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Joy v. Eastern Maine Medical Center: Extension of a Physician's Duty to Third Parties

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JOY v. EASTERN MAINE MEDICAL CENTER: EXTENSION OF A PHYSICIAN'S DUTY TO THIRD PARTIES

In *Joy v. Eastern Maine Medical Center*,[1] the Maine Supreme Judicial Court, sitting as the Law Court, held that a claimant may sue a physician to recover damages for injuries that were caused by a negligently treated patient.[2] The Law Court focused its analysis on the concept of duty and reasoned that a physician's duty to his patient extends to third parties whose injuries are a foreseeable result of negligent treatment.[3] The *Joy* case sets forth a broad rule that provides a new and untested means of recovery against physicians and hospitals. This Note examines the new rule against the backdrop of legislative endeavors to stabilize the medical malpractice insurance crisis. In this context, this Note argues that the court's decision is contrary to public policy. This Note also analyzes the Law Court's reasoning and contends that the breadth of the rule announced by the court is unsupported by the case law upon which the court relies. Finally, after reviewing relevant cases and social concerns, this Note suggests an alternative analysis that is consistent both with legal precedent and public policy.

As early as 1975, the Maine Legislature recognized the medical malpractice insurance emergency in the State of Maine. In that year, the 107th Legislature formed the Pomeroy Commission to evaluate Maine's laws relating to medical malpractice insurance.[4] The Commission's investigation revealed substantial problems regarding the availability and cost of medical malpractice insurance.[5]

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1. 529 A.2d 1364 (Me. 1987).
2. *Id.* at 1366.
3. *Id.* at 1365-66.
4. P. & S.L. 1975, ch. 73, § 1. The Commission was officially entitled the Commission to Revise the Laws relating to Medical and Hospital Malpractice Insurance, but is commonly referred to as the "Pomeroy Commission" because former Justice Pomeroy chaired the Commission.
5. COMMISSION TO REVISE THE LAWS RELATING TO MEDICAL AND HOSPITAL MALPRACTICE INSURANCE, REPORT TO THE 108TH LEGISLATURE at xv (Jan. 27, 1977) [hereinafter POMEROY REPORT]. The Commission determined that part of the problem stemmed from "very large awards in malpractice cases in other parts of the country [that] have an effect upon the cost of malpractice insurance in Maine." *Id.* at xv-xvi. The Pomeroy Commission's study revealed quantum increases in the cost of medical malpractice insurance:

> Medical malpractice insurance in Maine has climbed steeply in recent years. Some physicians in high risk classifications report increases of 400% in three years. Most have at least doubled. A survey among the more favorably rated Doctors of Osteopathy showed an average five year increase of 165% and an average increase of 312% over ten years. The largest single increases were 625% in five years and 525% in one year. Despite these depressing figures, the situation of Maine's doctors and hospitals remains a

According to the Pomeroy Report, the national medical " 'malpractice insurance crisis' " surfaced in the early 1970's and grew to intolerable proportions by 1975.[6] The Commission found that "[t]he malpractice emergency in Maine [was] not cataclysmic," but was "clearly present."[7] While some observers attributed the crisis to a malfunction in the American legal system that distorted principles of tort law, the Pomeroy Commission found that Maine courts apply traditional tort law "with no evidence of distortion or irresponsibility."[8] The Commission concluded, however, that the causes of the emergency were complex and "involve[d] the interaction of general social attitudes and developments within the professions of medicine, law and insurance."[9] For the purpose of curtailing incremental costs of health care and malpractice insurance, the Commission proposed legislation to counter the causes of the crisis.[10] The 108th Legislature adopted the Commission's recommendations and enacted the proposed legislation in 1976.[11]

The 1976 legislation did not entirely prevent deleterious increases in health care and insurance costs. The 112th Legislature therefore

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relatively favorable one. The Insurance Services Office reports Maine's hospital rate to be the sixth lowest in the country, and the rate for physicians to be the twelfth lowest in the country. The latest data available to the Commission shows the annual dollar cost for physicians to be between 585 and 4374 depending upon risk classification. The Commission cautions that these figures have probably seen subsequent upward revision.

Id. at xvi-xvii.

6. *Id.* at xv.

7. *Id.* at xvi.

8. *Id.* at xix. The Pomeroy Commission noted that those who viewed the American legal system as the cause of the problem believed that the system was being used to "generat[e] awards for patients who undergo unsuccessful treatment . . . . In short, the idea is that tort law has abandoned the concept of fault in a disastrous attempt to substitute insurance company money for the joy of good health." *Id.*

9. *Id.* at xvii. The Pomeroy Commission concluded that the interaction among the professions of medicine, law, and insurance rendered attempts to recommend corrective measures in any one area futile. Thus, the Commission viewed its proposals as "an entity" directed against the inseparable causes of the crisis and believed that the success of its recommendations depended upon the "collective capacity" of the proposals. *Id.* at xix.

10. For a detailed statement of the Pomeroy Commission's proposals, see POMEROY REPORT, *supra* note 5, at 1-32.

11. The legislation targeted three major areas for reform. First, it set forth a system for reporting, to the appropriate state agency, incompetence or substance abuse by physicians and alleged incidents of medical malpractice. *See* ME. REV. STAT. ANN. tit. 24, §§ 2501-2606 (Supp. 1987-1988) (enacted by P.L. 1977, ch. 492, § 3). Second, the statute provided for the submission of malpractice claims to arbitration, P.L. 1977, ch. 492, § 3 (repealed 1983), and a malpractice advisory panel. P.L. 1977, ch. 492, § 3 (repealed 1985). Third, the legislation set forth provisions regarding, inter alia, the statute of limitation applicable to malpractice claims, a notice requirement before filing a claim, and informed consent to medical treatment. *Id.* (current version at ME. REV. STAT. ANN. tit. 24, §§ 2901-2905 (Supp. 1987-1988)).

attempted to lighten the burden of malpractice insurance in 1985 by creating a mandatory pre-litigation screening procedure for medical malpractice claims.[12] The 112th Legislature also formed the Trafton Commission to examine the relationship between tort litigation and liability insurance in Maine.[13] The Commission studied the current "liability insurance crisis" and reported in December, 1987, that the volume of personal injury claims filed in Maine courts has continued to increase.[14] The Commission discovered, however, that "Maine courts and civil parties are dealing more and more efficiently with civil cases."[15] As a result, the Commission recommended that the Legislature make no substantial changes in Maine's civil justice system.[16]

The pattern of legislative action demonstrates the Legislature's sensitivity to the social costs of the medical malpractice emergency.

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12. ME. REV. STAT. ANN. tit. 24, §§ 2851-2859 (Supp. 1987-1988) (enacted by P.L. 1985, ch. 804, § 12). Section 2852(2) provides the process by which members of the screening panel are selected. Subsection B of section 2 provides in pertinent part:

> B. Upon notification of the Chief Justice's choice of chairman, the clerk who received the notice of claim under section 2853 shall notify that person and provide that person with the clerk's list of health care practitioners, health care providers and attorneys created under subsection 1. The chairman shall choose from those lists 2 or 3 additional panel members as follows:
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> (1) The chairman shall choose one attorney;
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> (2) The chairman shall choose one health care practitioner. If possible, the chairman shall choose a practitioner who practices in the specialty or profession of the person accused of professional negligence; and
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> (3) Where the claim involves more than one person accused of professional negligence the chairman may choose a 4th panel member who is a health care practitioner or health care provider. If possible, the chairman shall choose a practitioner or provider in the specialty or profession of the person accused.

13. Resolves 1985, ch. 89. The Commission was officially entitled the Commission to Examine Tort Litigation and Liability Insurance in Maine, but is commonly called the "Trafton Commission" because Richard L. Trafton chaired the Committee. The Commission was charged with the duty to "investigate and propose recommendations to address problems of the tort system in Maine and other problems of the insurance industry that affect the availability of liability insurance." *Id.* The Legislature assigned to the Committee the task of "assur[ing] the reasonable availability in Maine of liability insurance at a reasonable cost." *Id.*

14. COMMISSION TO EXAMINE TORT LITIGATION AND LIABILITY INSURANCE IN MAINE, REPORT TO THE 113TH LEGISLATURE 45 (Dec. 1987).

15. *Id.* at 46. The Trafton Commission noted that personal injury filings in Maine superior courts rose from 15.3% to 22.1% of all superior court filings from 1980 to 1986, resulting in a total increase of 6.8%. During the same period, however, dispositions of personal injury cases rose from 14.1% to 22.3% of all cases disposed of by the superior courts. This 8.2% increase more than offset the 6.8% increase in personal injury filings. *Id.* at 45.

16. *Id.* at 113-39 (majority recommendations for tort reforms). *But see id.* at 140-55 (minority recommendations for tort reform).

One legislator aptly described the concerns of the lawmaking body: "Currently, there are physicians who I believe are practicing in terror. They practice defensive, almost angry, intrusive services to protect themselves. We all pay for that through our insurance and the discomfort of going through these tests . . . ."[17] Moreover, the availability of medical services in Maine has declined as climbing malpractice insurance rates render performance of some medical services unprofitable.[18] A full discussion of the effects of the medical malpractice insurance emergency is beyond the scope of this Note.[19] The Legislature, however, has acknowledged the breadth of the crisis and has struggled to strike a balance between the concerns of the medical community and the legal rights of patients.[20] This balancing can be successful only to the extent that the judiciary formulates principles of tort law with a steady and even hand.

The legislative response to the medical malpractice insurance crisis was premised in part on the belief that the Maine judiciary also was sensitive to the problem and that the courts would adhere to traditional principles of tort law. The Pomeroy Commission found that there was "no distortion or irresponsibility" in tort law in Maine.[21] The Law Court produced evidence to the contrary in *Joy v. Eastern Maine Medical Center*.[22] The *Joy* court undermined legislative attempts to control spiraling medical malpractice insurance costs by unnecessarily expanding potential liability for malpractice in the medical profession.

In *Joy*, appellant Todd C. Joy sustained personal injuries when a motor vehicle collided with the motorcycle that he was driving.[23] Joy filed a negligence claim against Charles Marston, the driver of the motor vehicle, seeking to recover damages for the injuries that he suffered as a result of the collision. Joy also named Dr. Gary Littlepage and Eastern Maine Medical Center (EMMC) as defendants in the action.[24] The appellant's complaint alleged that Marston had received treatment for an eye abrasion at the emergency room of

17. Legis. Rec. 692 (2d Reg. Sess. 1986) (statement of Rep. Nelson).

18. POMEROY REPORT, *supra* note 5, at xvi.

19. For a discussion of the contributing factors and potential effects of the medical malpractice emergency, see BELLOTTI, VAN DE KAMP, THORNBURG, MATTOX, BROWN, & LAFOLLETTE, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (1986); TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986). For a detailed analysis of the legal development of medical malpractice, the resulting crisis, and suggested reforms, see Redlich, *Ending the Never-Ending Medical Malpractice Crisis*, 38 MAINE L. REV. 283 (1986).

20. POMEROY REPORT, *supra* note 5, at xix.

21. *Id.*

22. 529 A.2d 1364 (Me. 1987).

23. *Id.* at 1364.

24. *Id.* at 1365.

EMMC just prior to the accident. Littlepage, the physician who attended to Marston, placed a protective eye patch over Marston's injured eye. The complaint further alleged "that defendants EMMC and Littlepage negligently failed to warn Marston that he should not drive while wearing the eye patch."[25] The appellant claimed, in essence, that the failure to warn constituted a breach of a duty that proximately caused his injuries.

Appellees EMMC and Littlepage moved for summary judgment on the grounds that there was no duty to warn Marston not to drive, since the risk of driving with an eye patch presents "an obvious and apparent danger."[26] The appellees submitted that the absence of a duty to warn Marston necessarily sheltered them from any liability to Joy. The trial court held that the duty to warn, if there were any, "did not extend to Joy" and therefore granted the appellees' motions for summary judgment.[27] Joy appealed the summary judgments, contending that the lower court erred in ruling as a matter of law that the duty to warn did not extend to Joy. The appellant argued on appeal that the appellees owed a duty to Marston, that the appellant's injury was a foreseeable consequence of their breach of that duty, and that the breach was a proximate cause of the appellant's injuries.[28] The appellees countered with the contention that the obviousness of the risk of driving with an eye patch foreclosed the duty to warn Marston, and thus there existed no duty in favor of the appellant.[29]

As an initial matter of review, the Law Court noted that it would "analyze the [trial] court's action as a dismissal for failure to state a claim," rather than as a summary judgment, because the lower court had based its decision solely on the pleadings.[30] The court parsed its

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25. *Id.*

26. *Id.*

27. *Id.*

28. Brief of Appellants at 6, Joy v. Eastern Me. Medical Center, 529 A.2d 1364 (Me. 1987) (No. Pen-86-478).

29. Appellees Littlepage and EMMC dedicated the major portion of their appellate briefs to the argument that there is no duty to warn of an obvious danger. Brief of Appellee Eastern Me. Medical Center at 4-8, Joy v. Eastern Me. Medical Center, 529 A.2d 1364 (Me. 1987) (No. Pen-86-478); Brief of Appellee Littlepage at 6-18, Joy v. Eastern Me. Medical Center, 529 A.2d 1364 (Me. 1987) (No. Pen-86-478). Both appellees contended that the danger involved in driving while wearing an eye patch constituted an obvious peril: "[A]n eye patch is a simple device and everyone knows how it effects [sic] vision. If there is any question in this regard, one need only hold one's hand over one eye to see the effect an eye patch has on vision." Brief of Appellee Eastern Me. Medical Center at 6. *See* Brief of Appellee Littlepage at 6. The Law Court, however, declined to rule as a matter of law that all dangers associated with wearing an eye patch are obvious. *See infra* text accompanying notes 30 & 36-38.

30. Joy v. Eastern Me. Medical Center, 529 A.2d at 1365 n.2. A successful motion for summary judgment requires that there be "no genuine issue as to any material fact," M.R. Civ. P. 56(c), whereas a dismissal for failure to state a claim occurs where the plaintiff has not *alleged* all the elements necessary to establish a claim. M.R. Civ.

analysis into two parts: first, the court considered whether the scope of a physician's duty to treat a patient with a reasonable standard of care is sufficiently broad to cover persons injured by a negligently treated patient;[31] second, the court addressed the appellees' argument that there is no duty to warn a patient of the obvious perils associated with wearing an eye patch.[32] The major portion of the court's opinion focused on the concept of duty. According to the court, the existence of a duty is a matter of law and is simply " 'a question of whether the defendant is under any obligation for the benefit of the particular plaintiff.' "[33] The court resorted to case law of other state jurisdictions to ascertain whether the appellees were under any obligation for the benefit of Joy. The Law Court selected four cases and offered them as support for the broad rule that there is "a cause of action against a physician for injuries to a third party caused by a patient who had been negligently treated."[34] Thus the court held that the trial court erred in holding otherwise and concluded that appellant Joy had stated claims against appellees EMMC and Littlepage upon which relief could be granted.[35]

The second part of the court's analysis addressed the appellees' argument that the danger of driving while wearing an eye patch is so apparent that there can be no duty to apprise the patient of the

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P. 12(b)(6). *See, e.g.*, Vahlsing Christina Corp. v. Stanley, 487 A.2d 265, 267 (Me. 1985). This difference is of great importance in analyzing the appellees' argument that the danger of driving while wearing an eye patch is too obvious to give rise to a duty to warn.

In summarily dismissing the appellees' argument, the Law Court stated that it "cannot assume that the patient must have known that his driving would be materially affected. It is possible that the accident resulted from some effect of the eye patch known to the physician, but unknown to the patient." Joy v. Eastern Me. Medical Center, 529 A.2d at 1366. While this Note agrees with the court's conclusion that the complaint is sufficient to survive a motion to dismiss for failure to state a claim, the facts of *Joy* may warrant a summary judgment in favor of the hospital and physician. Summary judgment may be appropriate, if after further discovery, there is no genuine issue as to whether the dangers associated with the eye patch were so obvious that the patient "must have known his driving would be materially affected." *See id. Cf.* Plante v. Hobart Corp., 771 F.2d 617, 621 (1st Cir. 1985) (manufacturer of potato grinder has no duty to warn of obvious danger) (citing Cutherbertson v. Clark Equip. Co., 448 A.2d 315, 319-20 (Me. 1982) (failure to warn not causally related to injury from equipment because purchaser of equipment knew of danger)).

31. Joy v. Eastern Me. Medical Center, 529 A.2d at 1365-66.

32. *Id.* at 1366.

33. *Id.* at 1365 (quoting W. PROSSER, THE LAW OF TORTS § 53 (4th ed. 1971)).

34. *Id.* The Law Court properly confined its analysis to the issue of whether a duty to an individual can be extended to a third party when the duty arises in the context of a relationship between a physician and a patient. The Law Court cited only cases that address this narrow issue to support its conclusion that a physician's duty to a patient can be extended to a third party who is injured by the patient. For a discussion of the four cases and how they can be distinguished from *Joy*, see *infra* text accompanying notes 44-62.

35. Joy v. Eastern Me. Medical Center, 529 A.2d at 1366.

risk. The court declared that the obviousness of the danger is a question of fact that must be left to a jury.[36] The court reasoned:

> Although it is clear that an eye patch eliminates the use of one eye, we cannot assume that the patient must have known that his driving would be materially affected. It is possible that the accident resulted from some effect of the eye patch known to the physician, but unknown to the patient.[37]

The court, therefore, refused to preclude a jury from finding that appellees EMMC and Littlepage had a duty to warn Marston.[38] The Law Court reversed the lower court's decision and remanded the case to the superior court for a trial on the merits.[39]

A reversal of the superior court's decision does not imply, of course, that EMMC or Dr. Littlepage ultimately will be liable for the damages suffered by Todd Joy. The *Joy* decision requires the appellees to defend against the suit through trial, unless they opt to settle the case.[40] Beyond affecting these particular litigants, however, the court's decision upsets the Legislature's attempt to balance the concerns of the medical community with the legal rights of patients in order to stabilize the medical malpractice crisis.[41] The court has opened a new avenue of recovery against Maine's hospitals

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36. *Id.* The Law Court thus determined that a factfinder need not conclude that the dangers of driving while wearing an eye patch are obvious. The court refused to rule as a matter of law that the dangers associated with an eye patch are obvious, but such a determination may be appropriate on a summary judgment motion if a factfinder could draw no other rational conclusion. LaFerriere v. Paradis, 293 A.2d 526, 529 (Me. 1972). *See supra* note 30.

37. Joy v. Eastern Me. Medical Center, 529 A.2d at 1366.

38. For a discussion concerning the procedural posture of the *Joy* case that permitted the court to summarily reject the appellees' argument, *see supra* note 30 and accompanying text.

39. Joy v. Eastern Me. Medical Center, 529 A.2d at 1366.

40. While another attempt at pretrial disposition of this case is not precluded by the court's decision, the court's language suggests that the issue of "obviousness" must await the determination of a jury. *Id.* Dr. Littlepage and EMMC will prevail at a trial on the merits if they can convince the jury either that the treatment and failure to warn Marston did not constitute negligence or that the dangers of the eye patch were obvious and foreclosed any duty to warn Marston. Appellee EMMC perhaps will be able to show that neither the hospital nor Dr. Littlepage performed negligently. First, EMMC has procured an affidavit from defendant Marston stating that the eye patch did not impair his ability to drive. Brief of Appellee Eastern Me. Medical Center, supp. app. at 5. Second, Marston's affidavit states that an emergency room nurse did warn him "about driving with the eye patch." *Id.* Appellee EMMC did not submit Marston's affidavit to the superior court, and thus it was not considered by the Law Court. Both of these facts, if true, would provide strong defenses at trial.

41. *See* POMEROY REPORT, *supra* note 5, at xix. Despite the possibility that EMMC and Littlepage may ultimately prevail in this case, the court's opinion suggests that every third-party claim—such as the one brought by Joy—against a physician or a hospital must reach the jury. This result is directly contrary to legislative attempts in this area. *See supra* text accompanying notes 4-20.

and physicians, and it is not difficult to foresee that numerous claimants will travel this path. Whenever there exists any relationship between the medical care that a patient has received and the acts for which he is being sued, the patient will likely join his treating physician as a codefendant.[42] Moreover, competent plaintiffs' attorneys will search for such a relationship and, as in the *Joy* case, name the physician as a defendant in the action. Claimants will bring suits against doctors either for full recovery where the patient is not a suitable financial target or for a quick and small recovery from the malpractice insurer who knows that settlement is less costly than defense.

Rather than announcing a broad rule that tends to exacerbate the medical malpractice crisis, the Law Court could have held that a duty does not extend from a physician to an unrelated third party under the alleged facts of *Joy*. If the court had reached this conclusion, it would have added a degree of stability to the costs of health care and malpractice insurance. Moreover, an alternative legal analysis, which is both consistent with existing law and supported by precedent, provides a sound basis for such a holding. The court's decision thus was unnecessary and constituted a failure to fulfill its public policy obligations.

While examining the question whether any duty owed by the appellees to Marston could extend to benefit Joy, the court discussed four similar cases from other jurisdictions.[43] Two of these cases involved the use of prescription drugs,[44] and the third case concerned a physical exam undertaken to evaluate a truck driver's fitness to drive under federal law.[45] The last case arose from a failure to diagnose.[46] The physicians' duties in the first three cases are distinguishable from the duty that Dr. Littlepage and EMMC were obliged to perform. The fourth case is distinguishable from *Joy* because liability in that case was founded on a negligent act, not a mere negligent failure to act.

Two of the cases upon which the Law Court relied concerned injuries caused by motor vehicle operators who were under the influence of drugs prescribed by their physicians.[47] A physician is familiar

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42. Most physicians attract litigation because their malpractice insurance coverage constitutes a resource that will satisfy substantial damages awards. While a damage judgment against an uninsured or underinsured motorist might go unsatisfied, full recovery against a physician is almost certain.

43. *See infra* notes 47-62 and accompanying text.

44. Gooden v. Tips, 651 S.W.2d 364 (Tex. Ct. App. 1983); Kaiser v. Suburban Transp. Sys., 65 Wash. 2d 461, 398 P.2d 14 (1965).

45. Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521 (Tenn. 1980).

46. Freese v. Lemmon, 210 N.W.2d 576 (Iowa 1973).

47. In Gooden v. Tips, 651 S.W.2d at 364, the plaintiff was struck by a car driven by Edith Goodpasture. Plaintiff added Ms. Goodpasture's physician as a defendant when it was discovered that Ms. Goodpasture had been under the influence of a drug

with the properties of a medication that he prescribes, whereas a patient generally is ignorant of the effects of a drug. In contrast, a patient is at least partially, if not entirely, aware of the limitations resulting to his vision from wearing an eye patch over one eye. The patient thus is relying more heavily on the expertise of the doctor when drugs are prescribed, and this reliance heightens the standard of care that a physician is bound to exercise.[48] The patient and society as a whole rely upon doctors to apply their specialized knowledge of prescription drugs in a manner that aids the ill without endangering the community.

A third case cited by the court is *Wharton Transport Corp. v. Bridges*.[49] In *Wharton*, a trucking company hired a physician to perform physical examinations of truck drivers in accordance with Interstate Commerce Commission regulations. The doctor failed to

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prescribed by her physician at the time of the accident. The plaintiff's complaint was based on the physician's failure to warn of the potential effects of the drug. The Texas Court of Appeals, an intermediate appellate court, held that the physician owed a duty to the driving public as well as to the patient. *Id.* at 370, 372.

In Kaiser v. Suburban Transp. Sys., 65 Wash. 2d at 461, 398 P.2d at 14, a bus passenger was injured when the bus driver lost consciousness and the bus collided with a utility pole. *Id.* at 462, 398 P.2d at 15. The bus driver's loss of consciousness was a side effect of a drug that had been prescribed by the driver's physician. The plaintiff joined the physician as a defendant, alleging that the driver had not been properly warned of the side effects of the drug. The physician argued that he did not breach his duty and, in the alternative, that his breach was not a proximate cause of the plaintiff's injuries. The doctor did not argue, however, that his duty to his patient did not extend to the driving public. The court held in favor of the plaintiff, finding that there was evidence that the physician breached his duty to warn and that the failure to warn was a proximate cause of the plaintiff's injuries. *Id.* at 464, 398 P.2d at 16.

48. A New York appellate court stated:

> A person seeking medical care entrusts his well-being, and often his life, to the hands of his physicians. He generally knows little of the nature of his illness and even less of the appropriate treatment. When medication is required, the average patient's reliance on others necessarily becomes absolute. A drug represents nothing more to him than a mysterious chemical which, he is told, will improve his condition. He almost never has any understanding of how the improvement will be brought about or of what actual effect the drug will have on his body.

Baker v. St. Agnes Hosp., 70 A.D.2d 400, 404-405, 421 N.Y.S.2d 81, 84-85 (1979).

In both *Gooden* and *Kaiser*, the physicians prescribed medication over which the physicians had a unique understanding and control. These physicians, therefore, were obliged to exercise a greater degree of care than the physician in *Joy*. *Cf.* W. PROSSER, THE LAW OF TORTS § 34, at 180 (4th ed. 1971) ("Those who deal with instrumentalities that are known to be dangerous . . . must exercise a great amount of care because the risk is great."). Moreover, in *Kaiser* the evidence showed that the physician knew that his patient was a bus driver before he prescribed the medication that caused drowsiness and a loss of consciousness. Kaiser v. Suburban Transp. Sys., 65 Wash. 2d at 464, 398 P.2d at 16. Thus the doctor was aware of the enhanced risks of prescribing the drug.

49. 606 S.W.2d 521 (Tenn. 1980).

discover the severe disabilities of a particular driver who subsequently caused a vehicular accident resulting in the plaintiff's injuries.[50] The Tennessee Supreme Court reversed the lower court's directed verdict in favor of the defendant and held that the physician could be found liable to the plaintiff under these circumstances.[51] The court's decision, however, was based on the particular nature of the duty owed by the physician. The doctor's task was to ensure traffic safety by determining whether certain persons were physically capable of driving commercial trucks on interstate highways.[52] When a negligent failure to diagnose resulted in a traffic accident, therefore, the doctor's duty naturally extended to the injured member of the driving public.

Finally, the court cited *Freese v. Lemmon*[53] to support its conclusion. This case is closer than the others to the facts of *Joy*, but it too is an inadequate basis for the court's holding. In *Freese*, the patient suffered a seizure and sought medical treatment therefor.[54] The doctor failed to diagnose the cause of the patient's convulsions and did not warn the patient not to drive.[55] The patient subsequently exper-

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50. *Id.* at 523-24.

51. *Id.* at 528.

52. *Id.* In *Wharton*, the court focused on three factors that defined the scope of the doctor's duty:

> First, on the form on which he certified that Lawson was physically fit, appellee was put on notice of the requirements and importance of a properly conducted physical examination. . . . Second, these pre-employment physicals for prospective truck drivers were a large portion of appellee's industrial medicine practice. . . . Finally, there is testimony that Lawson's physical disabilities were not readily apparent to the untrained eye. . . . If Lawson's disabilities were not obvious, a properly conducted physical examination becomes much more important.

Id. at 526-27. The court concluded from these facts that the physician "knew the purpose of the examination and its importance in highway safety." *Id.* at 527. That is, the physician performed the physical examination for the benefit of the public as well as for the individual truck driver, and thus the physician's duty extended to the plaintiff. *Id.*

Note that the Tennessee court emphasized that the plaintiff's disabilities were not obvious to laymen, but were discoverable by a physician. Implicit in this emphasis is the proposition that the duty of a physician extends to third parties where the physician is uniquely qualified to discern and prevent dangers that are not apparent to others. Applying this principle to the facts of *Joy*, one would conclude that Dr. Littlepage's duty did not extend to Joy because the doctor was not *uniquely* qualified to discover the dangers that inhere in driving while wearing an eye patch.

53. 210 N.W.2d 576 (Iowa 1973). *Freese* involved an appeal of a dismissal for failure to state a claim. *Id.* at 579. The Iowa court thus merely examined the sufficiency of allegations in the complaint.

54. *Id.* at 578.

55. *Id.* The plaintiff alleged not only that the physician failed to warn his patient not to drive, but also that he "negligently advis[ed] defendant Norman Lemmon that he could drive an automobile." *Id.* The allegation that the physician affirmatively told the patient that he could drive caused four justices to concur with the majority. *See infra* note 59 and accompanying text.

ienced another seizure while driving and injured the pedestrian plaintiff as a result.[56] The court ruled that the physician's duty extended to the plaintiff, but cited no authority for its holding. The court simply enunciated the difficult burden placed on the moving party in a motion to dismiss and found that the mere allegation of a duty permitted the plaintiff to survive the defendant's motion. The court stated: "It occurs to us that the specifications of negligence asserted by plaintiffs . . . adequately serve to charge defendant [physician] with negligence."[57] Although this reasoning satisfied the Iowa court, it is not a sufficient foundation upon which to base a broad extension of Maine tort law.

The Iowa Supreme Court could not even muster unanimous support for the *Freese* opinion.[58] In fact, the only member of the court who fully agreed with the court's rationale was the author of the opinion. Four members of the court who sided with the majority also joined in a concurring opinion. The concurring justices reasoned that the defendant's motion to dismiss was not sustainable because the plaintiff had alleged that the doctor *affirmatively told* the patient that he could drive.[59] This allegation places the *Freese* case on

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56. Freese v. Lemmon, 210 N.W.2d at 577.

57. *Id.* at 579. While the Iowa court concluded that the pleadings were adequate to avoid dismissal, it did not discuss the concept of duty. The court failed to realize that unless a duty existed in favor of the plaintiff as a matter of law, a mere allegation of such a duty cannot save the claim from a motion to dismiss. *Cf.* Joy v. Eastern Me. Medical Center, 529 A.2d 1364, 1365 (Me. 1987). The court assumed that a duty can exist under the alleged facts of *Freese*, but did not set forth any legal basis for its assumption.

58. Justice Rees wrote the opinion of the court, but four justices of the nine-member panel concurred in the judgment only. The remaining four justices dissented. Thus, the only justice who agreed with the reasoning of Justice Rees was Justice Rees himself.

59. The *Freese* concurring opinion relied upon section 311(1)(b) of the *Restatement (Second) of Torts*, which states that one who negligently provides false information to another person can be liable for damages caused thereby. Freese v. Lemmon, 210 N.W.2d at 580 (Uhlenhopp, J., concurring).

The reliance by the concurrence on section 311(1)(b) emphasizes the distinction between a negligent *act*, i.e. a negligent statement regarding a patient's ability to drive, and a negligent *omission*, i.e. a failure to warn a patient of potential dangers from a medical treatment. The *Restatement* states that an actor is liable when a person takes some action "in reasonable reliance" on a representation affirmatively made by a negligent actor. Liability therefore arises from the act of providing false information, not from a failure to act.

Comment b to section 311 states:

> The rule . . . finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a *third party* depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine.

grounds separate from *Joy* and takes that case outside the criticisms of this Note.

Four members of the Iowa Supreme Court dissented and criticized the majority for citing no authority to support its result.[60] The dissent pointed out that no previous case in any jurisdiction "approaches in scope and importance the public policy disadvantages which the majority opinion entails."[61] The *Freese* dissent found that the majority opinion was apt to cause physicians to avoid providing health care that exposes them to "limitless liability" or to administer medical care in such an "ultraconservative" manner that the costs of health care will rise dramatically.[62] The dissent's argument, which was based on the increasing costs and declining availability of health care in 1973, is even more forceful in the context of the medical malpractice insurance crisis of the 1980's.

A New York appellate court adopted the *Freese* dissent's reasoning in the recent case of *Purdy v. Public Administrator*.[63] In *Purdy*, a physician examined a patient at a New York nursing home and authorized her to leave the facility unaccompanied.[64] The doctor neither prevented the patient from driving a car nor warned her not to drive.[65] The four-member New York court unanimously held that no duty extended from the doctor to the party injured by the patient who allegedly blacked out or fainted while driving after the examination.[66] In reaching its decision, the New York court studied

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RESTATEMENT (SECOND) OF TORTS § 311 comment b (1965) (emphasis added). The *Freese* concurrence, with its reliance on the *Restatement*, limited its ruling by focusing on the allegation that the physician had explicitly authorized the patient to drive. Freese v. Lemmon, 210 N.W.2d at 580-81 (Uhlenhopp, J., concurring).

60. Freese v. Lemmon, 210 N.W.2d at 581 (LeGrand, J., dissenting).

61. *Id.* at 583. The dissent acknowledged, "It is impossible to resolve the issue without taking into account the crisis which confronts us as to both the availability and cost of adequate health care." *Id.* Justice LeGrand predicted the results of the majority opinion:

> It will cause physicians, when possible, to shun cases exposing them to such limitless liability or their advice will be ultraconservative in justified apprehension over the fate which awaits them if they give what might otherwise have been sound medical counsel.
>
> Furthermore, if such liability is to be borne by the medical profession, the already oppressive cost of medical attention must be further increased. No matter how this is accomplished—by insurance or without it—it is the patient who must ultimately pay.

Id. at 584.

62. *Id.*

63. 127 A.D.2d 285, 514 N.Y.S.2d 407 (1987).

64. *Id.* at 287, 514 N.Y.S.2d at 408.

65. *Id.*, 514 N.Y.S.2d 408-409.

66. *Id.* at 288, 514 N.Y.S.2d at 409. At trial, the jury returned a verdict in favor of the plaintiff and found the physician liable for 60% of the damages. The trial court set aside the verdict and entered a directed judgment for the physician on the grounds that the plaintiff had not established proximate cause. *Id.* at 287-88, 514 N.Y.S.2d at 409. The appellate division affirmed the trial court's judgment for the

the same authorities that the Law Court cited in *Joy*. The New York court refused to follow these decisions, however, because "[a] doctrine which imposes such unlimited liability against physicians who may have negligently advised their patient can 'only aggravate an already grave problem, which finds medical help frequently unavailable at all and its cost, when it is available, fast reaching prohibitive amounts . . . .' "[67] The *Purdy* opinion was issued nearly three weeks before oral argument in *Joy*, but the Law Court neither discussed nor cited the decision.[68]

The *Purdy* court appropriately recognized that the ultimate question in the case was one of public policy.[69] There is no doubt that

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reason that neither the physician nor the nursing home owed a duty to the plaintiff, a member of the public. *Id.* at 288, 514 N.Y.S.2d at 409. The court reasoned that "the imposition of a duty upon one unable to control the person whose acts resulted in the plaintiff's injuries would be unduly onerous." *Id.*, 514 N.Y.S.2d at 409 (citations omitted). The court noted that a duty to control others arises only where a special relationship exists either between the defendant and the person who endangers a third person or between the defendant and the third party exposed to harm. The court found no special relationship under the facts of the case. *Id.* at 289, 514 N.Y.S.2d at 410.

67. *Id.* at 291, 514 N.Y.S.2d at 411 (quoting Freese v. Lemmon, 210 N.W.2d 576, 584 (Iowa 1973) (LeGrand, J., dissenting)). The court's decision was not founded merely on public policy. Underlying the court's decision was an adherence to a widely accepted principle of tort law:

> [A] duty directly assumed for the benefit of a particular person or entity does not extend to third parties who were not the intended beneficiaries of the subject undertaking. In the absence of privity, fraud, collusion or other special circumstances, New York authorities do not impose liability upon a professional for injuries sustained by members of the general public who might potentially be affected by negligence in the promised performance.

Id. at 288, 514 N.Y.S.2d at 409 (citation omitted). The court refused to broaden this concept of duty in the face of public policy concerns.

68. *Purdy* was decided on April 20, 1987, and *Joy* was argued on May 8, 1987.

69. The *Purdy* court stated: "The ultimate question is whether such a duty should be imposed as a matter of public policy. Under the circumstances at bar, the answer should be no." Purdy v. Public Adm'r, 127 A.D.2d at 292, 514 N.Y.S.2d at 412. The question remains, however, whether the circumstances of *Joy* are sufficiently analogous to the facts of *Purdy* to warrant the same response from the Law Court. One might contend that the plaintiff in *Purdy* alleged a negligent omission on the part of the physician, whereas Joy alleged a negligent action. That is, there is some degree of affirmative conduct in *Joy*, because the physician placed a protective eye patch over Marston's injured eye. Thus one might conclude that the reasoning of the concurring justices in *Freese v. Lemmon* applies to the *Joy* case, and the physician's duty extends to the plaintiff notwithstanding the force of public policy. *See supra* text accompanying notes 58-59. This, however, is a specious argument. Appellant Joy did not allege that the physician negligently covered the patient's eye with a protective patch, but rather that the physician negligently failed to warn the patient not to drive. Joy v. Eastern Me. Medical Center, 529 A.2d 1364, 1365 (Me. 1987).

In fact, there is a distinction between the circumstances of *Purdy* and the facts of *Joy* that afforded the Law Court more reason, than was available to the *Purdy* court, to hold that the doctor's duty did not extend to the injured plaintiff. In *Purdy*, the patient's illness was not obvious to the patient or to other laypersons. Purdy v. Public

courts must fulfill their obligations to interpret existing law and apply principles thereof in the manner that best serves justice. A court cannot ignore the needs of the community over which its adjudicatory power extends, however, when it approaches an unexplored area of the law or faces a request to broaden the scope of existing law. Appellant Joy requested the Law Court to broaden the concept of duty beyond the bounds established by prior Maine case law. Thus the court should have considered the effects of its decision on the entire community, not merely the results of its opinion on the particular litigants in the controversy at hand.[70]

The costs of the *Joy* decision will far outweigh any benefits derived therefrom. The extension of a doctor's duty beyond his patient to parties injured by the patient concededly will provide claimants with a near certain source of pecuniary compensation.[71] In addition, a broader concept of duty might lessen to some degree the occurrence of preventable injuries. Opposing factors, however, suggest that the Law Court's decision was unwise. The rule announced in *Joy* greatly expands the potential liability of physicians in Maine. Attorneys will sue physicians where there is the slightest possibility of recovery under the *Joy* rule because physicians represent sources for satisfying substantial damages awards. Malpractice insurers will inflate medical malpractice insurance rates, therefore, to reflect the increased risk of physicians' liability. Physicians will in turn charge more for medical service to cover the higher costs of malpractice insurance. People in need of health care will eventually bear the cost

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Adm'r, 127 A.D.2d at 287, 514 N.Y.S.2d at 409. The handicap under which Joy was operating, in contrast, was open and apparent. Joy v. Eastern Me. Medical Center, 529 A.2d at 1365. Under the reasoning of Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521 (Tenn. 1980), a physician's duty extends to the public when the physician is in a unique position to detect and prevent a latent danger. *See supra* note 52. The converse proposition is that the physician does not owe a duty to the public where the danger is obvious. The circumstances of *Joy*, therefore, presented ample reason for the Law Court to adopt the position taken by the *Purdy* court.

70. *See, e.g.*, Beaulieu v. Beaulieu, 265 A.2d 610, 613 (Me. 1970) (realities of modern society provided adequate justification to overrule precedent).

71. Note, however, that the Maine Legislature recently enacted legislation, effective 1 January 1988, that requires every operator or owner of a motor vehicle to procure automobile liability insurance. ME. REV. STAT. ANN. tit. 29, § 780(1) (Supp. 1987-1988). Motor vehicle owners or operators must obtain coverage

> in the amount of $20,000 because of bodily injury or death to any one person, and subject to said limit respecting one person, in the amount of $40,000 because of bodily injury to or death to 2 or more persons in any one accident, and in the amount of $10,000 because of injury to and destruction of property in any one accident.

Id. § 787(l) (1978). This legislation ensures a source of funds to satisfy judgments obtained by plaintiffs against negligent motorists. Although the minimum coverage amount probably is insufficient to provide full compensation for serious injuries, the statute diminishes the already weak policy justification for expanding the scope of physicians' duties.

of the *Joy* decision.

The Maine Supreme Judicial Court failed to discharge its duty to the public when it summarily expanded the potential liability of medical practitioners. The Law Court should have opted to rule "that a duty directly assumed for the benefit of a particular person . . . does not extend to third parties who were not the intended beneficiaries of the subject undertaking."[72] This proposition is supported by legal authority and is mandated by public policy. The court's failure to reach this conclusion aggravates the health care crises at a time when the Legislature is striving to mitigate the problem.[73] The *Joy* decision will send plaintiffs' attorneys scurrying to amend their complaints to name physicians as defendants and ultimately will force health care recipients to bear the resulting cost increases of medical treatment.

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72. Purdy v. Public Adm'r, 127 A.D.2d at 288, 514 N.Y.S.2d at 409.
73. *See supra* text accompanying notes 4-20.