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Cover Page Footnote

I wish to thank Carolyn and William Fleischer for supporting my endeavors, academic and otherwise.

FROM PILL-COUNTING TO PATIENT CARE: PHARMACISTS' STANDARD OF CARE IN NEGLIGENCE LAW

Lauren Fleischer[*]

INTRODUCTION

The pharmaceutical industry has faced a spike in civil litigation over the last twenty years.[1] Some customers are asking the judiciary to hold pharmacists accountable for failing to use their position in the healthcare system to protect customers from drug-related injuries.[2] Generally, plaintiffs allege that pharmacists have a common law duty to take corrective measures, such as refusing to fill or to warn the physician or patient about a potentially dangerous prescription.[3] They argue that this duty arises if a prescription has obvious inadequacies, such as incomplete directions;[4] if it calls for excessive dosages or quantities;[5] if it is refilled at an uncommonly high rate, indicating the customer's possible misuse of the drug;[6] or if it causes serious side effects, such as interaction or addiction.[7] Plaintiffs base other claims on the

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1. *See, e.g.*, Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 516 (Ind. 1994) (discussing a tort action brought by a pharmacy customer); Guillory v. Dr. X, 679 So. 2d 1004, 1006 (La. Ct. App. 1996) (same); Riff v. Morgan Pharmacy, 508 A.2d 1247, 1248 (Pa. Super. Ct. 1986) (same); Dooley v. Everett, 805 S.W.2d 380, 381 (Tenn. Ct. App. 1990) (same); McKee v. American Home Prods., 782 P.2d 1045, 1047 (Wash. 1989) (same).

2. *See infra* Part II.B.2.

3. *See, e.g.*, Lasley v. Shrake's Country Club Pharmacy, Inc., 880 P.2d 1129, 1130 (Ariz. Ct. App. 1994) (holding that defendant-pharmacist had a duty to warn either plaintiff or his physician about dangers of prolonged drug use).

4. *See Riff*, 508 A.2d at 1252 (holding defendant-pharmacist negligent for not clearly indicating the maximum safe dosage on the label when filling migraine medication prescription).

5. *See, e.g.*, Jones v. Irvin, 602 F. Supp. 399, 402 (S.D. Ill. 1985) (explaining plaintiff's argument that defendant-pharmacist should have warned the patient or physician that the prescription called for drugs in dangerous amounts, and that the drug quantities were likely to cause interactions).

6. *See, e.g.*, *Hooks*, 642 N.E.2d at 519 (holding that defendant-pharmacist had a duty to refuse to fill a prescription that customer was requesting at an unreasonably faster rate than prescribed).

7. *See, e.g.*, Guillory v. Dr. X, 679 So. 2d 1004, 1006 (La. Ct. App. 1996) (finding no duty to warn patient that prescriptions from various treating doctors were contraindicated).

pharmacist's actual knowledge of the danger,[8] or a voluntary assumption of a heightened duty.[9] The majority of courts, however, have rejected plaintiffs' claims that under negligence law a pharmacist has a duty to take corrective steps under such circumstances.[10]

Plaintiffs' heightened expectation of a pharmacist's duty follows the trend in personal injury litigation that favors plaintiff recovery.[11] For example, most jurisdictions have replaced the defense of contributory negligence with comparative negligence,[12] allowing plaintiffs to recover damages in spite of their own negligence.[13] Some courts have held manufacturers strictly liable for injuries their products caused to consumers, partially because of the consuming public's trust and reliance in goods marketed by sophisticated producers.[14] Injured customers, and the tort system that protects and compensates them, expect recovery from any party that could have prevented the harm, and public policy favors such recovery if it encourages the exercise of reasonable care and deters future injuries.[15]

The shift in pharmacist liability is appropriate and proportionate to the risk inherent in prescription drugs. Courts in determining the proper scope of contemporary pharmacist liability must contend with the extremely narrow, traditional concept of a pharmacist's duty, requiring clerical accuracy[16] but little else. While many courts accept this traditional standard of care and dismiss plaintiffs' claims, some apply a heightened standard.[17]

The academic response to the question of pharmacists' liability in negligence has criticized both decisions that limit liability by adopting

8. *See, e.g.*, Hand v. Krakowski, 453 N.Y.S.2d 121, 123 (App. Div. 1982) (finding a duty to warn alcoholic customer that drug was contraindicated with use of alcohol).

9. *See* Baker v. Arbor Drugs, Inc., 544 N.W.2d 727, 731 (Mich. Ct. App. 1996) (holding that a pharmacy had a duty to correctly use its computer system that was voluntarily installed and advertised as a safety measure for customers' safety).

10. *See, e.g.*, Roseann B. Termini, *The Pharmacist Duty to Warn Revisited: The Changing Role of Pharmacy in Health Care and the Resultant Impact on the Obligation of a Pharmacist to Warn*, 24 Ohio N.U. L. Rev. 551, 565 (1998) ("Courts remain reluctant to impose a legal duty on a pharmacist to provide unsolicited information to patients.") (footnote omitted).

11. *See* Marc A. Franklin & Robert L. Rabin, Tort Law and Alternatives 389 (5th ed. 1992) (noting the flood of comparative negligence legislation as part of the "growing unhappiness with the harshness of contributory negligence").

12. *See id.*

13. *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1244 (Cal. 1975) (replacing the common law defense of contributory negligence with comparative negligence).

14. *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) (observing that the consumer's "vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices").

15. *See* Bill Hotopp, Hook's SuperX, Inc. v. McLaughlin: *Pharmacists' Duty Toward Their Patients*, 6 J. Pharmacy & L. 35, 40 (1996).

16. Clerical accuracy refers to technical precision in filling the prescription. *See infra* note 23 and accompanying text.

17. *See infra* Part II.B.2.

the traditional view, and decisions that expand the scope of pharmacist liability. Commentators argue that in both situations courts have failed to properly consider the practices and customs of the industry, and instead have imposed judicially created standards in determining whether to impose liability.[18] The inconsistency stems from courts' treatment of pharmacists as ordinary negligence defendants. Were courts to recognize pharmacists as professionals, they would instead defer to the industry and relevant community to determine the applicable standard of care.[19] By doing so, pharmacists would be exposed to a consistent level of liability, which would be governed by the industry rather than by the judiciary. Recognizing pharmacists as professionals would serve to protect them from unpredictable judgments while holding them to industry standards as determined by professional negligence law.

Part I of this Note describes society's traditional view of the pharmacist as primarily a technician. This part then presents contemporary views of the pharmacist's changing role, views which rely on pharmacists' training to benefit and protect customers. Part II examines the standard of care applied to other types of professionals in malpractice suits. This part demonstrates that the procedures and privileges afforded to professionals in such suits provide consistency and fairness in finding liability. It then discusses the spectrum of liability that courts have applied to pharmacists, by contrasting jurisdictions that traditionally dismiss complaints against pharmacists with courts that either permit the trier of fact to determine the standard of care or to impose judicially created minimum standards of care. Part III argues that courts have been reluctant to expand the scope of pharmacists' responsibilities and thus their liability toward customers. Expansion of negligence liability should follow rather than precede court recognition of pharmacists as professionals. This Note concludes that by treating pharmacists as professionals for purposes of negligence suits, courts better serve the interests of both potential plaintiffs and the pharmaceutical industry.

18. *See* Jones v. Irvin, 602 F. Supp 399, 402 (S.D. Ill. 1985) (holding that a pharmacist has no duty to warn the customer or notify the physician that the customer is receiving dangerous amounts of the prescribed drug). *But see* Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 519 (Ind. 1994) (imposing a duty on a pharmacist to cease refilling prescription for customers seeking refills at an unreasonably fast rate).

19. *See infra* Part II.A.

I. THE CHANGING ROLE OF THE PHARMACIST

This part presents the traditional legal view of the pharmacist as a clerical technician, and then describes the more progressive approaches to pharmacy that acknowledge the independence of the profession and the resources it offers to patients and customers.

A. *The Traditional View of Pharmacists' Liability*

The liability of pharmacists traditionally rests on the pharmacist's responsibility to accurately fill valid prescriptions as directed by the treating physician. Under this traditional view, the pharmacist's role is predicated on the physician-patient relationship.[20] Interference with this relationship by the pharmacist is discouraged, as patients are expected to rely entirely on the prescribing physician to convey all appropriate warnings regarding drug therapy.[21] Because only the physician is familiar with the patient's medical condition, and can determine best which warnings are relevant to the patient, additional warnings by the pharmacist could confuse the customer or dissuade him from continuing the drug therapy.[22]

Viewed essentially as a technician, the traditional pharmacist focused on accuracy and efficiency in dispensing drugs.[23] A pharmacist's job was nonjudgmental, involving little discretion in fulfilling his duties.[24] In fact, the 1952 Code of Ethics for the industry expressly discouraged pharmacists from advising customers about drugs and drug therapy, even when a customer sought such information.[25] Instead, the pharmacist was advised to counsel the customer to contact the

20. *See, e.g.*, Hotopp, *supra* note 15, at 41 (charging the physician alone with the duty to prescribe, authorize and monitor drug use, and refuting any independence of the pharmacist-customer relationship from that of the physician).

21. This is the rationale behind the "learned intermediary doctrine." Originally developed as a defense for drug manufacturers, the doctrine obligates only the physician to warn patients about potential side effects associated with drug therapy. *See* Reyes v. Wyeth Lab., 498 F.2d 1264, 1276 (5th Cir. 1974); Presto v. Sandoz Pharms. Co., 487 S.E.2d 70, 73 (Ga. Ct. App. 1997).

22. *See* Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 395 (Ill. 1987) (adopting the learned-intermediary doctrine as a bar to claims against a pharmacist for failure to warn customers).

23. *See* Alison G. Myhra, *The Pharmacist's Duty to Warn in Texas*, 18 Rev. Litig. 27, 30 (1999) (discussing the "no mistakes allowed" approach of traditional pharmacy).

24. *See id.* at 34; David B. Brushwood, *The Professional Capabilities and Legal Responsibilities of Pharmacists: Should "Can" Imply "Ought"?* 44 Drake L. Rev. 439, 444-45 (1996) [hereinafter Brushwood, *Professional Capabilities*].

25. *See* Code of Ethics, 13 J. Am. Pharm. Ass'n Practical Pharmacy Ed. 722 (1952) (cited in David B. Brushwood, *The Pharmacist's Duty to Warn: Toward a Knowledge-Based Model of Professional Responsibility*, 40 Drake L. Rev. 1, 17 n.74 (1991) [hereinafter Brushwood, *Knowledge-Based Model*]).

prescribing physician.[26]

B. *The Modern Approach to Pharmacy*

Injured customers, as evidenced by litigation of the last twenty years, believe that pharmacists should play an important role in the healthcare safety net.[27] Not everyone agrees. Today, pharmacists struggle against the traditional perception that they simply move pills from one bottle to the other.[28] Many states do not even classify pharmacists as healthcare professionals.[29] Even in states that have statutes defining the practice of pharmacy, the courts apply these statutes to institutional, but not neighborhood, pharmacists.[30]

But the pharmaceutical industry is not confined to pill-counting. For example, HMOs employ pharmacists on committees that decide which drugs most effectively and efficiently treat ailments, and create "formulary" lists from which doctors can prescribe drugs for their patients.[31] Thus, pharmacists play a vital role in determining the success or failure of drugs.[32]

In the early 1990s, Congress demonstrated its recognition of pharmacists' impact on the quality of patient care by enacting legislation intended to minimize adverse drug therapy outcomes.[33] The Omnibus Budget Reconciliation Act of 1990 ("OBRA-90") requires states to take advantage of a pharmacist's unique position to promote successful drug therapy, in part by requiring pharmacists to provide better information to patients.[34] This new legislation expands pharmacy prac-

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26. *See id.*

27. *See infra* Part II.B.2.

28. *See* Paul Hochman, *The Real Power in Health Care: WHY DRUG COMPANIES FEAR AND LOATHE PHARMACISTS*, Fortune, Mar. 29, 1999, at 46.

29. *See id.* (quoting Bill Fitzpatrick, Corporate Compliance Officer at pharmacy-operator Omnicare).

30. *See* McKee v. American Home Prods., 782 P.2d 1045, 1052 (Wash. 1989). To support her claim, the plaintiff in *McKee* cited a Washington statute as evidence of a statutory duty to warn plaintiff about the dangerous propensities of prescribed drugs. *See id.* (citing Wash. Rev. Code § 18.64.011(11) (West 1989)). The statute defines the practice of pharmacy as including: monitoring of drug therapy and use; modifying drug therapy; and providing information on drugs, such as advising of therapeutic values and hazards. *See id.* at 1051-52. The court observed that the statute is definitional rather than prescriptive, and read it in conjunction with another statute that states that "monitoring drug therapy" includes measuring patient vital signs and ordering diagnostic tests. *See id.* at 1052 n.6 (citing Wash. Admin. Code § 360-12-150 (1987)). Because the court determined that the latter provision applied only to pharmacists employed in institutional settings and not to neighborhood pharmacists, it rejected the plaintiff's claim that the statute obligated the defendant-pharmacist to warn her about long-term effects of her prescription. *See id.* at 1052.

31. *See* Hochman, *supra* note 28.

32. *See id.*

33. *See* Ominbus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-151 (codified as amended at 42 U.S.C. § 1396r-8(g) (1994)).

34. *See* Tara L. Furnish, *Departing from the Traditional No Duty to Warn: A New*

tice to include an obligation to screen prescriptions, keep patient history records, and offer to discuss medications with Medicaid patients.[35] OBRA-90 obligated states to implement the programs by January 1, 1993, as a condition to receiving prescription drug reimbursement from Medicaid.[36] Though states were required to implement these programs only in regard to Medicaid patients, most states exceeded the mandate by applying the standards industry-wide.[37]

The pharmaceutical industry itself has acknowledged its ability to improve drug therapy and minimize avoidable injuries. Pharmacists now advertise their caretaker potential and invite the public to take advantage of expanded services.[38] Pharmacies such as Rite-Aid and Arbor Drugs advertise that their customers stay free from unwanted side effects because their pharmacists screen multiple prescriptions for possible contraindication.[39] An advertisement from Arbor Drugs, for example, entices customers by stating: "How can you avoid harmful drug interactions? Simple. Get your prescriptions filled at Arbor Drugs where Arbortech Plus provides your Arbor pharmacist with your complete medical history, so we're aware of any possible medication interactions."[40]

The industry's willingness to accept an expanded role in treating customers is further demonstrated by a national study on the activities of pharmacists[41] reported in the Standards of Practice.[42] Intended to

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Trend for Pharmacy Malpractice?, 21 Am. J. Trial Advoc. 199, 199 (1997).

35. *See* 42 U.S.C. § 1396r-8(g)(2)(A)(ii).

36. *See id.* § 1396r-8(g)(1)(A).

37. *See* Patient Counseling Requirements: A State-by-State Compilation of Statutory and Regulatory Provisions Enacted in Response to the Mandates of the Omnibus Budget Reconciliation Act of 1990 (National Association of Boards of Pharmacy, Chicago 1993) (cited in David B. Brushwood, *The Pharmacist's Duty Under OBRA-90 Standards*, 18 J. Legal Med. 475, 485 n.44 (1997) [hereinafter Brushwood, *Duty Under OBRA-90*]).

38. *See, e.g.*, Richard M. Eldridge & Michael F. Smith, Baker v. Arbor Drugs, Inc.: *Pharmacists Beware of Voluntarily Assuming the Duty to Protect Against Harmful Drug Interactions*, 14 J. Contemp. Health L. & Pol'y 41, 41, 50 (1997).

39. *See id.* Contraindication is a condition that makes unadvisable a particular treatment.

40. Baker v. Arbor Drugs, Inc., 544 N.W.2d 727, 731 n.1 (Mich. 1997) (providing examples of pharmacy advertisements regarding customer services). The advertisement is clearly intended to attract customers. When one considers statistics such as the 3000 independent pharmacies that went out of business over two years because of their inability to compete with larger pharmacies, these advertisements do not necessarily illustrate that all pharmacists believe that their professional purview should include checking prescriptions for interaction. *See* Eldridge & Smith, *supra* note 38, at 41 (citing Susan Headden et al., *Danger at the Drug Store*, U.S. News & World Report, Aug. 26, 1996, at 46, 49). Perhaps pharmacists feel compelled to offer such services in order to compete for customers. Nevertheless, the advertisements evidence confidence that pharmacists *can* protect customers from avoidable interactions.

41. *See* David W. Hepplewhite, *A Traditional Legal Analysis of the Roles and Duties of Pharmacists*, 44 Drake L. Rev. 519, 530 (1996).

42. *See generally* Samuel H. Kalman & John F. Schlegel, *Standards of Practice for the Profession of Pharmacy*, 19 Am. Pharmacy 22 (1979) (discussing the compilation

provide the "cornerstone" for the future of pharmacy practice, the Standards describe pharmacists' basic professional responsibilities.[43] The Standards' creators further intended to inform non-pharmacists, such as government officials, third-party payors, the public, and even other healthcare providers, about the comprehensive service of pharmacy.[44]

The Standards distinguish among the various tasks of the practice of pharmacy, requiring specific conduct for each. In cases of self-medication, for example, the pharmacist should interview and examine the patient, and in his "professional judgment" decide whether to refer the patient for further examination.[45] As part of "Patient Care Functions," a pharmacist must decide whether or not to advise the patient of potential side effects by determining whether "potential exists for a significant[46] drug interaction," and whether the benefit of explaining side effects outweighs the risk of doing so.[47] If it does, the pharmacist's task is to determine an alternative regimen,[48] and to notify the prescribing physician of his interaction with the patient.[49] These tasks are wholly antagonistic to the traditional paradigm of pharmacy, under which pharmacists were discouraged from questioning or supplanting the physician's orders.[50] This modern practice of pharmacy is institutionally independent of the practice of medicine,[51] and pharmacists are increasingly required to exercise professional judgment independent from the prescribing physicians.[52] Despite these developments in modern pharmacy practice, courts have been reluctant to acknowledge pharmacists' contemporary role in the drug-distribution system, and continue to impose a legal standard of clerical accuracy only.

The next part of this Note discusses courts' refusal to classify pharmacists as professionals for the purposes of negligence liability, thus

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of the Standards).

43. *See* Kalman & Schlegel, *supra* note 41, at 22.

44. *See id.*

45. *See id.* at Responsibility No. 8(2), (6), & (7).

46. Other industry representatives have advanced similar but possibly more stringent counseling standards, arguing that the pharmacist must warn the patient if he knows of a risk that is "reasonably foreseeable" to the patient. *See* Brushwood, *Knowledge-Based Model*, *supra* note 25, at 11-12.

47. *See Kalman & Schlegel*, *supra* note 41, § 3, at Responsibility Nos. 4 & 6(3).

48. *See id.* at Responsibility No. 4(5).

49. *See id.* at Responsibility No. 6(5). Responsibility No. 13 encourages the pharmacist to communicate alternate treatment plans to the physician after evaluating the patient's data base. The Standards also include this task as an "Activity Related to Processing the Prescription." *See id.* § 2, at Responsibility No. 3.

50. *See supra* notes 20-26 and accompanying text.

51. *See* Brushwood, *Knowledge-Based Model*, *supra* note 25, at 16 (observing that "[p]harmacists differ from most other nonphysician health care providers who act under physicians' orders, such as nurses and various therapists, because pharmacists have an independent practice not institutionally tied to the physician").

52. *See infra* Part II.B.2.

denying them legal protections afforded to other "professionals." It then examines the standards courts apply to pharmacists, from the traditional standard of clerical accuracy to more recent innovations, such as a limited-duty rule. It concludes with the academic response to these approaches.

II. PHARMACISTS' STANDARD OF CARE

The standard of care applied to professionals in malpractice law has typically not been extended to pharmacists. By failing to recognize pharmacists as professionals, courts have instead ruled on the applicable standard of care without deferring to industry practice. This part first defines the standard of care applied to professionals and then outlines the various standards of care that have been applied to pharmacists by courts. Finally, this part considers the academic response to courts' application of such standards.

A. *The "Professionals'" Standard of Care in Malpractice*

Plaintiffs in negligence actions must demonstrate that the defendant owed the plaintiff a legal duty and that the defendant's conduct (or lack thereof) breached that duty.[53] While existence of a legal duty is always predicated on the parties' relationship, in cases of malpractice, the duty arises from the employment relationship.[54] Courts measure ordinary negligence defendants against a hypothetical reasonable person in determining whether the defendant has met the appropriate standard of care.[55] Professional malpractice differs from ordinary negligence in that the standard of care is determined by the skill and diligence exercised in similar matters by other professionals of ordinary competence.[56] The standard of care applicable to professionals has been defined as follows: by accepting employment to give professional services a professional "impliedly agrees to use such skill, prudence, and diligence as [similar professionals] of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."[57]

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53. *See* W. Page Keeton et al., Prosser & Keaton on the Law of Torts § 53, at 356 (5th ed. 1984).

54. *See, e.g.*, Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering 175 (2d ed. 1994) (defining the first element of legal malpractice as "[a] duty of care arising from an attorney-client relationship or . . . some other showing . . . that a substantial purpose of the attorney-client relationship was to influence or benefit the plaintiff" (footnote omitted)).

55. *See* Oliver Wendell Homes, Jr., The Common Law 108-10 (1881) (noting that the law recognizes one standard of care owed by all, irrespective of temperament, intellect, and education); 3 Fowler Harper et al., The Law of Torts 389-90 (2d ed. 1986) (defining standard of care as conduct at least as cautious as that exercised by a reasonably prudent person).

56. *See* Hazard, *supra* note 54, at 175.

57. Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961). The *Lucas* court affirmed the

Unlike ordinary cases of negligence, in which courts determine the applicable standard of care based on the individual facts,[58] courts give greater, even exclusive, deference to industry custom in defining a professional's standard of care.[59] While the law imposes a heightened duty of care on professionals, this burden is tempered by permitting the profession to set its own standards of conduct.[60] Expert testimony is therefore required as part of plaintiff's prima facie case to demonstrate departure from the relevant professional standard of conduct.[61]

Courts' methods of defining a "professional" for purposes of malpractice is not clearly established.[62] Courts, in deciding whether to afford a vocation "professional" status, rely on many factors, including: duration of education;[63] licensing by the state in conjunction with education;[64] and independence of decision-making.[65] Modern professions are characterized by their ability to limit outside interference with the administration of the profession.[66] Commentators argue that the determinative factor that courts should consider is adherence to an ethical code above that of other occupations, because these codes operate to the benefit of the clients or customers who employ the professionals adhering to them.[67] Professional codes of conduct demonstrate an industry's concern for the welfare of its clients and bolster the profession's integrity by raising the quality of service accordingly.[68] Thus members of professions that govern their standard of practice pursuant to ethical codes should be recognized as professionals under negli-

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dismissal of a complaint alleging that a lawyer caused plaintiff to lose $75,000 of an inheritance because the lawyer misinterpreted the rule against perpetuities. *See id.* at 686-87. The court stated that "it would not be proper" to hold the defendant liable because the rule was so confusing and difficult. The lawyer could not be liable for every mistake or for erring on a judgment on which other lawyers would entertain reasonable doubt. *See id.* at 689.

58. *See* The T.J. Hooper v. Northern Barge Corp., 60 F.2d 737, 739 (2d Cir. 1932) (noting that while evidence of custom is persuasive, "there are precautions so imperative that even their universal disregard will not excuse their omission").

59. *See* Hazard, *supra* note 54, at 187.

60. *See* Robbins v. Footer, 553 F.2d 123, 126 (D.C. Cir. 1977) (defining applicable standard of care for an obstetrician).

61. *See id.*

62. *See generally* Michael J. Polelle, *Who's on First, and What's a Professional?*, 33 U.S.F. L. Rev. 205, 207 (1999) (opining that courts should preserve the privileges of professional malpractice by restricting its availability to professions that "govern themselves as fiduciaries of their clients").

63. *See, e.g.*, Pierce v. AALL Ins., 531 So. 2d 84, 87 (Fla. 1988) (finding that a "professional" may be determined by a four-year college degree).

64. *See, e.g.*, Harrell v. Lusk, 439 S.E.2d 896, 898 (Ga. 1994) (requiring plaintiff to attach expert affidavit to complaint in professional negligence action against pharmacist).

65. *See, e.g.*, Matthews v. Walker, 296 N.E.2d 569, 571-72 (Ohio Ct. App. 1973) (finding that a podiatrist has the independent-medical-discretion characteristic of a professional, but that a nurse does not).

66. *See* Polelle, *supra* note 62, at 212.

67. *See id.* at 228-29.

68. *See* Rossell v. Volkswagen of Am., 709 P.2d 517, 522 (Ariz. 1985) (en banc).

gence law and permitted to establish their own applicable legal standard of care.

B. *Approaches to Pharmacist Liability*

This section examines the various approaches courts apply to determine the liability of pharmacists. These approaches grapple with the degree of skill and knowledge courts require pharmacists to employ in conducting their business. This section then considers the scholarship on this issue, which criticizes courts' failure to articulate a clear and consistent standard of liability for pharmacists.

1. The Traditional View: Clerical Accuracy

Courts traditionally require only that pharmacists perform with clerical accuracy in filling prescriptions.[69] Clerical accuracy means that the prescription contains the intended medication free of contamination from improper storage, and that correct and complete directions are provided.[70] Accordingly, traditional pharmacist negligence claims allege that the pharmacist failed in one of four obligations: to dispense the drug prescribed;[71] to use due care in the drug's preparation; to use proper methods in the compounding[72] process; or to keep the drug free of infection from any adulterating foreign substance.[73]

This traditional approach to liability assumes several things about the role and responsibilities of the pharmacist. First, the pharmacist is neither licensed nor qualified to advise customers about their prescribed medication.[74] Second, patients rely on the skill of the physi-

69. *See, e.g.*, Alison G. Myhra, *The Pharmacist's Duty to Warn in Texas*, 18 Rev. Litig. 27, 33 (1999) (defining accuracy as the "bedrock function" of pharmacists).

70. *See, e.g.*, People's Serv. Drug Stores, Inc. v. Somerville, 158 A. 12, 13-14 (Md. 1932) (holding pharmacist to these duties only); *see also* Brushwood, *Duty Under OBRA-90*, *supra* note 37, at 475 (noting that the traditional role of the pharmacist has been limited to providing the customer with the right drug, in the proper strength, with accurate directions for use).

71. *See, e.g.*, Tremblay v. Kimball, 77 A. 405, 408-09 (Me. 1910) (affirming a jury verdict against a druggist for dispensing an incorrect drug, even though defendant argued that the mistake occurred because someone put the wrong pills in the storage unit, and that he properly filled the prescription from this source without knowing of the mistake).

72. The medical term "compounding" denotes the preparation of "[a] substance composed of two or more units or parts combined in definite proportions by weight and having specific properties of its own." Taber's Cyclopedic Medical Dictionary 430 (17th ed. 1993).

73. *See* McLeod v. W.S. Merrell Co., Div. of Richardson-Merrell, Inc., 174 So. 2d 736, 739 (Fla. 1965); *see also* Adkins v. Mong, 425 N.W.2d 151, 154 (Mich. Ct. App. 1998) (dismissing claim for failure to warn about addictive side effects); Batiste v. American Home Prods., 231 S.E.2d 269, 275 (N.C. Ct. App. 1977) (rejecting the claim that a pharmacist is liable for injuries in absence of actual knowledge of risk to customer).

74. *See Batiste*, 231 S.E.2d at 274.

cian, not the pharmacist, in deciding whether or when to take the medication.[75] Lastly, the traditional view assumes that a pharmacist cannot commit an error in the absence of an exercise of judgment.[76] Thus, a pharmacist should not use independent discretion in filling prescriptions.

The traditional scope of pharmacist liability reflects the distinction between "misfeasance" and "nonfeasance."[77] Under this distinction, customers have a right to assume that a pharmacist, in filling a prescription, exposes the customers to no new risk of injury.[78] Thus, a pharmacist who provides a drug other than that intended by the prescribing doctor clearly exposes the customer to a new risk not previously present in the prescription.[79] In these situations, courts have little difficulty in finding liability.[80] In contrast, by failing to provide a warning to customers about risks inherent in drug therapy, the druggist simply fails to benefit the customer with his knowledge. The pharmacist does not thereby place the customer in a worse position than he found him.[81] As a result, courts have typically refused to find pharmacists liable for acts of nonfeasance.[82]

Another rationale underlying the traditional paradigm is that establishing an obligation to warn compels the pharmacist to second-guess each prescription a doctor orders to escape civil liability.[83] This interference arguably violates the patient-physician relationship.[84] Because the physician is familiar with the patient's individual condition, he alone should plan the patient's therapy and determine what

75. *See id.* at 275.

76. *See* Furnish, *supra* note 34, at 199.

77. *See* Keeton et al., *supra* note 53, § 56, at 373 (noting that the term "misfeasance" characterizes a defendant's action that creates a new risk to the plaintiff, while "nonfeasance" means that he has left the plaintiff no worse off, but has only failed to benefit him by the defendant's interference).

78. *See* Burke v. Bean, 363 S.W.2d 366, 368 (Tex. Civ. App. 1962) (observing that a customer, who is generally ignorant about medicines, rightfully relies on the druggist, who holds himself out as having the particular knowledge, skill, and license to fill prescriptions).

79. *See, e.g.*, Taugher v. Ling, 187 N.E. 19, 21 (Ohio 1933) (recognizing the common law liability of a druggist who, in error, sells a harmful drug in place of the one a physician prescribed).

80. *See, e.g.*, Tremblay v. Kimball, 77 A. 405, 409 (Me. 1910) (holding a pharmacist who supplied a drug different than that prescribed liable).

81. Actions based on nonfeasance have typically required some special relationship between the parties, not merely a claim that the defendant could have, but did not, take action to protect the plaintiff from an injury foreseeable to defendant. *See* Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993).

82. *See infra* notes 90-117 and accompanying text.

83. *See, e.g.*, Jones v. Irvin, 602 F. Supp. 399, 402 (S.D. Ill. 1985) (rejecting plaintiff's claim that common law imposed a duty to warn customers about prescriptions in excessive amounts, dosages, or possible contraindications).

84. *See* Batiste v. American Home Prods., 231 S.E.2d 269, 274 (N.C. Ct. App. 1977).

potential side effects are relevant concerns for a particular patient.[85] Thus a general warning, issued by the pharmacist and possibly irrelevant to a specific customer, could confuse the customer and lead him to doubt his physician's choice in therapy.

In jurisdictions applying traditional liability, claims alleging that a pharmacist owes a duty proactively to take corrective measures are simply dismissed.[86] In North Carolina, for example, a complaint must allege a failure in one of the four traditional obligations of pharmacy.[87] Thus, in *Batiste v. American Home Products*, the plaintiff could not proceed on the allegation that her pharmacist failed to warn her about the many risks attendant to the use of an oral contraceptive drug.[88]

Florida's rule, set forth in *Pysz v. Henry's Drug Store*,[89] exemplifies the traditional view:

> [A] supplier of drugs has no duty to fail or refuse to supply a customer with drugs for which the customer has a valid and lawful prescription from a licensed physician, nor any duty to warn said customer of the fact that one using the prescribed drug for any period of time could or would become addicted to the use thereof... even though the supplier of such drugs was aware of the fact that the customer had developed a physical and psychological dependence and addiction to the prescribed drugs.[90]

The court rejected the opportunity to reexamine the pharmacist's duty to warn, finding that only the physician has the obligation to know the drug and properly monitor the patient's therapy.[91]

Similarly, in *Jones v. Irvin*,[92] the court held that Illinois negligence law does not impose upon the pharmacist a duty to warn the customer, or to notify the physician, that the drug is being prescribed in

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85. *See* Eldridge v. Eli Lilly & Co., 485 N.E.2d 551, 552-53 (Ill. App. Ct. 1985).

86. *See, e.g., Jones*, 602 F. Supp. 399, at 402 (holding that a pharmacist has no duty to warn a customer of dangerous medications); Pysz v. Henry's Drug Store, 457 So. 2d 561 (Fla. Dist. Ct. 1984) (finding that pharmacist's failure to warn patient of addictive propensities of drug did not constitute negligence); *Batiste*, 231 S.E.2d at 269 (holding that a pharmacist is neither qualified nor licensed to advise customer).

87. *See supra* notes 71, 73 and accompanying text.

88. 231 S.E.2d 269, 274 (N.C. Ct. App. 1977).

89. 457 So. 2d 561 (Fla. Dist. Ct. App. 1984).

90. *Id.* at 561-62. The appellate court affirmed the trial court's dismissal of the claim despite serious factual allegations. *See id.* at 561. Steve Pysz received prescribed Quaaludes for over nine years from the same pharmacist. *See id.* He claimed that the defendant-pharmacist should have warned him of the addictive propensities of the drug because defendant knew that using the drug for such a period of time would result in addiction. *See id.* He further alleged that the defendant in fact knew that he had become addicted to the drug and continued to fill the prescription without taking any corrective measures. *See id.* On appeal, Pysz argued that the trial court erred by ignoring how drastically the pharmaceutical business had changed in the preceding twenty years and that a pharmacist has greater knowledge than the physician of the dangerous propensities of drugs. *See id.* at 562.

91. *See id.*

92. 602 F. Supp 399, 402-03 (S.D. Ill. 1985).

dangerous amounts, that the customer is over-medicated, or that the various drugs in their prescribed quantities could cause adverse reactions.[93] In reaching its decision, the court examined precedent from the past fifty years, and concluded that the "overwhelming majority of recent state cases" imposed no duty to warn the customer.[94] The court thus adopted the reasoning of the majority of courts in announcing the respective duties of pharmacists, physicians, and even of patients.[95] In addition, the court held that it is the physician's duty to know the characteristics of the drug and the quantity to prescribe, and to monitor the patient's dependence on the drug.[96] The physician must also elicit from the patient any other drugs the patient is taking, and the patient has a duty to notify the physician of such usage.[97] Finally, the physician must warn the patient about potential dangers associated with taking the drug.[98] Imposing a duty to warn, the court reasoned, would compel pharmacists to second-guess each prescription they were asked to fill in order to escape liability.[99]

The *Jones* court considered a handful of cases that had imposed liability on pharmacists and distinguished them from the complaint of the plaintiff, Carole Jones.[100] Jones had not alleged that the defendant was familiar with her drug history,[101] that the pharmacist recommended use of a nonprescription drug in conjunction with other drugs,[102] or that the pharmacist had provided a drug other than one the physician intended.[103] The court agreed that a pharmacist owes the "'highest degree of prudence, thoughtfulness, and diligence,'" but

93. *See id.* at 400 (dismissing claim of personal injuries and loss of consortium as a result of excessive drug consumption). Georgia also adopted this rule in *Walker v. Jack Eckerd Corp.*, 434 S.E.2d 63, 67 (Ga. Ct. App. 1993). The *Walker* court observed that Georgia's common law does not recognize malpractice in the absence of a physician-patient relationship. *See id.* at 69.

94. *Jones*, 602 F. Supp. at 401 (citing Pysz v. Henry's Drug Store, 457 So. 2d 561 (Fla. Dist. Ct. App. 1984)).

95. *See id.* at 401-02.

96. *See id.* at 402.

97. *See id.*

98. *See id.* The court also addressed the duty of the drug manufacturer, which is satisfied when the manufacturer notifies the physician of potential side effects or precautions associated with the drug's use. *See id.*

99. *See id.*

100. *See id.* at 401-03.

101. *See id.* at 400. *But see* Hand v. Krakowski, 453 N.Y.S.2d 121, 123 (App. Div. 1982) (holding that a druggist may be liable for failing to warn a customer of the possible side effects from mixing a drug with alcohol when the druggist knows that the customer is an alcoholic).

102. *See Jones*, 602 F. Supp. at 400. *But see* Fuhs v. Barber, 36 P.2d 962, 964 (Kan. 1934) (finding a duty to warn a customer of side effects from mixing prescription and nonprescription drugs when the druggist recommended use of the nonprescription drug).

103. *See Jones*, 602 F. Supp. at 400. *But see* Jones v. Walgreen Co., 265 Ill. App. 308, 321-22 (1932) (holding a pharmacist liable for filling a prescription with a drug other than the one prescribed because he could not read the prescription).

concluded as a matter of law that the defendant had satisfied this duty by correctly filling a valid prescription.[104] Under *Jones*, the pharmacist's only clear obligation is clerical accuracy.[105]

The clerical accuracy standard requires precision in all respects in filling a prescription, and this requirement of accuracy applies even when the pharmacist undertakes more than traditional obligations.[106] Thus, if a pharmacist warns his customer about potential side effects, or uses a computer to avoid dangerous drug interactions, he has an obligation to do so accurately.[107] However, this expanded duty applies only to the particular service provided. In *Frye v. Medicare-Glaser Corp.*,[108] the court refused to expand the scope of the pharmacist's duty to warn because, as a practical matter, the pharmacist could not warn against all possible side effects without overwhelming the customer.[109] Imposition of such a duty would violate public policy because pharmacists would likely provide no warnings at all on labels.[110] Under the *Frye* rule, a pharmacist has the option to inform a customer about side effects that are common to the drug and generally inconsequential, such as drowsiness, so long as the warnings are accurate.[111]

Plaintiffs alleging that pharmacists have a duty to take corrective measures other than warning customers about side effects have met with similar results under the traditional view. The court in *Eldridge*

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104. *See Jones*, 602 F. Supp. at 402-03 (quoting *Jones*, 265 Ill. App. at 315).

105. The court noted that had Ms. Jones alleged that the pharmacist was negligent in filling the prescription by using the wrong drug, or by giving the wrong directions, she clearly would have had a claim. *See id.* at 400. The court stated that its holding was limited to the facts of the case, which did not include "side reactions, over dependence, misuse, or restrictions on use, associated with non-prescribed drugs he dispenses." *See id.* at 403.

106. *See supra* note 23 and accompanying text.

107. *See, e.g.*, Frye v. Medicare-Glaser Corp., 605 N.E.2d 557, 560 (Ill. 1992) (holding that a pharmacist's duty to warn must comport with the level of services he voluntarily undertakes to provide); Baker v. Arbor Drugs, Inc., 544 N.W.2d 727, 731 (Mich. Ct. App. 1996) (finding that a pharmacist who uses computer technology to warn customers voluntarily assumes a duty of care to do so without error).

108. 605 N.E.2d 557 (Ill. 1992).

109. *See id.* at 560-61. The plaintiff in *Frye* claimed that the pharmacist should have warned his customer about the dangerous interaction between Fiorinal, the drug prescribed, and alcohol consumption. The interaction between them caused the customer's death. *See id.* at 558.

110. *See id.* at 560. The defendant pharmacy had a computer program that provided general warnings about the drugs dispensed, and in this case, the computer did issue a warning about alcohol consumption. *See id.* at 558-59. The pharmacist testified that she purposefully omitted the warning from the label because "it offended so many people that [she] would think that they might drink." *Id.* at 559. Thus, the pharmacist had discretion as to what warnings to include or omit. *See id.*

111. *See id.* at 560-61 (stating that if the defendant had instead given a completely inaccurate warning, and had the customer followed the instruction, the pharmacist would be liable for the customer's injury resulting from his negligent voluntary undertaking). The court noted that potential warnings for use of the drug included everything from flatulence to adverse effects during pregnancy. Therefore, customers should rely on the prescribing physician for appropriate warnings. *See id.* at 561.

v. Eli Lilly & Co.[112] held that a pharmacist has no common law duty to take corrective action for prescriptions of excessive quantities.[113] The plaintiff asserted that because the pharmacist has greater knowledge than the physician of the propensities of drugs, the pharmacist should be under a duty to act as a "safety supervisor" to monitor prescriptions.[114] The court disagreed, opining that imposition of a duty to correct would cause the pharmacist to inject himself into the physician-patient relationship, requiring that he familiarize himself with the patient's condition and practice medicine without a license.[115] The court observed that the appropriate drug dosage is personal to each patient and his condition; what is excessive for one patient may be reasonable for another.[116] Acknowledging the existence of a risk to the customer, but precluding the opportunity for a jury finding of negligence, the court determined that the customer was entitled neither to the benefit nor consequence of the pharmacist's judgment, but only to that of the physician.[117]

The clerical-accuracy standard has thus functioned to preclude injured plaintiffs from recovery in situations in which a pharmacist could have prevented the harm. At the same time, it has sheltered pharmacists from liability and lowered the bar on their professional duties and the public's expectations.

2. Alternative Approaches to Pharmacist Liability

Many courts now recognize that pharmacists owe a greater duty of care than simply clerical accuracy. New approaches to pharmacists' liability assert that pharmacists must apply their skill and knowledge to prevent unnecessary injury to customers. Courts examining the legal duties of a pharmacist focus on the relationship between the pharmacist and customer, the foreseeablility of injury, and public policy issues.[118] The policy concerns that courts weigh are preservation of the physician-patient relationship, prevention of drug related injuries,

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112. 485 N.E.2d 551 (Ill. App. Ct. 1985).

113. *See id.* at 554-55. The court dismissed the plaintiff's claim that Brown Drug & Company negligently filled a prescription for Darvon, from which the decedent overdosed. *See id.* at 552, 555. The plaintiff argued that the pharmacist should have warned the physician that the prescription presented a risk to his patient or refused to fill the prescription. *See id.* at 552.

114. *See id.* at 553.

115. *See id.*

116. *See id.*

117. *See id.* at 552-53.

118. *See, e.g.*, Jones v. Irvin, 602 F. Supp. 399, 402 (S.D. Ill. 1985) (noting the importance of preserving the patient-physician relationship from interference by the pharmacist); Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 517-18 (Ind. 1994) (holding that imposition of a duty to refuse to fill a valid prescription is warranted because the pharmacist-customer relationship already gives rise to a duty, the injury was foreseeable, and public policy favors corrective action that prevents drug abuse).

and avoidance of unnecessary costs.[119] Application of expanded liability arises from courts' recognition that intervention by pharmacists, particularly in situations in which a prescription contains an obvious error, may prevent injuries, and that this measure of protection outweighs other policy concerns, such as preserving the physician-patient relationship.[120]

Courts have adopted different approaches to redefining pharmacists' standard of care. In some jurisdictions, courts have taken a very active role in establishing the appropriate standard of care for purposes of civil litigation.[121] For example, courts have affirmed a jury verdict against a pharmacist who correctly filled a valid prescription,[122] and imposed an affirmative obligation on a pharmacist to refuse to fill a prescription for addictive drugs for a patient seeking excessive refills.[123] Other jurisdictions have refused to rule on the appropriate standard of care, rendering it a factual question for jury determination.[124]

a. *The Limited-Duty Rule*

Jurisdictions adopting a "limited-duty" rule require that pharmacists be alert for patent inadequacies that appear on the face of prescriptions.[125] Such errors can include an obviously excessive or lethal dose, inadequate directions, and known contraindications.[126]

Pennsylvania adopted a limited-duty rule in *Riff v. Morgan Pharmacy*,[127] the first case ever to affirm a verdict against a pharmacist for filling a valid prescription. The court imposed a duty on pharmacists to take corrective measures when presented with an obviously inadequate prescription, if filling the prescription would create a substantial

119. *See Jones*, 602 F. Supp. at 402; *Hooks*, 642 N.E.2d at 518.

120. *See Hooks*, 642 N.E.2d at 517-18.

121. *See id.* at 519.

122. *See* Riff v. Morgan Pharmacy, 508 A.2d 1247, 1248 (Pa. Super. Ct. 1986) (holding a pharmacist liable for dispensing a dangerous prescription drug with incomplete directions); *infra* Part II.B.2.a.

123. *See Hooks*, 642 N.E.2d at 519; *infra* Part II.B.2.b.

124. *See* Lasley v. Shrake's Country Club Pharmacy, Inc., 880 P.2d 1129, 1130 (Ariz. Ct. App. 1994); Dooley v. Everett, 805 S.W.2d 380, 386 (Tenn. Ct. App. 1990); *infra* Part II.B.2.c.

125. *See, e.g.*, *Riff*, 508 A.2d at 1248 (holding a pharmacist liable for dispensing a medication with incomplete directions); McKee v. American Home Prods., 782 P.2d 1045, 1052 (Wash. 1989) (en banc) (observing that a pharmacist has a duty to be alert for, and to take corrective measures to prevent, patent errors in a prescription).

126. *See McKee*, 782 P.2d at 1053. The plaintiff in *McKee* did not allege that she was injured by a prescription containing such a patent error and the court decided against her summarily. *See id.* at 1055-56. The *McKee* court nevertheless used the case to set the rule in Washington that a pharmacist has a duty to protect his customers from patent errors. *See id.* at 1053.

127. 508 A.2d 1247 (Pa. Super Ct. 1986).

risk of serious harm to the customer.[128] The court held that the pharmacist's failure to take corrective measures in the face of inadequate directions—either by refusing to refill or to verify the prescription with the physician—was negligent, and the proximate cause of the customer's injury.[129] Accordingly, the pharmacist should have recognized the erroneous omission in the directions and the serious threat of over-use, and should have taken corrective action.[130] The court's holding, however, requires only a minimal exercise of judgment by the pharmacist, because the error must be objectively obvious, and limits the scope of liability by imposing a gravity-of-harm element.[131] By allowing the plaintiff to introduce evidence of industry practice, the court deferred to the judgment of the pharmaceutical community to expand the scope of a pharmacist's responsibilities.[132]

Subsequent courts have announced a limited-duty rule in pharmacist liability cases without actually finding that the defendant's conduct violated the standard of care. In *McKee v. American Home Products*,[133] a Washington court refused to expand pharmacist liability by creating a common law duty to warn customers about potential side effects.[134] The court did, however, state that at a minimum, a pharmacist has a duty to be alert for patent errors in a prescription, and to take corrective measures if necessary.[135] Such errors include: "obvious lethal dosages, inadequacies in the instructions, known contraindications, or incompatible prescriptions."[136] The court affirmed the defendant's summary judgment because the complaint did not allege that the pharmacist filled a prescription containing a patent error[137]

Louisiana adopted a limited-duty rule in *Gassen v. East Jefferson General Hospital*,[138] and subsequently reaffirmed its position in *Guil-*

128. *See Riff*, 508 A.2d at 1252. The plaintiff suffered serious and permanent leg injuries from over-use of a migraine suppository prescription. *See id.* at 1249. The physician and pharmacist provided inadequate directions because they did not alert plaintiff to the safe maximum dose. *See id.* at 1252-53.

129. *See id.* at 1252.

130. *See id.*

131. *See id.* at 1250-51

132. *See id.* at 1253-54 ("If the consensus of the medical community is that a safety net of overlapping responsibilities is necessary to serve the best interests of patients, it is not for the judiciary to dismantle the safety net and leave patients at the peril of one man's human frailty.").

133. 782 P.2d 1045 (Wash. 1989) (en banc).

134. *See id.* at 1055-56.

135. *See id.* at 1053.

136. *Id.* (emphasis in original) (footnotes omitted).

137. *See id.* at 1056. Elaine McKee alleged that her pharmacist had a duty to warn her about the adverse side effects of long-term use of a prescription drug when that pharmacist filled the prescription for ten years. *See id.* at 1046.

138. 628 So. 2d 256 (La. Ct. App. 1993) (holding that "a pharmacist has a limited duty to inquire or verify from the prescribing physician clear errors or mistakes in the prescription").

lory v. Dr. X.[139] The *Guillory* court held that, in addition to an obligation of accuracy, a pharmacist has a duty to warn the patient or to notify the physician if the prescription calls for an excessive dosage or has an obvious error on its face that presents a substantial risk of harm to the patient.[140] The court nevertheless affirmed summary judgment for the defendant-pharmacist.[141]

A limited-duty rule provides plaintiffs with some measure of protection by requiring a pharmacist's vigilance, but it fails to acknowledge the full potential of a pharmacist to analyze potential dangers present in prescriptions.

b. *A Judicially Created Minimum Standard of Care*

The Supreme Court of Indiana created a common law minimum standard of care for pharmacists in *Hooks SuperX, Inc. v. McLaughlin*[142] by holding that a pharmacist may be legally obligated to refuse to fill a validly issued prescription.[143] The *Hooks* court determined the duty of a pharmacist under ordinary negligence standards, examining the relationship between the parties, the foreseeability of the injury, and public policy.[144] It noted that the relationship between a pharmacist and customer gives rise to a duty to correctly fill the prescription.[145] The court justified its finding based on a customer's expectation that her pharmacist has expertise upon which she can rely.[146] It also observed that the relationship between a pharmacist and customer exists independently of the physician-patient relationship.[147]

The *Hooks* court relied on the foreseeability of the injury to determine that a person who consumes addictive drugs will become addicted.[148] It also considered the public policy concerns of deterring drug abuse and avoiding unnecessary health costs.[149] The court concluded that the possibility that pharmacists could prevent drug addiction simply by exercising their professional judgment outweighed con-

139. 679 So. 2d 1004, 1010 (La. Ct. App. 1996).
140. *See id.*
141. *See id.* Ms. Guillory's complaint alleged that the defendant provided her deceased husband with dangerous quantities and combinations of drugs, but not that the prescription contained excessive dosages or obvious errors. *See id.*
142. 642 N.E.2d 514 (Ind. 1994).
143. *See id.* at 518. Plaintiff McLaughlin became addicted to propoxyphene, the active chemical in Darvocet, after taking the drug for more than five years. *See id.* at 516. He was treated for addiction three times during that period and finally attempted suicide. *See id.* McLaughlin, his wife, and family sued the pharmacy for injuries resulting from the attempt, alleging that the pharmacist should not have continued to fill the prescription. *See id.*
144. *See id.* at 517-18.
145. *See id.* at 517.
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.* at 518.

cerns regarding interference in the doctor-patient relationship.[150] In regard to increased costs, the court noted only that most pharmacists, including the defendant, already use computer systems that can protect their customers against harmful interactions.[151] Therefore, the court found an extension of a duty to refuse to fill addictive drugs to patients seeking excessive refills did not increase the cost of providing medications.[152]

Turning to the question of the appropriate standard of care, the *Hooks* court applied traditional negligence standards and held that a pharmacist "must exercise that degree of care that an ordinarily prudent pharmacist would under the same or similar circumstances."[153] In finding that the defendant-pharmacist breached the standard of care, the court relied on the frequency of the customer's refills, the addictive nature of the drug dispensed, and the pharmacist's ability to access the patient's history.[154]

By holding that a pharmacist has a duty to refuse to fill a valid prescription under these circumstances, *Hooks* imposed on pharmacists an obligation to monitor their customers' addiction—an obligation that has traditionally rested with physicians. The holding thus acknowledges pharmacists' ability to use their professional judgment to benefit their customers. The court did not, however, afford the defendant-pharmacist the legal protections afforded to other professionals, such as deferring to a standard set by expert testimony.

3. The Academic Response

Academics have criticized courts for failing to create or to establish precedent that recognizes a broadened duty of care for pharmacists.[155] Academics consistently chastise courts for their unwillingness to acknowledge the skill and expertise possessed by pharmacists.[156] This refusal results in a failure to acknowledge the potential role in patient care that pharmacists can, and often do, play. Most commentators posit that courts must eventually accept and apply a higher standard of care, though scholars disagree on whether that time has come, and what that standard should entail.[157]

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150. *See id.* at 519.
151. *See id.*
152. *See id.*
153. *Id.*
154. *See id.*
155. *See, e.g.*, Brushwood, *Knowledge-Based Model*, *supra* note 25, at 4 (presenting four articles that criticize judicial reluctance to expand pharmacists' duties, in spite of his own assertion that "legal developments should reflect changes in professional practice, not create them").
156. *See, e.g.*, Myhra, *supra* note 23, at 82 (opining that "the common law has been slow to recognize the expertise of pharmacists").
157. *Compare* Brushwood, *Duty Under OBRA-90*, *supra* note 37, at 509 (recommending that courts consider the federal OBRA-90 as a minimum standard of phar-

Some academics have suggested an approach to the expanded role of the modern pharmacist that conflicts with basic tort principles. This proposed standard for the pharmacist's "new duty" uses capacity to determine responsibility.[158] Under this view, pharmacists, by employing their knowledge and professional judgment to do whatever is reasonably possible to prevent drug-related injury, meet customers' expectations that risks associated with drug therapy "will be minimized whenever possible."[159] Accordingly, commentators argue that courts should adopt the standard of pharmacy practice enacted by Congress in OBRA-90 as the minimal industry standard in determining whether to hold pharmacists accused of negligence liable.[160] This adoption would create an industry-wide obligation to screen prescriptions, to maintain patient records, and to offer to counsel patients about prescriptions.[161]

Presumably, in applying the OBRA-90 standards, courts would impose a common law obligation that mirrors the federal statutory requirements. Courts would thus hold pharmacists liable upon a showing that they have failed to screen, or offer to educate, a customer about a particular prescription.[162] The main proponent of this approach identifies OBRA-90 as a source of authority for pharmacists to use in capitalizing on their "emerging ability," and claims that it has "empowered pharmacists to use their full potential as health care professionals."[163] This commentator does not identify what prior restraints prevented pharmacists from voluntarily expanding their responsibilities—though this reluctance may have been due to the threat of negligence exposure, or by impracticability.[164]

The flaw in this approach is that it would apply to pharmacists a

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macy practice for purposes of negligence actions, but opining that the documentation requirement is unrealistic because pharmacists currently lack the technological support to create and maintain comprehensive medical records) *and* Brushwood, *Knowledge-Based Model*, *supra* note 25, at 60 (observing that some day pharmacists will practice without being limited by physician predominance, but "that day has not yet arrived"); *with* Myhra, *supra* note 23, at 33, 83 (suggesting that current state and federal statutes may compel Texas courts to apply a standard of care that includes an obligation to warn customers about potential risks associated with drug therapy).

158. *See* Brushwood, *Professional Capabilities*, *supra* note 24, at 448.

159. *See id.*

160. *See* Brushwood, *Duty under OBRA-90*, *supra* note 37, at 476.

161. *See* 42 U.S.C. § 1396r-8(g) (1994); Brushwood, *Duty under OBRA-90*, *supra* note 37, at 476.

162. *See* Brushwood, *Duty under OBRA-90*, *supra* note 37, at 485-86. The main proponent of this approach does not encourage courts to impose a requirement with respect to documentation of patient records, as he observes that this standard does "not yet reflect the reality of the contemporary pharmacy workplace." *Id.* at 509.

163. *See id.* at 485.

164. *See* Sheryl Gay Stolberg, *The Boom in Medications Brings Rise in Fatal Risks*, N.Y. Times, June 3, 1999, at A1 (observing that mistakes in the practice of pharmacy occur because pharmacists are extremely overworked, as their profits depend on the quantity of prescriptions dispensed).

standard of care created by the legislature, rather than a standard created by the industry itself. The next part argues that contrary to judicially created standards of care, or standards created by the legislature or presented by legal critics, courts should instead hold pharmacists to a professional's standard of care and defer to the pharmaceutical industry to determine what conduct breaches that standard.

III. THE PHARMACEUTICAL INDUSTRY'S OWN STANDARD OF CARE

This part argues that courts should treat pharmacists as professionals in negligence cases, thus permitting them to employ their professional judgment to benefit their customers without exposing themselves to the harsh uncertainty of judicially created standards of care. By permitting pharmacists to be judged according to industry-established standards, courts can move beyond their traditional paternalism and acknowledge the active role pharmacists play in-patient care.

No one refutes that pharmacists owe a duty of reasonable care to their customers. The existence of a legal duty by a pharmacist or any other actor does not depend solely on the alleged conduct in a particular controversy, but rather on the relationship between the parties.[165] As Prosser explains, in negligence cases the duty owed is always the same—to comply with the standard of conduct reasonable in proportion to the apparent risk of injury.[166] The conduct that satisfies this duty is a factual question,[167] and should be determined by the trier of fact. Were courts to treat pharmacists as professionals, the answer to this factual question would derive from industry standards that reflect the degree of care practiced by pharmacists generally.[168]

Judge Learned Hand created a formula for ordinary negligence cases to aid juries in determining what conduct constitutes negligence:[169] the probability of injury, multiplied by the gravity of that injury, is greater than the burden of preventing the injury, then the defendant assumes the burden of taking steps to prevent injury and will be liable if the plaintiff is injured.[170] Judge Hand's formula is relevant by example to demonstrate the analysis that pharmacists might make if the law permitted them to establish their own standard of conduct. It recognizes that personal choice will effect the perceived importance of each factor when weighing predictability, gravity of harm and burden of prevention against one another. Thus, the formula is best ap-

165. *See, e.g.*, Keeton et al., *supra* note 53, at 356 (defining "duty" in terms of "the relation between individuals which imposes upon one a legal obligation for the benefit of the other," and specifically, to a *particular* plaintiff).

166. *See id.*

167. *See id.*

168. *See* Polelle, *supra* note 62, at 206 & nn. 6-7.

169. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

170. *See id.*

plied by the members of a jury, not by the court, because preferences weighed by the jury members will reflect commonly accepted standards.[171] If the balance between these variables clearly establishes that the defendant bears the burden of avoiding the injury, however, the court may impose liability through summary judgment.[172]

In the context of pharmacist liability, the proper inquiry is whether that risk of injury outweighs the potential dangers of taking corrective action, not whether the risk and gravity of harm outweigh the burden on the defendant. For example, if presented with a prescription for a poison, a pharmacist may have an obligation to verify the prescription with the physician.[173] Imposing such a risk-benefit analysis requires the pharmacist to exercise judgment, and cannot be reconciled with the traditional role of pharmacists.[174]

Pharmacists cannot even err on the side of safety. If they affirmatively accept suggested and expansive responsibilities, and give their customers every benefit of their skill and unique position in the healthcare field, they actually expose themselves to a greater risk of liability than does a neighbor-pharmacist practicing according to the traditional paradigm.[175] Whereas the traditional pharmacist may be liable only for mistakes in filling prescriptions, and perhaps for failing to act, proactive pharmacists incur an obligation to use reasonable care in all aspects of their practice, and will be liable for injuries they caused. Thus, they increase their own exposure to liability, and unnecessarily so: if pharmacists' negligence liability reflected industry practice, all pharmacists would be held to identical standards.[176]

A minority of jurisdictions refuse to hold pharmacists to a judicially created standard of care because doing so would confuse the concepts of "duty" and "standard of care."[177] The court in *Lasley v. Shrake's Country Club Pharmacy*[178] held that pharmacists have a duty to conform their conduct to that of reasonable pharmacists in similar circumstances.[179] The court recognized that pharmacists, as profession-

171. *See* Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

172. *See Carroll Towing*, 159 F.2d at 171.

173. *See* People's Serv. Drug Stores, Inc. v. Somerville, 158 A. 12, 14 (Md. 1932). This decision, however, warns against the possible injury a pharmacist could cause to multiple customers if he refused to fill prescriptions calling for "unusual remedies." *Id.* at 13.

174. For a discussion of the traditional role of pharmacists' liability, see *supra* notes 20-26 and accompanying text.

175. *See supra* notes 20-26.

176. The similarity of the standards applied would be limited by the locality rule, which requires that the testimony used to determine a professional's standard of care come from an expert practicing in the same region. *See* Polelle, *supra* note 62, at 206.

177. *See* Lasley v. Shrake's Country Club Pharmacy, Inc., 880 P.2d 1129, 1132 (Ariz. Ct. App. 1994); Dooley v. Everett, 805 S.W.2d 380, 384 (Tenn. Ct. App. 1990).

178. 880 P.2d 1129 (Ariz. Ct. App. 1994).

179. *See id.* at 1132-34. The plaintiff alleged that the pharmacist owed him a duty to warn either the customer or his physician about the dangers of long-term use of the prescribed drug in combination with other drugs. *See id.* at 1131.

als, must be held to a higher standard of care than defendants in ordinary negligence actions.[180] Because expert testimony is required to determine the applicable standard in professional negligence actions, summary judgment is precluded in the absence of such testimony.[181]

Contrary to *Lasley*, which acknowledged that both the industry and the public benefit by judicial characterization of pharmacists as professionals, courts typically create a shield of liability for pharmacists to act below an appropriate standard of care by limiting findings to case-by-case analyses. Such holdings thus fail to deter preventable harm to pharmacy customers. This has the paradoxical effect of protecting pharmacists from legal liability but refusing to acknowledge their skill and acumen in administering to patients. Courts can end the confusion surrounding pharmacists' standard of care in negligence law by accepting pharmacists as professionals, and by allowing claims against them to proceed as any other malpractice claim. This approach would permit the fact-finder to evaluate the relevant standard of care based on expert testimony regarding industry practice, and to determine whether that standard has been met.[182] Holding pharmacists to a standard of "professional" negligence will end judicial paternalism toward pharmacists and their responsibilities toward patients. At the same time, courts would expand protections for the drug-consuming public.

CONCLUSION

The public and the healthcare industry alike would be best served by a judiciary that reflects and perceives changes in professions such as pharmacy, which has expanded its role in patients' healthcare beyond the confines of traditional pill-counting and distribution. Pharmacists have demonstrated their ability to use professional judgment, independent of prescribing physicians, to protect customers from avoidable drug-related injuries. They have further demonstrated their willingness to govern the integrity of the industry by creating and following Standards of Practice[183] that describe the industry's obligation to its clients. By deferring to the profession to govern its appropriate standard of practice, courts would encourage pharmacists, and other professionals, to strive for standards of care most beneficial to the public.

180. *See id.* at 1132.

181. *See id.* The court reversed the trial court's award of summary judgment to the defendant, noting that the trial court improperly refused to consider excerpts from the American Pharmaceutical Association Standards of Practice. *See id.* at 1134.

182. *See supra* Part II.

183. *See* Kalman & Schlegel, *supra* note 41.