Are Pharmacists Responsible for Physicians' Prescription Errors?

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Abstract: In McKee v. American Home Products, the Washington Supreme Court held that pharmacists' duties do not include contacting physicians who make judgment errors when prescribing medication. When physicians make obvious errors, however, juries decide whether pharmacists should contact physicians. This Note examines McKee and proposes that either juries should determine pharmacists' duties in all cases or, alternatively, the legislature should require pharmacists to contact physicians whenever prescriptions as issued could harm patients.

For ten years, Elaine McKee's pharmacists filled her prescriptions for a drug that she should have taken for no more than a few weeks. During those ten years, McKee's pharmacists neither informed her physician that refilling the prescription was harmful nor warned McKee of potential health dangers. When McKee was injured by long-term use of the drug, she sued her pharmacists, alleging they were negligent for failing to inform either her or her physician of the prescription error. The superior court granted summary judgment for the defendant pharmacists.

On direct appeal, the Washington Supreme Court affirmed the grant of summary judgment. The court held that McKee's pharmacists were not responsible for detecting the error or contacting her physician. The court distinguished between “judgment” errors and “obvious” errors and determined that McKee's physician had made a judgment error. Thus, McKee's pharmacists could fill the prescription as issued without first notifying her physician. According to the McKee court, juries determine whether the pharmacist should have contacted the physician in cases involving obvious errors.

This Note critically examines the Washington Supreme Court’s holding in McKee. It reviews pharmacists' duties in Washington and other jurisdictions and the Washington Supreme Court’s traditional protection of public safety. Next, it analyzes the McKee opinion and criticizes the court’s analysis on three independent grounds. First, the

2. Id. at 704, 714, 782 P.2d at 1047, 1052.
3. Id. at 704, 714, 782 P.2d at 1047, 1052.
4. Id. at 705, 782 P.2d at 1047.
5. Id. at 707, 782 P.2d at 1047-48.
6. Id. at 720, 782 P.2d at 1055-56.
7. Id. at 715-16, 782 P.2d at 1053.
8. Id. at 716, 782 P.2d at 1053.
9. See id. at 715, 782 P.2d at 1053.
majority’s rule creates a distinction that is arbitrary, unpredictable, and inconsistent with current legislation. Second, if the distinction between error types is significant, juries, not courts, should classify errors. Third, court determination of pharmacists’ duty of care via a distinction of error types is inconsistent with Washington statutes. This Note therefore concludes that in each case a jury should determine the scope and content of a pharmacist’s duties. Alternatively, the Washington legislature in response to McKee could amend statutes to require that pharmacists contact physicians whenever pharmacists are aware that prescriptions as issued could harm patients.

I. PHARMACISTS’ DUTIES: STATUTORY AND PUBLIC POLICY CONSIDERATIONS

Washington law requires pharmacists to maintain and review records of prescriptions filled. As health care providers, pharmacists are statutorily required to exercise the care society expects of reasonably prudent members of their profession. Prior Washington Supreme Court decisions evidence an intent to protect consumers from potentially harmful goods and services by expanding the liability of their suppliers. In contradiction to applicable precedent, the court in McKee greatly limited pharmacists’ duty of care. Courts of other jurisdictions, however, take a wide range of approaches to pharmacists’ responsibility for harmful prescriptions.

A. Pharmacists’ Statutory Duties

1. Procedural Duties

Presently, Washington statutes and administrative regulations impose three types of procedural duties on pharmacists. First, pharmacists must maintain detailed prescription records for at least two years on every prescription filled. These records must include: the date, name, drug strength, dosage form, and quantity of drugs dispensed; refill instructions; prescribing physicians’ names and addresses; and patients’ allergies, idiosyncrasies, and chronic conditions relating to drug use. Second, pharmacists must review these records for possible drug interactions, reactions, or therapeutic duplications, monitor for improper drug use, and consult with prescribing physicians. Third, pharmacists must contact physicians whenever pharmacists are aware that prescriptions as issued could harm patients.

This duty includes the original prescription, refills, and refill authorizations and limitations.

12. A therapeutic duplication occurs when two or more drugs have an “additive or synergistic effect” when used together. Id. at § 360-19-020(5).
physicians about improper drug use if necessary. Third, when patients transfer prescriptions between pharmacies, transferee and transferor pharmacists must maintain records of the transfer. Transferor pharmacists may not issue refills after transferring the prescription.

2. Statutory Standard of Care

Pharmacists are “health care providers.” Health care providers owe a duty of care defined by statute. This duty has broadened over time from the standard of care required in the profession's practice to a standard of “reasonable prudence”; subsequently, “reasonable prudence” has been amended to “society's expectations.”

At one time, Washington law required health care providers to exercise the care practiced by members of their profession. In *Helling v. Carey*, the Washington Supreme Court abandoned this standard in favor of a “reasonable prudence” test. In *Helling*, the court held that “reasonable prudence” required ophthalmologists to perform glaucoma tests on all patients, even though this practice had not been regular conduct in the ophthalmology profession. The court reasoned that public safety mandates that ophthalmologists perform the simple, inexpensive glaucoma test in all cases to prevent blindness in those few patients who develop glaucoma.

After *Helling*, the Washington legislature passed statutes explicitly defining health care providers' duty of care. The statutes provide that health care providers breach the statutory standard of care when they fail to exercise the degree of care expected of reasonably prudent health care providers. Plaintiffs may recover damages when a health care provider's breach of the standard of care proximately causes the plaintiff's injury.
The Washington Supreme Court interpreted the new statutory standard of care in *Harris v. Robert C. Groth, M.D., Inc.* In *Harris*, plaintiff's suit alleged that her physician negligently failed to diagnose her glaucoma. The court upheld a jury verdict in favor of the physician. The court held that the standard of care is what society expects of reasonably prudent health care providers, not what the particular health care providers expect of their profession.

B. Protecting Consumers' Health: The Washington Supreme Court's Tradition

The Washington Supreme Court has a long history of protecting consumers' health by holding providers of harmful goods and services liable for the injuries their products cause. The most notable examples are *Helling v. Carey* and *Falk v. Keene Corp.* In *Helling*, the court expanded ophthalmologists' duty of care, holding that broadened protection for patients was reasonable because the burden on ophthalmologists to perform the tests was small in relation to the potential damage the tests would prevent.

Similarly, in *Falk*, the court again demonstrated its intent to protect public safety by reestablishing a "consumer expectations" test for manufacturer design defects. In *Falk*, plaintiff brought a personal injury action against an asbestos insulation manufacturer, alleging that he developed cancer as a result of asbestos exposure. The Washington legislature had passed statutory guidelines determining when plaintiffs may recover from manufacturers of defective products.

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25.  *Id.* at 440, 663 P.2d at 114.
26.  *Id.* at 451, 663 P.2d at 120. The court upheld the jury verdict because the plaintiff's proposed jury instructions were incorrect. *Id.*
27.  *Id.* at 445, 663 P.2d at 117. The court stated that "[n]othing in the statute . . . suggests that ['expected by the medical profession'], rather than 'expected by society', is the proper reading. It is society and their patients to whom physicians are responsible, not solely their fellow practitioners.” *Id.*
28.  These decisions are consistent with a traditional common law notion that suppliers of goods are responsible for the safety of the goods they supply. See, e.g., *Heaven v. Pender*, 11 Q.B.D. 503 (1883) (dock owner held liable after his defective ropes injured a dock user).
31.  83 Wash. 2d at 518, 519 P.2d at 983; see *supra* notes 18–20 and accompanying text.
32.  113 Wash. 2d at 654–55, 782 P.2d at 980. The “consumer expectations” test in *Falk* differs from pharmacists' "society's expectations" standard only in its wording. The phrase "consumers of prescription drugs" is essentially synonymous with "society" because virtually every member of society consumes prescription drugs.
33.  *Id.* at 646, 782 P.2d at 975–76.
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These statutes provide that manufacturers are liable if the likelihood and seriousness of harm outweigh the burden on the manufacturer to design a safer product. The legislature further provided that courts may consider "consumer expectations," but that consumer expectations alone do not determine products' defectiveness. The court, however, expanded the legislature's guidelines by holding that products are defective if they are unsafe beyond that contemplated by ordinary consumers. In essence, the Falk court determined that what consumers expect of a product is dispositive of the scope and content of the duty its providers owe.

C. Approaches of Other Jurisdictions

Other jurisdictions have also addressed the issue of pharmacists' duty to notify physicians. Although they span the spectrum of possibilities, pharmacists' duties to notify physicians fall within three general categories: (1) as a matter of law, pharmacists have a duty to contact physicians about any unusual prescriptions; whether pharmacists' duties include contacting physicians about errors is a question of fact for the jury to decide, and (3) as a matter of law, pharmacists have no duty to contact physicians about any errors.

Maryland imposes the highest duty on pharmacists to protect patients from effects of drugs purchased under erroneous prescriptions. In People's Service Drug Stores v. Somerville, a physician prescribed strychnine to help the plaintiff with his illness. The dose

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35. Id. at § 7.72.030(1)(a).
36. Id. at § 7.72.030(3).
37. Falk, 113 Wash. 2d at 654-55, 782 P.2d at 980.
38. See, e.g., People's Serv. Drug Stores v. Somerville, 161 Md. 662, 158 A. 12 (1932); see also infra notes 41-44 and accompanying text.
39. See, e.g., Hendricks v. Charity Hosp. of New Orleans, 519 So. 2d 163 (La. Ct. App. 1987) (the trier of fact properly decided that a pharmacist was not liable for failing to contact a physician about an excessive dose when the pharmacist put a warning on the medication's label advising the patient to consult his physician about the prescription); Clayton v. Carroll Drug Co., 156 N.J.L. 407, 56 A.2d 732 (1948) (jury properly decided that a pharmacist was not liable for filling a prescription when the pharmacist contacted the physician, the physician modified the prescription, and the patient subsequently died); Hand v. Krakowski, 89 A.D.2d 650, 453 N.Y.S.2d 121 (1982); see also infra notes 45-51 and accompanying text.
41. 161 Md. 662, 158 A. 12 (1932).
prescribed was extremely high and seriously injured the plaintiff. The plaintiff sued the pharmacist, alleging that the pharmacist was negligent for filling the prescription without first contacting the physician. The Maryland Court of Appeals stated in dicta that when prescribed doses are unusual, pharmacists must notify physicians of the error prior to filling the prescription.

In New York, Louisiana, and New Jersey, however, courts have held that juries decide whether pharmacists' duties include contacting physicians about prescription errors. For example, in *Hand v. Krakowski*, a patient died after ingesting a drug contraindicated with alcohol. The pharmacist's records indicated that the patient was an alcoholic. The New York Appellate Division reversed the trial court's grant of summary judgment for the pharmacist, holding that whether pharmacists' duties include notifying physicians of prescription errors is a triable question of fact.

Courts in Florida, Illinois, and Michigan have made rulings going further than the *McKee* majority. These courts have taken a third approach and held that as a matter of law pharmacists have no duty to contact physicians about any error. In *Eldridge v. Eli Lilly & Co.*, a pharmacist filled a prescription calling for an obviously excessive dose without first contacting the patient's physician. The patient died from the overdose. The plaintiff argued that pharmacists have a duty to contact physicians about dangerous prescriptions because pharmacists have greater knowledge of drugs' propensities than physicians. The court stated, however, that prescriptions' propriety depend not only on the drug's propensities, but also on the

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42. Id. at 12-13.
43. Id. at 13.
44. Id. at 14.
49. A contraindication is "a circumstance under which the drug must never be given." Id. at 123 (quoting *Baker v. St. Agnes Hosp.*, 70 A.D.2d 400, 402, 421 N.Y.S.2d 81 (1979)).
50. Id. at 122.
51. Id. at 123.
55. See supra notes 52-54.
57. Id. at 552.
58. Id. at 553.
patient's condition. Therefore, doses that are appropriate for one patient may be excessive for others.\textsuperscript{59} The court reasoned that imposing a duty to contact physicians would require pharmacists to learn patients' conditions and monitor drug use, which would interfere with physician-patient relationships and could constitute practicing medicine without a license.\textsuperscript{60} As a result, the court held that as a matter of law pharmacists have no duty to contact physicians about any dangerous prescription.\textsuperscript{61}

\textbf{D. McKee v. American Home Products}

The Washington Supreme Court first considered pharmacists' duty of care in \textit{McKee v. American Home Products}.\textsuperscript{62} For ten years, McKee's physician prescribed Plegine, a potentially addictive amphetamine used to help obese patients lose weight.\textsuperscript{63} Plegine's manufacturer included warnings on the drug's labels stating that patients should take the drug for no more than a few weeks because thereafter patients become immune to the drug's anorectic effect.\textsuperscript{64} The warning listed possible side effects, such as extreme fatigue, dependence, and psychosis.\textsuperscript{65} McKee took nearly all of her prescriptions for Plegine to one Seattle pharmacy.\textsuperscript{66} One pharmacist filled her prescription for seven years and another for the remaining three years.\textsuperscript{67} McKee's pharmacists removed the manufacturer's warning labels from the drug's bottles prior to sale.\textsuperscript{68} The pharmacists told neither McKee nor her physician that patients should use Plegine for no more than a few weeks.\textsuperscript{69} McKee became addicted to Plegine and, consequently, suffered both physically and psychologically.\textsuperscript{70} McKee's suit alleged that the pharmacists breached their duty of care by neither contacting her physician about the error nor warning her of the drug's adverse

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\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. Similarly, in Pysz v. Henry's Drug Store, 457 So. 2d 561 (Fla, Dist. Ct. App. 1984), a patient became addicted to a drug prescribed to him for nine years. The court held that as a matter of law pharmacists have no duty to notify physicians about erroneous prescriptions. \textit{Id.} at 562. The court expressly limited its holding to the precise facts of \textit{Pysz} and recognized potential liability for pharmacists. \textit{Id.} The court did not indicate, however, when it would hold pharmacists liable.

\textsuperscript{62} 113 Wash. 2d 701, 782 P.2d 1045 (1989).
\textsuperscript{63} \textit{Id.} at 703, 782 P.2d at 1046.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} at 703–04, 782 P.2d at 1046.
\textsuperscript{66} \textit{Id.} at 704, 782 P.2d at 1047.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.} at 722, 782 P.2d at 1056 (Dore, J., dissenting).
\textsuperscript{69} \textit{Id.} at 704, 782 P.2d at 1047.
\textsuperscript{70} \textit{Id.}
effects.\textsuperscript{71} The trial court granted the pharmacists' motion for summary judgment, and McKee appealed to the supreme court.\textsuperscript{72}

In a 5-4 decision, the supreme court issued two rulings. First, the majority affirmed the summary judgment because McKee's expert witness was unqualified.\textsuperscript{73} Second, the majority held as a matter of law that pharmacists have no duty to contact physicians about judgment errors.\textsuperscript{74} The majority stated that while it did not need to reach this second ruling, it was appropriate to do so because of the public interest involved.\textsuperscript{75}

Most significant was the majority's ruling with respect to pharmacists' duty of care. The majority held that pharmacists' liability turns on the nature of a physician's error.\textsuperscript{76} The majority divided physicians' errors into two categories, judgment errors and obvious errors.\textsuperscript{77} The court defined obvious errors to include "obvious lethal dosages, inadequacies in the instructions, known contraindications,\textsuperscript{78} or incompatible prescriptions."\textsuperscript{79} When a court determines that the case involves an obvious error, the scope of pharmacists' duty of care is a question of fact; juries must decide whether defendant pharmacists had a duty to contact the physician who issued the prescription.\textsuperscript{80} The majority determined that the error in McKee was a judgment error.\textsuperscript{81} The court held that pharmacists' duties do not include contacting physicians

\textsuperscript{71} Id. at 704, 714, 782 P.2d at 1047, 1052.

\textsuperscript{72} The Washington Supreme Court granted direct review of the trial court's decision. Id. at 705, 782 P.2d at 1047.

\textsuperscript{73} Id. at 706-07, 782 P.2d at 1048. In opposition to the pharmacists' summary judgment motion, McKee provided an affidavit of an Arizona physician. Id. at 706, 782 P.2d at 1048. The majority held that only pharmacists licensed to practice in Washington can testify to pharmacists' duty of care. Id. at 707, 782 P.2d at 1048.

\textsuperscript{74} Id. at 716, 782 P.2d at 1053.

\textsuperscript{75} Id. at 707, 782 P.2d at 1048.

\textsuperscript{76} Id. at 715-16, 782 P.2d at 1053. It was unnecessary for the court to reach this second ruling because the court had already affirmed the summary judgment. The court affirmed the summary judgment because McKee had failed to prove the duty of care required by the statute. Id. at 706 n.3, 782 P.2d at 1048 n.3. No material issue of fact existed because the court determined that the Arizona physician was unqualified to testify to pharmacists' duty of care in Washington. Id. at 707, 782 P.2d at 1048. The court nevertheless continued to analyze pharmacists' duties in detail, deeming such analysis in "the public interest." Id. Whether the second ruling is or is not dicta, other Washington courts confronting similar issues in the future likely will view themselves bound by the full McKee opinion. Therefore, the court's opinion regarding pharmacists' duty of care is treated as a holding for purposes of this Note.

\textsuperscript{77} See id. at 715-16, 782 P.2d at 1053.

\textsuperscript{78} For a definition of contraindications, see supra note 49.

\textsuperscript{79} Id. at 715, 782 P.2d at 1053.

\textsuperscript{80} See id.

\textsuperscript{81} Id. at 716, 782 P.2d at 1053.
who make judgment errors and that courts may decide judgment error cases as a matter of law.\textsuperscript{82}

The majority based this holding on the concern that requiring pharmacists to contact physicians about judgment errors would place an undue burden on pharmacists and cause antagonism between pharmacists and physicians.\textsuperscript{83} Further, the majority noted that physicians often have valid reasons for deviating from drug manufacturers' recommendations.\textsuperscript{84} The court believed that pharmacists are often unaware of these reasons because they lack physicians' medical education and knowledge of patients' medical histories.\textsuperscript{85} Therefore, according to the majority, courts should not hold pharmacists liable for failing to contact physicians about judgment errors.\textsuperscript{86} The four-member dissent argued vigorously against both holdings. First, the dissent stated that McKee's expert witness was qualified.\textsuperscript{87} The dissent noted that testimony of physicians from other states is admissible to aid juries in determining pharmacists' duty of care.\textsuperscript{88} Second, the dissent argued that pharmacists' duties are always a question of fact.\textsuperscript{89} Because the standard of care is defined by society's expectations and juries are a microcosm of society, juries are in the best position to assess pharmacists' duty of care.\textsuperscript{90} Accordingly, juries and not courts must make these determinations.\textsuperscript{91} The dissent argued that the majority's rule regarding judgment errors "is, at best, unnecessary and, at worst, a usurpation of the Legislature's power."\textsuperscript{92}

II. PHARMACISTS SHOULD ALERT PHYSICIANS TO PRESCRIPTION ERRORS

The majority unwisely created separate rules for judgment errors and obvious errors. Instead, the court should allow juries to determine pharmacists' duty of care in all cases. If the court is determined to rely on its current distinction, the Washington legislature should amend current statutes to require pharmacists to notify physicians...
whenever pharmacists know or should know that prescriptions, as issued, may harm patients.

A. Jury Determination of Pharmacists’ Duty of Care

The McKee court erred in two ways. First, the majority’s distinction between error types creates a rule that is unpredictable and allows courts to deny pharmacists’ liability, thus circumventing the legislature’s “society’s expectations” test. Second, if the court continues to rely on distinctions between error types, it should adopt a rule requiring juries to classify errors. Jury determination assures compliance with the “society’s expectations” test. A preferable approach, however, is for juries, not judges, to determine pharmacists’ duties in all cases. These approaches accord with prior Washington Supreme Court decisions favoring public protection from potentially harmful products and services.

1. Distinction Between Judgment Errors and Obvious Errors

There is no justifiable basis for the majority’s determination that obviously excessive doses are “judgment errors,” considering that it labeled indistinguishable types of errors “obvious errors.” Obvious errors include “obvious lethal dosages, inadequacies in the instructions, known contraindications, [and] incompatible prescriptions.” The court, however, classified non-lethal, but obviously excessive doses as judgment errors.

Logical bases for classifying errors as either obvious or judgment include ease of detection and potential for harm. In McKee, however, the majority appeared to rely on neither criterion. Excessive doses such as those in McKee are as easily detected as the obvious errors.

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93. Pharmacists’ statutory standard of care is the “care, skill, and learning expected of a reasonably prudent health care provider.” WASH. REV. CODE § 7.70.040 (1989). Prior Washington Supreme Court decisions interpret this standard as “society’s expectations.” See, e.g., Harris v. Robert C. Groth, M.D., Inc., 99 Wash. 2d 438, 445, 663 P.2d 113, 117 (1983). The McKee dissent adopted the “society’s expectations” test. 113 Wash. 2d at 723, 782 P.2d at 1057 (Dore, J., dissenting). The majority in McKee did not rule out the “society’s expectations” test. Further, the majority stated that the standard is not the expectations of the pharmacy profession. Id. at 717, 782 P.2d at 1054.

94. McKee, 113 Wash. 2d at 715, 782 P.2d at 1053.

95. The majority held that McKee’s physician made a judgment error when he prescribed a drug for ten years that he should have prescribed for no more than a few weeks. Id. at 716, 782 P.2d at 1053.

If the majority had classified McKee’s physician’s error as an obvious error, the court nevertheless would have affirmed the summary judgment because McKee’s only expert witness was unqualified. See supra note 73 and accompanying text.
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listed by the majority. Further, excessive doses are as potentially harmful as the non-lethal obvious errors listed by the majority because excessive doses can cause serious illness and addiction.

The McKee majority cited Hand v. Krakowski to support its distinction between obvious errors and judgment errors. Hand implies that ease of error detection is critical to the distinction between obvious errors and judgment errors. The Hand discussion, however, only illuminates the arbitrariness of the majority's classification.

In Hand, the pharmacist's records indicated that the patient was an alcoholic, and the pharmacist knew that alcoholics should never take the prescribed drug. The McKee majority emphasized that the contraindication in Hand was an obvious error. The obviousness of this error, however, is hardly distinguishable from that in McKee. McKee's pharmacists were required to record and review her prescription records. Therefore, they should have known that they had sold Plegine to McKee for ten years. McKee's pharmacists knew or should have known that Plegine is appropriately prescribed for no more than a few weeks because the manufacturer's labels contained this warning. Early within this ten year period, the pharmacists should have realized that McKee was no longer benefitting from the drug and that she was in danger of its ill effects.

Similarly, the potential for harm in Hand is not substantially removed from the potential for harm in McKee. The only distinction between the physician's error in Hand and McKee is that the error in Hand resulted in death, while the error in McKee resulted in physical and psychological injury to the patient. Fatality, however, should not be dispositive in the determination of whether errors are obvious. The majority did not require that "obvious" errors be fatal, other than obvious lethal doses. Moreover, whether patients die from prescription errors is relevant primarily to the seriousness of the error, not its obviousness. Pharmacists can detect errors that will only injure as

96. For example, to detect incompatible prescriptions, which the majority lists as an obvious error, pharmacists need to know that particular drugs are incompatible and that a patient is using such drugs. To detect excessive doses, pharmacists have to know which doses are excessive and how much and for how long the physician has prescribed the drug. Pharmacists could detect the error in either case by their required review of prescription records.


98. Id. at 122-23.


100. Washington law requires pharmacists to record and review the prescriptions they fill. See supra notes 10-15 and accompanying text.

101. Hand, 453 N.Y.S.2d at 122; McKee, 113 Wash. 2d at 704, 782 P.2d at 1047.

102. If fatality was to be determinative, a clear opinion would have so provided.
easily as they can detect fatal errors. Indeed, a pharmacist who detected erroneous prescriptions could not be expected to predict which would cause death and which only injury; only in egregious cases could pharmacists anticipate the result. Finally, the critical point in time to classify errors and determine pharmacists' liability is when pharmacists dispense prescriptions. Determining liability based upon a post-hoc recognition of the error's result obscures this essential requirement.

If courts continue to rely on a distinction between error types, the error in *McKee* must fall within the definition of obvious errors. Including obviously excessive doses in the court's list of obvious errors better promotes public safety. Pharmacists are potentially liable for filling obviously erroneous prescriptions. Therefore, if excessive doses are characterized as obvious errors, pharmacists would likely exercise greater care in their reviews of patients' records in order to detect these harmful errors. A holding encouraging greater care could help prevent serious injuries and drug addiction.103

The *McKee* majority's separate rules for obvious and judgment errors also are unworkable. Future litigants and pharmacists in practice cannot know exactly where responsibility for physicians' errors lies. Pharmacists know that under *McKee* they are not responsible for contacting physicians regarding non-lethal, but obviously excessive doses.

The Washington rule's predictability, however, ends there. First, pharmacists cannot predict whether they are liable for failing to contact physicians about obvious errors because liability remains a jury question.104 Second, pharmacists cannot determine whether errors not listed in *McKee* are judgment or, potentially, obvious errors.105 The majority provided no guidelines for classifying errors.

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103. Whether greater care would increase pharmacists' burdens at all is arguable. To the extent greater care imposes a burden, potential benefits to the public justify broadened pharmacists' duties.

104. In any given case, juries could go either way. For example, one jury may find a pharmacist liable for failing to contact a physician that a certain dose is excessive. Another jury confronted with the exact same fact situation, however, may find the pharmacist not liable. The *McKee* rule precludes neither result.

105. For example, a physician might err by prescribing the wrong drug. Not only will the patient's medical condition remain untreated, but if the drug has dangerous effects, the patient may suffer. The majority does not mention this type of error, and pharmacists cannot predict whether a court would label this harmful error "judgment" or "obvious."
2. **Jury Determination of Error Type**

Under *McKee*, pharmacists' liability depends on whether errors are labeled by courts as judgment errors or obvious errors. This rule allows courts to circumvent the legislature's "society's expectations" test and decide cases' outcomes. If a court believes a pharmacist should not be liable in a particular case, the court can easily label the error "judgment error" and, in practical terms, put an end to the lawsuit.

The court should abandon this approach. If the court is determined to adhere to its distinction between judgment errors and obvious errors, however, the court should allow juries, rather than courts, to classify errors. The Washington legislature has provided that "society's expectations" determine pharmacists' liability. Juries are microcosms of society. Therefore, juries, not judges, are in the best position to make decisions that express society's expectations.

3. **Jury Determination in All Cases**

The better rule is not to rely on error distinctions at all. Rather, juries should determine pharmacists' duty of care in all cases. Juries should determine the standard of care because jurors, as representatives of society, are best able to express "society's expectations."

Further, jury determination in all cases comports with legislative intent. The legislature has provided that patients may recover whenever they are injured by pharmacists' breach of the care expected of reasonably prudent pharmacists, and the court has interpreted this standard as "society's expectations." When the court does not allow juries to determine pharmacists' liability, however, it is in effect

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106. *See supra* note 93.

107. Jury determination of error type, as well as jury determination in all cases, is as unpredictable as the majority's rule. However, despite their unpredictability, these approaches are better approaches because only they conform to statutory language and because they afford more protection for prescription drug users. To ensure both more predictability and consumer protection, the legislature should amend current statutes to require that pharmacists contact physicians about any harmful errors.

108. This is the approach followed by courts in Louisiana, New York and New Jersey. *See supra* notes 45–51 and accompanying text.


holding that patients may not always recover when pharmacists cause injury by breaching society's expectations.

Leaving decisions to the jury accords with Washington's history of consumer protectionism. In holding that pharmacists' duties do not include informing physicians about judgment errors, the McKee majority limited protection of prescription drug consumers. This ruling is inconsistent with prior Washington Supreme Court decisions expanding the degree of care required of suppliers of potentially harmful goods and services. For example, in Helling v. Carey, the court abandoned the prior professional practice standard in favor of the broader "reasonable prudence" standard. This decision illustrates the court's intent to promote public safety by imposing liability whenever potential health benefits outweigh marginal costs of safety protection. McKee presented an opportunity for the court to reaffirm its Helling approach. Like ophthalmologists testing for glaucoma, pharmacists can easily and inexpensively detect physicians' prescription errors. Therefore, they are in the best position to contact physicians and prevent serious harm, such as drug overdose. The McKee court, however, declined this opportunity to protect public health.

In Falk v. Keene Corp., a case decided only one month before McKee, the court expanded public safety protection. Falk reestablished a "consumer expectations" test for manufacturer design defects even though the legislature provided that the test for design defects is not consumer expectations. The court interpreted the legislation broadly to provide that "consumer expectations" is an alternative to the legislature's balancing test. The court's refusal to extend health protection to prescription drug consumers in McKee is inconsistent with its holdings in both Helling and Falk, which exemplify the court's intent to broaden protection of consumers from potentially harmful goods and services. In Helling, the court extended protection despite a lack of prior authority on

110. 113 Wash. 2d at 716, 782 P.2d at 1053.
111. If pharmacists are responsible for prescription errors, pharmacists will prevent some harm. In a six month study at two children's hospitals, pharmacists checked prescriptions before the hospital dispensed medication and found twenty-seven potentially fatal prescription errors. The overall rate of errors in the study was 4.9 and 4.5 per 1,000 prescriptions. The most common type of error was excessive doses. See Folli, Poole, Benitz, & Russo, Medication Error Prevention by Clinical Pharmacists in Two Children's Hospitals, 79 PEDIATRICS 718 (1987).
113. See supra notes 18-20, 31 and accompanying text.
114. 83 Wash. 2d at 518, 519 P.2d at 983.
116. Id. at 654-55, 782 P.2d at 980. See supra notes 32-37 and accompanying text.
117. Id. The court was interpreting WASH. REV. CODE § 7.72.030(1)(a), .030(3) (1989).
Pharmacist Responsibility

point; in *Falk*, the court broadly interpreted statutes to achieve public protection. *McKee* presented similar issues of public health risks occasioned by the failure of suppliers of services—pharmacists—appropriately to prevent harms. The court's retreat from its tendency to protect public safety is a surprising departure from prior sound judicial decision.

B. Physician Notification: The Need for a Legislative Response

The court's abdication of its role as protector of public health in *McKee* creates a need for legislative response. Absent a change in judicial approach, the legislature should amend current statutes to require that pharmacists contact physicians whenever the pharmacist knows or should know that prescriptions as issued likely will harm patients. The legislature should not, however, require pharmacists to refuse to fill prescriptions or to warn patients.

Requiring pharmacists to notify physicians of any potentially harmful error is justified for several reasons. First, courts have traditionally held suppliers of potentially dangerous goods and services liable. Second, by detecting prescription errors and contacting physicians, pharmacists could prevent serious harm or death. Prescription errors are potentially more dangerous now than they were in the past. This increased danger justifies the imposition of a higher standard of care. If pharmacists notify physicians whenever prescriptions appear harmful, pharmacists will catch a large percentage of these errors, effectively eliminating a great deal of unnecessary harm to patients.

118. The Maryland Court of Appeals has imposed a duty to contact physicians about unusual prescriptions. *See supra* notes 41-44 and accompanying text.

119. According to an oft-quoted English case:

> [W]henever one person supplies goods or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. Heaven v. Pender, 11 Q.B.D. 503, 510 (1883); *see also* Falk v. Keene Corp., 113 Wash. 2d 645, 782 P.2d 974 (1989); Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974).

120. "In the past, prescription errors were not likely to be so dangerous, since oftentimes the agents had very little or no pharmacologic effect. Unfortunately, this is not the case at present; an error in prescription writing can quickly lead to a death." *Friend, Principles and Practices of Prescription Writing*, 6 CLINICAL PHARMACOLOGY AND THERAPEUTICS 411, 412 (1965).
Third, pharmacists are in the best position to most easily detect physicians' prescription errors.121 Physicians err in prescribing medication if they are unaware of the dangers of prescribed drugs122 or incorrectly write prescriptions. Pharmacists can easily detect these errors because pharmacists know the qualities of the drugs they sell. Pharmacists have extensive drug education123 and manufacturers send warnings with drugs sold to pharmacies that pharmacists must read.

Accordingly, pharmacists' duties should include contacting physicians about harmful prescriptions despite the additional work and responsibility such duty would cause. The benefits to public safety justify the marginal burden imposed on pharmacists by requiring them to detect errors and contact physicians; public policy mandates that pharmacists have increased responsibility over prescription errors because pharmacists are the last, and perhaps the only, protection patients have against incorrect prescriptions.

Contrary to the majority's reasoning in McKee,124 imposing a duty to notify physicians will create little work beyond what Washington law already requires of pharmacists.125 If pharmacists have a duty to contact physicians about harmful prescriptions, they would have the added responsibility of checking their records for a few more potential problems, such as whether a prescribed dose is excessive, and contacting the physician if the prescription is harmful. The burden imposed is not onerous.126

Further, expanding pharmacists' duties will not create antagonistic physician-pharmacist relationships.127 Physicians should not oppose pharmacists' responsibility for prescription errors because by detecting

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121. Pharmacists should have responsibility only for errors they can detect. Pharmacists will not always know whether a particular prescription is harmful because pharmacists lack physicians' medical training and knowledge of patients' medical histories. Further, pharmacists should not have a duty to detect errors if the error involves long-term use of the drug and the patient continually changes pharmacies.

122. Physicians often do not have time to research each drug they prescribe. Brushwood, The Informed Intermediary Doctrine and the Pharmacist's Duty to Warn, 4 J. LEGAL MED. 349, 350–51 (1983).

123. To be licensed, Washington pharmacists must have either a baccalaureate degree in pharmacy or a doctor of pharmacy degree. WASH. REV. CODE § 18.64.080(c) (1989).


125. Washington law requires that pharmacists maintain detailed records of prescriptions they fill and review those records with each prescription filled. See supra notes 10–15 and accompanying text.

126. McKee's pharmacists could have prevented her injury if they had simply read the warning sent by the drug manufacturer, checked their records, and contacted her physician.

127. The McKee majority was concerned that expanded pharmacist responsibility would create antagonistic physician-pharmacist relationships. McKee, 113 Wash. 2d at 716, 782 P.2d at 1053.
prescription errors, pharmacists will prevent patients’ harm and, thus, decrease physicians’ potential liability. The possible benefits to public health outweigh the slim possibility of an antagonistic effect on physician-pharmacist relationships. If mutual responsibility increases safety and decreases liability, the end result may, in fact, create closer physician-pharmacist relationships, rather than antagonism.

1. No Duty Beyond Notification

A pharmacist’s responsibility should end after the pharmacist has contacted the physician about the error. When pharmacists and physicians disagree about the safety of a prescription, one side must bear the ultimate responsibility. This responsibility should fall on physicians. Physicians have a wider range of knowledge relating to the decision of which variety of drug to use and how much to prescribe. Although pharmacists have extensive drug education, physicians have medical training and know intimately a patient’s medical history. In addition, pharmacists’ deference to physicians’ judgments after contacting the physician could avoid some of the antagonism in physician-pharmacist relationships feared by the McKee majority.

The failure of physician notification to absolve pharmacists’ of liability would create additional problems. Pharmacists may refuse to fill unusual prescriptions to avoid liability. As a result, patients needing unusual prescriptions may find it difficult to obtain their prescribed medication. As the Maryland Court of Appeals in People’s Service Drug Stores v. Somerville noted, “[i]t would be a dangerous principle to establish that a druggist cannot safely fill a prescription merely because it is out of the ordinary. If that were done, many patients might die from being denied unusual remedies in extreme cases.”

128. Physicians are liable for erroneous prescriptions if juries determine that society expects reasonably prudent physicians not to make the prescription error. WASH. REV. CODE §§ 7.70.020–040 (1989).
129. Physicians may have valid reasons for deviating from safety recommendations about particular drugs. Patients’ unique conditions sometimes justify unusual prescriptions. Also, the benefits of a drug for a particular patient may outweigh its harmful effects. Pharmacists should defer to physicians’ judgment in these situations.
130. McKee, 113 Wash. 2d at 711, 782 P.2d at 1051.
131. Pharmacists are not legally bound to fill prescriptions. Fink, Prescription Errors. DRUG THERAPY, April 1975, at 190, 195. Therefore, if a pharmacist believes a prescription is harmful and the physician does not correct the prescription, pharmacists have the option to refuse to fill it.
132. 161 Md. 662, 158 A. 12, 13 (1932).
2. No Duty To Warn Patients

Policy reasons dictate that pharmacists contact physicians, rather than patients, about harmful prescriptions. First, patients look to physicians as the primary health care provider. The proposed amendment would reinforce this traditional relationship. Second, requiring pharmacists to advise individual patients could create the antagonistic physician-pharmacist relationships feared by the McKee majority. Physicians may resent pharmacists' interfering with patient relationships when pharmacists consult with patients rather than physicians. Finally, physicians can easily correct erroneous prescriptions when contacted by pharmacists, especially with pharmacists' advice. If pharmacists are required to warn patients instead of physicians, however, patients will not take the medication and will lose confidence in their physicians, both of which could hinder needed treatment.

III. CONCLUSION

Under McKee, pharmacists' duties do not include contacting physicians when the physician has made a judgment error in prescribing medication. In cases involving obvious prescription errors, however, juries determine whether pharmacists should contact physicians. In McKee, the majority's error classification is arbitrary, unpredictable, and allows courts to deny pharmacists' liability even though the legislature has provided that courts reserve this role for juries.

To conform with "society's expectations" and expand protection of prescription drug consumers, the court should have either allowed juries to classify physicians' errors or allowed juries to determine pharmacists' duties in all cases. The latter approach is preferable and is the only solution consistent with the legislature's intent as evidenced by statutory language. Alternatively, the legislature could expand protection of prescription drug consumers by amending laws to require pharmacists to contact physicians whenever the pharmacist knows or should know that prescriptions, as issued, will likely harm patients.

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133. For articles addressing pharmacists' duty to warn patients about the dangers of prescription drugs, see, e.g., Brushwood & Simonsmeier, Drug Information for Patients, 7 J. LEGAL MED. 279 (1986); Brushwood, The Informed Intermediary Doctrine and the Pharmacist's Duty to Warn, 4 J. LEGAL MED. 349 (1983); Comment, Drug Products Liability: Duty to Warn, 49 U. PIT. L. REV. 283 (1987).
134. 113 Wash. 2d at 716, 782 P.2d at 1053.
135. See id. at 715, 782 P.2d at 1053.