

Out With the New and in With the Old: Why the Illinois Supreme Court went too far in *Kirk v. Michael Reese Hospital* and not far enough in *Renslow v. Mennonite Hospital* on the issue of duties owed to third-party non-patients in medical malpractice cases

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*When the Illinois Supreme Court decided *Renslow v. Mennonite Hospital* in 1977 and *Kirk v. Michael Reese Hospital* in 1987, it was presented with unique facts where a third-party, non-patient was allegedly harmed by a physician's negligence. In its attempt to determine where the line for liability should be drawn in each case and whether a duty of care should be imposed, the court did not issue rulings that were limited to the facts of each case. Instead, the court created an exception in *Renslow* and a bright-line rule in *Kirk*. Unfortunately, not only do such rigid, legal rules not translate well to the field of medicine and science, which is always changing and developing, but they conflict with the notion that judges are to determine the issue of duty as a matter of law on a case-by-case basis. As a result, litigants and judges have struggled with applying the holdings of *Renslow* and *Kirk* in unique, real-life cases, often to the detriment of plaintiffs whose claims are dismissed prematurely.*

*This Article argues, in essence, that the Illinois Supreme Court went too far in *Kirk* when it created a bright-line rule on the issue of duty in cases involving third-party non-patients, but not far enough in *Renslow* when it created an exception to the general duty principles. In conjunction, the rulings in *Renslow* and *Kirk* have resulted in some cases being dismissed prematurely based on a lack of a legal duty. In order to avoid dismissing cases prematurely, while still ensuring that duties are imposed in appropriate cases, the Illinois Supreme Court needs to limit the rulings it handed down in *Renslow* and *Kirk* to the facts of each case and go back to allowing judges to determine the issue of duty on a case-by-case basis based on the reasonable foreseeability of the harm. Not only would such an approach be fair and just, it would also be more in line with legal principles that have*

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been recognized in Illinois for decades and would give courts more flexibility in adapting to new scientific and medical developments as they arise.

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I. INTRODUCTION

When the Illinois Supreme Court decided *Renslow v. Mennonite Hospital*¹ in 1977 and *Kirk v. Michael Reese Hospital*² in 1987, it was presented with unique facts where a third-party, non-patient was allegedly harmed by a physician's negligence. In its attempt to determine where the line for liability should be drawn in each case and whether a duty of care should be imposed, the court did not issue rulings that were limited to the facts of each case. Instead, the court created an exception in *Renslow* and a bright-line rule in *Kirk*. Unfortunately, not only do such rigid, legal rules not translate well to the field of medicine and science, which is always changing and developing, but they conflict with the notion that judges are to determine the issue of duty as a matter of law on a case-by-case basis. As a result, litigants and judges have struggled with applying the holdings of *Renslow* and *Kirk* in unique, real-life cases, often to the detriment of plaintiffs whose claims are dismissed prematurely.

This Article argues, in essence, that the Illinois Supreme Court went too far in *Kirk* when it created a bright-line rule on the issue of duty in cases

1. *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1250 (Ill. 1977).

2. *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 390 (Ill. 1987).

involving third-party non-patients, but not far enough in *Renslow* when it created an exception to the general duty principles. In conjunction, the rulings in *Renslow* and *Kirk* have resulted in some cases being dismissed prematurely based on a lack of a legal duty. In order to avoid dismissing cases prematurely, while still ensuring that duties are imposed in appropriate cases, the Illinois Supreme Court needs to limit the rulings it handed down in *Renslow* and *Kirk* to the fact of each case and go back to allowing judges to determine the issue of duty on a case-by-case basis based on the reasonable foreseeability of the harm. Not only would a result be more fair and just, but it would be more in line with legal principles that have been recognized in Illinois for decades and would allow courts more flexibility in adapting to new scientific and medical developments as they arise.

Part II of this Article looks at the general principles of legal duties in Illinois and takes an in-depth look at the Illinois Supreme Court's rulings in *Renslow* and *Kirk*.³ Part III looks at Illinois cases that were decided post-*Renslow* and *Kirk* to demonstrate the lower courts' inability to recognize any new duties in third-party non-patient medical malpractice cases.⁴ Part III then discusses the struggles created by the *Renslow* and *Kirk* holdings in communicable disease cases where the plaintiff is a third-party non-patient.⁵ In light of these struggles, Part III further suggests that the Supreme Court limit its holdings in *Renslow* and *Kirk* to the facts of those cases and revert to allowing judges to determine the issue of duty on a case-by-case basis using the reasonable foreseeability test.⁶ Part IV assesses the positive impacts of allowing judges to determine the issue of duty based on the reasonable foreseeability of the harm, with a focus on communicable disease cases, and explains why any potential negative impacts of reverting back to the old way of determining duties are minimal, if not nonexistent.⁷

II. BACKGROUND

A. GENERAL DUTY PRINCIPLES IN ILLINOIS

“Negligent conduct encompasses a failure to do an act which is necessary for the protection of others and which the actor is obligated to perform.”⁸ Under Illinois law, in an action for negligence, the plaintiff must set out sufficient facts to establish that the defendant owed a duty to the plain-

3. See *infra* notes 8-56.

4. See *infra* notes 57-88.

5. See *infra* notes 89-114.

6. See *infra* notes 115-117.

7. See *infra* notes 118-188.

8. Jeffrey W. Burnett, *A Physician's Duty to Warn A Patient's Relatives of A Patient's Genetically Inheritable Disease*, 36 HOUS. L. REV. 559, 563 (1999).

tiff, that the defendant breached that duty, and that the breach proximately caused injury to the plaintiff.⁹ The existence of a duty of care must be determined by the court as a matter of law; absent a showing from which the court can infer the existence of a duty no recovery by the plaintiff is possible as a matter of law.¹⁰

The existence of a duty depends on whether the parties stand “in such a relationship to one another that the law impose[s] upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.”¹¹ “Relationship” does not necessarily mean a contractual, familial, or other particular special relationship.¹² As the Illinois Supreme Court has noted, “the concept of duty in negligence cases is very involved, complex[,] and indeed nebulous.”¹³ Moreover, every person owes every other person the duty to use ordinary care to prevent any injury that might naturally occur as the reasonably foreseeable consequence of his or her own actions.¹⁴ In *Wintersteen v. National Cooperage & Woodenware Co.*, the Illinois Supreme Court stated:

It is axiomatic that every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act, and the law is presumed to furnish a remedy for the redress of very wrong. This duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest, or the proximity of relationship between the parties. It extends to remote and unknown persons.¹⁵

There are four factors that Illinois courts consider when determining whether a relationship exists between parties that will justify the imposition of a duty (hereinafter the “reasonable foreseeability test”): (1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the

9. *Wojdyla v. City of Park Ridge*, 592 N.E.2d 1098, 1101 (Ill. 1992).

10. *Schoenbeck v. Du Page Water Comm’n*, 607 N.E.2d 693, 695 (Ill. App. Ct. 1993); *Fris v. Personal Products Co.*, 627 N.E.2d 1265, 1269 (Ill. App. Ct. 1994).

11. *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1057 (Ill. 2006).

12. *See id.* at 1060 (explaining that whether or not the law imposes a duty on a defendant for the benefit of a plaintiff depends on “the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection” (quoting *Kirk*, 513 N.E.2d at 396 (Ill. 1987) (quoting W. PAGE KEETON, PROSSER & KEETON ON TORTS § 53, at 358 (5th ed. 1984))).

13. *Id.* at 1056 (quoting *Mieher v. Brown*, 301 N.E.2d 307, 310 (Ill. 1973)).

14. *See Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 238 (Ill. 2007).

15. *Wintersteen v. Nat’l Cooperage & Woodenware Co.*, 197 N.E.2d 578, 582 (Ill. 1935); *See also Renslow*, 367 N.E.2d at 1258.

burden involved in guarding against the harm, and (4) the consequences of placing on the defendant the duty to protect against the harm.¹⁶ A determination of the existence of a duty is informed by public policy considerations.¹⁷ As a matter of public policy, Illinois courts have found that it is best to place the duty to protect against a harm on the party best able to prevent it.¹⁸

Generally speaking, the above factors and principles are applied in cases where there is a question as to whether the defendant owes the plaintiff a duty of care such that liability can be imposed against the defendant. However, in medical malpractice cases, and more specifically in cases where the plaintiff is a third-party, non-patient, Illinois courts have strayed from these general principles and instead relied solely on the rulings of two Illinois Supreme Court cases when determining the issue of duty: *Renslow* and *Kirk*.

B. *RENSLOW V. MENNONITE HOSPITAL*: AN EXCEPTION CREATED

In *Renslow*,¹⁹ a woman was given two blood transfusions with blood that was incompatible with her blood.²⁰ The woman was not advised and did not learn of the faulty transfusions until eight years later when she became pregnant and was undergoing prenatal care.²¹ As a result of these faulty transfusions, the woman's child was born premature with a variety of severe health issues.²² The woman, individually and on behalf of her minor child, sued the hospital and the director of laboratories, alleging that the negligent blood transfusions proximately caused injuries to herself and her child.²³ The trial court dismissed the portion of the complaint wherein the woman claimed damages on behalf of the minor child for failing to state a cause of action because the child did not exist at the time of the alleged negligence.²⁴ The appellate court reversed the trial court's dismissal finding that there was "no reason to deny a cause of action to a person simply because he had not yet been conceived at the time of the wrongful conduct."²⁵

16. *Marshall*, 856 N.E.2d at 1057; *Ward v. Kmart Corp.*, 554 N.E.2d 223, 226-27 (Ill. 1990).

17. *Marshall*, 856 N.E.2d at 1060.

18. *Court v. Grzelinski*, 379 N.E.2d 281, 285 (Ill. 1978).

19. *Renslow*, 367 N.E.2d at 1250.

20. *Id.* at 1251 (The mother was negligently transfused with "500 cubic centimeters of Rh-positive blood" which was incompatible with, and sensitized by, the mother's Rh-negative blood.).

21. *Id.* at 1251.

22. *Id.*

23. *Id.* at 1250-51.

24. *Renslow*, 367 N.E.2d at 1251.

25. *Id.*

The hospital appealed, and on appeal the Illinois Supreme Court was asked to address the following question: “Does a child, not conceived at the time negligent acts were committed against its mother, have a cause of action against the tortfeasors for its injuries resulting from their conduct?”²⁶

The Illinois Supreme Court ultimately held that the defendant hospital and director of laboratories owed the minor child a duty of care, even though the child had not yet been conceived when the negligent acts were committed.²⁷ Although typically used to find a duty in consortium claims, the court found a duty existed in *Renslow* based on the theory of transferred negligence—where the law recognizes that “a wrong done to one person may invade the protected rights of one who is intimately related to the first.”²⁸ In coming to this conclusion, the court noted that “[t]his court has long recognized that a duty may exist to one foreseeably harmed though he be unknown and remote in time and place”²⁹ and that it would be “illogical to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child, unbeknownst to him, been conceived prior to his act.”³⁰ Finally, the court found that “there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child’s mother.”³¹

Addressing the concern that it was extending a duty to a new class of plaintiffs, the Illinois Supreme Court noted that: “[E]xamples of changing notions of legal duty in the area of products liability, as well as the progressive expansion of duty in prenatal cases already documented, demonstrate that duty is not a static concept.”³² The court, however, emphasized though, that its ruling in *Renslow* was not at odds with historically recognized principles of a duty in Illinois:

This court has long recognized that a duty may exist to one foreseeably harmed though he be unknown and remote in time and place Also, derivative actions, such as those of a husband or parent for the loss of the wife’s or child’s services, demonstrate that the law has long recognized that a wrong done to one person may invade the protected rights of one who is intimately related to the first. . . . In these cases, because of the nature of the relationship between the

26. *Id.*

27. *Id.*

28. *Id.* at 357.

29. *Renslow*, 367 N.E.2d at 1254-55.

30. *Id.* at 1255.

31. *Id.* at 1255.

32. *Id.* at 1254.

parties harmed, the law recognizes a limited area of transferred negligence.³³

The court also emphasized that its ruling in *Renslow* was consistent with “sound policy considerations.”³⁴ First, the court noted that “[m]edical science has developed various techniques which can mitigate or, in some cases, totally alleviate a child’s prenatal harm. In light of these substantial medical advances it seems to us that sound social policy requires the extension of a duty in this case.”³⁵ Second, in order to refute the defendants’ argument that the court’s ruling would open the door to perpetual liability for a single act, the court noted that “[t]he damage alleged is not, by its nature, self-perpetuating, nor is the plaintiff a remote descendant.”³⁶ Thus, because medicine existed that could have been used to ensure that the child was not born with injuries, and because the child in this case was not remote, but rather a single identifiable plaintiff, the court found that a legal duty was warranted.

Justice Dooley concurred with the holding in *Renslow*, and made several note-worthy comments in his concurring opinion. Initially he stated:

For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued. . . . That admonition is as vital today as it was then. It is life itself which creates new problems. So is it life itself which determines what particular interest will outweigh another. The judicial process by nature is a scheme of evaluating the varying forces which make society.³⁷

In commenting on the fact that the court’s decision found a duty existed where it had not previously—to a plaintiff not yet conceived—Justice Dooley stated: “We must remember that the body of law is not a repository of stagnant problems of society but a vital, moving force which deals with the current problems of society.”³⁸ Justice Dooley then summed up the court’s ruling by stating:

It was foreseeable that this 13-year-old girl would grow up, marry and become pregnant. Upon the happening of this

33. *Id.* at 1254-55 (citations omitted).

34. *Renslow*, 367 N.E.2d at 1255.

35. *Id.*

36. *Id.*

37. *Id.* at 1256 (citation omitted).

38. *Id.* at 1257.

event, the defendant hospital and doctor were chargeable with the knowledge of what she and her child would encounter as a result of the wrongful transfusion of blood. More than that, however, it must be remembered that defendants are a hospital and a doctor and held to the degree of knowledge of experts. . . . Conduct which puts harmful consequences in motion and injury to a foreseeable class of persons as a direct result may be negligence for which responsibility may attach. That there may be a time gap between the wrongful act and the suffering is immaterial. The cause of action is uniformly created not at the time of the negligent act, but only when the injury has been sustained.³⁹

C. *KIRK V. MICHAEL REESE HOSPITAL & MEDICAL CENTER: A BRIGHT-LINE RULE ESTABLISHED*

In *Kirk*,⁴⁰ the plaintiff sought to recover damages for injuries he sustained in a car collision while he was a passenger.⁴¹ The complaint alleged that the driver of the vehicle had recently been under the care of defendant doctors and released from defendant hospital.⁴² Prior to the patient's discharge, the defendant doctors had prescribed the patient with medications and allegedly failed to warn the patient of the side effects of those medications.⁴³ Shortly after leaving the hospital, the patient consumed an alcoholic beverage and then drove into a tree while the plaintiff was in the passenger seat of his car.⁴⁴

The plaintiff filed suit against the doctors who prescribed the medication, alleging that the doctors, hospital, and/or drug manufacturing company failed to warn the driver of the medication's side effects.⁴⁵ The defendants filed a motion to dismiss the case arguing that they did not owe plaintiff a duty of care because he was not a patient.⁴⁶ The trial court dismissed the case, and the plaintiff appealed.⁴⁷ The appellate court reversed and remanded the matter to the trial court, finding that defendants did owe the plaintiff a duty of care, and the defendants appealed.⁴⁸

39. *Renslow*, 367 N.E.2d at 1258-59 (internal citation omitted).

40. *Kirk*, 513 N.E.2d at 390.

41. *Id.*

42. *Id.*

43. *Id.* at 390-91.

44. *Id.*

45. *Kirk*, 513 N.E.2d at 391.

46. *Id.* at 390.

47. *Id.*

48. *Id.* at 391.

The Illinois Supreme Court reversed the appellate court's ruling and affirmed the dismissal of the plaintiff's complaint finding that, absent a direct physician-patient relationship or special relationship, the defendants could not owe the plaintiff a duty of care.⁴⁹ In coming to this conclusion, the Supreme Court recognized that "*Renslow*, it would appear, is the only medical malpractice action in which this court recognized that a nonpatient third party with no patient-hospital or patient-doctor relationship was allowed to maintain a cause of action against a hospital and doctor."⁵⁰ In citing *Renslow*, the court noted, "[a] wrong against one person may invade the protected rights of one who has a special relationship with the first party, as the law recognizes a limited area of transferred negligence."⁵¹ Although the court recognized that some jurisdictions have held that a physician's relationship with the patient was sufficient to impose a duty to protect unidentifiable, unknown third-parties while other jurisdictions have limited the scope of a physician's duty to situations in which there is, apart from the patient, a specifically identifiable potential victim, the *Kirk* court held that:

We consider that the preferable view, and the one consistent with this court's holdings and with legislation based on social and public policy, is that a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and plaintiff or a special relationship, as present in *Renslow*, between the patient and the plaintiff.⁵²

The court explained that extending a duty of care to third-party non-patients "would expand the physician's duty of care to an indeterminate class of potential plaintiffs."⁵³

Justice Simon dissented in part, finding that the defendant doctors did owe a duty of care to the plaintiff based upon the "basic concepts of negligence."⁵⁴ Justice Simon noted that "[i]t is immaterial that the passenger rather than the patient was injured as a result of the doctors' failure to issue these warnings"⁵⁵ and concluded that:

Because it was foreseeable that if the patient were unaware of the side effects of the drugs he might have a drink and drive, it was also foreseeable that such conduct could harm

49. *Id.* at 399.

50. *Kirk*, 513 N.E.2d at 397.

51. *Id.*

52. *Id.* at 399.

53. *Id.* at 387.

54. *Id.* at 400 (Simon, J., dissenting).

55. *Kirk*, 513 N.E.2d at 400 (Simon, J., dissenting).

a passenger in his car. Since the plaintiff's harm was a foreseeable consequence of the doctors' failure to guard against this risk, the plaintiff's injury fell within the scope of the doctors' duty of due care.⁵⁶

III. ANALYSIS

Based on the holdings in *Renslow* and *Kirk*, Illinois courts have repeatedly, and without any exceptions, dismissed plaintiffs' claims based on a finding that the defendant health care provider owed no duty of care to the plaintiff because the plaintiffs were unable to establish either a direct plaintiff/patient-physician relationship or a special relationship as defined in *Renslow*.⁵⁷ As observed by the Illinois Appellate Court: "In the 13 years since *Renslow*, there has been no other case in which the supreme court has found a duty to non-patient third parties."⁵⁸ And, when confronted with the issue again "[i]n *Kirk v. Michael Reese Hospital & Medical Center*, the court refused to extend its holding in *Renslow*."⁵⁹ In effect, *Renslow* and *Kirk* together have stalled any new developments on the issue of duties owed to third-party non-patients.

A. POST-*RENSLOW* AND *KIRK*: NO DUTY OF CARE FOUND IN THIRD-PARTY NON-PATIENT MEDICAL MALPRACTICE CASES

In *Eckhardt v. Kirts*,⁶⁰ after a patient shot and killed her husband, the deceased husband's estate, the plaintiff, filed a medical malpractice action against the psychiatrist alleging that the husband's death was the result of the psychiatrist's negligent treatment of the wife.⁶¹ The plaintiff's complaint alleged that the doctor was negligent in failing to warn the couple of the attendant dangers of the wife's mental health disabilities.⁶² In response, the defendant filed a motion for summary judgment arguing that the plaintiff could not establish a duty of care because there was no patient-physician relationship between the deceased husband and the defendant; the circuit court granted the defendant's motion.⁶³ In affirming the circuit court's ruling, the appellate court discussed *Kirk* and further considered cases from other jurisdictions that had "concluded that a therapist cannot be held liable for injuries inflicted upon third persons absent specific threats to

56. *Id.*

57. *See infra* notes 60-87.

58. *Britton v. Soltes*, 563 N.E.2d 910, 912 (Ill. App. Ct. 1990).

59. *Id.*

60. *Eckhardt v. Kirts*, 534 N.E.2d 1339 (Ill. App. Ct. 1989).

61. *Id.* at 1339-40.

62. *Id.* at 1340.

63. *Id.* at 1339-40.

a readily identifiable victim.”⁶⁴ The *Eckhardt* court went on to find that its disposition was consistent with the “sound public policy against expanding the liability of health professionals to an indeterminate class of potential plaintiffs” and that “[h]uman behavior is simply too unpredictable and the field of psychotherapy presently too inexact to require that therapists be ultimately responsible for all the actions of their patients.”⁶⁵ “To impose such a responsibility without limit would be to place an unacceptably severe burden on those who provide mental health care to the people of this State, ultimately reducing the opportunities for needed care.”⁶⁶

In a special concurrence, Justice Reinhard agreed with the outcome in *Eckhardt*, but emphasized that the court should have just based its holding on *Kirk* since it was “clear that plaintiff’s decedent had no direct physician-patient relationship with defendant” and that there was no “special relationship between the patient and the plaintiff’s decedent, as was present in *Renslow*”⁶⁷

In *Doe v. McKay*,⁶⁸ the plaintiff sued the defendant psychologists based on alleged negligent treatment they provided to the plaintiff’s daughter.⁶⁹ Specifically, the plaintiff alleged that the defendants induced his daughter into falsely believing that plaintiff had sexually abused her when she was a child.⁷⁰ The defendants filed a partial motion to dismiss, and the trial court dismissed the plaintiff’s claims of negligence and intentional interference with a family relationship.⁷¹ The appellate court reversed the trial court’s dismissal of those counts⁷² based on its belief that the plaintiff had stated a cause of action under a theory of transferred negligence as defined in *Renslow*.⁷³ The Illinois Supreme Court, however, disagreed and affirmed the trial court’s dismissal.⁷⁴ In noting that the father had not alleged that he had a therapist-patient relationship with the defendant psychologist, the Supreme Court held that pursuant to *Kirk*, the father could not sustain a cause of action based on the defendant’s treatment of his daugh-

64. *Id.* at 1344.

65. *Eckhardt*, 534 N.E.2d at 1345.

66. *Id.*

67. *Id.* at 1346.

68. *Doe v. McKay*, 700 N.E.2d 1018 (Ill. 1998).

69. *Id.* at 1019.

70. *Id.* at 1019-21.

71. *Id.* at 1019.

72. *Id.*

73. *Doe*, 700 N.E.2d at 1022 (“The appellate court believed that the present case comes within the *Renslow* exception because of the plaintiff’s parent-child relationship with his daughter and because the therapist involved the plaintiff in the treatment here, rendering him a ‘quasi-patient’ of Dr. McKay.”).

74. *Id.* at 1026.

ter.⁷⁵ Further, the Supreme Court declined to apply the *Renslow* exception stating that “[t]he relationship between a mother and a fetus is perhaps singular and unique, and is demonstrably different from the relationship that exists between a parent and an adult child.”⁷⁶ Thus, in declining to “apply *Renslow*’s concept of transferred negligence” to facts of the case, the court reiterated that “the duty of due care owed by a health care professional runs only to the patient, and not to third parties.”⁷⁷

In *Tedrick v. Community Resource Center*,⁷⁸ the estate of a wife who was murdered by her husband brought a wrongful death action against the husband’s mental health care providers alleging that the providers breached their duty of care by failing to protect the wife from the patient’s violent acts.⁷⁹ The circuit court dismissed the amended complaint finding that it failed to recognize a duty, by any named defendant, owed to the wife or any special relationship recognized by existing Illinois law to allow a duty based on transferred negligence.⁸⁰ The appellate court reversed, finding that the estate had set forth sufficient factual allegations to establish a cause of action under both the theories of a voluntary undertaking and transferred negligence.⁸¹ The Supreme Court reversed the appellate court’s ruling, affirming the circuit court’s dismissal of the complaint with prejudice, based on the lack of any recognized duty of care.⁸² Although the Supreme Court recognized that the now-deceased wife had actively participated in her husband’s medical care, it found that “treating the marital relationship as a special relationship for purposes of a derivative loss-of-consortium action does not mean the marital relationship should be treated as a special relationship for purposes of the direct personal injury actions brought by plaintiffs”⁸³ and held that the relationship between the husband and wife in this case was “not comparable to the relationship between a mother and fetus.”⁸⁴

The rulings of *Kirk* and *Renslow* have been used so frequently to dismiss claims based on a lack of a duty of care that Illinois courts have maintained that “Illinois law is well settled that a plaintiff cannot maintain a medical malpractice cause of action absent a direct physician-patient relationship with the defendant unless a special relationship exists between a

75. *Id.* at 1022.

76. *Id.* at 1023.

77. *Id.* at 1022; *Sherer v. Sarma*, 2014 IL App (5th) 130207, ¶ 28.

78. *Tedrick v. Cmty. Res. Ctr., Inc.*, 920 N.E.2d 220 (Ill. 2009).

79. *Tedrick*, 920 N.E.2d at 221.

80. *Id.*

81. *Id.*

82. *See id.* at 233.

83. *Id.* at 232.

84. *Tedrick*, 920 N.E.2d at 232.

patient and the plaintiff.”⁸⁵ More recently, in an unpublished order issued by the Illinois Appellate Court reinforced this notion by stating: “the court [in *Kirk*] concluded that medical providers do not owe a duty of due care to third-party non-patients absent a special relationship between the plaintiff and the patient or a direct relationship between the plaintiff and the medical provider.”⁸⁶ As stated in Justice Reinhard’s concurring opinion in *Eckhardt*:

Although I am not entirely certain whether the *Renslow* exception to the scope of the duty owed absent a direct physician-patient relationship is *sui generis*, until our supreme court more fully explains this exception I would limit any expansion of the physician’s duty to third-person nonpatients to a *Renslow*-type situation.⁸⁷

On the issue of duties owed to third-party non-patients, it appears clear that the lower courts have viewed the exception in *Renslow* and the bright-line rule in *Kirk* “as an indication of the Illinois Supreme Court’s unwillingness to accept any new, creative or novel approaches in imposing liability upon the medical industry.”⁸⁸

B. *RENSLOW AND KIRK* CREATE DISPARITY IN COMMUNICABLE DISEASE CASES

In medical malpractice cases involving communicable diseases and third-party non-patient plaintiffs, stark divisions have arisen among Illinois judges regarding the application of the *Kirk* and *Renslow* holdings. In *Britton v. Soltes*,⁸⁹ the plaintiff, Britton, along with his ex-wife and two children, filed a lawsuit against defendant Dr. Soltes alleging that Dr. Soltes failed to discover that Britton was suffering from tuberculosis and, as a result, Britton’s ex-wife and children, who lived next door to Britton and visited Britton on a regular basis, contracted the infectious disease.⁹⁰ Dr. Soltes filed a partial motion for summary judgment to dismiss Britton’s ex-wife and children from the lawsuit based on the fact that he had never treated Britton’s ex-wife or children and, therefore, did not share the requisite patient-physician relationship or a special relationship sufficient to establish

85. *Charleston v. Larson*, 696 N.E.2d 793, 802-03 (Ill. App. Ct. 1998) (citing *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 287, 398-99 (Ill. 1987)).

86. *Patti v. Daniels*, 2011 IL App (2d) 110133-U, ¶ 14.

87. *Eckhardt v. Kirts*, 534 N.E.2d 1339, 1345-46 (Ill. App. Ct. 1989).

88. Robert P. Giacalone, *Kirk v. Michael Reese Hosp. & Medical Center: The Treatment of A Third Party Plaintiff in A Medical Context*, 38 DEPAUL L. REV. 749, 784-85 (1989).

89. *Britton v. Soltes*, 563 N.E.2d 910 (Ill. App. Ct. 1990).

90. *Id.* at 911.

a duty of care.⁹¹ The trial court granted Dr. Soltes's partial motion for summary judgment, dismissing Britton's ex-wife and his children from the case, and they appealed.⁹²

On appeal, the appellate court noted that prior to 1977, "Illinois courts did not recognize any duty on the part of hospitals or doctors to non-patient third parties injured as a result of a negligent act performed against a patient."⁹³ In 1977, however, "for the first time [in *Renslow*], a non-patient third party was allowed to maintain an action against a hospital and doctor."⁹⁴ Nevertheless, the court noted that "[i]n the 13 years since *Renslow*, there has been no other case in which the supreme court has found a duty to non-patient third parties [and] [i]n *Kirk v. Michael Reese Hospital & Medical Center*, the court refused to extend its holding in *Renslow*."⁹⁵ With that backdrop, the court found that:

Our reading of the *Renslow* and *Kirk* cases does not lead us to conclude that the supreme court intended to extend duty in all cases involving familial or parent-child relationships. We read *Renslow* and *Kirk* as providing that a duty will be extended only where the relationship between the patient and the third party is such that negligence to the patient necessarily results in injury to the third party.⁹⁶

The appellate court noted that its unwillingness to find a duty was "especially true in light of evidence in the record that at the time Roger S. Britton fell ill he was divorced and living apart from his family."⁹⁷ Accordingly, the court held that "the trial court correctly found that the appellants' injury was caused by chance and not by any special relationship."⁹⁸

Justice Freeman, however, did not agree with the *Britton* majority's analysis of *Renslow* and *Kirk* and, ultimately, did not agree with its ruling. In his dissenting opinion, Justice Freeman argued that the majority read *Renslow* and *Kirk* too narrowly.⁹⁹ Citing *Renslow*, Justice Freeman pointed out that "[t]his court has long recognized that a duty may exist to one foreseeably harmed though he may be unknown and remote in time and place."¹⁰⁰ Accordingly, Justice Freeman stated that the issue in *Britton* was

91. *Id.* at 911-12.

92. *Id.* at 912.

93. *Id.* at 911.

94. *Britton*, 563 N.E.2d at 911.

95. *Id.* at 912.

96. *Id.* at 912-13.

97. *Id.* at 913.

98. *Id.*

99. *Britton*, 563 N.E.2d at 913 (Freeman, J., dissenting).

100. *Id.* (Freeman, J., dissenting) (citing *Renslow*, 367 N.E.2d at 1254-55).

not so much whether the precise holdings in *Renslow* and *Kirk* support the assertion of a duty in this case; rather, the issue in *Britton* was “whether the concept of transferred negligence [as] applied in *Renslow* supports that assertion.”¹⁰¹ When framing the issue in this way, Justice Freeman would have found that Dr. Soltes *did* owe a duty of care to Britton’s ex-wife and children.¹⁰² Justice Freeman noted that by citing to *Hoffman* (a Florida case that found doctors have a duty to warn family members of a patient suffering from a contagious disease) “as supporting the principle of transferred negligence applied in *Renslow*, the supreme court clearly, albeit tacitly, recognized that *Hoffmann* involved a special relationship, upon which the theory of transferred negligence rests, as much as *Renslow* involved a special relationship.”¹⁰³ Justice Freeman further recognized that “upholding a cause of action in the minor children, if not the ex-wife, in this case would align Illinois with most of the states that have considered the same or a similar issue as presented here”¹⁰⁴

In *Heigert v. Riedel*,¹⁰⁵ the plaintiff nurse filed a lawsuit against two doctors after they failed to recognize that a patient was suffering from tuberculosis, allowing her to come into contact with the patient and contract the disease.¹⁰⁶ The defendant doctors filed a motion to dismiss on the grounds that the plaintiff’s complaint failed to state a cause of action, and the trial court denied the defendant’s motion.¹⁰⁷ The defendant doctors appealed the trial court’s ruling.¹⁰⁸

The appellate court recognized that one standard reference work states:

101. *Id.* (Freeman, J., dissenting).

102. *Id.* at 913-14 (Freeman, J., dissenting).

103. *Id.* at 914 (Freeman, J., dissenting).

104. *Britton*, 563 N.E.2d at 915 (Freeman, J., dissenting). *See also* Hedlund v. Superior Court of Orange County, 669 P.2d 41 (1983) (breach of physician’s duty to warn or protect others from the danger posed by patient suffering from a communicable disease may result in liability to close family members and others whom the physician knows or should anticipate will be in close proximity to the patient); McIntosh v. Milano, 403 A.2d 500, 509 (1979) (physician has a duty to warn third persons against possible exposure to contagious or infectious diseases where he should have known thereof); Wojcik v. Aluminum Co. of North America, 183 N.Y.S.2d 351 (1959) (wife had a cause of action against defendant employer for negligent failure to inform husband that physical examination conducted by physician working for employer disclosed that husband had or was developing tuberculosis); Shepard v. Redford Community Hospital, 390 N.W.2d 239 (1986) (hospital had a physician-patient and thus special relationship with its patient and thus owed a duty of reasonable care to her minor son who, as also a member of her household, was a foreseeable potential victim of negligent failure to diagnose spinal meningitis in the patient which was communicated to her son).

105. *Heigert v. Riedel*, 565 N.E.2d 60 (Ill. App. Ct. 1990).

106. *Id.* at 61.

107. *Id.*

108. *Id.*

[I]t is the general rule that a physician is liable for his negligence in permitting persons to be exposed to infectious or communicable diseases to the injury of the persons so exposed. Thus, a physician in attendance upon a case of typhoid fever must notify attendants of the nature and character of the disease, warn them of the danger of infection, and instruct them as to the usual methods approved by the profession, of which he has knowledge, for preventing the spread of the disease. He must also exercise reasonable care to advise members of the patient's family, and others who are liable to be exposed thereby, of the nature of the disease and the danger of exposure.¹⁰⁹

Recognizing that at least two jurisdictions, Florida and Pennsylvania, have adopted the standard laid out above, the appellate court went on to point out that nurses should not be treated any differently than family members when dealing with cases of contagious diseases, and that “the prevention and control of communicable diseases is a momentous task which is of the utmost importance to the health and welfare of our citizens.”¹¹⁰ Nevertheless, despite these acknowledgements, the appellate court reversed the trial court's ruling based on its perception that the Supreme Court laid out a “bright-line” test in *Kirk*—that “absent a direct physician-patient relationship between the doctor and plaintiff or a special relationship, as present in *Renslow*, between the patient and the plaintiff.”¹¹¹ As a result, because the plaintiff and the defendant doctors in *Heigert* did not have a direct physician-patient relationship, the appellate court found that the defendants did not owe a duty of care to the plaintiff. In so ruling, the appellate court noted:

[I]t would appear that our supreme court regards the circumstances in *Renslow* as *sui generis*. Until that court holds otherwise, we therefore do not believe that we can recognize any other situations in which a physician will be regarded as owing a duty in a malpractice action to a third party who is not his patient.¹¹²

Justice Goldenhersh dissented in *Heigert*. Arguing that the majority read *Kirk* too narrowly, Justice Goldenhersh found that when “reading

109. *Id.* at 63 (citing 61 Am. Jur. 2d *Physicians, Surgeons and Other Healers* § 245 at 377 (1981)).

110. *Heigert*, 565 N.E.2d at 64.

111. *Id.* at 65 (quoting *Kirk*, 513 N.E.2d at 399).

112. *Id.*

Renslow, *Kirk* and *Condell* together, the supreme court was limiting the imposition of a duty to those situations in which a relationship distinguishable from that of a mere member of the general public was present.”¹¹³ Accordingly, when

[a]pplying the *Kirk* and *Johnson* factors for analysis of duty to the instant case, the circuit court properly denied defendants’ motion to dismiss. It is reasonably foreseeable that one who has a contagious disease such as tuberculosis could communicate that disease and that the likelihood of injury through that contact is great. The magnitude of the burden of guarding against this is not great and, in fact, has already been considered; the doctors involved in treating the individual with a communicable disease such as tuberculosis are already under a duty to diagnose that disease, recognize it as a communicable disease, and provide accordingly for the patient’s treatment, including confinement if required. The consequences of placing this burden on defendants is essentially to compel them to do what they are already obligated to do. This analysis is further strengthened by the position of plaintiff in this cause as being in a special relationship with the patient. This special relationship heightens the degree of reasonable foreseeability of an injury and the likelihood of that injury when one is discussing a fellow health care professional who is compelled by the mandates and ethics of the profession as well as the direct order of doctors similarly situated to the defendants in this case to provide care for a person who has a contagious disease; however, in this case, due to defendants’ failure to diagnose that contagious disease, the fellow health care professional, the plaintiff in this cause, was not given the opportunity to guard against the harm and likely injury of contracting this contagious disease. The burden of guarding against this injury and the consequences of placing this burden are merely to compel defendants to do what they were already obligated to do.¹¹⁴

Britton and *Heigert* were decided by courts that were clearly divided as to the scope and implications of *Renslow* and *Kirk*. These divisions can be linked to three factors. First, when the rulings in *Kirk* and *Renslow* were

113. *Id.* at 66 (Goldenhersh, J., dissenting).

114. *Id.* at 67-68 (Goldenhersh, J., dissenting).

handed down, the court could not have foreseen the exact fact patterns that would arise in later cases, such as those facts it was faced with in *Heigert* and *Britton*. Second, since *Kirk* and *Renslow* were decided, numerous developments in the way communicable diseases spread and are prevented and treated have been made,¹¹⁵ raising concerns as to why the law had not developed as well.¹¹⁶ Third, the bright-line rule created in *Kirk* and the exception created in *Renslow* have tied the hands of judges on the issue of duty in third-party non-patient cases in an area of the law where they have typically had unfettered discretion.¹¹⁷

IV. IMPACT

Justice and fairness dictate that the holdings of *Renslow* and *Kirk* should not be applied in communicable disease cases. Instead, the Illinois Supreme Court should limit the holdings of *Renslow* and *Kirk* to the facts of those cases and should go back to allowing judges to assess the issue of duty in medical malpractice cases involving third-party non-patients on a case-by-case basis pursuant to the reasonable foreseeability test. Not only will this be more just, but it will be more in line with the legal principle that judges are to determine the issue of duty as a matter of law, and it will al-

115. *Overview: A CDC Framework for Preventing Infectious Diseases*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 2011), <http://www.cdc.gov/oid/docs/id-framework-2pageoverview.pdf> (“Today’s infectious disease challenges are broader and more complex than they were in 1998 While our changing, globalized world has provided increased opportunities for the emergence and spread of infectious diseases, it has also brought significant advances.”); Duane J. Gubler, *EPID: Focus on Surveillance Emerging Infectious Diseases in the 21st Century: A Threat to Global Economic Security*, INST. ON SCI. FOR GLOBAL POLICY (Oct. 17-20, 2010), <http://scienceforglobalpolicy.org/wp-content/uploads/552ea90aecf1a-EPID%20-%20Focus%20on%20Surveillance.pdf>.

There has been a dramatic global re-emergence of epidemic infectious diseases in the past 30 years. In 2010, infectious diseases are once again a leading cause of morbidity and mortality in the world. The reasons for this re-emergence are many, but the principal drivers are uncontrolled urbanization, which has greatly increased infectious disease transmission, combined with the massive movement of people, animals, and commodities via modern transportation into areas that do not have the public health infrastructure to detect and contain introduced pathogens. This provides the ideal recipe for increased epidemic transmission of both well known and novel pathogens. The potential for rapid spread of epidemic disease around the world is a new phenomenon that threatens global economic and public health security.

Id.

116. *See, e.g., Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977) (“Medical science has developed various techniques which can mitigate or, in some cases, totally alleviate a child’s prenatal harm. In light of these substantial medical advances it seems to us that sound social policy requires the extension of duty in this case.”).

117. *See infra* notes 166-169.

low courts to adapt to future scientific and medical advancements. In addition, any negative implications that could arise from applying the reasonable foreseeability test instead of *Kirk* and *Renslow* are null in communicable disease cases.

A. JUSTICE

Applying the reasonable foreseeability test on a case-by-case basis would be more just than merely applying the rules laid out in *Renslow* and *Kirk* to all medical malpractice cases in which the plaintiff is a third-party non-patient. First, it is arguable that some plaintiffs have had their cases dismissed prematurely¹¹⁸ under the rulings of *Renslow* and *Kirk* where little to no consideration is given to the reasonable foreseeability of the alleged harm.¹¹⁹ As discussed earlier, Illinois judges have dismissed cases based on *Kirk* and *Renslow* without considering whether the resulting harm was reasonably foreseeable.¹²⁰ Allowing judges to determine duty on a case-by-case basis will allow meritorious claims to proceed beyond the pleading stage—claims where the resulting harm caused by the alleged negligence is reasonably foreseeable—so that cases are decided on the merits rather than solely on the pleadings. As stated by one author, *Renslow* and *Kirk* have “halt[ed] any expansion of health care liability regardless of the potential foreseeability of harm.”¹²¹

By way of example, if we were to set aside the rules established in *Renslow* and *Kirk* and instead apply the reasonable foreseeability test to the facts of *Heigert* and *Britton*, it is very likely that the plaintiffs in each of those cases would not have had their claims dismissed at the pleading stage.¹²² In *Britton* and *Heigert*, each plaintiff alleged that they were harmed because of a physician’s failure to diagnose or warn about the risks

118. See *infra* notes 121-134.

119. See *supra* notes 19-56 (*Kirk* requires that the plaintiff established a patient-physician relationship and *Renslow* requires that, where the plaintiff cannot establish a patient-physician relationship, that the plaintiff establish a special relationship, which is that of a mother and her fetus. Absent from these requirements is whether the harm alleged was reasonably foreseeable.).

120. See *supra* notes 60-114.

121. Robert P. Giacalone, *Kirk v. Michael Reese Hosp. & Medical Center: The Treatment of A Third Party Plaintiff in A Medical Context*, 38 DEPAUL L. REV. 749, 749 (1989) (emphasis added).

122. See, e.g., *Doe v. McKay*, 700 N.E.2d 1018, 1027 (Ill. 1998) (Harrison, J., dissenting) (applying the reasonable foreseeability factors to the facts of *Doe*: “The damage that [plaintiff] allegedly sustained as a result was foreseeable by any meaningful standard. The likelihood of injury was great, the burden of guarding against that injury was slight, and there would be no significant adverse consequences from placing that burden on a therapist.”).

of communicable diseases.¹²³ The court dismissed both the plaintiffs' claims by finding the defendants did not owe the plaintiffs a duty of care because the plaintiffs did not have a direct patient-physician relationship with the defendant (*Kirk*) and the plaintiffs and defendants did not share a special relationship (*Renslow*). As a result, the plaintiffs' cases were dismissed at the pleading stage of the litigation, before any substantive evidence was presented.

Under the reasonable foreseeability test, whether a relationship exists between the parties that will justify the imposition of a duty, is determined by analyzing four factors: (1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the burden involved in guarding against the harm, and (4) the consequences of placing on the defendant the duty to protect against the harm.¹²⁴ Consideration of these four factors should be informed by public policy considerations,¹²⁵ and as a matter of public policy, it is best to place the duty to protect against a harm on the party best able to prevent it.¹²⁶ If the courts were to apply this reasonable foreseeability test to the facts of *Britton* and *Heigert*—instead of being confined to applying the rules laid out in *Renslow* and *Kirk*—it is fair to hypothesize that each of those cases would have survived the pleading stage of litigation.

In *Britton*, a judge could reasonably find that the four reasonable foreseeability factors were met. First, it was foreseeable that, upon coming into close contact with his wife and children, Britton would infect them with tuberculosis.¹²⁷ Second, the likelihood of spreading the disease to his family was great given the contagious nature of the disease and the fact that Britton was frequently in close contact with his family and lived next door to them.¹²⁸ Third, in order to protect against the harm of passing the disease

123. *Communicable Disease*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/medical/communicable+disease> (A communicable disease is “an infectious disease transmissible (as from person to person) by direct contact with an affected individual or the individual’s discharges or by indirect means (as by a vector).”).

124. *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1057 (Ill. 2006); *Ward v. KMart Corp.*, 554 N.E.2d 223, 226-27 (Ill. 1990).

125. *Marshall*, 856 N.E.2d at 1057.

126. *See* *Court v. Grzelinski*, 379 N.E.2d 281, 285 (Ill. 1978).

127. *Tuberculosis*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/tuberculosis/basics/definition/con-20021761> (“Tuberculosis [(TB)] is a potentially serious infectious disease that mainly affects your lungs. The bacteria that cause tuberculosis are spread from one person to another through tiny droplets released into the air via coughs and sneezes.”).

128. Diana Rodriguez, *Tuberculosis Infection: How Does It Spread*, EVERYDAY HEALTH (Dec. 16, 2009), <http://www.everydayhealth.com/tuberculosis/how-does-it-spread.aspx> (“TB is a highly contagious bacterial infection that can quickly spread if not caught, isolated, and treated early. Tuberculosis is an airborne disease, and can be caught by

along to his family, the defendant would, at a minimum, only have to advise Britton of the risks of spreading his tuberculosis to others, a “burden” that doctors are already required to do.¹²⁹ Fourth, the consequences of placing this additional “burden” on doctors would be nonexistent given that the standard of care already requires that they advise their patients of the risks associated with their contagious/communicable disease.¹³⁰

Likewise, in *Heigert*, a judge could reasonably find that the four reasonable foreseeability factors were also met. First, it was foreseeable that if a patient in the hospital contracted a contagious disease, those personnel caring for that infected patient would be exposed to the disease if the proper precautions were not taken.¹³¹ Second, as the majority in *Heigert* admits,

[n]urses such as plaintiff who work in a hospital setting may, of necessity, have extensive physical contact of the most personal nature with the patients in their charge. Accordingly, the risk they run of contracting a contagious illness from a patient can certainly rival the risk experienced by the members of the patient’s household.¹³²

As such, the likelihood of injury was great. Third, the magnitude of the “burden” involved in guarding against the harm would be minimal as physicians are already under a duty to appropriately advise and warn personnel of a patient suffering from a communicable disease.¹³³ Fourth, given that

breathing in the air that an infected person has contaminated through: Breathing, Coughing, Talking, Singing, Sneezing.”).

129. *Turner v. Nama*, 689 N.E.2d 303, 313 (Ill. 1997) (“Once a health care provider receives unfavorable test results it is obligated to timely inform the patient of the results.”); *Goldberg By & Through Goldberg v. Ruskin*, 471 N.E.2d 530, 537 (Ill. 1984) (“The nature of [the patient-physician] relationship gives rise to a duty of the physician to care for and advise the patient in accordance with proper medical practice.”); see also Rebecca Coffield Moore, *Dimarco v. Lynch Homes-Chester County, Inc.: How Far Should West Virginia Go in Extension of Physician Liability for Transmission of Communicable Disease?*, 94 W. VA. L. REV. 1031, 1031-32 (1992) (“In everyday practice, a physician has the difficult task of correct diagnosis and treatment of communicable diseases. When a patient presents with communicable disease symptoms, the physician’s immediate action is to attend to that individual’s needs. However, the physician must also consider the extent to which the communicable disease may spread and who may be subsequently affected.”).

130. See *supra* note 129.

131. See *supra* notes 127-128.

132. *Heigert v. Riedel*, 565 N.E.2d 60, 64 (Ill. App. Ct. 1990).

133. 61 AM. JUR. 2D *Physicians, Surgeons and Other Healers* § 245 (1981) (“[I]t is the general rule that a physician is liable for his negligence in permitting persons to be exposed to infectious or communicable diseases to the injury of the persons so exposed. Thus, a physician in attendance upon a case of typhoid fever must notify attendants of the nature and character of the disease, warn them of the danger of infection, and instruct them as to the usual methods approved by the profession, of which he has knowledge, for preventing the

the duty to advise and warn personnel already exists, there would be no consequences in placing the “burden” on the defendant to protect against such harm.¹³⁴

Moreover, in line with the principles of justice, it must be noted that several jurisdictions outside of Illinois *have* recognized a duty of care where a third-party non-patient is allegedly injured by a defendant physician’s failure to properly diagnose a communicable disease or failure to properly warn about the adverse effects of a communicable disease. In *Reisner v. Regents of University of California*,¹³⁵ the defendant doctor failed to tell his patient or her parents that she had been infected with the HIV virus following a blood transfusion in 1985.¹³⁶ Approximately three years later, the patient became intimate with the plaintiff.¹³⁷ In March of 1990, the patient discovered that she had AIDS and that she had been infected with the HIV virus back in 1985.¹³⁸ She immediately informed the plaintiff of her AIDS diagnosis, and upon testing, the plaintiff learned that he had the HIV virus.¹³⁹ The court of appeals held that the defendant doctor owed a duty to the plaintiff, even though he did not share a patient-physician relationship with him.¹⁴⁰ Specifically, the court found that the defendant doctor’s duty included the “duty to warn ‘others of likely to apprise the victim of danger . . . or to take whatever . . . steps are reasonably

spread of the disease. He must also exercise reasonable care to advise members of the patient’s family, and others who are liable to be exposed thereby, of the nature of the disease and the danger of exposure.”).

134. Although the *Heigert* court essentially admits that all factors of the reasonable foreseeability test have been satisfied, it still dismissed plaintiff’s complaint stating: “Although we have found no Illinois authority dealing with the precise situation here, our supreme court has recently articulated [in *Kirk*] what appears to be a ‘bright line’ test regarding the scope of a physician’s duty in medical malpractice actions” which is

that a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and plaintiff or a special relationship, as present in *Renslow*[,] . . . between the patient and the plaintiff.” Plaintiff here, of course, had no direct physician-patient relationship with either of the defendants, nor can she claim to have had the ‘special relationship’ with defendants’ patient as was present in *Renslow*.

Heigert, 565 N.E.2d at 65 (citing *Kirk*, 513 N.E.2d at 399).

135. *Reisner v. Regents of Univ. of California*, 31 Cal. App. 4th 1195, 1198 (Cal. Ct. App. 1995).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Reisner*, 31 Cal. App. 4th at 1199.

necessary under the circumstances.”¹⁴¹ With respect to the specific facts of the case, the court stated: “Just as [the defendant] knew or reasonably should have known that [the patient] was likely to get AIDS as a result of the contaminated blood, he knew or reasonably should have known that, as she matured, [the patient] was likely to enter an intimate relationship.”¹⁴² The court went on to state that “[o]nce the physician warns the patient of the risk to others and advises the patient how to prevent the spread of the disease, the physician has fulfilled his duty--and no more (but no less) is required.”¹⁴³ Accordingly, the Court of Appeal noted that “the facts of this case compel a conclusion designed to encourage the highest standard of care concerning communicable and infectious diseases”¹⁴⁴

In *Hoffman v. Blackmon*,¹⁴⁵ a father was treated by the defendant doctor for two years.¹⁴⁶ The defendant doctor failed to diagnose the father with tuberculosis during those two years and, as a result, the plaintiff, the father’s two-year-old child, contracted the disease as well.¹⁴⁷ The District Court of Appeal of Florida held that

a physician owes a duty to a minor child who is a member of the immediate family and living with a patient suffering from a contagious disease to inform those charged with the minor’s well being of the nature of the contagious disease and the precautionary steps to be taken to prevent the child from contracting such disease and that the duty is not negated by the physician negligently failing to become aware of the presence of such a contagious disease.¹⁴⁸

Further, the *Hoffman* court noted that “[i]t is recognized that once a contagious disease is known to exist a duty arises on the part of the physician to use reasonable care to advise and warn members of the patient’s immediate family of the existence and dangers of the disease.”¹⁴⁹

141. *Id.* (internal citations omitted). The court noted that the plaintiff in *Reisner* did not claim that the defendants had a duty to warn him, only that they had a duty to warn the patient or her parents. *Reisner*, 31 Cal. App. 4th at 1195.

142. *Reisner v. Regents of Univ. of California*, 31 Cal. App. 4th 1195, 1201 (Cal. Ct. App. 1995).

143. *Id.* at 1203.

144. *Id.* at 1201.

145. *Hoffman v. Blackmon*, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970).

146. *Id.* at 753.

147. *Id.*

148. *Id.*

149. *Id.*

In *DiMarco v. Lynch Homes-Chester County, Inc.*,¹⁵⁰ a blood technician was punctured by a needle that had been used on a patient who was the carrier of hepatitis.¹⁵¹ The defendant physicians told the blood technician that if she remained symptom free for six weeks, that would mean she had not been infected with the disease; however, the defendant physicians did not advise her to refrain from engaging in sexual relations for any period of time.¹⁵² After eight weeks of no symptoms, the blood technician engaged in sexual relations with her boyfriend, the plaintiff, and both were later diagnosed with hepatitis, a communicable disease.¹⁵³ The plaintiff sued the blood technician's doctors alleging that they failed to advise the blood technician to refrain from engaging in sexual relations for six months.¹⁵⁴ The Pennsylvania Supreme Court held that the plaintiff stated a cause of action against the defendant physicians for failing to advise the patient to avoid having sexual relations for six months after coming into contact with the hepatitis.¹⁵⁵ The court noted that "the duty of a physician in such circumstances extends to those 'within the foreseeable orbit of risk of harm.'"¹⁵⁶ The court further stated that

[i]f a third person is in that class of persons whose health is likely to be threatened by the patient, and if erroneous advice is given to that patient to the ultimate detriment of the third person, the third person has a cause of action against the physician, because the physician should recognize that the services rendered to the patient are necessary for the protection of the third person.¹⁵⁷

More specifically, the court explained:

When a physician treats a patient who has been exposed to or who has contracted a communicable and/or contagious disease, it is imperative that the physician give his or her patient the proper advice about preventing the spread of the disease. Communicable diseases are so named because they are readily spread from person to person. Physicians are the first line of defense against the spread of communicable diseases, because physicians know what measures must be

150. *DiMarco v. Lynch Homes-Chester Cty. Inc.*, 583 A.2d 422 (Pa. 1990).

151. *Id.* at 423.

152. *Id.*

153. *Id.* at 423-24.

154. *Id.*

155. *DiMarco*, 583 A.2d at 424.

156. *Id.* (citing *Doyle v. South Pittsburgh Water Co.*, 199 A.2d 875, 878 (Pa. 1964)).

157. *Id.* at 424-25.

taken to prevent the infection of others. The patient must be advised to take certain sanitary measures, or to remain quarantined for a period of time, or to practice sexual abstinence or what is commonly referred to as ‘safe sex.’¹⁵⁸

The court also noted that in imposing a duty on the defendant physician, “[s]uch precautions are taken *not* to protect the health of the patient, whose well-being has already been compromised, rather *such precautions are taken to safeguard the health of others.*”¹⁵⁹

In *C.W. v. Cooper Health System*,¹⁶⁰ the Superior Court of New Jersey was asked to decide “whether a physician and/or hospital can be held civilly liable in damages to an individual who contracted the human immunodeficiency virus (“HIV”) from a former patient who was not informed of the results of an HIV test ordered by the physicians responsible for the patient’s care.”¹⁶¹ The court answered that question in the affirmative, holding that “a health care provider, who orders an HIV test for a patient, has a duty to take reasonable measures to notify that patient of the results of the test.”¹⁶² In coming to this conclusion, the court reasoned that it was “entirely foreseeable that [the plaintiff], a twenty-nine-year-old individual, was, or would likely be sexually active.”¹⁶³ As such, as the patient’s sexual partner, the plaintiff “[fell] within the scope of foreseeable individuals who would be harmed by [the defendant’s] failure to inform [the patient] of his HIV positive status.”¹⁶⁴

Thus, allowing judges to determine the issue of duty under the reasonable foreseeability test rather than confining their analysis to the rules laid out in *Kirk* and *Renslow* would better serve the principles of justice as it would ensure that plaintiffs’ claims are not dismissed prematurely at the pleading stages of litigation. It would also align Illinois with numerous other states that have recognized a duty of care in third-party non-patient cases involving communicable diseases.¹⁶⁵

B. LEGAL PRINCIPLES

Giving Illinois judges back the ability to assess duty in third-party non-patient medical malpractice cases under a reasonable foreseeability test

158. *Id.* at 424.

159. *Id.* (emphasis in original).

160. *C.W. v. Cooper Health Sys.*, 906 A.2d 440 (N.J. Super. Ct. App. Div. 2006).

161. *Id.* at 443.

162. *Id.*

163. *Id.* at 450-51.

164. *Id.*

165. *See supra* notes 136-163.

rather than simply applying the rules laid out in *Kirk* and *Renslow* is also more in line with the legal principle that judges are responsible for deciding the issue of duty as a matter of law. The rulings of *Kirk* and *Renslow* dictate that a judge is limited to answering two questions when deciding duty in medical malpractice cases where the plaintiff is a third-party non-patient: (1) is there a direct patient-physician relationship between the plaintiff and the defendant, which would be sufficient to impose a duty (*Kirk*), and (2) if the answer to the first question is no, is the relationship between the patient and the plaintiff one of a mother and her fetus (*Renslow*)? As such, judges have no meaningful discretion when it comes to determining duty in third-party non-patient medical malpractice claims. Yet, the *Renslow* court made it clear that judges are more than capable of determining where to draw the line on the issue of duty in such cases: “We feel confident that when such a case is presented, the judiciary will effectively exercise its traditional role drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not.”¹⁶⁶

In Illinois, this notion that judges are to determine whether a duty of care is owed to a plaintiff, even where the plaintiff is a third-party non-patient, is not a new legal concept.¹⁶⁷ Because “the concept of duty in negligence cases is very involved, complex[,] and indeed nebulous,”¹⁶⁸ it is an issue that has been left to judges to decide as a matter of law. As appropriately explained by one author:

To conclude that an individual owes an obligation to a party with whom he has not chosen to deal is to create a line-drawing problem. If physicians and attorneys were obligated only to parties with whom they have chosen to deal, line-drawing would be relatively easy: Obligations would arise out of contractual relationships, and only those parties entering into such relationships would bear such obligations. Each party would know, presumably by name, the identity of all other parties to whom he owed a duty to ex-

166. *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977).

167. In *Davis v. Weiskopf*, 439 N.E.2d 60 (Ill. App. Ct. 1982), the Illinois Appellate Court found that the

[p]laintiff stated a cause of action for medical malpractice by alleging that defendant was [a] practicing physician who had accepted referral of plaintiff's case from another doctor, after being advised plaintiff may have been suffering from serious illness, and that defendant declined to treat plaintiff without informing him of his condition or referring him to another physician for his care, to [the plaintiff's] damage.

Id. at 64.

168. *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1056 (Ill. 2006) (quoting *Mieher v. Brown*, 301 N.E.2d 307, 310 (Ill. 1973)).

ercise reasonable care. Each party could predict the losses his negligent behavior might generate and, therefore, could choose to avoid the negligent behavior or to insure adequately against the cost of its consequences. Once legal obligations extend beyond the limits of contractual relationships, however, another sort of line must be drawn to avoid the imposition of potentially limitless liability.

The law, of course, does extend the obligation to exercise reasonable care beyond the limits of contractual relationships, and all individuals do have some obligations to parties with whom they have not chosen to deal and whose identities they do not know. Operators of automobiles, for example, are obligated to other drivers and pedestrians to exercise reasonable care in their driving. Manufacturers of products owe obligations not only to consumers and users of those products but also to bystanders whose lives and property may be affected by the use of those products. Operators of automobiles may reasonably foresee that the manner in which they drive affects other drivers and pedestrians. Similarly, manufacturers may easily foresee that their products may affect persons other than consumers and users.¹⁶⁹

Thus, in keeping with the principle that judges are to decide the issue of duty as a matter of law, it follows that judges should have the discretion to determine duty in third-party non-patient medical malpractice cases on a case-by-case basis pursuant to the reasonable foreseeability test.

C. SCIENTIFIC AND MEDICAL DEVELOPMENTS

Contagious diseases remain one of the leading causes of death in the world and in the United States,¹⁷⁰ and as such, it is not an area of medicine where innovation should be demoted, especially because health care providers “are . . . often a last line of defense against the spread of disease”¹⁷¹

169. Dale L. Moore, *Disparate Treatment of the Allocation of Power Between Judge and Jury in Legal and Medical Malpractice Cases*, 61 TEMP. L. REV. 353, 356-57 (1988) (internal citations omitted).

170. “Infectious diseases remain the leading cause of death worldwide, and are, in the aggregate, the third leading cause of death in the United States.” Lawrence O. Gostin et al., *The Law and Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 97 (1999).

171. W. Jonathan Cardi, *A Pluralistic Analysis of the Therapist/physician Duty to Warn Third Parties*, 44 WAKE FOREST L. REV. 877, 883 (2009).

and Illinois public policy recognizes that it is best to place the duty to protect against a harm on the party best able to prevent it.¹⁷² Since *Kirk* and *Renslow* were decided, numerous developments have been made in how communicable diseases spread, and how communicable diseases are prevented and treated.¹⁷³ The legal community, and specifically the courts, must be able to align themselves with these new developments and recognize new duties of care as they arise. Such alignments cannot be made under the *Renslow* and *Kirk* rulings; however, they can be made if judges are allowed to determine the issue of duty on a case-by-case basis pursuant to the reasonable foreseeability test.

Just as “the standard of care necessarily evolves with medical advancements,”¹⁷⁴ “[t]he court’s perceptions of duty in negligence cases will change as society changes.”¹⁷⁵ As stated by the Tennessee Supreme Court:

[T]he imposition of a legal duty reflects society’s contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another’s act or conduct. . . . Indeed, it has been stated that ‘duty’ is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.¹⁷⁶

As such, as scientific and medical developments arise, the courts need to be able to adapt to these developments and align themselves where necessary.

Further, tying judges’ hands so that they cannot recognize new duties of care in third-party non-patient medical malpractice cases, even as new scientific and medical advancements are made, could have a very serious negative impact on the medical field.

If the medical industry is under the impression that the Illinois courts are becoming more defense oriented, there will be less incentive to take precautionary measures to protect potential victims. Therefore, rather than pursuing research or taking additional steps to safeguard patients and others

172. See *supra* note 18.

173. See *supra* note 115.

174. Jalayne J. Arias, *Becoming the Standard: How Innovative Procedures Benefiting Public Health Are Incorporated into the Standard of Care*, 39 J.L. MED. & ETHICS 102, 103 (2011).

175. *Zimmermann v. Netemeyer*, 462 N.E.2d 502, 509 (Ill. App. Ct. 1984).

176. *Bradshaw v. Daniel*, 854 S.W.2d 865, 870 (Tenn. 1993) (internal citations omitted).

that may be affected, those in the medical field may simply choose to provide the minimum level of care which has already been established.¹⁷⁷

“[W]ithout the consideration of public health as a factor of the standard of care to curb physicians’ perception of liability risks, innovative procedures may not be fully implemented to benefit communal health despite their known efficacy.”¹⁷⁸ As stated by the California Court of Appeal, “we believe that a doctor who knows he is dealing with [a contagious disease] ought to have a very strong incentive to tell his patient what she ought to do and not do and how she ought to comport herself in order to prevent the spread of her disease.”¹⁷⁹ Similarly, in cases where the alleged negligence is the failure to diagnose contagious/communicable diseases, cutting off liability at the patient “would reward the doctor for failing to discover that which a finder of fact may determine was within his professional ability to discover and, therefore, was his duty to discover.”¹⁸⁰ Overall, it is clear that as scientific and medical developments occur, especially in the field of the treatment and prevention of communicable disease, judges need to have discretion in recognizing (legally) new duties of care where they arise. Currently, under *Kirk* and *Renslow*, judges do not have the ability to recognize any new duties of care in third-party non-patient cases.

D. POTENTIAL NEGATIVE IMPLICATIONS ARE NULL

Some concerns that might arise if judges sitting in Illinois were allowed to determine the issue of duty in third-party non-patient medical malpractice cases involving communicable diseases under a reasonable foreseeability test rather than pursuant to the *Kirk* and *Renslow* rulings are: (1) plaintiffs with frivolous cases might be able to pursue their claims beyond the pleading stage, (2) the pool of potential plaintiffs could be unlimited, (3) the burden placed on defendant health care providers could be too

177. Robert P. Giacalone, *Kirk v. Michael Reese Hosp. & Medical Center: The Treatment of A Third Party Plaintiff in A Medical Context*, 38 DEPAUL L. REV. 749, 785 (1989) (citing Comment, *Medical Malpractice Statutes: Special Protection for a Privileged Few?*, 12 N.KY L. REV. 295, 310 (1985) (“[P]hysicians, using threats and scare techniques have pushed state legislatures into enacting poorly thought-out legislation in an almost hysterical atmosphere.”)).

178. Jalayne J. Arias, *Becoming the Standard: How Innovative Procedures Benefiting Public Health Are Incorporated into the Standard of Care*, 39 J.L. MED. & ETHICS 102, 104 (2011).

179. *Reisner v. Regents of Univ. of California*, 31 Cal. App. 4th 1195, 1204 (Cal. Ct. App. 1995).

180. *Hofmann v. Blackmon*, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970).

great, and (4) privacy issues could arise.¹⁸¹ However, in cases involving communicable diseases, these concerns are minimal, if not nonexistent.

First, the likelihood of frivolous claims proceeding beyond the pleading stage is minimal given that duty is only one of the elements that plaintiffs must plead and subsequently prove.¹⁸² Accordingly, where the courts are presented with frivolous claims, there are several other grounds upon which courts can dismiss the case early on. Further, even if a frivolous claim survives the pleading stage, that plaintiff's claim would inevitably be dismissed on the merits during discovery. Of course, even where this is the case, it still weighs on the side of fairness to have defendants potentially incur additional litigation costs rather than risk potentially dismissing an otherwise meritorious claim based solely on the pleadings.¹⁸³

Second, the pool of potential plaintiffs would not be unlimited since judges would be responsible for ensuring that the line for liability is reasonably drawn. Again, as stated by the *Renslow* court, "We feel confident that when such a case is presented, the judiciary will effectively exercise its traditional role drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not."¹⁸⁴ Moreover, as implied by its title, the reasonable foreseeability test would require that any imposition of a duty be *reasonably* foreseeable, which implies that a line on potential plaintiffs would be drawn in every case. Further,

[u]ndue burdens on the medical community are unlikely because the medical community itself is responsible for setting its own standards of reasonable care in providing the warning, and it is unlikely that physicians would make a

181. See generally W. Jonathan Cardi, *A Pluralistic Analysis of the Therapist/physician Duty to Warn Third Parties*, 44 WAKE FOREST L. REV. 877, 885-86 (2009) (internal citations omitted) ("Common policy considerations include the desire to prevent the spread of disease, concerns about breaching physician-patient confidentiality (which is vital to the success of treatment), concern for the 'medical malpractice and insurance crisis,' the possibility that physicians will be held to too high a standard, and the possibility that courts will fail to sort out issues of factual causation adequately.").

182. "To properly state a cause of action for negligence, the plaintiff must establish that the defendant owed a duty of care, a breach of that duty, and an injury proximately caused by the breach." *Wojdyla v. City of Park Ridge*, 592 N.E.2d 1098, 1100 (Ill. 1992).

183. Along the same lines, "it would be more equitable to require that a negligent physician incur the cost of his mistake than to require a totally innocent plaintiff to absorb the costs." Robert P. Giacalone, *Kirk v. Michael Reese Hosp. & Medical Center: The Treatment of A Third Party Plaintiff in A Medical Context*, 38 DEPAUL L. REV. 749, 784 (1989).

184. *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977).

practice of warning distant relatives of diseases when the inheritability of those diseases is highly suspect.¹⁸⁵

Third, because doctors already have a duty to warn their patients of the treatment, side effects, and dangers of communicable diseases,¹⁸⁶ no additional burden is imposed by recognizing a duty to third-party non-patients when their alleged negligence arises out of a failure to warn their patients of the treatment, side effects, and dangers of communicable diseases where their failure to give such warnings results in injuries to third-party non-patients. Further, courts have recognized that the potential for additional plaintiffs or potentially unlimited plaintiffs is an argument that carries very little weight given that “the doctor’s liability to fourth and fifth persons would by its nature be limited by traditional causation principles.”¹⁸⁷

Last, privacy issues would be minimal as defendant health care providers could fulfill their duty to third-party non-patients by (at a minimum) informing the patient of the adverse effects his or her diagnosis and treatment could have on others, so that the patient can warn those at risk, or by warning those at risk with the patient’s permission.¹⁸⁸ As such, there are a number of ways in which a health care provider can reasonably warn of foreseeable risks associated with communicable disease without infringing upon a patient’s privacy rights.

V. CONCLUSION

In *Renslow*, the Illinois Supreme Court created an exception to the general duty rule, the “special relationship” exception, which has not been recognized outside of the mother-fetus relationship. In *Kirk*, the court created a bright-line rule that has consistently been used to dismiss cases where the plaintiff cannot establish a direct patient-physician relationship, despite the foreseeability of the harm caused. Together, *Renslow* and *Kirk* have served to prevent any real discussion about duties in third-party non-patient cases, even where the alleged harm is almost certain to flow from the plaintiff’s alleged negligence. As such, when the Illinois Supreme Court is con-

185. Jeffrey W. Burnett, *A Physician’s Duty to Warn A Patient’s Relatives of A Patient’s Genetically Inheritable Disease*, 36 HOUS. L. REV. 559, 581 (1999).

186. See *supra* note 129.

187. *Reisner v. Regents of Univ. of Cal.*, 31 Cal. App. 4th 1195, 1204 (Cal. Ct. App. 1995).

188. See W. Jonathan Cardi, *A Pluralistic Analysis of the Therapist/physician Duty to Warn Third Parties*, 44 WAKE FOREST L. REV. 877, 879 n. 17 (2009) (Noting that “while most courts have endorsed suits by a foreseeably harmed third party against a physician for the failure to warn the physician’s patient of the risks of spreading disease.”). “An even greater majority has imposed on physicians a Tarasoff-like duty of reasonable care to warn those foreseeably at risk of infection by the patient.” *Id.* at 879-80 n. 18.

fronted with its next case involving the issue of duty where the plaintiff is a third-party non-patient,¹⁸⁹ it should seriously consider limiting its rulings in *Renslow* and *Kirk* to the facts of those cases and revert to determining duty on a case-by-case basis based upon the reasonable foreseeability of the harm. This is especially true in cases involving communicable diseases. Doing so will not only result in justice for deserving plaintiffs who might otherwise have their case dismissed prematurely, but it will be more in line with the legal principle that judges are to determine legal duties as a matter of law and will provide judges with greater flexibility when medical and scientific developments demand that new duties be recognized. Moreover, as the reasonable foreseeability test worked just fine before *Renslow* and *Kirk*, and in considering the arguments made herein, there seems to be no good reason why the reasonable foreseeability test would not be able to work again. Sometimes the old *is* better than the new.

189.

It is true that cases involving a physician's duty to third parties arise in a whole host of fact patterns. For example, they involve different risks (such as hepatitis, tuberculosis, genetic conditions, even Rocky Mountain Spotted Fever) and a variety of wrongdoings (for example, failure to diagnose or properly treat the patient, failure to warn the patient of the risk of transmission of disease, or failure to warn third parties of the risk of transmission).

W. Jonathan Cardi, *A Pluralistic Analysis of the Therapist/physician Duty to Warn Third Parties*, 44 WAKE FOREST L. REV. 877, 878-79 (2009).