Utilization Review to Bad Faith*, 66 UMKC L. REV. 763, 763 (1998). Thirty years ago, there were less than forty. *Id.*

6. Lyle Denniston, *Patients Challenge HMOs in Wave of Medical Lawsuits; At Least 20 Cases Pending Amid Fears That Finances Determine Health Care*, BALT. SUN, Feb. 20, 2000, at 3A, available at 2000 WL 4859044. This attack on the managed care industry has been so aggressive that it has been described as an echo of the recent attack on the tobacco industry. *Id.*

7. Greenburg, *supra* note 4, at 1; see also Jennifer S. Anderson, Comment, *All True Histories Contain Instruction: Why HMOs Cannot Avoid Malpractice Liability Through Independent Contracting with Physicians*, 29 MCGEORGE L. REV. 323, 323 (1998) (stating that "one of the greatest controversies surrounding the explosive growth of the HMO industry has been the distribution of tort liability between doctors and managed care entities").

8. Bruce Japsen, *Family Doctors Side with HMOs, Not Medical Society*, CHI. TRIB., Mar. 24, 1999, § 4, at 1, available at 1999 WL 2856415.

9. William Neikirk, *'Patients' Bill of Rights' Sails Through the House but Legislation Faces a Long Road Before Implementation*, CHI. TRIB., Oct. 8, 1999, § 1, at 1, available at 1999 WL 2919811. For example, in *Petrovich v. Share Health Plan of Illinois, Inc.*, the plaintiff's doctor recommended she have an MRI and a CT scan performed on her skull. *Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756, 761 (Ill. 1999). The HMO would not cover these tests, however, and thus, they were never performed. Six months later, she was diagnosed with cancer, and ultimately, she died. *Id.*; see also *infra* notes 56-89 and accompanying text (discussing *Petrovich* and its holding).

In another example of an HMO's denial or delay in appropriate care, a nine-year-old boy had experienced fainting spells for a couple of years. His HMO-provided physician took his temperature, and advised the boy to drink more Gatorade and refrain from overexertion. Two months later, the boy died from an enlarged heart while playing basketball outside his home. Milo Geyelin, *Health Care: Courts Pierce HMOs' Shield Against Lawsuits*, WALL ST. J., Apr. 30, 1999, at B1, available at 1999 WL 5450772.

In some cases, even the patient's own doctor objects to the HMO's delay or denial of coverage. Philip H. Corboy, Commentary, *Holding Managed Care Accountable*, CHI. TRIB., July 22, 1999, § 1, at 22, available at 1999 WL 2895240.

10. Douglas Holt, *Patients Can Sue Their HMO: State Justices OK Malpractice Action*, CHI.

controversy, legislatures and courts across the country have attempted to expand this “patients’ bill of rights” and hold HMOs accountable for the health care they provide to their subscribers.¹¹ Advocates of reform argue that expanding patients’ rights will force HMOs to deliver more reliable care.¹² Conversely, the managed care industry fervently lobbies against any action, arguing that reform will lead to both frivolous lawsuits and an increase in the costs of health care.¹³ Nevertheless, a number of states have successfully passed various reform bills expanding HMO liability.¹⁴ The Illinois General Assembly considered several bills on managed care reform and recently enacted a “patients’ bill of rights” that includes some, but not all, of the reforms urged by advocates of patients’ rights.¹⁵ Absent from the Illinois legislation was a provision giving patients the right to sue their HMOs under a theory of tort liability, a controversial issue that has been of particular concern for patients’ rights advocates.¹⁶

TRIB., Oct. 1, 1999, § 1, at 1, available at 1999 WL 2917409. This “patients’ bill of rights” refers to legislation designed to give HMO patient-subscribers more options and “protect consumers from abuses by HMOs and make health insurance more affordable for those who don’t have coverage.” Editorial, *Finding Balance on Patients’ Rights*, CHI. TRIB., June 5, 2000, § 1, at 12, available at 2000 WL 3672054. Advocates of the “patients’ bill of rights” include doctors, unions, and groups representing patients, consumers veterans and seniors. Corboy, *supra* note 9, at 22.

11. Jane Bryant Quinn, *Insurance Malpractice: HMOs and Other Managed-Care Plans May Be Held Accountable for Medical Decisions*, CHI. TRIB., Sept. 11, 1997, § 1, at 9, available at 1997 WL 3587473. For example, in 1996, 1000 pieces of legislation, attempting to regulate HMOs, were introduced in state legislatures across the country. Russell Korobkin, *The Efficiency of Managed Care “Patient Protection” Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1, 2 & n.3 (1999) (quoting Thomas Bodenheimer, *The HMO Backlash—Righteous or Reactionary?*, 335 NEW ENG. J. MED. 1601, 1601 (1996)).

12. Corboy, *supra* note 9, at 22.

13. See Steve Silverman, *Woman Suing HMO over Breast Surgery*, PANTAGRAPH (Bloomington, Ill.), Apr. 14, 2000, at A3, available at 2000 WL 7790237.

14. For example, in 1995 alone, more than twenty state legislatures considered bills aimed at managed care organizations, such as HMOs. Bruce D. Platt & Lisa D. Stream, *Dispelling the Negative Myths of Managed Care: An Analysis of Anti-Managed Care Legislation and the Quality of Care Provided by Health Maintenance Organizations*, 23 FLA. ST. U. L. REV. 489, 493 (1995) (discussing legislative proposals for managed care reform in the Florida state legislature). In 1996, thirty-five states passed some type of “patient-friendly legislation.” Quinn, *supra* note 3, at 282 n.11. In May 1997, Texas was the first state to give HMO subscribers the right to sue their HMO for medical malpractice. S.B. 386, 75th Leg., Gen. Sess. (Tex. 1997); see also Quinn, *supra* note 11, at 9. Missouri also enacted a bill giving patients the right to sue their HMOs in 1997. H.B. 335, 89th Leg., 1st Reg. Sess. (Mo. 1997). California, Arizona, Georgia, Louisiana, Maine, Oklahoma, and Washington also recently enacted laws that allow subscribers to sue their HMOs. Charles Stile, *Patients Right to Sue Gains Two Key Backers*, THE RECORD (Northern N.J.), Aug. 30, 2000, at A1, available at 2000 WL 15829081.

15. *Infra* Part II.B (discussing the Illinois General Assembly’s passage of the Patients’ Bill of Rights).

16. *Infra* Part II.B (discussing the enactment of the Illinois Patients’ Bill of Rights).

Despite this omission by the General Assembly, the Illinois Supreme Court recently filled the void and expanded tort liability in the arena of health law, substantially affecting HMOs.¹⁷ In *Petrovich v. Share Health Plan of Illinois, Inc.*,¹⁸ the court granted subscribers the right to sue their HMOs for medical malpractice under a theory of vicarious liability.¹⁹ Soon after *Petrovich*, the Illinois Supreme Court went even further in *Jones v. Chicago HMO*,²⁰ a landmark ruling that grants patient subscribers the right to sue their HMOs on a theory of institutional negligence.²¹ As a result of *Jones*, an HMO subscriber in Illinois can now directly sue the HMO for any corporate negligence or carelessness resulting in the subscriber's injury.²² Until *Jones*, HMOs relied on "presumed legal protections" against negligence suits. Thus, *Jones* is expected to have a significant effect on the way HMOs do business.²³

This Note will examine the gradual expansion of tort liability for HMOs in Illinois, leading up to the Illinois Supreme Court's ruling in *Jones*.²⁴ This Note will then trace the Illinois Supreme Court's treatment of tort liability in the health care arena and discuss recent legislation in this area.²⁵ Next, this Note will review the decisions of the lower courts and the Illinois Supreme Court in *Jones*.²⁶ This Note will then analyze the *Jones* court's far-reaching decision and the necessity for such an outcome in light of the recent changes in health care, especially the expanding role of HMOs.²⁷ Finally, this Note will

17. Daniel P. Wurl, *HMO Liability and the Fiduciary Duty of Physicians*, TORT TRENDS (Illinois State Bar Association, Springfield, Ill.), May 2000, at 1.

18. *Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756 (Ill. 1999).

19. *Id.* Prior to this holding, injured patients could sue only the "direct providers of health care (doctors, hospitals, etc.)." Editorial, *The Dam Bursts on HMO Lawsuits*, CHI. TRIB., Oct. 5, 1999, § 1, at 14, available at 1999 WL 2918755 [hereinafter *Dam Bursts*]. Vicarious liability claims do not hold HMOs accountable for medical decisions of the HMO, but rather for the negligence of their employees or agents. Joshua M. Spielberg, *Overcoming ERISA*, TRIAL, May 2000, at 54.

20. *Jones v. Chicago HMO Ltd. of Ill.*, 730 N.E.2d 1119 (Ill. 2000) [hereinafter *Jones II*].

21. Institutional negligence involves an administrative or managerial action by an HMO and does not involve the professional conduct of the physician. *Id.* at 1128.

22. Bruce Japsen, *HMO Liability Increases: Illinois Justices Allow Direct Lawsuits by Patients*, CHI. TRIB., May 19, 2000, § 1, at 1, available at 2000 WL 3667125.

23. *Id.*

24. *Infra* Parts II and III (discussing the passage of the Illinois Patients' Bill of Rights and the *Jones II* decision).

25. *Infra* Part II (examining the development of Illinois law on patients' rights).

26. *Infra* Part III (explaining the decision of the Illinois Supreme Court in *Jones II*, holding that an HMO can be liable for institutional negligence).

27. *Infra* Part IV (asserting that the Illinois Supreme Court was correct in its *Jones II* holding that HMOs are subject to tort liability for institutional negligence).

explore the future impact of this decision on HMOs and the managed care industry, predicting a much-needed increase in HMO accountability and a vast improvement in the quality of health care.²⁸

II. BACKGROUND

A. Illinois Courts on Health Care Reform and HMO Liability

Traditionally, health care providers such as hospitals and HMOs have enjoyed special immunity from liability for the medical care they provide to their subscribers.²⁹ Until recently, only the direct providers of medical care, like doctors, could be held liable.³⁰ Despite resistance from institutional health care providers, Illinois courts have gradually chipped away at this traditional legal immunity.³¹ The emergence of liability against HMOs mirrors the emergence of liability against hospitals.³² The first decision affecting hospital liability was the 1965 landmark decision of the Illinois Supreme Court in *Darling v. Charleston Community Memorial Hospital*.³³ This decision was the birth of tort liability for health care providers, other than doctors, in Illinois.³⁴ In 1999, the Illinois Supreme Court opened the door to liability against HMOs in *Petrovich v. Share Health Plan of Illinois, Inc.*³⁵ An examination of *Darling* and *Petrovich* reveal the gradual movement in Illinois courts toward holding health care providers accountable for their actions.³⁶

28. *Infra* Part V (analyzing the impact of this change in patients' rights and the effect on the managed care industry).

29. *Dam Bursts*, *supra* note 19, at 14.

30. *Id.* The doctrine of charitable immunity protected hospitals from liability. See Anderson, *supra* note 7, at 330. Under charitable immunity, non-profit organizations, including not-for-profit hospitals, escaped liability for the negligent acts of their employees. *Id.* For HMOs, immunity from liability stemmed from the federal ERISA statute, which governs employee benefits. Editorial, *Sue Your HMO? Bad Idea*, CHI. TRIB., June 14, 1998, § 1, at 20, available at 1998 WL 2866350. Under ERISA, employees can only sue their insurance plans in federal court and can only recover the value of the service that was unfairly denied. *Id.*

31. Anderson, *supra* note 7, at 329.

32. *Id.* (discussing the similarities between HMOs and hospitals in the area of tort liability and arguing that the traditional immunity both enjoyed was based on oversight or mistake). Both entities were immune from all tort liability and, in recent years, both have tried to maintain this immunity and avoid liability by resorting to independent contracting with physicians. *Id.* at 330; see also Bruce Japsen, *Ruling Against HMOs Looks Familiar*, CHI. TRIB., May 23, 2000, § 4, at 5, available at 2000 WL 3668286 (comparing HMO liability in *Jones II* to hospital liability in *Darling*).

33. *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965).

34. Anderson, *supra* note 7, at 328.

35. *Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756 (Ill. 1999).

36. See *infra* Parts II.A.1 (discussing the *Darling* decision, in which the Illinois Supreme

1. *Darling v. Charleston Community Memorial Hospital*

The doctrine of corporate, or institutional, negligence was introduced to the health care industry in *Darling v. Charleston Community Memorial Hospital*.³⁷ In *Darling*, the plaintiff, Dorrence Darling II, injured his leg in a football game and was taken to the emergency room of the defendant hospital where he was treated by the emergency room doctor.³⁸ The doctor, with the assistance of other hospital personnel, placed Mr. Darling's leg in a plaster cast.³⁹ Not long after, Mr. Darling's toes, which protruded from the cast, turned a dark color and became swollen, cold, insensitive, and extremely painful.⁴⁰ Three days after the application of the cast, the doctor split the sides of the cast.⁴¹ Under the cast, the doctor observed blood and a horrific stench.⁴² Mr. Darling was transferred to another hospital where a second doctor examined his leg.⁴³ This doctor found dead tissue, which he believed resulted from interference with the circulation of the blood in the limb caused by swelling or hemorrhaging of Mr. Darling's leg.⁴⁴ Ultimately, the doctor amputated Mr. Darling's leg eight inches below the knee.⁴⁵

Court held for the first time that a hospital could be subject to tort liability on the theory of institutional negligence), II.A.2 (explaining the *Petrovich* decision, in which the Illinois Supreme Court held that an HMO can be vicariously liable for negligence of physicians acting as independent contractors, under agency law).

37. *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965). In the area of health care, "[t]he theory of corporate negligence holds that the health care organization . . . has a duty to its patients to ensure the 'competency of its medical staff and the quality of medical care provided through prudent selection, review and continuing evaluation of the physicians that are granted staff privileges.'" *Bartimus & Wright*, *supra* note 5, at 764 (quoting *Rule v. Lutheran Hosps. Soc'y of Am.*, 835 F.2d 1250, 1253 (8th Cir. 1987)). This was the first time any court in the nation imposed corporate negligence against a hospital. *Id.* at 765. Prior to the court's decision in *Darling*, hospitals faced liability only based on ordinary negligence, the failure to use reasonable care in the selection of staff, or on a theory of vicarious liability for the conduct of employee or agent medical professionals. *Advincula v. United Blood Serv.*, 678 N.E.2d 1009, 1023 (Ill. 1997) (discussing a number of cases that illustrate these three bases of liability from decisions prior to the Illinois Supreme Court's landmark holding in *Darling*).

Since the Illinois Supreme Court's decision in *Darling*, the doctrine of corporate negligence has been applied to hospitals in the courts of several states. *Bartimus & Wright*, *supra* note 5, at 765.

38. *Darling*, 211 N.E.2d at 255. The defendant is a licensed and accredited hospital. *Id.* at 256.

39. *Id.* at 255.

40. *Id.*

41. *Id.*

42. *Id.* A bystander described this stench as the worst he had smelled since World War II. *Id.*

43. *Id.* at 256.

44. *Id.* An orthopedic surgeon at a different hospital than that of the defendant made this diagnosis. *Id.*

45. *Id.* Prior to the amputation, Mr. Darling had several operations in a futile effort to save the leg. *Id.*

Mr. Darling brought an action against the hospital to recover damages for the negligent medical and hospital treatment that resulted in the amputation of his right leg.⁴⁶ Mr. Darling alleged that the hospital, as an entity, was negligent for failure to adequately supervise its medical staff and for failure to follow up on his injuries, particularly after complications developed.⁴⁷ The defendant hospital argued that only an individual professional, and *not* a corporation, could be held liable for the health care provided to a patient.⁴⁸ Therefore, the defendant argued, the hospital, as an entity, was immune from liability for the negligence of its medical staff.⁴⁹

The Illinois Supreme Court rejected the defendant's assertions and established corporate negligence as a recognized theory of liability against hospitals.⁵⁰ The court stressed the expanding role of a hospital in providing health care to its patients, noting that hospitals do much more than merely furnish facilities for treatment.⁵¹ Instead, the court stated that hospitals regularly employ not only physicians and interns, but also administrative and manual workers, all of whom provide services on behalf of the hospital to patients who rely on the hospital, as

46. *Id.* at 255. Because Mr. Darling was a minor, the action was actually brought by his father. *Id.*

47. *Id.* at 256. The court summarized Mr. Darling's arguments on the issue of institutional negligence:

Plaintiff contends also that in a case which developed as this one did, it was the duty of the nurses to watch the protruding toes constantly for changes of color, temperature and movement, and to check circulation every ten to twenty minutes, whereas the proof showed that these things were done only a few times a day. Plaintiff argues that it was the duty of the hospital staff to see that these procedures were followed, and that either the nurses were derelict in failing to report developments in the case to the hospital administrator, he was derelict in bringing them to the attention of the medical staff, or the staff was negligent in failing to take action.

Id.

48. *Id.*

49. *Id.* The court quoted the defendant hospital's brief:

It is a fundamental rule of law that only an individual properly educated and licensed, and not a corporation, may practice medicine. Accordingly, a hospital is powerless under the law to forbid or command any act by a physician or surgeon in the practice of his profession. . . . The extent of the duty of a hospital with respect to actual medical care of a professional nature such as is furnished by a physician is to use reasonable care in selecting medical doctors. When such care in the selection of the staff is accomplished, and nothing indicates that a physician so selected is incompetent or that such incompetence should have been discovered, more cannot be expected from the hospital administration.

Id.

50. *Id.* at 257.

51. *Id.*

a whole, for their health care.⁵² Because hospitals assume this active role in providing health care, the Illinois Supreme Court recognized an institutional or corporate duty to supervise the treatment that is provided to its patients.⁵³ This duty does not pertain to medical care, but is administrative or managerial in nature, ensuring that hospital supervision results in adequate patient care.⁵⁴ In accordance with this newly recognized duty, the *Darling* court applied liability based on a theory of corporate or institutional negligence to hospitals for the first time.⁵⁵

2. *Petrovich v. Share Health Plan of Illinois, Inc.*

Although *Darling* diminished the immunity traditionally granted to health care providers in the case of hospitals, HMOs continued to enjoy freedom from liability.⁵⁶ In 1992, an Illinois appellate court considered *Raglin v. HMO Illinois, Inc.* and, for the first time, addressed the theories of liability that a subscriber could assert against an HMO.⁵⁷ In *Raglin*, the court maintained its reluctance to expand liability by refusing to hold an HMO liable for the medical malpractice of a physician under a theory of vicarious liability.⁵⁸

52. *Id.* The court continued, “[c]ertainly, the person who avails himself of ‘hospital facilities’ expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.” *Id.* (quoting *Bing v. Thunig*, 143 N.E.2d 3, 8 (1957)).

53. *Id.* The *Darling* court did not distinguish between a situation where the doctors are salaried employees of the hospital and one where the doctors are merely contractors. Subsequent cases relying on *Darling*, however, have made this distinction. For example, in *Johnson v. St. Bernard Hospital*, an Illinois Appellate Court stated, “although a hospital may be liable for the injuries to a patient caused by the negligence of its agents or employees, traditionally, it has been held that a hospital is not liable for acts of one who renders medical care as an independent agent outside the control of the hospital.” *Johnson v. St. Bernard Hosp.*, 399 N.E. 2d 198, 203 (Ill. App. Ct. 1979).

54. *Advincula v. United Blood Services*, 678 N.E.2d 1009, 1023 (1997) (citing *Pedroza v. Bryant*, 677 P.2d 166 (Wa. 1984)). Corporate negligence is “not based on medical expertise, but administrative expertise to enforce rules and regulations adopted to ensure a smoothly run hospital and adequate medical care.” *Id.*

55. *Darling*, 211 N.E.2d at 257.

56. See *Anderson*, *supra* note 7, at 338.

57. Mary Beth Deneffe & Robert W. Brunner, *Managed Care Liability Under Illinois Law*, 86 ILL. B.J. 536, 542 (1998).

58. *Raglin v. HMO Ill., Inc.*, 595 N.E.2d 153 (Ill. App. Ct. 1992), *overruled by Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756 (Ill. 1999). In *Raglin*, the plaintiff, Gwendolyn Raglin, was a subscriber to the defendant HMO. *Id.* at 154. Ms. Raglin became pregnant and visited a doctor who was an independent contractor with the defendant HMO. *Id.* at 154 n.1. This doctor was aware that Ms. Raglin’s medical history “presented a strong likelihood that Raglin could develop diabetes during pregnancy, which, in turn, could lead to a larger than normal birth size baby.” *Id.* at 155. However, the doctors failed to perform tests to monitor her blood sugar. *Id.* The delivery of her baby was “complicated by a condition known as shoulder

The tables turned for HMOs, however, in 1999 when the Illinois Supreme Court decided *Petrovich v. Share Health Plan of Illinois, Inc.*⁵⁹ The *Petrovich* court overturned *Raglin* and ruled that an HMO can be held vicariously liable under a theory of agency law for the negligence of physicians who act as independent contractors.⁶⁰ For the first time, the Illinois Supreme Court granted HMO subscribers a right to sue; this was a radical decision considering that the Illinois General Assembly debated the issue for almost four years without reaching an agreement.⁶¹ *Petrovich* provided that medical malpractice liability, which is generally directed at doctors, now could be aimed at “the deep pockets of HMOs.”⁶²

The plaintiff in *Petrovich*, Ms. Petrovich, was an enrollee of Share HMO.⁶³ Ms. Petrovich visited Dr. Kowalski, a primary care physician who contracted with Share.⁶⁴ Ms. Petrovich complained to Dr.

dystocia,” which means that “because of its size, the baby’s shoulders become lodged in the birth canal and caused delivery to be arrested.” *Id.* The doctors then had to apply pressure to Ms. Raglin’s abdomen and use forceps to deliver the baby. *Id.* As a result, the baby suffered serious permanent injuries, including paralysis. *Id.*

Ms. Raglin filed a medical malpractice action against the HMO for the alleged negligent medical care she received. *Id.* The appellate court affirmed the trial court’s grant of summary judgment in favor of the HMO, holding that an HMO cannot be held vicariously liable for the negligence of doctors under contract with them because respondeat superior does not apply in the case of independent contractors. *Id.* at 158. Despite this ruling the court did state, in dicta, that,

HMOs can be held liable for medical malpractice based on one or more theories, including vicarious liability on the basis of respondeat superior or ostensible agency; corporate negligence based upon negligent selection and control of physicians; corporate negligence based upon the corporation’s independent acts of negligence, such as the management of an utilization control system; and breach of contract or breach of warranty.

Denefe & Brunner, *supra* note 57, at 542.

59. *Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756 (Ill. 1999).

60. *Id.* at 769. The *Petrovich* decision was deemed a “victory” by patient advocates, and a “blow” by the health care industry. See Holt, *supra* note 10, at 1. This victory for patients’ rights advocates came after they had failed to win legislative approval of the right to sue over four years.

61. See Wurl, *supra* note 17, at 1; see also *supra* Part II.B (discussing attempts by the Illinois General Assembly to pass Managed Care Reform legislation.)

62. Bruce Japsen and Michelle Brutlag, *Rights—and Expense—to Rise Under HMO Law*, CHI. TRIB., May 28, 1999, § 1, at 1, available at 1999 WL 2877872.

63. *Petrovich*, 719 N.E.2d at 760. Inga Petrovich was the plaintiff who originally filed this action. *Id.* However, because she died during the pendency of the appeal, her husband, William Petrovich, took her place as appellee, on behalf of her estate. *Id.* at 760.

64. *Id.* at 761. Share is organized as an independent practice association (“IPA”) model HMO, meaning it contracts with physicians, rather than employing them. *Id.* at 762. In addition, “Share does not . . . own, operate, maintain, or supervise the offices [of the physicians]. Rather, Share contracts with independent medical groups and physicians that have the facilities, equipment and professional skills necessary to render medical care.” *Id.*

Kowalski of persistent pain on the right side of her mouth and around her tongue and throat.⁶⁵ Dr. Kowalski referred Ms. Petrovich to Dr. Friedman, also a contract physician with Share.⁶⁶ Dr. Friedman suggested that Ms. Petrovich undergo an MRI or a CT scan of her skull.⁶⁷ Ms. Petrovich reported these suggestions to Dr. Kowalski, who informed Ms. Petrovich that Share did not allow these tests.⁶⁸ The tests were never performed.⁶⁹

Approximately six months later, Ms. Petrovich went back to Dr. Kowalski, complaining again of pain in her mouth, and Dr. Kowalski again referred her to Dr. Freidman.⁷⁰ This time, Dr. Friedman performed multiple biopsies that revealed that Ms. Petrovich had cancerous cells at the base of her tongue and the surrounding tissues of her pharynx.⁷¹ Parts of her tongue, palate, pharynx, and jawbone were removed, and she underwent radiation treatment and rehabilitation.⁷²

Ms. Petrovich brought a medical malpractice action against Share, alleging that both Dr. Kowalski and Dr. Freidman were negligent in failing to diagnose her cancer in a timely manner, and that Share was vicariously liable for the negligence of the doctors because the doctors were both agents of Share.⁷³ Defendant Share argued that it could not be held liable for the negligence of Dr. Kowalski or Dr. Friedman because they were independent contractors at the time they treated the plaintiff, and not Share's agents.⁷⁴ The circuit court granted summary judgment in favor of Share, holding that an HMO cannot be held vicariously liable for the negligence of its independent contractor

65. *Id.* at 761. Ms. Petrovich's employer was enrolled in the defendant HMO, Share, which only pays benefits for health care provided by one of its contracting physicians. *See* Deneffe & Brunner, *supra* note 57, at 540. Share's physicians provide its members with overall care and issue referrals when necessary. *Petrovich*, 719 N.E.2d at 761. Share has approximately 500 primary care physicians in the service area it covers. *Id.* Share allows its members to select from a list of participating physicians. *Id.* Inga Petrovich selected Dr. Kowalski as her primary care physician. *Id.*

66. *Petrovich*, 719 N.E.2d at 761.

67. *Id.*

68. *Id.*

69. *Id.* Dr. Kowalski did subsequently perform an MRI on Ms. Petrovich, but this test did not cover the area of her skull that Dr. Freidman had directed. *Id.* Ms. Petrovich did not discuss the tests with anyone at Share because she was not aware of Share's grievance policy. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* Ms. Petrovich also brought a suit against Dr. Kowalski. *Id.* Dr. Freidman was not named as a defendant. *Id.*

74. *Id.* at 761-62.

physicians.⁷⁵ The appellate court reversed the lower court's decision and held, instead, that an HMO can be liable for medical malpractice under the theory of apparent agency.⁷⁶ The court also held that Ms. Petrovich had raised sufficient issues of fact to preclude summary judgment.⁷⁷ Share petitioned the Illinois Supreme Court for leave to appeal.⁷⁸ The Illinois Supreme Court granted review and affirmed.⁷⁹

In affirming the decision of the appellate court, the Illinois Supreme Court ruled that HMOs can be liable for medical malpractice.⁸⁰ In so doing, the court stated that there was no reason to grant HMOs special legal protections and, because of the risks involved in health care delivery, HMOs should be held accountable for their actions in order to ensure quality medical care.⁸¹ The court stated that every organization is subject to tort liability for any injury caused by its actions and the mere fact that HMOs were designed to contain costs did not exempt them from liability.⁸² Rather, the court reasoned that HMO accountability is a necessary safeguard to counterbalance the profit making motives inherent in managed care organizations and will help ensure that subscribers receive quality health care.⁸³ Therefore, the

75. *Id.* at 760. The circuit court relied on a provision in the contract between Share and its subscribers expressly stating: "The relationship between a Share Plan Provider and any Member is that of provider and patient. The Share Plan Physician is solely responsible for the medical services provided to any Member." *Id.* at 763. In addition, the Share benefits contract explained that Share physicians are independent contractors and that Share plan providers "are not agents or employees of Share." *Id.* at 762. The circuit court simply held that, based on the structure and organization of Share, there was no genuine issue of material fact that an agency relationship existed. *Id.* The supreme court noted, however, that "unlike the master agreements and benefits contract . . . the member handbook which plaintiff received does not contain any provision that identifies Share physicians as independent contractors." *Id.*

76. *Petrovich v. Share Health Plan of Ill., Inc.*, 696 N.E.2d 356 (Ill. App. Ct. 1998). The appellate court stated: "HMOs should not be allowed to hold themselves out as total providers of health care and then seek to avoid liability based on a disclaimer [that physicians were independent contractors] buried in a contract." *Id.* at 365.

77. The First District Appellate Court pointed to evidence that may tend to show some doctors may have tailored their medical decisions in light of the compensation arrangements and cost-containment concerns. *See Deneffe & Brunner, supra* note 57, at 542. Therefore, the court held that a "genuine issue of material fact existed as to whether Share exerted a sufficient amount of control over its participating physicians such that an agency relationship could be inferred." *Id.*

78. *Petrovich*, 719 N.E.2d at 760.

79. *Id.*

80. *Id.* at 766. The supreme court did not decide the merits of the case, only that a genuine issue of material fact existed. *See Holt, supra* note 10, at 1.

81. *Petrovich*, 719 N.E.2d at 764.

82. *Id.* The court stated, "[t]he principle that organizations are accountable for their tortious actions and those of their agents is fundamental to our justice system." *Id.* Furthermore, the cost-containment role of HMOs grants them no special protection from liability. *Id.*

83. *Id.* The court stated, "[t]o the extent that HMOs are profit making entities, accountability is also needed to counterbalance the inherent drive to achieve a large and ever increasing profit

court held that theories of tort liability should apply to HMOs in the same way they apply to other entities.⁸⁴

Applying this reasoning to the facts of the case, the Illinois Supreme Court explained that although vicarious liability generally does not apply to the acts of an independent contractor, vicarious liability may nevertheless be imposed if an agency relationship is established under the doctrine of apparent authority.⁸⁵ The court relied on an earlier Illinois case, *Gilbert v. Sycamore Municipal Hospital*,⁸⁶ which imposed vicarious liability on hospitals for the medical malpractice of their independent contractor physicians, and reasoned that the same theory of tort liability should apply in the case of HMOs.⁸⁷ Examining the facts set forth by Ms. Petrovich, the Illinois Supreme Court determined that there was a genuine issue of material fact as to whether, under the doctrine of apparent authority, vicarious liability could apply to Share.⁸⁸ Accordingly, the court affirmed the decision of the appellate court.⁸⁹

B. Proposed Illinois Legislation on Health Care Reform and HMO Liability

With the transformation of the health care market in the U.S., the issue of managed care reform has troubled Congress and state legislatures across the country.⁹⁰ For nearly four years, the Illinois

margin." *Id.*

84. *Id.* The court also recognized a pattern of HMO liability emerging across the nation. The court said, "[t]he national trend of courts is to hold HMOs accountable for medical malpractice under a variety of legal theories, including vicarious liability on the basis of apparent authority, vicarious liability on the basis of *respondeat superior*, direct corporate negligence, breach of contract and breach of warranty." *Id.*

85. *Id.* at 765.

86. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788 (Ill. 1993).

87. *Petrovich*, 719 N.E.2d at 765. In *Gilbert*, the Illinois Supreme Court held that "unless the patient knows or should have known that the physician providing treatment is an independent contractor, vicarious liability can attach to a hospital for the medical malpractice of its physicians under the apparent authority doctrine." *Id.* (citing *Gilbert*, 622 N.E.2d 795). The *Gilbert* decision established that two requisite elements for proving apparent agency are a "holding out" by a hospital and "justifiable reliance" by the plaintiff. *Id.* (quoting *Gilbert*, 622 N.E.2d at 796).

88. *Id.* at 769. The court also considered whether the doctrine of implied authority could apply, and it reached the same result. *Id.* at 770. The court stated that, "the implied authority doctrine may be used against an HMO to negate a physician's status as an independent contractor," and that, "[a]n implied agency exists where the facts and circumstances show that an HMO exerted such sufficient control over a participating physician so as to negate that physician's status as an independent contractor, at least with respect to third parties." *Id.* at 772.

89. *Id.* at 775.

90. See Japsen, *supra* note 22, at 1. United States House Democratic Leader, Richard Gephardt, stated that the quality of managed care is "one of the kitchen-table issues that people care about." William Neikirk, *GOP Suffers Self-Inflicted Wounds over Health Care Wider Coverage, HMOs Debated*, CHI. TRIB., June 7, 1998, § 1, at 3, available at 1998 WL 2864263.

General Assembly has struggled with attempts to craft legislation regulating HMOs and providing HMO subscribers with more rights and a higher quality of health care.⁹¹ Through the passage of a "Patients' Bill of Rights," the issue of managed care reform has been hotly debated on the floors of both houses, but legislators have fervently disagreed over which rights should be included.⁹²

For the most part, the Illinois General Assembly has avoided the issue of institutional negligence, focusing instead on the subscriber's right to sue HMOs for malpractice.⁹³ In both 1998 and 1999, the House Health Care Availability and Access Committee drafted a bill to amend the Health Maintenance Organization Act.⁹⁴ Each of these bills included a provision that would affirmatively provide HMO subscribers the right to sue their HMO for medical malpractice.⁹⁵ This "right to sue" was the most aggressive health care proposal in the General Assembly in recent years.⁹⁶ However, a like provision was excluded from Senate proposals and was the source of disagreement between the two houses.⁹⁷ As a result, HMO reform efforts ended in deadlock.⁹⁸ The House Committee proposals passed in the Democratic-controlled

91. Clair M. Callan, Commentary, *Health Rights*, CHI. TRIB., June 22, 1999, § 1, at 12, available at 1999 WL 2885638.

92. Kaplan, *supra* note 3, at 9 (describing the House and Senate as "miles apart on what an HMO bill should include").

93. See Dori Meinert, *Supreme Court Rejects Lawsuit Against HMO*, ST. J. V. REG., June 13, 2000, at 1, available at <http://www.sj-r.com/news/0010106113Id.htm>.

94. See Adriana Colindres, *Election Could Shape Health-Care Reforms*, ST. J. REG., Nov. 2, 1998, at 1, available at 1998 WL 21332190; see also Christi Parsons & Ray Long, *Patient's Bill of Rights in Trouble: Passage by Legislature Doubted by Session End*, CHI. TRIB., May 13, 1998, § 1, at 9, available at 1998 WL 2855611.

95. See Michelle Brutlag, *House Bill Would Allow Patients To Sue HMOs: Measure Targets Medical Malpractice*, CHI. TRIB., Mar. 25, 1999, § 1, at 11, available at 1999 WL 2856888. This is the same "right to sue" that the Illinois Supreme Court ultimately granted to HMO subscribers in *Petrovich*. Holt, *supra* note 10, at 1. The House bill also included a grievance procedure under which subscribers could appeal decisions made by their HMO. Parsons & Long, *supra* note 94, at 9.

96. See Brutlag, *supra* note 95, at 11. The bill was sponsored by Democratic Representative Mary Flowers. *Id.*

97. See Adriana Colindres, *House Passes HMO Reform Plan/Senate Vote Likely Today*, ST. J. REG., May 27, 1999, at 1, available at 1999 WL 16229298. In an attempt to help pass a bill, negotiators began drafting legislation that was a "hybrid" of proposals from the two houses. *Id.* However, this compromise legislation did not include the provision of the House version that would allow subscribers to sue their HMOs. *Id.*

98. *Id.* at 9. At the federal level, a similar debate persists, preventing Congress from reaching an agreement on a "patients' bill of rights." In 1999, the House passed a managed care reform bill that would give patients numerous rights, including the right to sue health insurance plans. See Quinn, *supra* note 3, at 282 n.12 (quoting Robert Pear, *House Passes Bill to Expand Rights on Medical Care*, N.Y. TIMES, Oct. 8, 1999, at A15). However, the Senate would not support this provision. *Id.*

House both years, over objections by many Republican representatives.⁹⁹ The Senate, however, refused to agree to the right to sue provision and, consequently, both bills failed.¹⁰⁰ The Illinois General Assembly placed the issue of corporate negligence in the background of the managed care reform debate.¹⁰¹

After much compromise, the General Assembly finally passed a "Patients' Bill of Rights" in August 1999.¹⁰² This new law forbids gag rules that prevent doctors from informing patients of treatment options, gives patients greater access to specialists, and creates new ways for patients to appeal medical decisions.¹⁰³ Although this bill will certainly boost the quality of health care that HMO subscribers receive, it does not go so far as to provide subscribers the right to sue their HMO.¹⁰⁴ Whereas the enactment of *some* legislation relieved patients' rights advocates, because the legislature omitted a patient's right to sue from the bill, many considered the bill a defeat.¹⁰⁵

III. DISCUSSION

A. Jones v. Chicago HMO: *The Facts*

The Illinois Supreme Court went much further than the General Assembly in May 2000 when it issued a landmark ruling in favor of patients' rights in *Jones v. Chicago HMO*.¹⁰⁶ Chicago HMO, organized pursuant to the Illinois Health Maintenance Organization Act,¹⁰⁷

99. Brutlag, *supra* note 95, at 11. Many Republican legislators objected to this provision, arguing that it is "not good public policy to legislate the right to sue," in light of the overburdened court system. *Id.* (quoting Republican Representative James Durkin).

100. Holt, *supra* note 10, at 1.

101. Meinert, *supra* note 93, at 1 (discussing legislation affecting HMO liability).

102. See McKinney, *supra* note 3, at 12. The enacted bill is the Managed Care Reform and Patient Rights Act, 1999 Ill. Laws 91-0617 (S.B. 0251). This legislation will only apply to about forty percent of the HMO subscribers in Illinois because ERISA exempts the health insurance plans of large employers from state regulation. See Brutlag, *supra* note 95, at 11. This bill became effective on January 1, 2000. See McKinney, *supra* note 3, at 12.

103. 1999 Ill. Laws 91-0617 (S.B. 0251); see also Holt, *supra* note 10, at 1.

104. Holt, *supra* note 10, at 1.

105. Matt Adrian, *HMO Reform, State Budget Measures Still Awaiting Vote*, CHI. SUN-TIMES, May 23, 1999, at 3, available at 1999 WL 6540356 (stating that health care reform advocates were angry that the legislation did not include provisions allowing patients to sue). Despite this defeat in the Illinois General Assembly, these patients' rights advocates were ultimately victorious when the Illinois Supreme Court granted patients the right to sue HMOs for medical malpractice in *Petrovich v. Share Health Plan of Illinois, Inc.* Holt, *supra* note 10, at 1.

106. *Jones II*, 730 N.E.2d 1119 (Ill. 2000).

107. See 215 ILL. COMP. STAT. 125/1-2(9) (1994). The Illinois Health Maintenance Organization Act defines an HMO as "any organization formed under the laws of this or another state to provide or arrange for one or more health care plans under a system which causes any part

provides health care to its subscribers by contracting with independent medical groups or physicians.¹⁰⁸ Chicago HMO contracted with the Illinois Department of Public Aid and agreed to provide health care services to Medicaid recipients.¹⁰⁹ Sheila Jones, a Medicaid recipient, subscribed to Chicago HMO,¹¹⁰ and Dr. Jordan, a contract physician of Chicago HMO, became the Jones' primary care physician.¹¹¹ In addition to Ms. Jones and her family, over 4,500 other Chicago HMO patients used Dr. Jordan as their primary care physician.¹¹²

On January 18, 1991, Ms. Jones' three-month old baby, Shawndale, became ill. Ms. Jones immediately called Dr. Jordan's office, pursuant to Chicago HMO protocol.¹¹³ Because Dr. Jordan was unavailable, Ms. Jones informed Dr. Jordan's assistant of Shawndale's symptoms.¹¹⁴ The assistant advised her to give Shawndale castor oil.¹¹⁵ Dr. Jordan returned her call later in the evening and gave Ms. Jones the same

of the risk of health care delivery to be borne by the organization or its providers." *Id.*

108. Wurl, *supra* note 17, at 5. Chicago HMO contracts with physicians, rather than directly employing its own physicians. *Id.* Chicago HMO is a for-profit corporation. *See Jones II*, 730 N.E.2d at 1124. It is organized as an independent practice association ("IPA") model HMO. *Id.* An IPA contracts with its physicians for the providing of health care, whereas a "staff model" HMO provides health care through employing its own salaried physicians. *Raglin v. HMO Ill., Inc.*, 595 N.E.2d 153, 154 n.1 (Ill. 1992), *overruled by Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756 (Ill. 1999). Under a staff model, because the physicians are employees of the HMO, the HMO will usually be held liable under the traditional theory of respondeat superior. DiCicco, *supra* note 3, at 504. This theory of liability is not available in the case of an IPA model HMO. Usually, IPA model HMO physicians see HMO patients in their own offices, use their own equipment, and maintain their own private practice in addition to their contract with the HMO. *Jones v. Chicago HMO Ltd. of Ill.*, 703 N.E.2d 502, 508 (Ill. App. Ct. 1998) [hereinafter *Jones I*]. This is the most common form of HMO today. Barry R. Furrow, *Managed Care Organizations and Patient Injury: Rethinking Liability*, 31 GA. L. REV. 419, 433 (1997).

109. *Jones I*, 703 N.E.2d at 504.

110. *Jones II*, 730 N.E.2d at 1124. Jones' deposition revealed that she became a subscriber to Chicago HMO after a representative of the HMO visited her home, assuring her that Chicago HMO could provide her with health care benefits that were "better than a regular medical card." *Id.*

111. *Id.* Jones did not choose Dr. Jordan as her primary care physician. *Id.* Rather, Chicago HMO assigned her to his care. *Id.*

112. *Id.* at 1125. According to Chicago HMO's medical director, federal regulations limit HMO pediatricians to 3,500 patients. *Jones I*, 703 N.E.2d at 506. At Dr. Jordan's deposition, he estimated that he was assigned only 3,000 Chicago HMO patients as well as 1,500 patients through other HMOs. *Jones II*, 730 N.E.2d at 1125. However, Chicago HMO's records listed him as the primary care physician for 4,527 Chicago HMO patients as of December 1, 1990. *Id.* In addition, Dr. Jordan maintained his own private practice of non-HMO patients. *Id.*

113. *Jones II*, 730 N.E.2d at 1123. Chicago HMO's "Member Handbook" instructed that subscribers in need of care should "[c]all your Chicago HMO doctor first when you experience an emergency or begin to feel sick." *Id.* at 1125 (emphasis in original).

114. *Id.* at 1123.

115. *Id.*

advice.¹¹⁶ The following day, when Shawndale's condition did not improve, Ms. Jones took her daughter to the emergency room.¹¹⁷ The emergency room doctor diagnosed Shawndale with bacterial meningitis—a permanently disabling illness.¹¹⁸

Ms. Jones filed suit.¹¹⁹ Her complaint charged Chicago HMO with institutional negligence, alleging that Chicago HMO negligently assigned Dr. Jordan as the Jones' primary care physician when he had an exorbitant number of patients.¹²⁰ In addition, Ms. Jones alleged that Chicago HMO had negligently adopted procedures requiring a subscriber to call the doctor in advance for an appointment, before visiting the doctor's office.¹²¹ The circuit court granted summary judgment in favor of Chicago HMO, rejecting Jones' assertion that Chicago HMO was subject to corporate negligence.¹²² Jones appealed.¹²³

B. Jones v. Chicago HMO: *The Court Opinions*

1. The Lower Court's Opinion

On appeal, the Illinois Appellate Court affirmed the decision of the circuit court granting summary judgment in favor of the defendant on

116. *Id.* A medical expert for Jones stated in an affidavit and deposition testimony that Dr. Jordan deviated from the standard of care when he was informed of Shawndale's symptoms, and failed to schedule an immediate appointment. *Id.*

117. *Id.* Chicago HMO did authorize Shawndale's admission into the emergency room on January 19. *Id.*

118. *Id.* Today, Shawndale is nine-years-old, weighs just forty-five pounds, and is unable to feed herself. See Japsen, *supra* note 22, at 1.

119. *Jones II*, 730 N.E.2d at 1123. This suit was filed in the Circuit Court of Cook County. *Id.*

120. *Id.* Jordan had over 4,500 patients at the time that he was treating Shawndale. See *supra* note 112 (revealing that Chicago HMO records listed Dr. Jordan as the primary care physician for 4,527 Chicago HMO patients as of December 1, 1990).

121. *Jones II*, 730 N.E.2d at 1123-24. Jones' complaint also charged Chicago HMO with vicarious liability for the medical malpractice of Dr. Jordan and breach of contract. *Jones I*, 703 N.E.2d at 504. The Circuit Court of Cook County granted summary judgment in favor of the Chicago HMO on both issues. *Id.* Subsequently, the Illinois Appellate Court and Supreme Court both affirmed the Circuit Court's ruling on the breach of contract issue, holding that Jones' claim is based on the contract between Chicago HMO and the Illinois Department of Public Aid, a contract to which Jones herself was not a party. *Jones II*, 730 N.E.2d at 1123.

The Illinois Appellate Court reversed the Circuit Court's decision regarding the vicarious liability issue, affirming its own decision in *Petrovich* (which had not yet been decided by the Illinois Supreme Court), and held that Chicago HMO could be subject to a claim of vicarious liability for medical malpractice. Wurl, *supra* note 17, at 4-5. This issue was not raised again in *Jones II*. *Jones II*, 730 N.E.2d at 1123.

122. *Jones I*, 703 N.E.2d at 504.

123. *Id.* at 507. Jones appealed to the Illinois Appellate Court for the First District. *Id.*

the issue of institutional negligence.¹²⁴ Relying heavily on Illinois precedent, the court found no facts in the record of a negligent act that warranted the application of corporate or institutional negligence liability to an HMO that merely contracts with physicians to provide health care to its subscribers.¹²⁵ Instead, the court stated that Illinois precedent indicated that HMOs could be subjected to tort claims in limited instances, but only after a plaintiff has asserted a recognized legal theory of liability.¹²⁶ Although the court conceded that the *Petrovich* and *Raglin* decisions made reference to the potential for HMO liability under a theory of corporate negligence, no Illinois case had affirmatively recognized this as a viable cause of action.¹²⁷

In explaining its holding, the court focused on the independent relationships between the HMO and Dr. Jordan.¹²⁸ Although the opinion made no reference to *Darling*,¹²⁹ the court did compare HMOs to hospitals in terms of liability.¹³⁰ According to the court, a hospital owes its patients an independent duty to review and supervise medical treatment, but Illinois courts have never recognized any duty or “corporate responsibility” of an HMO to oversee the quality of health care that a *contracting* physician, independent of the HMO, provides in

124. *Id.* at 509, 511. This was a case of first impression for the Illinois Appellate Court. Ted Gianaris, Jr., *Survey of Illinois Law: Tort*, 23 S. ILL. U. L.J. 1253, 1258 (1999).

125. *Jones I*, 703 N.E.2d at 508-09. The appellate court relied primarily on *Petrovich* and *Raglin*, two recent cases addressing the issue of liability of HMOs. *Id.*; see also *supra* Part II.A.2 (discussing development of Illinois caselaw). The court did note that Pennsylvania courts have recognized institutional negligence as a valid theory of liability. *Jones I*, 703 N.E.2d at 509. In addition, the court noted that in Illinois a hospital owes its patients an independent institutional duty, “administrative and managerial in nature, to review and supervise medical treatment.” *Id.* However, the court stated that under Illinois law this corporate duty has not been extended to create HMO liability “on facts similar to those developed in this case.” *Id.*

126. *Jones I*, 703 N.E.2d at 504. The court stated that: “*Raglin* and *Petrovich* stand for the proposition that while HMOs are not immune from civil prosecution for malpractice, some recognized legal theory must be satisfied before liability can be attached.” *Id.*

127. *Id.* at 508. The courts in *Raglin* and *Petrovich* both observed the possibility that HMOs may be liable for medical malpractice under more than one of the following theories of liability: “(1) vicarious liability on the basis of respondeat superior or ostensible agency; (2) corporate negligence based on the negligent selection and negligent control of the physician; and (3) corporate negligence based upon the corporation’s independent acts of negligence, e.g., in the management of utilization control systems.” *Id.* at 504 (quoting *Raglin v. HMO Ill., Inc.*, 595 N.E.2d 153, 156 (Ill. App. Ct. 1992)).

128. *Id.* at 509. For example, Dr. Jordan’s office was at a separate location, completely independent of Chicago HMO. *Id.* In addition, Dr. Jordan wore no Chicago HMO identification and his office contained no Chicago HMO insignia. *Id.* at 506.

129. See *supra* notes 37-55 and accompanying text (discussing *Darling* and its holding that hospitals were subject to an administrative or managerial duty and therefore, they could be held liable for institutional or corporate negligence).

130. *Jones I*, 703 N.E.2d at 509.

his private office.¹³¹ The court stated that the Jones' injuries were entirely divorced from any Chicago HMO policy or instruction and related only to the conduct of Dr. Jordan.¹³² Accordingly, the court held that Chicago HMO was not guilty of any tortious act resulting in Shawndale's injuries.¹³³

In its conclusion, the court noted the number of legislative attempts at reform in this area.¹³⁴ The court recognized that this was a delicate area of the law and one that had been the subject of recent legislative debates.¹³⁵ The court stated that based on the significance of the issue and the considerations of public interest at stake, it was not the appropriate forum for resolution.¹³⁶

2. The Illinois Supreme Court's Opinion

a. The Majority Opinion

In an opinion written by Justice Michael Bilandic, the Illinois Supreme Court overturned the decision of the appellate court regarding the liability of Chicago HMO for institutional negligence.¹³⁷ The court's decision was two-fold. First, it held for the first time that an HMO could, in fact, be held liable for institutional negligence.¹³⁸ Second, in analyzing the facts of the case, the court held that there was

131. *Id.*

132. *Id.* at 508.

133. *Id.* at 509. The court stated:

We have reviewed the record for evidence that Chicago HMO was guilty of a negligent act that proximately caused the injury in this case. We find none. Speculation cannot take the place of fact. We have found no reported case anywhere that creates HMO liability on facts similar to those developed in this case.

Id.

134. *Id.*

135. *Id.*

136. *Id.* The court stated:

We have been especially cautious when treading through this new ground. While we believe that there may be circumstances that establish the independent corporate negligence of an HMO, we also understand this area is fraught with considerations of public interest, matters that courts are ill-equipped to determine. We note that two bills on managed care reform were considered, but not acted upon by our legislature in 1998. . . . We presume the matter will again be addressed.

Id. (citing Managed Care Reform Act, S.B. 1904, 90th Leg., 1998 Sess. (Ill.); H.B. 974, 90th Leg., 1998 Sess. (Ill.)).

137. *Jones II*, 730 N.E.2d 1119, 1135 (Ill. 2000). The Illinois Supreme Court affirmed the appellate court's decision regarding Jones' breach of contract claim. *Id.* Jones also included in her appeal a breach of warranty claim against Chicago HMO. *Id.* The court held, however, that Jones had waived any breach of warranty claim by failing to raise it in the courts below. *Id.*

138. *Id.*

sufficient evidence of such negligence to withstand Chicago HMO's motion for summary judgment.¹³⁹ Accordingly, the lower court's decision granting Chicago HMO's motion for summary judgment was reversed.¹⁴⁰

In analyzing whether a patient could sue an HMO for institutional negligence, the court relied heavily on its own precedent in *Darling*,¹⁴¹ where institutional negligence was applied to hospitals.¹⁴² The court examined the *Darling* decision and its rationale and drew a persuasive analogy between hospitals and HMOs as health care providers.¹⁴³ *Darling* recognized that hospitals have an independent duty to assume responsibility for the care of its patients.¹⁴⁴ The standard of care required is the care of a "reasonably careful hospital" under similar circumstances.¹⁴⁵ The liability imposed in *Darling* was based on the negligence of the hospital alone, not that of any physician.¹⁴⁶ This liability was appropriate in *Darling* because the role of a hospital in providing health care had expanded considerably over the years. Such expanded responsibility for care required the hospital to assume greater legal responsibilities for its corporate activities.¹⁴⁷ The staff employed to fulfill this role is made up of administrative and manual workers, in addition to medical staff.¹⁴⁸ Thus, a hospital is subject to institutional liability for any negligence beyond that of the employed physicians.¹⁴⁹

Having thus elaborated on the *Darling* rationale, the *Jones* court concluded that HMOs, like hospitals, assume an "expanded role" in providing health care.¹⁵⁰ More importantly, the court stated that the corporate responsibilities of an HMO are essential to fulfilling their expanded role.¹⁵¹ The group of individuals who, through their various duties, collectively provide comprehensive health care services to HMO

139. *Id.* at 1134.

140. *Id.* at 1135.

141. *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965).

142. *Jones II*, 730 N.E.2d at 1128-32.

143. *Id.* Conversely, the appellate court decision made no reference to the *Darling* decision. See *supra* notes 129-31 and accompanying text (discussing the appellate court's reference to hospital liability without specifically mentioning *Darling*).

144. *Jones II*, 730 N.E.2d at 1128.

145. *Id.* (quoting *Advincula v. United Blood Serv.*, 678 N.E.2d 1009 (Ill. 1996)).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1128-29.

151. *Id.* at 1128.

subscribers extends far beyond merely medical staff.¹⁵² Therefore, as an institution, HMOs assume a legal duty to conform to a standard of reasonable conduct.¹⁵³ The court also noted that the Superior Court of Pennsylvania recently addressed this issue. In *Shannon v. McNulty*,¹⁵⁴ the Pennsylvania court recognized the institutional liability of HMOs and also relied heavily on an analogy to hospitals.¹⁵⁵ Thus, quoting *Shannon* as the only available authority on this issue, the court concluded that, in Illinois, institutional negligence is, in fact, a basis for a valid claim against HMOs.¹⁵⁶

The court then assessed whether, under a theory of institutional negligence, Chicago HMO was entitled to summary judgment.¹⁵⁷ The court addressed both of Jones' claims: first, that Chicago HMO had negligently assigned too many patients to Dr. Jordan;¹⁵⁸ and second, that the HMO had negligently adopted procedures requiring patients to call for an appointment before visiting the doctor's office.¹⁵⁹ As to the

152. *Id.* The court referred to an HMO as an "amalgam of many individuals who play various roles in order to provide comprehensive health care services to their members." *Id.* (citing *Shannon v. McNulty*, 718 A.2d 828, 835-36 (Pa. Super. Ct. 1998)).

153. *Id.* at 1129.

154. *Shannon v. McNulty*, 718 A.2d 828 (Pa. Super. Ct. 1998).

155. *Jones II*, 730 N.E.2d at 1128 (citing *Shannon*, 718 A.2d at 835-36). In *Shannon*, the plaintiff patient sued her HMO for corporate liability "stemming from the premature delivery and subsequent death of [her] son." *Shannon*, 718 A.2d at 829. The defendant HMO, HealthAmerica, provided an emergency care phone service staffed by triage nurses. *Id.* at 836. The Superior Court of Pennsylvania held that "HMOs may, under the right circumstances, be held corporately liable." *Id.*

156. *Jones II*, 730 N.E.2d at 1128.

157. *Id.* at 1128-29. At this point in the opinion, Justice Bilandic reiterated the basis for institutional negligence. *Id.* at 1132-35. He stated, "[p]arenthetically, we note that this assertion involves an administrative or managerial action by Chicago HMO, not the professional conduct of its physicians." *Id.* at 1132.

158. *Id.* at 1132-34.

159. *Id.* at 1135. In addition, the parties were in dispute over the evidence Jones was required to present in support of her negligence claims against the HMO. *Id.* at 1129. Specifically, Chicago HMO argued that Jones could not proceed on her claim without putting forth expert testimony as to the appropriate standard of care required of an HMO. *Id.* The court thoroughly examined this issue, comparing this case to those of both ordinary negligence and professional negligence. *Id.* at 1129-32. The standard of care in a case of ordinary negligence is that of a "reasonably prudent person" and this requires only lay testimony—expert testimony is unnecessary. *Id.* at 1130. Conversely, the standard of care in the case of professional negligence requires expert testimony to establish both the standard of care expected of the professional and the professional's deviation from that standard. *Id.* The difference between the two is that, in the case of professional negligence, a lay juror is thought to be unfamiliar with the profession and therefore, "not equipped to determine what constitutes reasonable care in professional conduct without the help of expert testimony." *Id.* Applying this analysis to proof of the standard of care of an HMO the court again relied on the holding in the *Darling* case. *Id.* at 1131. The institutional negligence of a hospital can be proven without the use of expert testimony. *Id.* Instead, hospital bylaws, licensing regulations and standards for hospital accreditation were

latter claim, the court quickly disposed of Jones' argument and held that Chicago HMO was entitled to summary judgment because Jones failed to set forth sufficient evidence of the standard of care required of an HMO in developing appointment procedures.¹⁶⁰

The court, however, agreed with Jones as to the claim against Chicago HMO for Dr. Jordan's extraordinary patient-load.¹⁶¹ The court relied on the testimony of Chicago HMO's own medical director as "proper and sufficient evidence" of the requisite standard of care.¹⁶² The HMO's medical director had stated that an HMO should not assign more than 3,500 patients to a single physician.¹⁶³ The evidence revealed that Dr. Jordan had more than 6,000 patients.¹⁶⁴ Because Chicago HMO assigned Jones to Dr. Jordan instead of allowing her to choose her primary care physician, the court held that Dr. Jordan's patient overload was enough evidence to support a claim of institutional negligence against the HMO.¹⁶⁵

The court further noted that other evidence in the record supported Jones' claim of institutional negligence against Chicago HMO.¹⁶⁶ For example, Chicago HMO was soliciting new subscribers by sending representatives door to door when it did not have a sufficient number of

sufficient to establish the standard of care of a hospital. *Id.* Because the same rule should apply to HMOs, similar evidentiary sources, not necessarily expert testimony, are capable of proving the standard of care required of an HMO. *Id.* at 1131-32.

160. *Id.* at 1135.

161. *Id.* at 1134.

162. *Id.* at 1132. The court stated, "[t]his particular standard of care evidence, setting forth a limit of 3,500 patients per primary care physician, is adequate to equip a lay juror to determine what constitutes the standard of care required of a 'reasonably careful HMO' under the circumstances of this case." *Id.* The court relied on *Darling*, holding that a hospital's own bylaws could establish the standard of care, to come to this determination. *Id.*

163. *Id.* The number "3,500" was based on federal guidelines. *Id.* Chicago HMO's medical director, Dr. Trubitt, had even stated that "if Dr. Jordan himself had 6,000 or more patients, then that would be an unusually large number and of concern to Chicago HMO." *Id.*

164. *Id.*; see also *supra* note 112 (discussing the number of patients that Dr. Jordan had under his care at the time he was treating the Jones family). The court relied on Chicago HMO's own reports listing Dr. Jordan as the primary care physician of 4,527 Chicago HMO subscribers, which alone constitutes a patient load in excess of the number determined to be the standard of care. See *Jones II*, 730 N.E.2d at 1132. In addition, Dr. Jordan estimated that he was assigned another 1,500 patients through other HMOs, and he also maintained a private practice. *Id.* Chicago HMO argued that these numbers were excusable because Dr. Jordan had testified that he employed four part-time physicians to work in his office. *Id.* at 1132-33. On a motion for summary judgment, however, the court had to dismiss this argument since there was no record as to the capacity of these part-time employees and their relationship with the Chicago HMO subscribers who were treated by Dr. Jordan. *Id.* at 1133.

165. *Id.* at 1134. HMOs have been repeatedly criticized for limiting a patient's choice of doctors and hospitals. Japsen, *supra* note 22, at 3.

166. *Jones II*, 730 N.E.2d at 1133-34.

physicians to serve the needs of so many patients.¹⁶⁷ Furthermore, the contract between Chicago HMO and the Department of Public Aid required that Chicago HMO have one full time physician for every 2,000 subscribers.¹⁶⁸ Chicago HMO argued that there was no evidence of any causal connection between a patient overload and the injuries Shawndale suffered.¹⁶⁹ However, the court noted that this was a reasonable issue for the trier of fact to decide.¹⁷⁰

The court also addressed the policy concerns pervading the issue of HMO liability.¹⁷¹ Chicago HMO argued that only individual physicians, not HMOs, have a duty to determine the number of patients any one physician can handle.¹⁷² The court held, however, that because the role of an HMO is to provide medical care, it would offend public policy to allow an HMO to assign an excessive number of patients to a single physician without holding the HMO accountable for any injuries that result.¹⁷³ Holding HMOs accountable serves to counteract the excessive need for profits.¹⁷⁴

In the end, both public policy considerations and overwhelming evidence supported Jones' theory of Chicago HMO's institutional negligence in assigning Dr. Jordan too many patients.¹⁷⁵ Accordingly, the court concluded that "Chicago HMO [was] not entitled to summary

167. *Id.* at 1133. Jones testified that she initially became a subscriber when a Chicago HMO representative "visited her home and persuaded her to become a member." *Id.*

168. *Id.* at 1134. The contract stated, "[t]here shall be at least one full-time equivalent, board eligible physician to every 1,200 enrollees, including one full-time equivalent, board certified primary care physician for each 2,000 enrollees. There shall be one pediatrician for each 2,000 enrollees under age 17." *Id.* at 1126.

169. *Id.* at 1133.

170. *Id.* The court stated, "[a] lay juror can discern that a physician who has thousands more patients than he should will not have time to service them all in an appropriate manner." *Id.* Because questions of fact remained, the majority held that the lower court's grant of summary judgment must be reversed. *Id.* at 1134.

171. *Id.*

172. *Id.*

173. *Id.* The court stated:

Finally, the remaining factors favor placing this burden on HMOs as well. Public policy would not be well served by allowing HMOs to assign an excessive number of patients to a primary care physician and then 'wash their hands' of the matter. The central consequence of placing this burden on HMOs is HMO accountability for their own actions. This court in *Petrovich* recognized that HMO accountability is needed to counterbalance the HMO goal of cost containment and, where applicable, the inherent drive of an HMO to achieve profits.

Id. (citing *Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756, 764 (Ill. 1999)).

174. *Id.*

175. *Id.*

judgment on Jones' claim of institutional negligence for assigning too many patients to Dr. Jordan."¹⁷⁶

b. The Dissents

Two justices disagreed with the majority's conclusion on the issue of institutional negligence.¹⁷⁷ Justice Benjamin Miller and Justice S. Louis Rathje both agreed that the court should affirm the lower court's grant of summary judgment, but for different reasons.¹⁷⁸ Accordingly, the two justices wrote separate dissenting opinions.

Justice Miller acknowledged that corporate or institutional negligence is a recognized and valid theory of liability.¹⁷⁹ Instead, he disagreed that Ms. Jones set forth the requisite causal connection between the excessive number of patients assigned to Dr. Jordan by Chicago HMO and Jones' injuries.¹⁸⁰ Justice Miller opined that a "nexus" was required in order for Jones' corporate negligence claim to succeed.¹⁸¹ Justice Miller further criticized the majority for relying on the statement by the HMO's medical director that 6,000 patients would be a worrisome patient load for one doctor, while ignoring the testimony of the medical director that this number would not be so inordinate if the doctor's office employed additional doctors and other personnel or increased its hours of operation.¹⁸² In sum, Justice Miller believed the majority improperly inferred a connection between Chicago HMO's actions and Shawndale Jones' injuries and therefore disagreed with their conclusion.¹⁸³

Justice Rathje dissented on much broader grounds. Instead of disagreeing on the issue of whether the facts supported the claim of institutional negligence, Justice Rathje argued against extending

176. *Id.* The court's decision in favor of Jones bears "no verdict of innocence or guilt." Japsen, *supra* note 22, at 2.

177. *Jones II*, 730 N.E.2d at 1136-39 (Miller, J., and Rathje, J., dissenting). Although both justices disagreed on the issue of institutional negligence, they concurred with the majority on the issues of breach of warranty and breach of contract. *Id.* (Miller, J., and Rathje, J., dissenting).

178. *Id.* (Miller J., and Rathje, J., dissenting).

179. *Id.* at 1136 (Miller, J., dissenting).

180. *Id.* (Miller, J., dissenting).

181. *Id.* (Miller, J., dissenting). Justice Miller quotes the trial court opinion as saying, "[Plaintiff's counsel] comes up with some theories. He comes up with some numbers . . . there's no nexus. There's no expert testimony to show how these claimed theories and numbers, omissions, or failures, had any impact on the doctor's decisions in this case." *Id.* (Miller, J., dissenting). Justice Miller cites the appellate court as recognizing the same flaw in the Jones case. *Id.* (Miller, J., dissenting) (citing *Jones I*, 703 N.E.2d 502, 508 (Ill. App. Ct. 1998)).

182. *Id.* (Miller, J., dissenting).

183. *Id.* at 1136-37 (Miller, J., dissenting).

institutional negligence to managed care organizations like Chicago HMO.¹⁸⁴ Specifically, he argued that the majority's analogy between hospitals and HMOs was misplaced and, thus, an HMO should not be subjected to the same theories of liability as a hospital.¹⁸⁵ An HMO, such as Chicago HMO, is simply a "vehicle" through which subscribers are assigned a primary care physician and pay their bills.¹⁸⁶ In contrast, he argued, a hospital plays a much more significant role in the actual decision making and medical care of its patients, including physically administering or supervising the medical care and aiding its patients in decision making regarding their care.¹⁸⁷ The difference, according to Justice Rathje, between an HMO's role and that of a hospital is so fundamental that subjecting the two to the same theories of liability is inappropriate.¹⁸⁸

Justice Rathje also recognized crucial differences among various HMO models and addressed the majority's reliance on the Pennsylvania case, *Shannon v. McNulty*.¹⁸⁹ Like a hospital, the HMO at issue in *Shannon* was much more involved in the actual medical care that its patients were provided; it was not merely a "vehicle" for paying medical bills.¹⁹⁰ The HMO in *Shannon* employed nurses to advise subscribers on important medical decisions.¹⁹¹ Justice Rathje argued that this type of HMO was very different from Chicago HMO, which simply contracted with physicians.¹⁹² He explained that this difference was even recognized by the *Shannon* court as paramount in its analysis and extension of liability.¹⁹³ According to Justice Rathje, the majority

184. *Id.* at 1137 (Rathje, J., dissenting).

185. *Id.* at 1137-38 (Rathje, J., dissenting). Justice Rathje stated, "[a]lthough both a hospital and an HMO hire many different people for many different reasons, the reasons for holding hospitals liable under this theory do not hold true for Chicago HMO." *Id.* at 1137 (Rathje, J., dissenting).

186. *Id.* at 1138 (Rathje, J., dissenting).

187. *Id.* (Rathje, J., dissenting).

188. *Id.* (Rathje, J., dissenting).

189. *Id.* at 1137-39 (Rathje, J., dissenting).

190. *Id.* at 1137 (Rathje, J., dissenting).

191. *Id.* (Rathje, J., dissenting).

192. *Id.* at 1138 (Rathje, J., dissenting).

193. *Id.* (Rathje, J., dissenting). Justice Rathje quotes the *Shannon* court as concluding:

Where the HMO is *providing health care services rather than merely providing money to pay for services* their conduct should be subject to scrutiny. We see no reason why the duties applicable to hospitals should not be equally applied to an HMO *when that HMO is performing the same or similar functions as a hospital*. When a benefits provider, be it an insurer or a managed care organization, interjects itself into the rendering of medical decisions affecting a subscriber's care it must do so in a medically reasonable manner. Here, HealthAmerica provided a phone service for emergent care staffed by triage nurses. Hence, it was under a duty to oversee that the

created a general rule regarding HMO liability while failing to take into account fundamental structural differences that exist among various HMOs.¹⁹⁴ Therefore, Justice Rathje urged that the majority's reliance on *Shannon* was misplaced.¹⁹⁵ Justice Rathje concluded that institutional liability was inappropriate in the case of Chicago HMO.¹⁹⁶

IV. ANALYSIS

In *Jones v. Chicago HMO*, the Illinois Supreme Court correctly concluded that tort liability for corporate negligence applies to HMOs just as it does to hospitals. Because of the expanded role that HMOs have assumed in the area of health care and the number of people relying on HMOs today, far-reaching tort liability must be extended into this area of health care in order to ensure quality care.¹⁹⁷ Furthermore, because an HMO inherently seeks to limit costs, it must be held to a higher standard of care. HMO accountability is the most efficient way to safeguard against placing profits ahead of proper medical treatment.¹⁹⁸

A. HMOs Assume the Same Role as Hospitals in Health Care Delivery

Since the Illinois Supreme Court decision in *Darling*, Illinois has recognized institutional negligence as a theory of tort liability for hospitals.¹⁹⁹ The *Darling* court recognized the administrative duty of

dispensing of advice by those nurses would be performed in a medically reasonable manner. Accordingly . . . HMOs may, *under the right circumstances*, be held corporately liable.

Id. at 1137 (Rathje, J., dissenting) (emphasis in original) (quoting *Shannon v. McNulty*, 718 A.2d 828, 835-36 (Pa. Super. Ct. 1998)).

194. *Id.* at 1139 (Rathje, J., dissenting). Rathje recognized that Chicago HMO is an independent practice association that contracts with individual physicians who are solo or group practitioners. *Id.* (Rathje, J., dissenting). “[T]he way in which daily business is conducted, the duties of nurses and other staff, and other day-to-day decisions are made by the individual doctor or hospital with whom the HMO has contracted.” *Id.* at 1138 (Rathje, J., dissenting). Conversely, under a staff model HMO, where the providers are all salaried employees of the HMO, the HMO presumably has much more control over these providers, and institutional liability against the HMO is more appropriate. *Id.* at 1139 (Rathje, J., dissenting). “Having a uniform standard of care for all HMOs makes little sense, given the major differences in structure.” *Id.* (Rathje, J., dissenting).

195. *Id.* at 1138 (Rathje, J., dissenting).

196. *Id.* (Rathje, J., dissenting).

197. Anderson, *supra* note 7, at 337-38.

198. *Jones II*, 730 N.E.2d at 1134 (quoting *Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756 (Ill. 1999)).

199. *Id.* at 1128 (stating, “[s]ince the landmark decision in *Darling v. Charleston Community Memorial Hospital*, Illinois has recognized that *hospitals* may be held liable for institutional negligence . . . an independent duty of hospitals to assume responsibility for the care of their

hospitals, due to the expanded role of hospitals in the medical care of their patients.²⁰⁰ Hospitals no longer merely provide a setting for the medical treatment to take place. Rather, they are an active participant in the actual administration of medical treatment.²⁰¹ As such, hospitals are held to a standard of care that incorporates administrative or managerial duties.²⁰²

HMOs have taken over today's health care industry.²⁰³ A very large number of Americans now rely on an HMO for their health care.²⁰⁴ Like hospitals, HMOs no longer play a passive role in providing health care to their subscribers.²⁰⁵ Their policies and regulations directly impact the health care that is provided.²⁰⁶ HMOs, as an entity, provide comprehensive health care services to their subscribers.²⁰⁷

In accordance with this new role, HMOs have a duty to supervise the administration of health care to their subscribers and maintain policies that provide for the best possible care.²⁰⁸ Corporate liability imposes on HMOs certain non-delegable duties to ensure that subscribers receive this quality care and are protected from any foreseeable harm.²⁰⁹ With

patients" (emphasis in original) (citations omitted)).

200. *Id.* (citing *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 257 (Ill. 1965), *cert. denied*, 383 U.S. 946 (1966)).

201. *Darling*, 211 N.E.2d at 257. In *Darling*, the court stated:

Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such, if necessary, by legal action.

Id.

202. *See id.*

203. *Supra* Part I (discussing the transformation of the health care industry in America and the growing number of HMOs and HMO subscribers); *see also* Todd Ebersole, *Emerging Theories of HMO Liability for Negligence of Its Network Providers*, ORANGE COUNTY LAW., Dec. 1999, at 30 (stating, "HMOs have become the dominant organization in our nation's health care delivery system").

204. Spielberg, *supra* note 19, at 54 (stating that more and more people are receiving their health care through HMOs).

205. Linda Peeno, *Managed Care and the Corporate Practice of Medicine*, TRIAL, Feb. 2000, at 18-20 (stating that HMOs have the "last word in determinations of medical necessity").

206. *Id.* (asserting that HMOs are making medical decisions).

207. *Jones II*, 730 N.E.2d 1119, 1124 (Ill. 2000).

208. *Shannon v. McNulty*, 718 A.2d 828, 831 (Pa. Super. Ct. 1998) (stating that, like a hospital, an HMO has a duty "to oversee all persons who practice medicine within its walls as to patient care").

209. *Bartimus & Wright*, *supra* note 5, at 767. The two most "paramount" duties under the doctrine of corporate negligence for HMOs are:

(1) to ensure that all treating physicians who are endorsed by, are employed by or are agents of the HMO are properly qualified to render health care to HMO subscribers;

so many subscribers depending on the managed care system, HMOs should assume a responsibility to the subscribers to maintain a certain standard of care in the administration of these duties.²¹⁰ In the event that an HMO fails to meet this standard, a subscriber should have a right to sue under a theory of corporate negligence.²¹¹

B. HMOs' Cost-Containment Aim Mandates Increased Tort Liability

HMOs must be subject to the threat of tort liability in order to counteract the "cost-containment philosophy" of managed care.²¹² The organization of an HMO inherently creates a motivation to provide the subscriber with a minimal amount of health care.²¹³ Most HMOs, including Chicago HMO, provide their physicians with compensation under a "capitation method."²¹⁴ Under this system, doctors are not compensated according to the services they provide.²¹⁵ Instead, for each patient the HMO assigns to a physician, the HMO pays the physician a monthly fixed fee, regardless of whether that physician has actually seen or treated the patient that month.²¹⁶ This system of compensation provides the HMO's physicians with an incentive *not* to treat the patient.²¹⁷ In addition, HMOs create additional incentives for physicians by setting up bonus arrangements whereby physicians receive increased compensation if they reduce their use of ancillary

and (2) to establish a process by which an HMO may thoughtfully determine whether treatment requested by a primary care physician is medically necessary, thereby allowing patients to receive beneficial health care that will not compromise their well-being in exchange for trying to save the HMO money.

Id.

210. *Id.* at 765 (arguing that although traditionally corporate negligence has been applied primarily to hospitals, HMOs should be subject to this theory of liability as well).

211. *Id.* (stating that as they are "gaining increased popularity as a source of health care delivery, HMOs are no longer untouchable when it comes to court imposed liability for failing to meet the obligations imposed under the corporate negligence doctrine").

212. Noah, *supra* note 2, at 1225 (referring to the cost-containment philosophy of managed care, which causes an HMO to restrict how and where patients can seek medical treatment).

213. *Id.* at 1225-27.

214. Anderson, *supra* note 7, at 326-27 (describing the capitation method of payment for doctors that have contracted with HMOs); see also *Jones II*, 730 N.E.2d 1119, 1127 (Ill. 2000) (describing the contractual agreement between Chicago HMO and Dr. Jordan for compensation).

215. Anderson, *supra* note 7, at 326.

216. See *Jones II*, 730 N.E.2d at 1127. For example, under Dr. Jordan's contract with Chicago HMO, for every female patient under two years old (like Shawndale Jones), Dr. Jordan would receive \$39.14 per month, regardless of whether he actually treated that child. *Id.*

217. Anderson, *supra* note 7, at 327 (arguing that "[u]nder this system, doctors have a financial incentive to do less rather than more for patients because HMOs do not provide extra compensation for additional procedures"). This system provides doctors with a financial incentive not to order tests or even see the patient because they are getting paid the fixed rate regardless. *Id.*

services, such as diagnostic tests, referrals, and experimental treatments.²¹⁸ This clearly creates a disincentive to administer proper tests or to make referrals to other physicians.²¹⁹ Based on this system of compensating physicians and its inherent dangers, HMOs should be held to a corporate or administrative duty to supervise the quality of care that physicians are providing to the HMO's subscribers.²²⁰

Furthermore, HMOs should not be immune from liability because they no longer merely "facilitate" the providing of health care from physicians to HMO subscribers.²²¹ Rather, the role of an HMO has expanded, and HMOs actually *provide* health care.²²² The business and practices of an HMO have a direct effect on the quality of health care that is eventually received by the subscriber.²²³ The medical decisions are no longer left to the physicians because the HMOs place substantial financial restraints on the physicians.²²⁴ An entity that interjects itself into medical decisions with effects on the health and treatment of its subscribers should be held accountable for any injury that results from those decisions.²²⁵ With so much control over the medical treatment

218. See Herrington, *supra* note 1, at 719. Under these arrangements, the HMO sets up a pool of funds to pay for any ancillary services prescribed by the physician. *Id.* Physicians who are "frugal in their use" of these services receive the unspent funds. *Id.* Other arrangements provide that an HMO "reduces a portion of the physician's capitated payment and uses the withheld amount to fund a pool for ancillary services." *Id.* Again, any unspent portion of the fund will be returned to the physician. *Id.*

219. *Petrovich v. Share Health Plan of Ill., Inc.*, 696 N.E.2d 356, 362 (Ill. App. Ct. 1998) (stating, "Share's use of the capitation system could lead to the reasonable inference that Share's method of compensation to its participating physicians created a disincentive to order tests or make referrals and thus exerted control over its physicians' medical decisions").

220. Noah, *supra* note 2, at 1232 (stating that as courts begin to recognize the effects these financial incentives have on the quality of health care, they are more willing to hold HMOs accountable).

Despite these concerns about physician incentives, it should be noted that on June 12, 2000, the United States Supreme Court held, in *Pegram v. Herdrich*, that under ERISA, which governs employment benefits, patients cannot sue their HMOs for giving doctors financial incentives to cut treatment costs. *Pegram v. Herdrich*, 530 U.S. 211 (2000).

221. Noah, *supra* note 2, at 1233.

222. *Jones II*, 730 N.E.2d 1119, 1128 (Ill. 2000) (stating, "HMOs, like hospitals, consist of an amalgam of many individuals who play various roles in order to provide comprehensive health care services to their members").

223. *Id.* (arguing that an HMO's "cost containing strategies have a direct influence on the quality of health care").

224. Noah, *supra* note 2, at 1225 (stating that "HMOs seek to control the use of outside facilities and specialists because the overuse of such services would pose a threat to the fiscal stability of the HMO"); see also *supra* note 219 (quoting *Petrovich v. Share Health Plan of Illinois, Inc.*, stating that the capitation system of compensating physicians creates a "disincentive to order tests or make referrals and thus, exert[s] control over its physicians' medical decisions").

225. *Shannon v. McNulty*, 718 A.2d 828, 836 (Pa. Super. Ct. 1998) (stating, "when a benefits provider, be it an insurer or managed care organization, interjects itself into the rendering of

that a patient subscriber receives, an HMO should no longer be shielded from immunity.²²⁶

Corporate negligence as a theory of tort liability is especially appropriate in the case of an HMO because it holds the HMO accountable for its policies and organization, rather than its employees' negligence.²²⁷ A challenge to an HMO's policies will improve the quality of health care provided in a more effective way than a medical malpractice claim because it is a direct attack on the HMO's business administration.²²⁸ The HMO will find it is more profitable to assure that its subscribers receive proper and adequate care.

V. IMPACT

In the wake of the Illinois Supreme Court's decision, the actual impact of the *Jones* case on the health care industry is uncertain. What is certain is that legal remedies are now much more available to HMO subscribers than they were in the past.²²⁹ Furthermore, the national movement toward giving subscribers more rights and remedies does not seem to be coming to a close and the *Jones* decision may only add to the momentum.²³⁰ The vast right to sue will certainly increase HMO accountability and responsibility.²³¹ HMOs will inevitably be held to a higher standard of quality care which, in turn, will result in better

medical decisions affecting a subscriber's care, it must do so in a medically reasonable manner").

226. Anderson, *supra* note 7, at 338 (stating that "it is unfair to shield this enormous industry from accountability to its customers").

227. Spielberg, *supra* note 19, at 54 (discussing the case of *In re U.S. Healthcare*, 193 F.3d 151 (3rd Cir. 1999), in which the plaintiffs sued the defendant HMO under a theory of corporate negligence, challenging the policy of the HMO that limited its members to twenty-four hours of hospitalization after delivery of a newborn).

228. *Id.* at 58 (stating, "these claims challenge policies that put profits first and health last").

229. Japsen, *supra* note 22, at 1. The decision in *Jones II*, however, will only immediately effect 2.4 million of the Illinois residents enrolled in HMOs. *Id.* The hundreds of thousands of Illinois residents who are enrolled in self-insured plans through their employer will not be affected because their plans are exempt from such litigation under ERISA. *Id.*

230. The United States Congress is still considering the Norwood-Dingell Bill, which would expand patients' rights and include the right to sue. The recently elected 107th Congress is considered likely to have enough support for the bill to finally pass both houses. Melanie Eversley, *Patients' Bill of Rights Looks Poised for Passage: Tight Congress Boosts Prospects*, ATLANTA J. & CONST., Nov. 18, 2000, at 6, available at 2000 WL 5487249. In addition, a subscriber's right to sue their HMO was a key issue in the 2000 presidential and congressional elections. Jim Ritter, *Opponents Differ on Patients' Right to Sue Care Plans*, CHI. SUN-TIMES, Oct. 2, 2000, at 7, available at 2000 WL 6697635 (noting that George W. Bush opposes granting HMO subscribers the right to sue, while Al Gore is in favor of providing subscribers this right).

231. *Jones II*, 730 N.E.2d 1119, 1134 (Ill. 2000) (stating that "[t]he central consequence of placing this burden on HMOs is HMO accountability for their own actions").

medical treatment for HMO subscribers.²³² However, these legal ramifications may bring an increase in the costs of HMOs as well as an increase in the number of lawsuits.²³³ Nonetheless, HMO accountability and an improvement in the quality of health care provided will overshadow any unfavorable consequences that accompany this vast right to sue.²³⁴

A. HMO Accountability for Inadequate Care

Subjecting HMOs to legal ramifications, as in *Jones*, will undoubtedly improve the quality of care provided to HMO subscribers.²³⁵ In fact, the court in *Jones* relied on this result in its rationale in support of its holding.²³⁶ Expanding the subscribers' right to sue has an immediate deterrent effect on an HMO.²³⁷ In an effort to avoid litigation and limit their liability, HMOs will increase the number of services provided to its subscribers.²³⁸ In addition, HMOs will make quality health care a priority, and HMO accountability will counterbalance the urge to sacrifice quality in favor of profit-making.²³⁹ Accordingly, the impact *Jones* will have on the quality of the health care an HMO subscriber receives is substantial.

B. Increase in Health Care Costs and Frivolous Lawsuits

Opponents of the *Jones* decision argue that subjecting HMOs to such liability will lead to an increase in the cost of health care.²⁴⁰ By

232. *Id.*

233. *Infra* Part V.B (discussing potential for increase in health care costs and litigation).

234. Geyelin, *supra* note 9, at 1. Advocates of the "patients' bill of rights" believe that even if the costs increase, the changes in the law will be worth it. *Id.* One attorney who specializes in representing patients suing HMOs stated: "The American public would be willing to pay a few dollars more to have the assurance that managed-care companies will be sued if they provide care that costs their loved ones their lives." *Id.*

235. *Jones II*, 730 N.E.2d at 1134.

236. *Supra* notes 171-76 and accompanying text (quoting *Jones II* and its discussion of HMO accountability as a reason for deciding in favor of *Jones*). This was also a factor for the *Petrovich* court. *Supra* note 83 and accompanying text (quoting *Petrovich* on the issue of HMO accountability).

237. Corboy, *supra* note 9, at 22; see also *infra* notes 245-49 and accompanying text (discussing the obvious deterrent effect the right to sue has had in other states as evidenced by the minimal number of lawsuits since the enactment of the law granting subscribers the right).

238. Japsen, *supra* note 22, at 1.

239. *Jones II*, 730 N.E.2d at 1134 (referring to the "inherent drive of an HMO to achieve profit").

240. Holt, *supra* note 10, at 1 (noting that Republican leaders in the Illinois General Assembly who opposed legislation granting this right to sue argued that it would increase health care costs and make health insurance available to fewer people). Costs have been predicted to increase up to ten to twelve percent within a year. Paul Swiech, *Businesses' Health Costs Forecast to Rise*

allowing patients the right to sue, HMOs will be forced to increase the cost of enrollment in the HMO to cover the costs of potential lawsuits.²⁴¹ In addition, HMOs will increase costs to provide their subscribers with better and more services, in order to limit their liability.²⁴² The increase in costs is an inevitable, but necessary, consequence of this essential expansion in the rights of HMO subscribers.

Opponents also argue that improving legal ramifications will result in frivolous lawsuits flooding an already over-burdened judicial system.²⁴³ While it is still too soon after the *Jones* decision to determine the impact on litigation in Illinois, a review of the results in other states that have granted HMO subscribers the right to sue may provide guidance on this issue.²⁴⁴ In Texas, a statute providing subscribers the right to sue for medical malpractice was enacted in 1997.²⁴⁵ In the two years following this enactment, there were five lawsuits against HMOs in Texas courts.²⁴⁶ In Missouri, the state legislature also granted HMO

Legislation, Costs Upping Expense of Workers Insurance, THE PANTAGRAPH (Bloomington, Ill.), Nov. 13, 1999, at D7, available at 1999 WL 16671500 (discussing the potential financial implications for any legislation granting patients the right to sue).

241. Japsen, *supra* note 22, at 3 (quoting a local consultant who stated, "if a health plan is on the losing end of a lawsuit, they are going to seek financial recovery by raising rates").

242. *Id.* It should be noted that in the three years since Texas enacted legislation granting HMO subscribers the right to sue, the premiums have increased only minimally. Rosalyn Bonanti, *Tort 'Reform' in the States*, TRIAL, Aug. 2000, at 32.

243. Corboy, *supra* note 9, at 22. The rising concerns surrounding the quality of health care provided by HMOs has resulted in a considerable amount of litigation, ranging from class actions alleging negligent care, to claims under federal anti-racketeering laws, alleging the use of cost-limited standards to deny coverage. Denniston, *supra* note 6, at 3A.

244. A recent case before the Illinois Supreme Court did consider the financial incentives that an HMO uses to contain costs for tests and referrals. *Neade v. Portes*, 739 N.E.2d 496, 497 (Ill. 2000). However, HMO accountability and liability was not at issue in this case. Instead, the case addressed only a doctor's liability for his relationship with the patient's HMO and whether a doctor is responsible for failing to disclose the HMO's financial incentives to the patient. *Id.* The Illinois Supreme Court held that the patient may not bring both a medical negligence claim and a breach of fiduciary claim against a doctor. *Id.* at 10. Chicago HMO was the HMO at issue in this case, although the HMO was not a party. *Id.* at 1.

245. Amy Goldstein, *'Patients' Rights' Case Study: So Far, Benign; In Texas, Ability to Sue HMOs Has Prompted Little Litigation*, WASH. POST, Sept. 28, 1999, at A1.

246. *Id.* (urging that the Congress should enact a statute similar to that of Texas). There are 4 million Texans who belong to HMOs. *Id.* A Texas state senator who had supported the right to sue legislation stated, "[t]he sky didn't fall," noting that the "horror stories" predicted by the managed care industry never materialized. *Id.*

In addition, the Texas statute provided for an external review board for subscribers' complaints regarding HMO decisions for medical treatment. *Id.* The Texas Department of Insurance had predicted 4,400 complaints in the first year. *Id.* Instead, only 531 complaints were registered with the board. *Id.* Forty-six percent of these complaints were decided in favor of the HMO subscriber. *Id.*

subscribers the right to sue their HMO.²⁴⁷ In the first year following this enactment there were no liability suits against HMOs.²⁴⁸ These low numbers indicate that the potential for legal ramifications has a deterrent effect on HMOs, increasing the quality of health care provided and reducing the need for lawsuits.²⁴⁹

VI. CONCLUSION

The Illinois Supreme Court correctly concluded that the theory of corporate negligence applies to HMOs. HMO patients and subscribers should have a right to legal remedies for injuries that result from the policies and procedures of their HMO. The medical treatment that a subscriber receives is too important to preclude such remedies. HMOs have assumed great responsibility for the care that its subscribers receive, and, therefore, they must assume consummate legal liability. In conclusion, the right to sue will result in more responsible corporate management on issues dealing with patients' care, which in turn will result in better care.

247. *Id.*

248. *Id.*

249. *Id.* (stating "[t]he experience in Texas and Missouri suggests that the deterrent effect of legal accountability has encouraged managed-care insurers to provide better patient care").