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## *Kirk v. Michael Reese Hospital: A Hospital's Liability as a Health Care Provider*

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# Casenotes

## *Kirk v. Michael Reese Hospital: A Hospital's Liability as a Health Care Provider*

### I. INTRODUCTION

The role of hospitals as providers of health care has changed significantly over the past two decades.<sup>1</sup> As a result of this change, new theories of hospital liability have evolved.<sup>2</sup> Only recently, for example, hospitals have been held liable for providing negligent care.<sup>3</sup> These new theories of hospital liability follow the Illinois judiciary's long-time recognition of remedies for injuries resulting from the negligent acts of physicians and other health care practitioners.<sup>4</sup>

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1. Simonson, *Corporate Negligence: An Evolving Theory of Hospital Liability*, PRACTICING LAW INSTITUTE, HOSPITAL LIABILITY 11 (1986). See also *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957), in which the court noted the following with respect to the changing nature of hospitals:

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. 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 internes, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action.

*Id.* at 666, 143 N.E.2d at 8, 163 N.Y.S.2d at 11.

2. Note, *Theories for Imposing Liability Upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability*, 11 WM. MITCHELL L. REV. 561 (1985).

3. *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 333, 211 N.E.2d 253, 258 (1965), *cert. denied*, 383 U.S. 946 (1966) (*see infra* notes 43-46 and accompanying text). See, e.g., *Greenberg v. Michael Reese Hosp.*, 83 Ill. 2d 282, 289, 415 N.E.2d 390, 397 (1980) (standards of care applicable to hospitals must be proven by expert testimony); *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 359, 367 N.E.2d 1250, 1255 (1977) (*see infra* notes 51-54 and accompanying text); *Ohligschlager v. Proctor Community Hosp.*, 55 Ill. 2d 411, 420, 303 N.E.2d 392, 397 (1973) (*see infra* note 40 and accompanying text); *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 457, 266 N.E.2d 897, 904 (1970) (*see infra* notes 63-65 and accompanying text); *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 718, 399 N.E.2d 198, 204 (1st Dist. 1979) (*see infra* notes 56-59 and accompanying text); *Slater v. Missionary Sisters of Sacred Heart*, 20 Ill. App. 3d 464, 469, 314 N.E.2d 715, 719 (1st Dist. 1974) (*see infra* notes 47-50 and accompanying text).

4. See, e.g., *Ritchey v. West*, 23 Ill. 329 (1860) (physician who holds himself out as a professional and who fails to exercise the amount of reasonable care and skill that is ordinarily possessed by a physician is liable); *Gault v. Sideman*, 42 Ill. App. 2d 96, 191

Historically, under the doctrine of charitable immunity, hospitals did not have an affirmative duty under Illinois law to provide medical care to patients.<sup>5</sup> The Illinois Supreme Court abandoned the doctrine of charitable immunity in *Darling v. Charleston Community Memorial Hospital*,<sup>6</sup> in which the court held that a hospital has an affirmative duty to provide quality medical care to its patients.<sup>7</sup> In the recent decision of *Kirk v. Michael Reese Hospital*,<sup>8</sup> however, the Illinois Supreme Court held that a hospital that had dispensed and administered<sup>9</sup> psychotropic drugs did not have an affirmative duty to warn its patients of the adverse side effects of the drugs.<sup>10</sup>

This Note first reviews the various theories of liability under which hospitals have been found liable in the context of medical malpractice actions.<sup>11</sup> This Note then examines and analyzes the *Kirk* decision as it relates to the liability of the hospital,<sup>12</sup> and suggests that the hospital should have been found liable under the theories of strict liability, vicarious liability, and corporate negligence.<sup>13</sup> This Note concludes that the public policy underpinnings of *Darling* suggest an alternative theory that was not raised in *Kirk*, but that would have required the court to find the hospital

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N.E.2d 436 (1st Dist. 1963) (one who holds himself out as a physician is bound to exercise ordinary skill and care); *Magana v. Elie*, 108 Ill. App. 3d 1028, 439 N.E.2d 1319 (2d Dist. 1982) (physician breached a duty of care by refusing to treat a patient in need of further care); *Cram v. Showalter*, 140 Ill. App. 3d 1068, 489 N.E.2d 892 (2d Dist. 1986) (physician liable for negligently treating a preexisting injury).

5. Molchan & Sinn, *Hospital Malpractice Problems: Defense Point of View*, REPRESENTING HEALTH CARE INSTITUTIONS AND PROFESSIONALS 27-1 (Ill. Inst. for C.L.E.) 1985. See generally *Wattman v. St. Luke's Hosp. Ass'n*, 314 Ill. App. 244, 41 N.E.2d 314 (1st Dist. 1942); *Maretick v. South Chicago Community Hosp.*, 297 Ill. App. 488, 17 N.E.2d 1012 (1st Dist. 1938); *Mater v. Silver Cross Hosp.*, 285 Ill. App. 437, 2 N.E.2d 138 (2d Dist. 1936); *Olander v. Johnson*, 258 Ill. App. 89 (2d Dist. 1930); *Armstrong v. Wesley Hosp.*, 170 Ill. App. 81 (1st Dist. 1912).

6. 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

7. *Id.* at 333, 211 N.E.2d at 258.

8. 117 Ill. 2d 507, 513 N.E.2d 387 (1987), *cert. denied*, 108 S. Ct. 1077 (1988).

9. It is the medical practice in hospitals that physicians *order* the medication, pharmacists *dispense* the medication, and nurses *administer* the medication. B. BERGERSEN, PHARMACOLOGY IN NURSING 68, 75, 71 (13th ed. 1976) (emphasis added).

10. *Kirk*, 117 Ill. 2d at 527, 513 N.E.2d at 397.

11. See *infra* notes 15-71 and accompanying text.

12. This Note examines only those issues raised by the *Kirk* decision relating specifically to the hospital's liability. Three other major issues identified in *Kirk* but not discussed in this Note include the liability of the physicians, the drug manufacturers (except to the extent the reasoning used by the court in analyzing the liability of the drug manufacturers is relevant to the issue of the hospital's liability), and the patient-driver. In addition, the concurring and dissenting opinion by Justice Simon does not discuss the liability of the hospital, and therefore will not be discussed in this Note.

13. See *infra* notes 72-149 and accompanying text.

liable.<sup>14</sup>

## II. THEORIES OF HOSPITAL LIABILITY

Modern hospitals offer a wide range of health care services.<sup>15</sup> The purpose of modern hospitals is no longer merely to provide a facility for physicians to render medical care independently.<sup>16</sup> Rather, the broader purpose of modern hospitals is to provide quality medical care.<sup>17</sup> When hospitals fail in their obligation to render appropriate patient care through the supervision of hospital personnel, the hospital may be found vicariously liable to the injured party.<sup>18</sup> Additionally, the doctrine of corporate liability<sup>19</sup> imposes upon hospitals an independent, affirmative, and non-delegable duty to provide quality medical care.<sup>20</sup> Lastly, under a theory of strict liability, hospitals are not permitted to sell an inherently defective or unreasonably dangerous product without providing appropriate warnings.<sup>21</sup>

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14. See *infra* notes 150-52 and accompanying text.

15. *Bing v. Thunig*, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 11 (1957).

16. Southwick, *The Hospital as an Institution: Expanding Responsibilities Change its Relationship with the Staff Physician*, 9 CAL. W.L. REV. 429, 434 (1973).

17. The Joint Commission on Accreditation of Hospitals supports the following principle: "There shall be an organized governing body, . . . that has overall responsibility for the conduct of the hospital in a manner consonant with the hospital's objective of making available high quality patient care." JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS 19 (1970). "Quality health care" is an illusory phrase. Quality, defined as striving for excellence, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1189 (college ed. 1968), must be determined by the patient or public receiving health care.

18. *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

19. When a hospital incorporates, it assumes the role of a comprehensive health care center that is ultimately responsible for arranging and coordinating total health care. Simonson, *supra* note 1, at 11. The corporate nature of a hospital not only establishes a hospital's role in the delivery of health care services, but also provides the basis for the hospital's liability for negligence. *Id.* at 12.

20. See *Darling*, 33 Ill. 2d at 333, 211 N.E.2d at 258 (1965) (see *infra* notes 43-46 and accompanying text for further discussion). See also *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 359, 367 N.E.2d 1250, 1255 (1977) (see *infra* notes 51-54 and accompanying text for further discussion); *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 716, 399 N.E.2d 198, 204 (1st Dist. 1979) (see *infra* notes 56-59 and accompanying text for further discussion); *Slater v. Missionary Sisters of Sacred Heart*, 20 Ill. App. 3d 464, 469, 314 N.E.2d 715, 719 (1st Dist. 1974) (see *infra* notes 47-50 and accompanying text for further discussion).

21. See *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 457, 266 N.E.2d 897, 904 (1970). For a further discussion of *Cunningham*, see *infra* notes 63-65 and accompanying text.

### A. Charitable Immunity

Hospital-based medical care began in the early 1900's.<sup>22</sup> Traditionally, hospitals, as charitable institutions, were immune from liability.<sup>23</sup> Hospitals simply provided a facility for doctors to treat their patients, and doctors exercised their professional discretion in providing medical treatment.<sup>24</sup> The charitable immunity doctrine,<sup>25</sup> which was created in 1876,<sup>26</sup> protected hospitals from any form of liability through the 1940's.<sup>27</sup> Although some jurisdictions abolished the doctrine as early as 1942,<sup>28</sup> Illinois finally abolished the doctrine in 1965 when the Illinois Supreme Court held in *Darling* that a hospital has an affirmative duty to provide quality care to its patients.<sup>29</sup>

### B. Vicarious Liability

Historically, hospitals have not been held vicariously liable<sup>30</sup> for the actions of physicians because of the unique nature of the physi-

22. B. FURROW, S. JOHNSON, T. JOST & R. SCHWARTZ, *HEALTH LAW CASES, MATERIALS AND PROBLEMS* 164 (1987) [hereinafter FURROW].

23. *Id.* at 165.

24. Southwick, *supra* note 16, at 434.

25. The doctrine of charitable immunity was premised on a public policy notion that either recipients of charity waived their right to recover damages when medical care was rendered gratuitously or, because a hospital depends on charitable contributions, contributors would cease to contribute if the funds were used to pay tort claims. Note, *supra* note 2, at 567.

26. *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876) (overruled in *Colby v. Carney Hosp.*, 356 Mass. 527, 254 N.E.2d 407 (1969)).

27. FURROW, *supra* note 22, at 165. See, e.g., *Schoendorff v. Soc'y of New York Hosps.*, 211 N.Y. 125, 105 N.E. 92 (1914) (doctrine of charitable immunity first announced in New York) (overruled in *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957)); *Parks v. Northwestern Univ.*, 218 Ill. 381, 385, 75 N.E. 991, 993 (1905) (doctrine of charitable immunity first announced in Illinois) (overruled in *Darling*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965)).

28. *President of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

29. *Darling*, 33 Ill. 2d at 333, 211 N.E.2d at 258 (1965). Cf. *Moore v. Moyle*, 405 Ill. 555, 565, 92 N.E.2d 81, 86 (1950) (the doctrine was modified); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 38, 163 N.E.2d 89, 102 (1959), *cert. denied*, 362 U.S. 968 (the doctrine was invalidated as it applied to the public school system).

30. Under the principle of vicarious liability an employer may be charged with an employee's tortious acts when such acts are committed within the scope of the employee's employment. Note, *supra* note 2, at 564.

To sustain a cause of action for vicarious liability, a plaintiff must establish that an employer had some degree of control over the method and means of an employee's work at the time the act or omission occurred. Simonson, *Vicarious Liability*, PRACTICING LAW INSTITUTE, *HOSPITAL LIABILITY* 45 (1986). See also *Mduba v. Benedictine Hosp.*, 52 A.D.2d 450, 384 N.Y.S.2d 527 (1976), in which the New York Appellate Court found that the test for determining vicarious liability "is one of control in respect to the manner in which the work is to be done." *Id.* at 452, 384 N.Y.S.2d at 529. Vicarious liability is premised upon the public policy notion that employers who are engaged in an enterprise,

cian-hospital relationship.<sup>31</sup> Hospitals typically hire physicians as independent contractors, thereby protecting the hospital from liability for patient injuries.<sup>32</sup>

The courts have struggled with the physician's status as an independent contractor.<sup>33</sup> In the 1950's, the courts began to recognize the significance of hospitals as health care providers.<sup>34</sup> At that time, the principle of vicarious liability was established in the context of medical malpractice.<sup>35</sup> In *Bing v. Thunig*,<sup>36</sup> the New York Court of Appeals abandoned the immunity of hospitals for the actions of independent contractor physicians. The court stated that "[t]he rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and

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and who are thus in the best position to insure against the risk of injury, should bear the cost of such injury rather than the innocent party to the act. *Id.*

31. Note, *supra* note 2, at 564. See, e.g., *Hundt v. Proctor Community Hosp.*, 5 Ill. App. 3d 987, 284 N.E.2d 676 (3d Dist. 1972) (hospital not vicariously liable for alleged wrongdoing of a physician who was on the medical staff of the hospital but who did not receive salary or other compensation from the hospital); *Lundahl v. Rockford Memorial Hosp. Ass'n*, 93 Ill. App. 2d 461, 235 N.E.2d 671 (2d Dist. 1968) (vicarious liability action against hospital failed because of insufficient evidence against the physician, the alleged wrongdoer).

32. FURROW, *supra* note 22, at 169.

33. See *Beeck v. Tucson Gen. Hosp.*, 18 Ariz. App. 165, 500 P.2d 1153 (1972) (hospital held vicariously liable when it had the right to control standards of performance of a physician employed by the hospital in order to perform an inherent and essential function for the hospital); *Senieris v. Haas*, 45 Cal. 2d 811, 291 P.2d 915 (1955) (when a hospital permits a physician to use drugs and equipment belonging to the hospital and the physician has a regular call schedule at the hospital, the physician acts as an agent for the hospital, relieving patients of any obligation to determine the physician's status prior to treatment); *Kitto v. Gilbert*, 39 Colo. App. 374, 570 P.2d 544 (1977) (operating surgeon who assumed control in operating room was liable for the acts of hospital employees assisting in the operation, but both the surgeon and the hospital could not be held liable under a theory of vicarious liability); *Foster v. Englewood Hosp. Ass'n*, 19 Ill. App. 3d 1055, 313 N.E.2d 255 (1st Dist. 1974) (hospital held vicariously liable when an employee of hospital assisted a physician who retained some degree of control over the assisting employee, and the employee remained within the bounds of her employment); *Kober v. Stewart*, 148 Mont. 117, 417 P.2d 476 (1966) (when a physician acts as an agent for the hospital in performing his services pursuant to the rules of the hospital medical staff, a contract that does not explicitly refer to the physician as an independent contractor may be merely the means by which a hospital hires the physician); *Arthur v. St. Peter's Hosp.*, 169 N.J. Super. 575, 405 A.2d 443 (1979) (hospital liable for physician's negligence when hospital held out the physician as its agent or employee and the patient accepted treatment from the physician reasonably believing that such treatment was rendered on behalf of the hospital); *Adamski v. Tacoma Gen. Hosp.*, 20 Wash. App. 98, 579 P.2d 970 (1978) (hospital liable when it holds itself out to the public as a provider of medical care and the public reasonably believes that a physician is employed by the hospital to deliver that service and the public is not advised to the contrary).

34. FURROW, *supra* note 22, at 169.

35. *Id.*

36. 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

fair dealings. It should be discarded."<sup>37</sup>

Today, a hospital may be held vicariously liable for an act or omission of an agent, or one deemed to be an agent, that causes injury to another.<sup>38</sup> The doctrine of vicarious liability applies to an agent of a hospital, or one deemed to be an agent, such as physicians,<sup>39</sup> physical therapists, laboratory technicians, respiratory therapists, and nurses.<sup>40</sup>

### C. Corporate Negligence

From the 1960's to the 1970's, the focus of liability changed from the hospital-physician relationship<sup>41</sup> to an analysis of the hospital's role in providing quality patient care.<sup>42</sup> In the landmark

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37. *Id.* at 667, 143 N.E.2d at 9, 163 N.Y.S.2d at 11. *But see* *Cooper v. Curry*, 92 N.M. 417, 421, 589 P.2d 201, 209 (1978) (hospital not liable for injuries sustained by the plaintiff because the physician was not an employee of the hospital or engaged in a joint venture with the hospital). Generally, the judiciary has taken two different approaches in determining a hospital's vicarious liability. *See generally* FURROW, *supra* note 22, at 165-77. The first approach, the "captain-of-the-ship" rule, is based upon the degree of control that the party in command has over the actions of the party who committed the wrongful act. *Id.* at 168. *See Foster v. Englewood Hosp. Ass'n*, 19 Ill. App. 3d 1055, 313 N.E.2d 255 (1st Dist. 1974). The second approach, based on the laws of agency, is the more important concept in the area of medical malpractice because most physicians are not employees of the hospitals in which they practice. RESTATEMENT (SECOND) OF AGENCY states the following:

[O]ne who represents that another is his agent and thereby causes a third party to justifiably rely upon the care of such agent is subject to liability to the third party for harm caused by the lack of care of the one appearing to be an agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (1957). *See also supra* note 33 and accompanying text.

In *Hannola v. City of Lakewood*, 68 Ohio App. 2d 61, 426 N.E.2d 1187 (1980), an Ohio court applied the doctrine of vicarious liability to include non-employee, independent contractor physicians. *Id.* at 68-69, 426 N.E.2d at 1192. The *Hannola* court justified the imposition of liability on the part of the hospital by redefining the hospital's right to control the mode and manner of the physician's work. *Id.*

38. Note, *supra* note 2, at 564.

39. *See supra* note 37.

40. The doctrine was applied in *Ohligschlager v. Proctor Community Hosp.*, 55 Ill. 2d 411, 303 N.E.2d 392 (1973). *Ohligschlager* was admitted to the defendant hospital for the treatment of dehydration necessitating the insertion of an intravenous (I.V.) catheter for the administration of feedings and medications. *Id.* at 415, 303 N.E.2d at 395. *Ohligschlager's* arm was severely damaged from the seepage of fluids and medications into the tissues of the arm. *Id.* at 414, 303 N.E.2d at 395. The fluids and medications should have been contained in the vein. *Id.* Expert testimony revealed that the nursing staff had a duty to periodically observe the I.V. site. *Id.* at 420, 303 N.E.2d at 397. The court held the hospital vicariously liable for the injury suffered by *Ohligschlager* for failing to properly supervise a nurse performing a routine nursing function. *Id.*

41. *See supra* notes 30-40 and accompanying text for discussion of vicarious liability.

42. The court in *Pedroza v. Bryant*, 101 Wash. 2d 226, 677 P.2d 166 (1984), stated that, "[t]he doctrine of corporate negligence reflects the public's perception of the modern

decision of *Darling v. Charleston Community Memorial Hospital*,<sup>43</sup> the Illinois Supreme Court held the hospital directly liable for the failure of its administrators and staff to monitor and supervise properly the delivery of health care rendered within its confines.<sup>44</sup> The court noted that a hospital was responsible for maintaining proper standards of professional conduct and establishing methods to evaluate patient care.<sup>45</sup> According to *Darling*, therefore, a hospital has an affirmative and non-delegable duty to protect the well-being of its patients.<sup>46</sup>

In *Slater v. Missionary Sisters of the Sacred Heart*,<sup>47</sup> the Illinois Appellate Court for the First District expanded the duty established in *Darling*.<sup>48</sup> In *Slater*, the court held that a hospital has a duty to protect a patient by exercising the degree of reasonable care that the patient's pre-existing condition would require.<sup>49</sup> Unlike *Darling*, in which the hospital was required to be aware only of the injury being treated, the *Slater* court required the hospital to be

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hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered." *Id.* at 231, 677 P.2d at 169.

43. 33 Ill. 2d 326, 211 N.E.2d 253 (1965). *Darling*, a college football player, was treated for a broken leg in the defendant hospital's emergency room where the treating physician applied a cast in a manner that impeded adequate blood flow. *Id.* at 328, 211 N.E.2d at 255. *Darling* complained of severe pain and swollen and discolored toes, yet no physician or other hospital staff member removed the cast. *Id.* The leg festered and rotted in the cast, ultimately resulting in the amputation of *Darling's* leg below the knee. *Id.* at 329, 211 N.E.2d at 256.

44. *Id.* at 333, 211 N.E.2d at 258. The defendant hospital was liable for breach of a duty to "conform to the legal standard of reasonable conduct in the light of the apparent risk." *Id.* at 331, 211 N.E.2d at 257.

45. *Id.* at 339, 211 N.E.2d at 261.

46. *Id.* at 332-33, 211 N.E.2d at 257-58. See *Molchan & Sinn supra* note 5, at 27-7. See also *Jackson v. Power*, 743 P.2d 1376 (Alaska 1987) (hospital has a non-delegable duty to provide non-negligent physician care in its emergency room even though the emergency room physicians are hired as independent contractors); *Crawford County State Bank v. Grady*, 161 Ill. App. 3d 332, 514 N.E.2d 532 (4th Dist. 1987) (although hospital held liable under several other theories, the court specifically held the hospital liable under an independent duty to provide care theory). Compare *Darling* (affirmative duty to treat) with *Lundahl v. Rockford Memorial Hosp. Ass'n*, 93 Ill. App. 2d 461, 235 N.E.2d 571 (1968). The court in *Lundahl* held that when a failure to act results from a medical decision within the discretion of a physician, the hospital cannot be found negligent for failure to act to rectify the physician's omission. *Id.* at 466, 235 N.E.2d at 674. In essence, the court concluded that *Darling* did not require the hospital to affirmatively treat the patient, but rather, to seek treatment by consulting physicians when it becomes apparent that the attending physician is incompetent. *Id.*

47. 20 Ill. App. 3d 464, 314 N.E.2d 715 (1st Dist. 1974).

48. *Id.* *Slater* was admitted to the hospital for a hernia operation. *Id.* at 466, 314 N.E.2d at 717. The hospital did not know that *Slater* was an alcoholic and mentally disturbed when he jumped from his hospital room window while suffering from delirium tremens. *Id.* at 467, 314 N.E.2d at 717.

49. *Id.* at 469, 314 N.E.2d at 719.



aware of a patient's pre-existing condition that was not directly related to the treatment being administered to the patient.<sup>50</sup>

The doctrine of corporate negligence was further expanded in *Renslow v. Mennonite Hospital*<sup>51</sup> when the Illinois Supreme Court extended a hospital's liability to a non-patient third party.<sup>52</sup> The court held that, although the one to whom the duty was owed was not in existence at the time of the wrongful act, the injury sustained was a reasonably foreseeable injury.<sup>53</sup> The court noted that, as medical science technology advanced, the concept of legal duty changed from a static concept to a dynamic one.<sup>54</sup>

In *Darling, Slater, and Renslow*, the hospital had an obligation to be aware of the medical care that it rendered.<sup>55</sup> In *Johnson v. St. Bernard Hospital*,<sup>56</sup> the Illinois Appellate Court for the First District imposed a greater obligation on the hospital by holding that the hospital not only must supervise the care rendered, but also must intervene between the patient and physician to provide reasonable and proper treatment.<sup>57</sup> The court based its holding on a breach of the standard of care established in the hospital's by-laws.<sup>58</sup> The bylaws required the hospital to exercise reasonable ef-

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50. *Id.* at 469-70, 314 N.E.2d at 719.

51. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). In *Renslow*, the plaintiff's mother received a transfusion of incompatible blood eight years before the conception of the plaintiff. *Id.* at 349, 367 N.E.2d at 1251. The plaintiff infant was in a non-existent state at the time of the wrongful act, and therefore, was a third party to the negligent act of the tortfeasors. *Id.* The blood transfusion caused permanent brain damage to the plaintiff at birth. *Id.* at 349-50, 367 N.E.2d at 1251.

52. *Id.* at 359, 367 N.E.2d at 1255.

53. *Id.*

54. *Id.* at 357-58, 367 N.E.2d at 1254.

55. See *supra* notes 43-54 and accompanying text for a discussion of these cases.

56. 79 Ill. App. 3d 709, 399 N.E.2d 198 (1st Dist. 1979). Two and one-half months after admission to the defendant hospital, it was discovered that Johnson had a fractured hip from the automobile accident that precipitated his admission. *Id.* at 711, 399 N.E.2d at 200. When Johnson's attending physician requested an orthopedic consult for the fractured hip, the hospital's orthopedic surgeon refused to examine Johnson. *Id.* In compliance with the hospital bylaws, the attending physician notified the hospital administration of the orthopedic surgeon's refusal to examine Johnson. *Id.* The bylaws established the hospital administration's authority to take corrective measures when a consulted physician fails to fulfill his obligation to comply with the requested consult when such failure is below acceptable medical practice. *Id.* at 717, 399 N.E.2d at 205. The hospital administration failed to intervene to insure that Johnson received proper and adequate treatment for his fractured hip. *Id.* at 718, 399 N.E.2d at 201. One month after discovering the broken hip, Johnson died, allegedly due to complications arising from the fracture, without ever being examined by an orthopedic surgeon. *Id.* at 711, 399 N.E.2d at 201.

57. *Id.* at 716, 399 N.E.2d at 204.

58. *Id.* at 718, 399 N.E.2d at 205. Evidence of hospital standards can be found not only in hospital bylaws but also in professional customs, hospital accreditation, regula-

forts to insure that its patients received adequate care.<sup>59</sup>

#### D. Strict Liability

In 1965, the Illinois Supreme Court, in *Suvada v. White Motor Co.*,<sup>60</sup> adopted the concept of strict liability in tort as the basis for a claim.<sup>61</sup> The *Suvada* court extended strict liability to products other than food.<sup>62</sup> Five years later, in *Cunningham v. MacNeal Memorial Hospital*,<sup>63</sup> the Illinois Supreme Court applied the strict liability in tort doctrine in a medical malpractice case.<sup>64</sup> In *Cunningham*, the court held a hospital strictly liable for selling an in-

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tions and professional organization requirements applicable to hospitals. See Note, *supra* note 2, at 579.

59. *Johnson*, 79 Ill. App. 3d at 718, 399 N.E.2d at 205.

60. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

61. *Id.* at 621, 210 N.E.2d at 188. The court rejected the pre-1965 notion that the theory of strict liability must be premised solely on either an express or implied warranty or on a contract between the parties. *Id.*

In strict liability actions, the seller of a product is held to the standard described in the Restatement (Second) of Torts, which provides that:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to reach the user or consumer in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The rule applies to persons engaged in the business of selling products as well as to distributors, dealers, and manufacturers of such products. *Id.* at comment f.

In a strict liability claim, it is not necessary to prove that the manufacturer or seller of a product is negligent. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 13 (1965). If a product leaves the control of the manufacturer or seller in an unreasonably unsafe condition, the manufacturer or seller is liable whether or not he produced the dangerous condition or failed to recognize and correct the dangerous condition. *Id.* at 15. The dangerously unsafe product is the focus of the liability, rather than the manufacturer or seller's conduct, *id.*, which is distinct from actions in either vicarious liability or corporate negligence.

62. *Suvada*, 32 Ill. 2d at 619, 210 N.E.2d at 186. The court held that liability should be extended for the following three reasons: (1) the public interest in human life and health, (2) the manufacturer's invitations and solicitations to use the product and its representations that the product is safe and suitable for use, and (3) the justice of imposing the loss on the one creating the risk and reaping the profit. *Id.*

63. 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

64. *Id.* at 457, 266 N.E.2d at 904. In *Cunningham*, the plaintiff contracted serum hepatitis after receiving a transfusion of blood while hospitalized. *Id.* at 445, 266 N.E.2d at 898. The plaintiff then sought damages on a theory of strict tort liability. *Id.* The court held that the hospital sold an inherently dangerous product by providing blood for a transfusion. *Id.* at 457, 266 N.E.2d at 904. In response to the *Cunningham* decision, the Illinois legislature passed a statute that specifically rejects the imposition of strict liability in tort rule for services involving blood and blood products. ILL. REV. STAT. ch. 111½, para. 5102 (1985).

herently dangerous product.<sup>65</sup>

In *Lawson v. G.D. Searle & Co.*,<sup>66</sup> the Illinois Supreme Court expanded the strict liability in tort doctrine when it held that a failure to warn of a product's dangerous propensities may serve as a basis for holding a manufacturer or seller strictly liable in tort.<sup>67</sup> The failure to warn theory in strict liability was limited in *Woodhill v. Parke Davis & Co.*<sup>68</sup> when the Illinois Supreme Court focused on the nature of the product and the adequacy of the warning, rather than the conduct of a manufacturer or seller.<sup>69</sup> In *Woodhill*, the court required that an injured party prove that a manufacturer or seller knew or should have known of the danger that caused the injury.<sup>70</sup> Accordingly, a manufacturer or seller of a product is strictly liable when the manufacturer or seller knows or should have known of the dangerous propensities of a product and fails to disclose the dangers.<sup>71</sup>

### III. *KIRK V. MICHAEL REESE HOSPITAL*

#### A. *Factual Background*

Daniel McCarthy was under treatment as a psychiatric patient at Michael Reese Hospital when his psychiatrists ordered that McCarthy be given two psychotropic prescription drugs,<sup>72</sup> Prolixin Decanoate ("Prolixin") and Thorazine.<sup>73</sup> The hospital pharmacy

65. *Cunningham*, 47 Ill. 2d at 457, 266 N.E.2d at 904.

66. 64 Ill. 2d 543, 356 N.E.2d 779 (1976).

67. *Id.* at 551, 356 N.E.2d at 784.

68. 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

69. *Id.* at 35, 402 N.E.2d at 198.

70. *Id.* The court held that when an inherently unsafe product is accompanied by proper warnings, it is no longer defective, nor is it unreasonably dangerous. *Id.*

71. *Id.* at 37, 402 N.E.2d at 199. Although the allegation of a breach of the duty to warn is similar to an action sounding in negligence, the focus of such an allegation is whether it would have been reasonable for a drug manufacturer or seller to have given a warning. *Id.* at 34, 402 N.E.2d at 198.

72. A psychotropic drug alters the behavior, experience, or psychic function of one who ingests the drug. *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 1411 (15th ed. 1986).

73. *Kirk v. Michael Reese Hosp.*, 136 Ill. App. 3d 945, 949, 483 N.E.2d 906, 909 (1st Dist. 1985), *rev'd*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987), *cert. denied*, — U.S. —, 99 L.Ed. 2d 236 (1988).

Prolixin is a "highly potent behavior modifier with a markedly extended duration of effect." *PHYSICIANS' DESK REFERENCE* 1497 (30th ed. 1976). Thorazine is described as a psychotropic drug. *Id.* at 1457. Both drugs carry a warning that the drug could impair the patient's mental and physical abilities, and, therefore, that the patient should avoid the consumption of alcohol and the operation of a motor vehicle while under the influence of the drug. *Id.* at 1497, 1457, respectively. This warning has been associated with these two drugs since their introduction in the market and can currently be found in the *PHYSICIANS' DESK REFERENCE* (41st ed. 1987).

dispensed the drugs and hospital personnel administered the Prolixin as an injection and the Thorazine as an oral agent.<sup>74</sup> Just hours after administering the drugs to McCarthy, the hospital discharged him, allegedly without warning him about the dangers associated with the use of the two drugs.<sup>75</sup> After he was discharged, McCarthy drank an alcoholic beverage and then drove his automobile in which the plaintiff, Kirk, was a passenger.<sup>76</sup> McCarthy lost control of his automobile and hit a tree.<sup>77</sup> Kirk suffered severe and permanent injuries in the accident.<sup>78</sup>

Kirk alleged that the physicians and hospital were negligent for failing to warn McCarthy of the adverse effects of the psychotropic drugs.<sup>79</sup> In addition, Kirk sought recovery from the hospital on a strict liability theory.<sup>80</sup> Kirk alleged that because the hospital failed to warn McCarthy of the adverse effects of the drugs, the drugs became an unreasonably dangerous product.<sup>81</sup> Finally, Kirk sought recovery from McCarthy for McCarthy's alleged negligent operation of his automobile.<sup>82</sup>

## B. The Majority Opinion

### 1. Strict Liability

Justice Ward's opinion for a four-member majority began with a discussion of the strict liability issue as it applied to the hospital

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74. *Kirk*, 117 Ill. 2d at 514, 513 N.E.2d at 390.

75. *Id.* at 514-15, 513 N.E.2d at 391.

76. *Id.* at 514, 513 N.E.2d at 390.

77. *Id.* at 514, 513 N.E.2d at 390-91.

78. *Id.* James Kirk sustained a spinal injury in the accident resulting in quadriplegia, necessitating confinement to a wheelchair. Plaintiff's Petition for Rehearing in the Supreme Court of Illinois 1 (1987).

79. *Kirk*, 117 Ill. 2d at 514-15, 513 N.E.2d at 391.

80. *Id.* at 515, 513 N.E.2d at 391.

81. *Id.*

82. *Id.* The court consolidated all causes of action, except for the negligence count against McCarthy, on the appeal of the defendants' motion to dismiss for failure to state a claim upon which relief could be granted. *Id.* at 513-14, 513 N.E.2d at 390.

The appellate court considered whether the doctors, hospital and drug manufacturers owed a duty to McCarthy. *Kirk*, 136 Ill. App. 3d 945, 950, 483 N.E.2d 906, 910 (1st Dist. 1985), *rev'd*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987). The appellate court concluded that each defendant had a duty to adequately warn McCarthy of the dangers associated with the use of the psychotropic drugs in conjunction with consuming alcohol and operating an automobile. *Id.* at 955, 483 N.E.2d at 913. The court ruled that the duty owed McCarthy implicitly extended to members of the general public. *Id.* at 956, 483 N.E.2d at 914. In addition, the appellate court held the hospital strictly liable for a failure to warn of the adverse side effects of the drugs rendering the drugs unreasonably dangerous. *Id.* Although the court addressed all of the allegations, the focus of this Note is limited to the allegations against the hospital.

and the drug manufacturer.<sup>83</sup> The court recognized that, under the theory of strict liability,<sup>84</sup> manufacturers and sellers in the original chain of production have a legal duty to warn about the proper use of their products when they place unreasonably dangerous products in the mainstream of society.<sup>85</sup> The court noted that, under a strict liability theory, a plaintiff's injury must be reasonably foreseeable.<sup>86</sup> The court explained that if an injury is reasonably foreseeable from a defective product, the duty of care extends not only to the original users or consumers, but also to those persons outside the original purchasing chain.<sup>87</sup>

In *Kirk*, the court first concluded that the drug manufacturer was not required to provide warnings to any hospital personnel, other than physicians, because the hospital personnel were not responsible for prescribing drug therapy for the hospital's patients.<sup>88</sup> Accordingly, the court held that the drug manufacturer had no duty to warn McCarthy directly.<sup>89</sup> The court reasoned that the drug manufacturer could not reasonably foresee either that the drugs would be dispensed or administered without warnings issued by McCarthy's physicians, or that McCarthy would be discharged from the hospital, consume alcohol, operate and lose control of his car, hit a tree, and injure Kirk, his passenger, all in the same day.<sup>90</sup>

Second, regarding the liability of the hospital, the court recognized that the hospital was in the chain of distribution as the supplier of the drugs.<sup>91</sup> The court applied the learned intermediary doctrine<sup>92</sup> to the hospital, however, and held that the hospital was not liable under a strict liability theory.<sup>93</sup> The court reasoned that

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83. *Kirk*, 117 Ill. 2d at 516, 513 N.E.2d at 391. The majority's discussion of strict liability with respect to the drug manufacturer is significant to this Note only to the extent that the court applied the discussion of the drug manufacturer to its application of strict liability and negligence with respect to the hospital.

84. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

85. *Kirk*, 117 Ill. 2d at 516, 513 N.E.2d at 391.

86. *Id.* at 519-20, 513 N.E.2d at 393 (citing *Winnett v. Winnett*, 57 Ill. 2d 7, 10, 310 N.E.2d 1, 3 (1974)).

87. *Kirk*, 117 Ill. 2d at 520, 513 N.E.2d at 393.

88. *Id.* at 523, 513 N.E.2d at 395 (citing *Greenberg v. Michael Reese Hosp.*, 83 Ill. 2d 282, 415 N.E.2d 390 (1980) and *Dubin v. Michael Reese Hosp.*, 83 Ill. 2d 277, 415 N.E.2d 350 (1980)).

89. *Kirk*, 117 Ill. 2d at 519, 513 N.E.2d at 393.

90. *Id.* at 521, 513 N.E.2d at 394.

91. *Id.* at 522, 513 N.E.2d at 394.

92. The learned intermediary doctrine states that a drug manufacturer's duty to warn extends to the physician and no further. The physician is expected to apply his medical knowledge, training, and expertise to decide what drugs to order and what warnings to issue. See RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

93. *Kirk*, 117 Ill. 2d at 524, 513 N.E.2d at 395.

the physicians were in an intermediate position between the hospital and the patient. Therefore, the hospital could not reasonably foresee that the drugs would be dispensed without the appropriate warnings.<sup>94</sup> Also, because the hospital could not reasonably foresee that the drugs would be dispensed without warnings, the court held that the hospital had no duty to warn Kirk, a non-patient, non-user of the drug.<sup>95</sup>

## 2. Vicarious Liability

After analyzing the strict liability issue, the *Kirk* court considered the hospital's negligence under the vicarious liability theory.<sup>96</sup> The court agreed with the hospital's assertion that the duty to issue warnings is in the discretion of the attending physician, and that the hospital bore no liability for the physician's failure to provide such warnings.<sup>97</sup> The court ruled, therefore, that the plaintiff's complaint failed to establish a theory to hold the hospital vicariously liable for the misconduct of either the physicians or any other hospital personnel.<sup>98</sup> The court noted that a duty imposed upon hospital personnel to provide warnings to patients to guard against injuries, such as that suffered by Kirk, would be very burdensome because such injuries are not reasonably foreseeable by hospital employees.<sup>99</sup>

## 3. Corporate Negligence

Regarding the hospital's liability under a negligence theory, the court focused on whether the hospital had an independent duty to warn "based on ordinary principles of professional malpractice," and further, whether that duty would extend to injured third parties.<sup>100</sup> Under the independent duty theory, the court noted that Kirk, as a third party, must establish that the hospital owed him a legal duty<sup>101</sup> not premised solely on the factor of foreseeability.<sup>102</sup>

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94. *Id.* at 522, 513 N.E.2d at 394.

95. *Id.*

96. *Id.* at 524, 513 N.E.2d at 395. The court noted that the complaint failed to establish liability on a respondeat superior theory for the actions of any hospital employee or agent. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 526, 513 N.E.2d at 396.

100. *Id.* at 525-26, 513 N.E.2d at 395.

101. *Id.* at 525, 513 N.E.2d at 395-96 (citing *Teter v. Clemens*, 112 Ill. 2d 252, 256, 492 N.E.2d 1340, 1343 (1986)).

102. *Id.* at 525, 513 N.E.2d at 396 (citing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342-43, 162 N.E. 99, 100 (1928)).

The court noted that consideration of other factors was necessary to determine whether a duty is owed by the hospital.<sup>103</sup> Specifically, the court listed factors such as the likelihood of an injury occurring, the burden placed upon the hospital to avoid such an injury, and the consequence of the hospital carrying that burden.<sup>104</sup>

The court referred to its discussion of foreseeability in the strict liability issue to conclude that Kirk did not suffer a reasonably foreseeable injury.<sup>105</sup> Regarding the other necessary factors, the court held that, as a matter of public policy, it would be unduly burdensome to hold the hospital liable for injuries to third party nonpatients who had no special relationship to the hospital.<sup>106</sup> Furthermore, the court stated that holding the hospital liable for Kirk's injury would be an extreme hardship when the duty to issue warnings is in the discretion of the attending physician.<sup>107</sup> According to the court, Kirk failed to establish that the hospital owed him a duty of care and, therefore, the corporate negligence count against the hospital failed.<sup>108</sup>

#### IV. ANALYSIS

The majority, by holding the hospital not liable for the injury sustained by Kirk,<sup>109</sup> failed to recognize that modern hospitals have a duty to render safe medical care.<sup>110</sup> The purpose of this Note is to argue, first, that a hospital should require its physicians to adhere to certain basic guidelines and, second, that a hospital should be responsible for its failure to monitor adherence to such guidelines.

The nature and scope of "basic guidelines" are unclear and should be explored carefully by both the courts and the legislature. At the very least, in the area of prescription drugs, a hospital should insist upon appropriate warnings when all standard refer-

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103. *Id.* at 526, 513 N.E.2d at 396 (citing *Lance v. Senior*, 36 Ill. 2d 516, 518, 224 N.E.2d 231, 232 (1967)).

104. *Id.* at 526, 513 N.E.2d at 396.

105. *Id.*

106. *Id.* at 527, 513 N.E.2d at 397. *Cf. Renslow v. Mennonite Hosp.*, 62 Ill. 2d 348, 367 N.E.2d 1250 (1977), *supra* notes 51-54 and accompanying text. The transfer of a duty to a third party plaintiff was permitted in *Renslow* because the infant's injuries occurred as a direct result of the negligent acts of the hospital to the infant's mother and because a special relationship existed between infant and mother. *Id.* at 357, 367 N.E.2d at 1255.

107. *Kirk*, 117 Ill. 2d at 526, 513 N.E.2d at 396.

108. *Id.* at 528, 513 N.E.2d at 397.

109. *Id.*

110. *See Darling*, 33 Ill. 2d at 333, 211 N.E.2d at 258.

ence materials indicate such warnings are necessary. Moreover, a hospital should be held liable when physicians with practicing privileges at that hospital do not provide such warnings. In the area of prescription drugs, the ramifications of the *Kirk* decision are very troubling. The decision relieves a hospital from responsibility when it discharges a patient without warning the patient of the adverse side effects of the drugs it has administered.

### A. *Strict Liability*

The *Kirk* court improperly dismissed the action in strict liability against the hospital. The court based its dismissal of the first element of the strict liability count against the hospital, the issue of an unreasonably dangerous product in the line of distribution, on a faulty construction of the learned intermediary doctrine.<sup>111</sup> Because the court viewed the physician as a learned intermediary between the patient and the hospital, the court ruled that no liability existed on the part of the hospital.<sup>112</sup> The learned intermediary doctrine, however, provides protection for drug manufacturers,<sup>113</sup> not hospitals. The learned intermediary doctrine should not be applied to hospitals because a hospital's relationship to the patient is different from a drug manufacturer's relationship to the patient. Unlike a drug manufacturer, a hospital holds itself out to the public as a full service provider of quality medical care.<sup>114</sup> In light of the hospital's direct relationship with the public, the court should not have applied the learned intermediary doctrine to hospitals.

Finally, even if the court concluded that the learned intermediary doctrine applies to hospitals, the court should have limited the doctrine's application. Although the court in *Kirk* recognized that a seller of products has a duty to warn of unreasonably dangerous products,<sup>115</sup> the court misconstrued the learned intermediary doctrine's application to Michael Reese Hospital.<sup>116</sup> If a seller of products has a duty to warn the ultimate consumer of a product's dangerous propensities,<sup>117</sup> then "[t]his duty exists even when there is an intermediary in the chain of distribution who takes some con-

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111. For a discussion of the learned intermediary doctrine, see *supra* notes 92-94 and accompanying text.

112. *Kirk*, 117 Ill. 2d at 522, 513 N.E.2d at 395.

113. *Id.* at 517, 513 N.E.2d at 392.

114. See *supra* note 17 and accompanying text.

115. *Kirk*, 117 Ill. 2d at 516, 513 N.E.2d at 391.

116. *Id.* at 522-23, 513 N.E.2d at 394.

117. See *supra* note 61 and accompanying text.



trol over the product and who may himself be negligent."<sup>118</sup> Because Michael Reese Hospital dispenses drugs and charges for them, it should be considered a seller of the drugs,<sup>119</sup> which exerts some control over the products. A hospital must decide which drugs to order from the various manufacturers for the hospital pharmacy. Physicians then order drugs that are available from the hospital pharmacy. If the court had correctly applied the learned intermediary doctrine, the court, in placing the physician in the learned intermediary position between the hospital, as seller of the drugs, and the patient,<sup>120</sup> as the recipient, would have found the hospital liable. This is true regardless of whether the physician exerted some control by choosing which drugs to dispense and regardless of whether the physician himself was negligent in failing to issue the appropriate warnings. The hospital, as seller of the drugs, still has a duty to warn the patient of the drugs' dangerous propensities. Classifying the physician as an intermediary should not destroy the hospital's duty to warn, nor should it excuse the breach of that duty.

Regarding foreseeability, the second element of a strict liability action, the hospital knew or should have known of the unreasonably dangerous condition that the failure to warn of the adverse effects would create. The adverse effects of the drugs prescribed were contained in the drug package inserts<sup>121</sup> that accompanied the drugs when distributed to the hospital. The adverse effects also were described in the Physicians' Desk Reference. Both the drug package inserts and the Physicians' Desk Reference are available readily in any hospital pharmacy.<sup>122</sup> The court's argument that the injury was not reasonably foreseeable by the hospital<sup>123</sup> is without

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118. Reingold, *Products Liability-The Ethical Drug Manufacturer's Liability*, 18 RUT. L. REV. 947, 985-86 (1964). See, e.g., *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 187 (2d Cir. 1958) (dealer failed to inspect product); *United States v. Lobb*, 192 F. Supp. 461 (W.D. Ky. 1961) (manufacturer informed dealer of defect but dealer sold product without informing buyer of same). The reason for imposing liability on the manufacturer in such cases is that it is foreseeable to the manufacturer that the intermediary may fail to warn the ultimate user or consumer of the defect. Reingold *supra* at 986 n.222.

119. See *Cunningham*, *supra* notes 63-65.

120. *Kirk*, 117 Ill. 2d at 522, 513 N.E.2d at 394.

121. *Kirk*, 136 Ill. App. 3d 945, 952 n.2, 483 N.E.2d 906, 911 n.2 (1st Dist. 1985).

122. *Id.*

123. The manufacturer details in a package insert the uses and contraindications of the medication that accompanies every package of medication distributed to the pharmacist. Brushwood, *The Informed Intermediary Doctrine and the Pharmacist's Duty to Warn*, 4 J. LEGAL MED. 349, 356 (1983). Although the physicians may not have ready access to the drug inserts, the same information is printed in the Physicians' Desk Reference. *Id.*

merit considering that the plaintiff's injury was of the exact nature of the warnings.<sup>124</sup> Accordingly, Kirk should have been permitted to proceed against the hospital under a theory of strict liability.

### B. Vicarious Liability

In discussing the plaintiff's allegation of the hospital's negligence, the court agreed with the hospital's defense that the duty to disclose was the responsibility of the physician in exercising his medical judgment.<sup>125</sup> The majority erred in accepting the hospital's defense because the issue was not whether the physicians improperly exercised medical judgment. Rather, the issue was whether the hospital was vicariously liable because of the failure of one of its agents or employees to warn McCarthy of the adverse effects of the drugs.

A hospital is vicariously liable when the acts or omissions of its agents or employees cause injury to another.<sup>126</sup> A hospital "has a duty to review the quality of patient care [rendered] and [to] provide safeguards to insure that [the hospital] staff, agents and servants perform their duties with reasonable care."<sup>127</sup> The physician acts as an agent for the hospital when he is subject to the rules and regulations of the institution, when the hospital may discharge the physician from practicing at the institution by withdrawing the physician's privileges, and when the hospital furnishes the equipment and laboratories that the physician relies upon to render medical care.<sup>128</sup> In *Kirk*, the physicians acknowledged their failure to issue the necessary warnings when administering psychotropic drugs.<sup>129</sup> Because the hospital failed to insure that the physicians,

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124. See *supra* notes 73-78 and accompanying text.

125. *Kirk*, 117 Ill. 2d at 524, 513 N.E.2d at 395. Apparently, the court's decision rested in part on the court's finding that the plaintiff failed in his third amended complaint to establish vicarious liability on the part of the hospital through the actions of the physicians or other hospital personnel. *Id.* When the information needed to plead facts is within the knowledge or control of the defendant, however, the plaintiff is not required to plead with specificity. See *Holton v. Resurrection Hosp.*, 88 Ill. App. 3d 655, 658, 410 N.E.2d 969, 972 (1st Dist. 1980). For the purpose of determining whether the complaint sufficiently supports a cause of action, the fact that treatment was rendered on the defendant hospital's premises creates permissible presumption that an agency-principal relationship exists. *Id.* at 659, 410 N.E.2d at 973. The court, therefore, should have permitted the plaintiff to proceed on his complaint without alleging the specific facts when the hospital was aware, through its records, of which agents of the hospital were involved.

126. RESTATEMENT (SECOND) OF AGENCY § 267 (1957). See *supra* note 37.

127. *Cooper v. Curry*, 92 N.M. 417, 423, 589 P.2d 201, 207 (1978).

128. *Foster v. Englewood Hosp. Ass'n*, 19 Ill. App. 3d 1055, 1060, 313 N.E.2d 255, 261 (1st Dist. 1974).

129. *Kirk*, 117 Ill. 2d at 534, 513 N.E.2d at 400 (Simon, J., dissenting).

as its agents, performed their duties with reasonable care, the hospital should be found vicariously liable.

The court also should have held the hospital vicariously liable for breaching its duty to supervise or regulate the actions of an employee, the pharmacist who dispensed the drugs, for his failure to perform his duties in a safe manner. A hospital exerts control over a pharmacist as an employee, not only through the hospital rules and regulations, but also because the hospital compensates the pharmacist. Liability is established when the hospital has failed to supervise the pharmacy to insure that the pharmacist carried out his duties in a safe manner.<sup>130</sup>

The pharmacist, as a professional hospital employee, failed to apply his knowledge and training about pharmaceuticals to provide the required warning to McCarthy.<sup>131</sup> The drug distribution system provides a built-in method of communication between the drug manufacturers and pharmacists by giving the pharmacist access both to drug inserts and to the Physicians' Desk Reference.<sup>132</sup> The availability of these reference materials establishes that the pharmacist employed by Michael Reese Hospital knew or should have known of the adverse effects that the psychotropic drugs would have on McCarthy's ability to safely operate his car when

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130. See *Foster v. Englewood Hosp. Ass'n*, 19 Ill. App. 3d 1055, 1060, 313 N.E.2d 255, 261 (1st Dist. 1974) (hospital held vicariously liable when an employee of hospital assisted a physician who retained some degree of control over the assisting employee, and the employee remained within the bounds of her employment).

131. Standards of Practice for the Profession of Pharmacy, Section III, Responsibility Six (cited in Kalman & Schlegel, *Standards of Practice for the Profession of Pharmacy*, 19 AMERICAN PHARMACY, Mar., 1979 at 21, 31) states that a pharmacist shall "[a]dvise[] patient[s] of potential drug-related . . . conditions which may develop from the use of the medication. . . ." *Id.* See generally Brushwood, *supra* note 123, at 349.

A pharmacist's formal training prepares him with an in-depth knowledge of pharmacotherapeutics in order to practice in the clinical environment of a hospital. *Id.* at 351. The combination of a pharmacist's formal training and the practical application of such knowledge in the hospital places the pharmacist in an optimal situation to provide patients with drug information. *Id.* The changing professional role of a pharmacist over the past decade has resulted in the emergence of clinical pharmacy, a patient-oriented professional service, rather than the traditional product-oriented service. *Id.* at 351 n.7. The American Society of Hospital Pharmacists encourages hospital-based pharmacists to provide drug information to the patients. *Id.* at 350, n. 3. In Illinois, the pharmacist only is advised strongly to provide the patient with drug information, whereas other states mandate patient counseling. *Id.* at 352 n.9. The modern pharmacist has assumed greater responsibility in counseling his patients and, thus, has established a duty owing to his patients. Morgan, *Pharmacist Liability*, MED. TRIAL TECH. Q. 315, 328 (Annual, 1987). See *Hand v. Krakowski*, 89 A.D.2d 650, 651, 453 N.Y.S.2d 121, 122-23 (1982) (pharmacist has a duty to warn of dangers of interactions between alcohol and psychotropic drugs when the pharmacist has knowledge of the contraindications of such combinations).

132. Brushwood, *supra* note 123, at 356.

combined with the consumption of alcohol. The court erred in holding that the injury suffered by Kirk was not reasonably foreseeable to the hospital pharmacist, as a hospital employee,<sup>133</sup> because the injury suffered by Kirk was of the exact nature of the warning found in the reference materials available to hospital employees.

Finally, the hospital should have been held vicariously liable for failing to insure reasonable patient care by the nurse who administered the oral agent Thorazine and the injection Prolixin. Nurses have a duty to protect the well-being and safety of their patients,<sup>134</sup> and therefore, bear the responsibility of teaching patients about the drugs they receive.<sup>135</sup> A nurse's formal training prepares that nurse to administer medications only after being cognizant of the drug's actions, interactions, dosages, and side effects.<sup>136</sup> A nurse has access to drug information through various resources including the Physicians' Desk Reference and the hospital pharmacy.

The nurse who administered the psychotropic drugs to McCarthy knew or should have known of the side effects that the drugs might have on McCarthy's ability to operate his car when combined with the consumption of alcohol. The court erred in holding that the injury suffered by Kirk was not reasonably foreseeable to hospital employees<sup>137</sup> when the injury suffered by Kirk was of the exact nature or consequence of the warning found in the reference materials available to hospital employees. Neither the nurse nor any other hospital employee informed McCarthy of the adverse effects of the psychotropic drugs administered to him prior to his discharge from the hospital and, therefore, the hospital should have been found vicariously liable for the negligent actions of its employees.

### C. Corporate Negligence

In addition to his claims against the hospital under the theories of strict liability and vicarious liability, the plaintiff should have

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133. *Kirk*, 117 Ill. 2d at 524, 513 N.E.2d at 395.

134. Nursing practice includes, but is not limited to, the administration, teaching, and evaluation of the practice and execution of the medical regimen. This includes the administration of medications and treatments prescribed by an authorized person. Each registered nurse is directly accountable and responsible to the consumer for the quality of nursing care rendered. American Nurses' Association, *THE NURSING PRACTICE ACT Suggested State Legislation* 6 (1981).

135. B. BERGERSEN, *PHARMACOLOGY IN NURSING* 1, 87 (13th ed. 1976).

136. *Id.*

137. *Kirk*, 117 Ill. 2d at 524, 513 N.E.2d at 395.

been permitted to proceed against the hospital under a theory of corporate negligence.<sup>138</sup> Michael Reese Hospital is a large medical corporate facility that is competitive in the health care industry and has a well-deserved reputation for providing quality medical care. Because the hospital benefits from representing itself as a quality health care provider, it has an affirmative duty to maintain high medical standards.<sup>139</sup> Further, the patient justly deserves the right to rely on this representation.<sup>140</sup> A hospital that fails in its affirmative duty to render quality medical care should be liable for the resultant injuries.<sup>141</sup> In *Kirk*, the defendant breached its duty to provide adequate and safe medical care to McCarthy by failing to warn him of the adverse effects of the psychotropic drugs it administered to him.<sup>142</sup> This failure to warn resulted in an injury to an innocent third party,<sup>143</sup> and recovery should have been permitted.

The plaintiff in *Kirk* asserted that the hospital had an "independent duty" to warn McCarthy and, further, that this duty extended to third parties.<sup>144</sup> The court not only failed to recognize the independent duty concept, but also misconstrued the plaintiff's argument. According to the court, the plaintiff alleged that although Kirk had no special relationship with the doctors or the hospital, Kirk should have been permitted to proceed in an action for the alleged negligent treatment of another. The court rejected the plaintiff's argument and held that the responsibility to warn rested solely with McCarthy's attending physicians.<sup>145</sup> The majority failed to recognize that the "independent duty" concept, as created in *Darling*, established the affirmative duty of a hospital in a corporate negligence claim.<sup>146</sup> This affirmative and non-delegable duty owed to McCarthy to warn of the adverse effects of the psychotropic drugs imposed upon the hospital a duty of reasonable conduct for the protection of Kirk.

The court recognized that the existence of a legal duty is premised upon whether the harm suffered was reasonably foresee-

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138. See *supra* notes 41-59 and accompanying text.

139. See *Darling*, 33 Ill. 2d at 333, 211 N.E.2d at 258 (1965) (discussion of the affirmative duty imposed upon hospitals).

140. See *Pedroza v. Bryant*, 101 Wash. 2d 226, 231, 677 P.2d 166, 169 (1984) (discussion of the case theory of corporate negligence).

141. See *Darling*, 33 Ill. 2d at 339, 211 N.E.2d at 261.

142. *Kirk*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987).

143. *Id.*

144. *Id.* at 524-25, 513 N.E.2d at 395.

145. *Id.* at 527, 513 N.E.2d at 397.

146. *Darling*, 33 Ill. 2d at 339, 211 N.E.2d at 261.

able.<sup>147</sup> In the context of corporate negligence, however, the majority failed to discuss adequately the foreseeability of this type of accident and the resulting injuries. The court erred in applying to the corporate negligence action its finding of non-foreseeability in connection with a strict liability theory, rather than evaluating foreseeability as a separate issue under both theories.<sup>148</sup> Furthermore, the court recognized that, in determining whether the hospital owed a duty to Kirk, the court must consider the current social policies in the community where the action is raised.<sup>149</sup> The court inappropriately relied upon the Illinois legislature's goal of reducing medical malpractice damage awards to conclude that the hospital had no duty to warn McCarthy of the adverse effects of the psychotropic drugs. The court should have evaluated the hospital as a modern provider of health care with an independent duty to render quality medical care.

#### D. *An Alternative Theory*

A public policy analogy could have provided the court with an alternative theory of liability. This theory for liability was not considered by the court because the theory was not raised by the plaintiff. A bartender or seller of alcoholic beverages, in dispensing intoxicating liquors to a patron, contributes to a patron's inebriated state. When the patron thereafter fails to operate his automobile in a safe manner and causes injury to an innocent third party, the injured third party has a cause of action against the bartender or seller of the intoxicating liquors.<sup>150</sup> Although the bartender or seller does not necessarily have any formal education or special knowledge about the effects of intoxicating liquors, he is liable for the injuries sustained.<sup>151</sup>

In comparison, the court in *Kirk* did not impose liability upon the hospital for the injuries sustained by the plaintiff despite the

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147. *Kirk*, 117 Ill. 2d at 525, 513 N.E.2d at 396.

148. *Id.* at 526, 513 N.E.2d at 396.

149. *Id.* at 527, 513 N.E.2d at 396.

150. Liquor Control Act of 1934 § 6-21 (codified at ILL. REV. STAT. ch. 43, para. 235 (1983)). *Cf.* *Hopkins v. Powers*, 113 Ill. 2d 206, 497 N.E.2d 757 (1986) (recovery under Dramshop Act limited to innocent third parties who are injured as a result of the sale or gift of alcoholic beverages); *Fabian v. Polish Am. Veterans Ass'n*, 126 Ill. App. 3d 80, 466 N.E.2d 1239 (1st Dist. 1984) (liability under Dramshop Act limited to those engaged in the business of "selling" intoxicating beverages); *Yangas v. Charlie Club, Inc.*, 113 Ill. App. 3d 398, 447 N.E.2d 484 (3d Dist. 1983) (the court limits the duty of tavern owners to exclude patrons that have been injured by one who was denied admission to the tavern even though the attempted patron caused injury to patron in the parking lot).

151. Liquor Control Act, *supra* note 150.

hospital personnel's formal training and special knowledge of the adverse side effects of psychotropic drugs dispensed to McCarthy.<sup>152</sup> The end result is the same in both situations: An innocent third party is injured when a person under the influence of either alcohol or drugs fails to safely operate his automobile. A legal remedy is provided to a third party injured by a person under the influence of alcohol, yet no similar provision is made for a third party injured by a person under the influence of psychotropic drugs administered in a hospital without proper warnings of the drugs adverse effects. Logic, sound public policy, and equity dictate that hospitals be held to the same standard as the seller of intoxicating liquors.

#### V. RECOMMENDATIONS

The courts must recognize the public's expectation that modern hospitals, as providers of quality medical care, should be viewed as business enterprises with a commitment to maintain high standards of medical care in protecting the health and lives of their patients. With respect to situations similar to *Kirk*, hospitals must exercise due care in informing patients of the adverse effects of prescription drugs. Fifteen to twenty seconds must be taken to issue the necessary warnings, rather than unduly burdening injured third parties with the costs of an injury that a hospital had the knowledge and ability to prevent.<sup>153</sup> As long as hospitals fail to meet their affirmative duty to provide safe medical care by establishing stricter guidelines for drug administration and regulation within the hospital, the courts must protect the public by finding hospitals liable for injuries to third parties that are proximately caused by the hospitals' breach of their duty.

#### VI. CONCLUSION

Hospitals may suffer serious consequences for failing to provide an acceptable level of medical care. The laws of medical malpractice no longer provide hospitals with a blanket immunity from liability.<sup>154</sup> Because modern hospitals represent themselves to the public as providers of quality medical care, hospitals must be held to a standard of medical care that protects the safety of their patients. Until hospitals become more actively and aggressively involved in the reduction of injuries resulting from wrongful acts for

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152. *Kirk*, 117 Ill. 2d at 514, 513 N.E.2d at 390-91.

153. Plaintiff's Petition for Rehearing in the Supreme Court of Illinois 1 (1987).

154. See *supra* notes 22-29 and accompanying text.

which the hospital is liable (as opposed to medical decisions that may result in injury, but that do not represent an error in medical judgment), the courts must provide the injured third party with a legal remedy. To find otherwise is a grave injustice to society.

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