EVELEIGH, J., with whom HARPER, J., joins, dissenting. I respectfully dissent. I disagree with the majority's conclusion that the complaint of the plaintiff, John Jarmie, fails to state a cause of action for negligence in this case involving a physician's duty to warn his patient of potential driving risks associated with her underlying medical condition "because Connecticut precedent does not support it, the plaintiff was an unidentifiable victim, public policy considerations counsel against it, and there is no consensus among courts in other jurisdictions, which have considered the issue only rarely." Instead, I would conclude that the trial court improperly granted the motion to strike the plaintiff's complaint filed by the defendants, Frank Troncale, a physician, and his employer, Gastroenterology Center of Connecticut, P.C., because the plaintiff's complaint stated a cause of action for negligence. Specifically, I would conclude that, under the facts of this case, Troncale owed a duty to his patient, Mary Ann Ambrogio, to warn her of the potential risks associated with her underlying medical condition as they related to routine activities such as driving. Furthermore, I would conclude that Troncale's breach of the duty to Ambrogio can, in turn, constitute a breach of duty to an injured third party—in the present case, the plaintiff, who was struck by Ambrogio's car after she blacked out while driving—that can form the basis of a negligence claim. Accordingly, I dissent.

At the outset, I note the majority's assertion that "[t]he principal issue in this appeal is whether a physician who fails to advise an unaware patient of the potential driving risks associated with her underlying medical condition breaches a duty to the victim of the patient's unsafe driving because of the failure to advise." First, I emphasize that the duty owed to the plaintiff, as alleged, is the same duty as that owed to Ambrogio. The plaintiff does not claim, and I would not conclude, that Troncale had a duty to warn either a specific class, or the public in general, about Ambrogio's medical condition that may cause blackouts. Instead, the plaintiff claims only that Troncale had a duty to warn Ambrogio of the possible effect of her medical condition. Second, the plaintiff does not claim that Troncale either had a duty to control Ambrogio—take her car keys away—or to warn the plaintiff specifically. Third, the plaintiff bases his claim on Troncale's duty of care to Ambrogio, therefore, recognizing the plaintiff's claim is not inconsistent or detrimental to the physician-patient relationship. Fourth, the plaintiff does not challenge Troncale's treatment decisions, only Troncale's already existing duty to inform Ambrogio regarding the consequences of her medical condition. It is on this narrow and limited basis that I dissent.

I begin by noting that I agree with the underlying facts and procedural history recited by the majority. I will provide additional facts where necessary. Further, I also agree with the majority that "[t]he standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the [pleading] that has been stricken and we construe the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Lestorti* v. *DeLeo*, 298 Conn. 466, 472, 4 A.3d 269 (2010).

First, Connecticut precedent supports recognizing a cause of action by the plaintiff against Troncale under the facts of the present case. Specifically, this court has recognized that there are circumstances in which a health care professional does owe a duty to a nonpatient. Thus, in *Fraser* v. *United States*, 236 Conn. 625, 633–35, 674 A.2d 811 (1996), we noted with approval the principle first established in *Tarasoff* v. *Regents of the University of California*, 17 Cal. 3d 425, 441, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), that a psychotherapist whose outpatient threatens to commit acts of violence against others owes a duty of care to the potential victims, despite the absence of privity. Moreover, even in cases where this court has held that a physician does not owe a duty to a nonpatient, it has centered its analysis on the fact that the injuries were not foreseeable and that public policy did not support a duty under the facts of those cases. See *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 476, 822 A.2d 1202 (2003) (sister of patient fainted while observing medical procedures and filed action against treating emergency medical technician and nurse); *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 95–96, 735 A.2d 347 (1999) (plaintiff claimed psychiatrist's negligence in treating ex-wife caused divorce); *Zamstein* v. *Marvasti*, 240 Conn. 549, 551, 692 A.2d 781 (1997) (plaintiff claimed psychiatrist's negligence in evaluating his children caused false charges of sexual abuse to be brought against him); *Maloney* v. *Conroy*, 208 Conn. 392, 939, 545 A.2d 1059 (1988) (daughter of patient filed action against physicians and hospital for emotional distress arising from negligent treatment of patient); see also *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 562–70, 864 A.2d 1 (2005) (engaging in analysis to determine whether father's claim against physicians who treated son was medical malpractice claim requiring expert testimony); *Gold* v. *Greenwich Hospital Assn.*, 262 Conn. 248, 253–57, 811 A.2d 1266 (2002) (conducting analysis to determine whether nonpatient's claim against hospital and physician sounded in medical malpractice, requiring expert testimony). None of these

cases, or any other decision of this court, employ or endorse the per se rule that such claims are barred categorically because of the absence of a provider-patient relationship.

Second, unlike the majority, I would conclude that, under the limited facts of the present case, the injury to the plaintiff was foreseeable and that public policy supports recognizing a duty to a nonpatient in the circumstances present herein. This approach is consistent with the modern general rule requiring the issue of whether a physician owes a duty to a nonpatient to be determined on the specific facts of each individual case. See 1 D. Dobbs & P. Hayden, The Law of Torts (Sup. 2010) § 241D, p. 237 ("[w]hen a physician's patient causes injury to a third person . . . courts have generally recognized that, given appropriate facts, the physician owes a duty to the nonpatient [despite a lack of privity]"). Indeed, "[l]iability [to a nonpatient] has . . . been found when the doctor was aware of a physical condition of which the patient was unaware, but which was likely to result in an accident." 1 D. Louisell & H. Williams, Medical Malpractice (2012) § 8.03 [5], p. 8-62.3.

The complaint in the present case alleges the following: (1) Troncale diagnosed Ambrogio as having a certain medical condition, hepatic encephalopathy; (2) judged by the standards of his professional specialty, gastroenterology, Troncale knew or should have known that Ambrogio's condition rendered her unable to drive a car safely; (3) nevertheless, Troncale failed to advise or to warn Ambrogio not to drive. Taking these facts as true, as we must in considering an appeal from the grant of a motion to strike, I would conclude, as have numerous courts from other jurisdictions, that these facts establish that a prudent physician in Troncale's position would have foreseen harm to a patient because a car accident of some kind was a foreseeable result if his patient continued driving in her impaired condition. See *Myers* v. *Quesenberry*, 144 Cal. App. 3d 888, 892, 193 Cal. Rptr. 733 (1983); *Cram* v. *Howell*, 680 N.E.2d 1096, 1098 (Ind. 1997); *Duvall* v. *Goldin*, 139 Mich. App. 342, 352, 362 N.W.2d 275 (1985) (all concluding, under similar facts, that harm to nonpatient victim was foreseeable to physician). There is certainly no dispute that, if Ambrogio had sustained injuries due to Troncale's failure to warn her not to drive, her damages would have been foreseeable as a matter of law. Because the plaintiff's injuries occurred in the same manner in which Ambrogio's foreseeable injuries would have occurred, it is, therefore, inconsistent to conclude that the plaintiff's injuries were not foreseeable. An out of control car, by its very nature, carries a high degree of risk of injury, not only to those in the car, but also to other users of the roadways, including pedestrians, such as the plaintiff. Indeed, the car accident that caused the plaintiff's injuries is not merely one of many

possible foreseeable eventualities that could result from the breach of a duty to use care; a car accident is *exactly* the harm that should have been foreseen.

In view of the fact that I conclude that the accident and consequent injuries to the plaintiff were foreseeable, I next examine the relative policy considerations both for and against the imposition of liability in this case. There are four factors to be considered in determining the extent of a legal duty as a matter of public policy: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging . . . participation in the activity, while protecting the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Perodeau* v. *Hartford*, 259 Conn. 729, 756–57, 792 A.2d 752 (2002).

There are numerous policy considerations that support the imposition of a duty under the circumstances presented in this case. First, the proposed duty serves an important public interest. Disclosing latent driving impairments to motorists is likely to reduce the incidence of preventable injuries to persons and property. As the Hawaii Supreme Court has stated, "[i]t appears obvious that warning a patient not to drive because his or her driving ability may be impaired . . . could potentially prevent significant harm to third parties. There is little [social] utility in failing to warn patients about the effects of a drug or condition that are known to the physician but are likely to be unknown to the patient." (Internal quotation marks omitted.) *McKenzie* v. *Hawaii Permanente Medical Group, Inc.*, 98 Haw. 296, 306, 47 P.3d 1209 (2002), quoting *Praesel* v. *Johnson*, 967 S.W.2d 391, 398 (Tex. 1998). Further, imposing a duty to warn patients under the limited facts of the present case is likely to be effective, because such a duty is carefully calibrated to address the specific problem of accidents caused by drivers who are unaware of their driving impairments. The purpose of the duty is to ensure that crucial knowledge possessed only by a patient's physician is transferred to the patient.

The majority asserts that "extending a physician's duty to third persons does not necessarily mean that a patient with a latent driving impairment would be more likely to discontinue driving. Even if Troncale had advised Ambrogio at the time of her diagnosis that she should no longer drive, she might have continued driving and caused an accident regardless of the warning." Although I agree with the majority that Ambrogio may have driven and caused an accident even if Troncale had warned her of the dangers of her driving, this hypothetical does not represent the facts of the present case and does not militate against recognizing the plaintiff's claims against Troncale. To the contrary, if Troncale had warned Ambrogio, and Ambrogio had driven despite those warnings, then Troncale would not be

negligent for failing to warn his patient. Instead, Ambrogio would be negligent for having driven despite warnings from Troncale. Thus, under those circumstances, Ambrogio would be liable and Troncale would not.

Second, the proposed duty, in my view, is the most efficient way to reduce the occurrence of the harm at issue. In fact, it may be the only way to reduce such harm. Where a patient does not know and cannot reasonably be expected to know that her medical condition renders her unable to drive safely, the patient's physician is in the best position to prevent the harm. The action necessary to discharge the duty is also very simple and virtually costless: the physician must take some additional time to inform his patient of the driving impairment. It would, therefore, seem logical for the law to require that the physician initially bear the risk that harm may result if the critical information known only to the physician is not duly conveyed to the patient. The patient who is warned can then take appropriate steps to protect both herself and members of the public. "Compensation of innocent parties, [and] shifting the loss to responsible parties or distributing it among appropriate entities" are two of the "fundamental policy purposes of the tort compensation system." G. Calabresi, The Cost of Accidents: A Legal and Economic Analysis (1970) pp. 135–73.

Third, recognizing the plaintiff's claim would prevent a potentially unfair and irrational result. Under the majority's conclusion, a patient who is injured in a car accident caused by that patient's driving impairment may file an action against the physician who failed to inform her of the impairment, while a nonpatient who is injured in that accident may lack a comparable remedy. "[I]n many of these cases, the physician has breached a duty to the patient by failing to warn the patient of dangers, and the physician plainly would be subject to liability to the patient if the patient suffered harm." 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 7, reporters' note to comment (e), p. 91 (2010). Indeed, if the nonpatient could not prove negligence against the patient driver—i.e., if the driver had not previously had blackouts and was not advised not to operate an automobile—he may not recover for his injuries. See *Caron* v. *Guiliano*, 26 Conn. Sup. 44, 45–46, 211 A.2d 705 (1965) (sustaining verdict for defendant driver because evidence showed that he involuntarily lost control of car due to unforeseen physical condition). "Negligence is not to be imputed to the driver of an automobile merely because he suddenly blacks out, faints, or suffers a sudden attack, losing consciousness or control of the car, when he is without premonition or warning of his condition." (Internal quotation marks omitted.) Id., 45, quoting 8 Am. Jur. 2d 245, Automobiles and Highway Traffic § 693 n.17. Under the majority's view, a person injured in a car accident

caused by the driver's latent medical driving impairment potentially lacks any meaningful legal remedy. Moreover, by allowing the third party to file an action against the physician directly, we avoid imposing unnecessary costs on the uninjured patient. To the contrary, under the majority's view, the third party would file an action against the patient, and that patient will have to hire her own attorney and an expert in order to bring an action against the physician. It is highly unlikely that the insurance company attorney defending the case would agree to represent the patient in an action against the physician. Therefore, the patient will be forced to incur the expense of both another attorney and an expert physician, in order to bring an action against her physician. In all likelihood, the patient, even if she were successful in the action, would not recover all of her out-of-pocket expenses, especially for the costs of the attorney. I consider this result to be untenable. In my view, the fairer result is a direct action against the physician for failure to warn. The patient should not have to bear unnecessary expenses as a result of the physician's negligence.

Although we have not had the occasion to rule on this precise issue, there are numerous decisions from our sister states that also support the imposition of such a duty to a third party. See *Hoehn* v. *United States*, 217 F. Sup. 2d 39, 48–49 (D.D.C. 2002) (failure to warn patient that drugs could impair driving states valid negligence claim); *Myers* v. *Quesenberry*, supra, 144 Cal. App. 3d 893–95 (duty to warn patient of driving impairment arising from uncontrolled diabetic condition aggravated by profound emotional trauma); *McKenzie* v. *Hawaii Permanente Medical Group, Inc.*, supra, 98 Haw. 307–308 (duty to warn patient of adverse reaction to medication created cause of action for personal injury to third party); *Cram* v. *Howell*, supra, 680 N.E.2d 1097–98 (duty to warn patient of driving impairment caused by immunizations); *Joy* v. *Eastern Maine Medical Center*, 529 A.2d 1364, 1365–66 (Me. 1987) (duty to warn motorcyclist of impairment caused by eyepatch); *Duvall* v. *Goldin*, supra, 139 Mich. App. 352 (duty to warn epileptic patient not to drive); *Wilschinsky* v. *Medina*, 108 N.M. 511, 512–16, 775 P.2d 713 (1989) (duty to exercise care in releasing patient injected with drugs impairing driving ability; warning is not necessarily adequate); *Hardee* v. *Bio-Medical Applications of South Carolina, Inc.*, 370 S.C. 511, 516, 636 S.E.2d 629 (2006) (duty to warn diabetic patient of driving impairment caused by dialysis); *Burroughs* v. *Magee*, 118 S.W.3d 323, 331–32 (Tenn. 2003) (duty to warn patient of driving impairment caused by prescribed drugs); *Kaiser* v. *Suburban Transportation System*, 65 Wn. 2d 461, 464–65, 398 P.2d 14 (duty to warn bus driver of side effects of drug that caused him to faint while driving), abrogated on other grounds by *Pederson* v. *Dumouchel*, 72 Wn. 2d 73, 431 P.2d 973 (1967); see also *Coombes* v. *Florio*,

450 Mass. 180, 197–200, 877 N.E.2d 567 (2007) (Greany, J., concurring) (accepting duty to warn patient of driving impairment caused by prescribed drugs but rejecting plurality opinion that purportedly recognized broader duty of reasonable care to third parties); compare *Coombes* v. *Florio*, supra, 185–95 (plurality opinion) (appearing to adopt only duty to warn); 1 D. Dobbs & P. Hayden, supra, § 241D, pp. 237–39 (surveying case law and advocating in favor of duty to warn).

Similarly, courts in several jurisdictions have ruled that a physician may be held liable to a third party for failing to warn his patient—and sometimes people other than his patient—that the patient has a communicable disease or has been exposed to one. See *C. W.* v. *Cooper Health System*, 388 N.J. Super. 42, 60–62, 906 A.2d 440 (App. Div. 2006) (duty to warn patient of positive HIV test); *Estate of Amos* v. *Vanderbilt University*, 62 S.W.3d 133, 138 (Tenn. 2001) (duty to warn patient that transfusion involved AIDS contaminated blood); *Reisner* v. *Regents of the University of California*, 31 Cal. App. 4th 1195, 1203, 37 Cal. Rptr. 2d 518 (1995) (duty to warn patient of positive HIV test); *Bradshaw* v. *Daniel*, 854 S.W.2d 865, 872 (Tenn. 1993) (duty to warn wife that husband had Rocky Mountain Spotted Fever). In a related area, courts also have recognized a duty to warn family members of a patient's genetic condition. See *Pate* v. *Threlkel*, 661 So. 2d 278, 282 (Fla. 1995) (duty to warn patient of condition that could be passed on to daughter).

Indeed, failure to warn cases such as the present case have been recognized as "the strongest cases for holding the physician to a duty of care to a third person . . . ." 1 D. Dobbs & P. Hayden, supra, § 241D, p. 237. "[I]n this group of cases, the patient drives, but because of medication, epilepsy, or other condition, he loses consciousness and drives into the plaintiff. Since a negligent failure to warn or diagnose puts the patient at risk as well as others, it makes sense to hold the physician liable to the nonpatient victim if the physician negligently prescribed or injected medication without warning the patient against driving while medicated [or if the physician] fail[ed] to diagnose the patient's epilepsy or fail[ed] to warn the epileptic patient against driving . . . . Some courts simply reject liability to nonpatients . . . on the ground that a duty to nonpatients would present the physician with a conflict between duties to his patient and duties to nonpatients. Such arguments are inapplicable, however, when the physician's duty of care to his own patient calls for exactly the same diagnosis or treatment that would also be safer for members of the public. In this situation . . . he satisfies his duty to third persons when he satisfies his duty to his patient." Id., pp. 237–38; accord 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 7, comment (e); 1 Restatement (Third), Torts, Liability for Physical Harm § 41, report-

ers' note to comment (h), pp. 808–809 (Proposed Final Draft No. 1, 2005) (noting that reasoning used to reject duty to control patient is "unpersuasive when . . . the plaintiff claims that the physician should have provided a warning to the patient"). Most of the courts that have rejected the limited duty to warn that I support herein have done so on materially distinguishable facts—e.g., the patient's impairment was known or obvious—or by treating the proposed duty as legally indistinguishable from more expansive duties calling for control of a patient, warning the public, or intrusion on patient treatment. See 1 D. Dobbs & P. Hayden, supra, § 241D, pp. 237–38 (criticizing decisions rejecting duty to warn patient of driving impairment); see also *Schmidt* v. *Mahoney*, 659 N.W.2d 552, 554–55 (Iowa 2003) (treating duty to warn claim as if it was claim asserting duty to control or duty intruding on patient treatment); *Calwell* v. *Hassan*, 260 Kan. 769, 785, 925 P.2d 422 (1996) (no duty to warn patient because she already knew she might fall asleep while driving); *Purdy* v. *Public Administration of Westchester*, 72 N.Y.2d 1, 9–10, 526 N.E.2d 4, 530 N.Y.S.2d 513 (1988) (defendant was not patient's treating physician and did not even owe duty to patient); *Praesel* v. *Johnson*, supra, 967 S.W.2d 391, 392, 398 (duty to warn adult epileptic patient who suffered from seizures since age nine unnecessary because "the risk that a seizure may occur while driving and the potential consequences should be obvious to those who suffer from epilepsy"). It must be stressed that the doctrine I have suggested today does not affect treatment decisions made by the physician toward his patient. It only reinforces the duty that the physician already owes to the patient and allows a third party to bring an action against the physician predicated upon a breach of that duty. The issue at the heart of this case is whether Troncale owed the plaintiff a duty of care. The content and scope of a person's duty of care depends upon the particular facts and circumstances presented, so it is possible for a person to owe a limited duty of care in one context, a more demanding duty in another, and no duty at all in a third context. See *Doe* v. *Yale University*, 252 Conn. 641, 659, 748 A.2d 834 (2000) (type of duty claimed can determine whether negligence *claim* is cognizable); *Clohessy* v. *Bachelor*, 237 Conn. 31, 45, 675 A.2d 852 (1996) ("[t]he nature of the [defendant's] duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual" [internal quotation marks omitted]).

In the present case, the majority concludes that the cases of sister states should not be relied upon because many of the cases cited involve the adverse effects of medications prescribed by the physician, whereas the present case involves the adverse effects of a patient's medical condition. In my view, this is a distinction without a difference. The duty at issue in both the "medical

prescription" case and the "medical condition" case is exactly the same: it is the physician's affirmative duty to warn patients about hazards—whatever their source—when the applicable standard of care dictates that the warning must be given. See 1 D. Dobbs & P. Hayden, supra, § 241D, pp. 237–38 (treating medical condition and medication as analogous for purpose of duty to warn patient of driving impairment). Indeed, in my view, the facts of the present case strongly support the imposition of a duty to warn because this case is specifically limited to a situation wherein the physician has a duty to warn the patient due to the very nature of the condition. The physician's duty is not affected by any affirmative act on the part of the physician in the nature of a treatment decision. Therefore, the physician will not be influenced in any treatment decision by any concern over potential liability to third parties. As alleged, the duty to warn the patient already exists. There is no additional duty placed upon the physician as a result of a determination that an injured third party should have a cause of action in these circumstances.

I further disagree with the majority that "a cause of action alleging medical malpractice must be brought by a patient against a health care provider because the language of [General Statutes § 52-190a] specifically provides that the alleged negligence must have occurred 'in the care or treatment of the claimant.' " Although I agree with the majority that § 52-190a does require that the alleged negligence must have occurred in the care or treatment of the claimant, that does not prohibit us from recognizing the plaintiff's claim at common law. "A common-law rule . . . may be subject to both legislative and judicial modification. . . . Accordingly, the issue . . . is whether the legislature . . . has manifested an intention to occupy the field or whether a common-law remedy would conflict with or frustrate the purpose of the act [in question], so as to stay our hand in recognizing an action at common law." (Citations omitted; internal quotation marks omitted.) *Craig* v. *Driscoll*, 262 Conn. 312, 323–24, 813 A.2d 1003 (2003). In the present case, the majority does not point to, and I cannot find, anything in the language of § 52-190a that indicates that the legislature intended to occupy the field and abrogate this court's common-law authority to recognize a cause of action by a third party against a physician under the facts of the present case. Indeed, if there were such a legislative intent barring medical malpractice claims outside the confines of § 52-190a, this court would have relied on that intent in previous cases in which we have evaluated whether to recognize a common-law cause of action for negligent infliction of emotional distress on a bystander where the negligence was predicated on malpractice. See *Clohessy* v. *Bachelor*, supra, 237 Conn. 37–38 (discussing *Maloney* v. *Conroy*, 208 Conn. 392, 545 A.2d 1059 [1988], and *Amodio* v. *Cunningham*, 182 Conn. 80, 438 A.2d 6 [1980]).

Although this court ultimately did not recognize a cause of action for bystander emotional distress where the negligence was predicated on malpractice, its decision was based on policy considerations, none of which, notably, are present here.

I disagree with the majority that the harm to the plaintiff in the present case was not foreseeable because "the plaintiff was not an identifiable victim, nor does he belong to an identifiable class of victims, because the potential victims of Troncale's alleged negligence included any random pedestrian, driver, vehicular passenger or other person who happened to come in close proximity to a motor vehicle operated by Ambrogio following her diagnosis." In support of its position, the majority relies on the foreseeability test applied in *Fraser* v. *United States*, supra, 236 Conn. 632, in which this court recognized that "our decisions defining negligence do not impose a duty to those who are not identifiable victims . . . ." I disagree with the majority's extension of the analysis in *Fraser* to the present situation. The issue in *Fraser* was a narrow one. Specifically, this court was deciding whether a psychotherapist had a duty to exercise control to prevent a patient, *who was not known to have been dangerous*, from inflicting bodily harm on a victim who was not either readily identifiable or in an identifiable class of victims. Id., 626. The facts of this case are distinguishable from *Fraser*. *Fraser* was certified from the United States Court of Appeals for the Second Circuit. Id. The question for this court was whether, in the circumstances presented therein, psychotherapists undertaking the treatment of a psychiatric outpatient assumed a duty to exercise control over the patient to prevent the patient from committing an act of violence against a third person. Id. The Second Circuit Court of Appeals had already decided the question of whether the medical center had a duty to warn the victim, Hector Fraser, that the patient, John Doe, would commit an act of violence against him. That court held that, " 'in the absence of any objective indicia of a patient's propensity to cause harm,' summary judgment had properly been granted on this cause of action." Id., 629. It is interesting to note that the Second Circuit did not discount the possibility of third party liability had there been some objective indicia of Doe's propensity to cause harm. Likewise, this court answered the certified question in the negative. Id., 637. This court noted in *Fraser* that "[t]he medical center owed no duty to control Doe so as to prevent Doe's assault on Fraser. The medical center neither knew nor had reason to know that Doe would attack Fraser because Fraser was not an identifiable victim, a member of a class of identifiable victims or within the zone of risk to an identifiable victim." Id.

In *Fraser*, Doe was not known to have been dangerous, whereas in the present case, Troncale knew that

Ambrogio was suffering from a medical condition that could cause sudden and unexpected blackouts. Therefore, the dangers of Ambrogio's medical condition were known to Troncale, making much of the analysis in *Fraser* inapplicable to the present case. Moreover, it is important to note that in the same year that this court decided *Fraser*, it also decided *Clohessy* v. *Bachelor*, supra, 237 Conn. 56–57, wherein this court recognized third party injury without requiring identifiable victims in the form of a cause of action for bystander emotional distress. Although this court limited those who could claim third party injury, in doing so in *Clohessy*, this court focused on those that are most likely to suffer the greatest injury and rejected the "zone of danger" limitation, which is akin to the test being adopted by the majority in the present case, which requires that there be an identifiable victim. The concerns raised in the present case, therefore, are distinguishable from the policy considerations underlying our decision in *Fraser* v. *United States*, supra, 236 Conn. 635, wherein we held that the psychiatrist therein did not owe a duty to third parties to control Doe's violent behavior or warn the public of Doe's dangerousness. We noted, however, that at least where a patient has not threatened a specific person or class of persons, imposing a duty to control the patient and/or warn the public would unjustifiably jeopardize "the interests of the mental health profession in honoring the confidentiality of the patient-therapist relationship . . . and in respecting the humanitarian and due process concerns that limit the involuntary hospitalization of the mentally ill." (Citation omitted.) Id. The same concerns are not present in this case because the allegation is a failure to warn the patient, not the public.

In support of its conclusion that public policy concerns do not favor recognizing the plaintiff's cause of action in the present case, the majority asserts that, "[w]ith respect to the compensation of innocent parties, the present situation is not one in which an injured party necessarily receives no compensation, as the plaintiff suggests. Injured parties may be covered by their own motor vehicle and health insurance policies. Moreover, accidents caused by persons with latent driving impairments may not always be due to the driver's medical condition but, rather, may be due to other factors indicative of negligence, such as speeding or driving while intoxicated. In such cases, injured parties may bring an action against the driver and seek compensation through the driver's insurance policy." I disagree. Connecticut already has in place a system mandating that all registered vehicles are required to carry motor vehicle liability insurance and uninsured/underinsured motorist coverage. General Statutes §§ 38a-371, 38a-334 and 38a-336. Therefore, the majority concludes that there is no principle of public policy that requires the court to provide the plaintiff with the highest possible recov-

ery or payment from as many sources as possible or from the deepest pockets available. See *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 579, 717 A.2d 215 (1998) (imposition of liability not justified by potentially greater recovery where plaintiff was already compensated). Thus, the compensation goal of tort law, it is argued, does not support the expansion of liability requested. Importantly, however, providing compensation to victims injured as a foreseeable result of another person's carelessness is among the foremost policy purposes of the law of negligence in this state. In my view, the majority's reasoning fails to account for the situation wherein the patient may not be negligent in the accident because she did not have any knowledge that she either could blackout or should not drive. In that situation, the focus is on any recovery for the injured party as opposed to a double recovery or limited recovery. We previously have held that the foreseeable nature of the harm was the primary consideration favoring the imposition of liability. *Gazo* v. *Stamford*, 255 Conn. 245, 250, 765 A.2d 505 (2001); see also *Lombard* v. *Edward J. Peters., Jr., P.C.*, 252 Conn. 623, 633–34, 749 A.2d 630 (2000) (foreseeablity of harm to plaintiff was primary policy consideration in recognizing liability); *Clohessy* v. *Bachelor*, supra, 237 Conn. 47–48 (emphasizing policy significance of remedying foreseeable harm in recognizing negligence action for bystander emotional distress).

The majority assumes that a remedy is available to the plaintiff in the present case through either a tort claim against Ambrogio, or through the motor vehicle insurance system. I do not believe that, given the circumstances of this case and other similar cases, this assumption is correct. I do not believe that the plaintiff would always be compensated in this situation. To the contrary, if the driver is insured, depending on the specifics of his or her coverage, the only additional financial compensation that the plaintiff would be provided is possible underinsured motorist coverage. If the driver had no knowledge of the condition, the driver would not be liable and his or her insurance would not cover the damage under its liability provisions. Further, the plaintiff's no-fault motor vehicle insurance would only pay a small percentage of medical bills and, depending on the plaintiff's health insurance, a portion of the bills would be paid minus deductibles. There would be no recovery for such items as pain and suffering, permanent disability and loss of pay. Accordingly, I disagree with the majority that the plaintiff would be adequately compensated through motor vehicle and health insurance.

Moreover, contrary to the majority's conclusion, I do not agree that recognizing the duty to warn in the present case would result in increased litigation and higher health care costs. To the contrary, in my opinion, it would merely change the parties involved in the litigation. Instead of requiring the injured party to file an

action against the driver and the driver to counter an action against the physician, recognition of the duty to warn allows the injured party to bring an action against the physician directly. Indeed, allowing the direct action would actually result in more efficient litigation. The majority concludes that, if we were to extend liability is this instance, it would place a strain on the entire Connecticut medical community. I disagree and note that the majority not only provides no evidence that this has been the case in other jurisdictions that recognize third party actions against physicians, but also recognizes that these situations are rare. The fact that a patient would get in an accident while leaving the physician's office after being informed of the condition would seem to be highly unusual. The fact that a patient would not have had some advance warning—such as past history, physician's advise, or prescription labels—would also seem to be very unique. These are very rare cases and will remain so. Cf. 1 Restatement (Third), Torts, Liability for Physical Harm § 41, reporters' note to comment (h), p. 808 (Proposed Final Draft No. 1, 2005) (in criticizing objection that duty at issue here will lead to limitless liability, noting that present context "involve[s] liability that, in all likelihood, is limited to a single accident"). Second, this argument ignores the facts that the duty already exists and that the breach of that duty already gives rise to a cause of action by the patient against the physician. As in any malpractice case, the physician will be required to answer interrogatories and attend depositions and trial, which represent time away from his patients. Acceptance of the doctrine that I propose may result in a few additional plaintiffs bringing direct claims against a physician. Cf. *Wilschinsky* v. *Medina*, supra, 108 N.M. 515 (addressing concern regarding new litigation and stating that "additional burden" on physicians is "negligible" because of existing standard of care). Third, the majority's conclusion ignores the contra point: liability rules exist in part because they are believed to deter unsafe conduct. If physicians are motivated by this liability rule to be more mindful of the need to warn impaired patients not to drive, then it is likely that there will be fewer impaired drivers on the road, fewer injuries caused by these drivers and, therefore, a net reduction in the total number of actions, thereby decreasing the amount of litigation and the rising cost of both medical costs and medical insurance. See *Burroughs* v. *Magee*, supra, 118 S.W.3d 332–33; cf. *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 120, 869 A.2d 179 (2005).

Furthermore, the majority's concern over involving physicians in litigation ignores the fact that, as a practical matter, physicians of patients involved in the type of accidents at issue will necessarily be involved in the resulting litigation, and not only as witnesses. Drivers named as defendants under these circumstances likely would file indemnification-type claims against their

physicians. The physician will be part of the litigation one way or another in this instance, so the cost factor is already present.

Also, the majority fails to consider the impact on health care costs of the uncompensated and uninsured victims that result under its no-duty rule. The plaintiff remains injured regardless of the outcome of the present case, and someone must pay for his care. The social costs of the physician's negligence does not disappear if a plaintiff's claim is barred; rather, such costs are just shifted onto the shoulders of someone who did not cause the injuries, and therefore cannot prevent them from happening. The majority's conclusion recognizes the fact that we have a statutory scheme providing for mandatory insurance for drivers of motor vehicles. Its argument fails, however, to address those injured pedestrians who may not have insurance to cover the costs of their injuries.

I further disagree with the majority that "expanding the duty of health care providers would create a significant risk of affecting conduct in ways that are undesirable because it would interfere with the physician-patient relationship and give rise to increased litigation, with all of its attendant costs." Recognition of the plaintiff's claim does not extend a physician's obligation beyond that duty to warn, which the physician already owes to the patient. The allegation in the complaint in the present case is directed toward Troncale for his failure to warn Ambrogio; it is not a new duty placed upon the physician to warn the public. The proposed duty does not even add any burden or cost to the physician beyond the burden he undertook to treat the patient with reasonable care. 1 D. Dobbs & P. Hayden, supra, § 241D. As this court stated when it extended the duty of a contractor removing snow beyond the property owner to all foreseeable users of a sidewalk: "[contractors] always have had the duty to perform their work in a nonnegligent manner, and our conclusion does no more than to hold contractors liable to those foreseeably injured by their negligence." *Gazo* v. *Stamford*, supra, 255 Conn. 254. The proposed duty I have set forth herein will not impinge on the physician-patient relationship or on a physician's professional obligation to exercise independent medical judgment because physicians owe the same duty to the patient already. The physician's duty to warn the patient does not affect the physician's ability to make treatment decisions. This is not a case where a physician is required to consider the risks to third persons when making treatment decisions for his patient. Rather, the allegation is that Troncale failed to warn Ambrogio of the risks in driving with her medical condition. Further, the claim in this case is not that Troncale has a duty to control Ambrogio. See 1 Restatement (Third), Torts, Liability for Physical Harm § 41, reporters' note to comment (h), pp. 808–809 (Proposed Final Draft No. 1, 2005)

(noting that reasoning used to reject duty to control patient is "unpersuasive when . . . the plaintiff claims that the physician should have provided a warning to the patient"). The claim in this case rests on Troncale's failure to inform Ambrogio of a driving impairment relating to her existing and known medical condition, which Troncale had diagnosed. Certainly, there are no confidentiality or conflicting duties in this case. See, e.g., 1 D. Dobbs & P. Hayden, supra, § 241D, pp. 237–38 (observing that duty to warn patient creates no conflict or threat to patient privacy).

The majority further concludes that the optimal treatment of patients is frustrated by extending a physician's liability to third parties. The majority cites *Maloney* v. *Conroy*, supra, 208 Conn. 403, in which this court declined to permit bystander recovery for emotional distress arising out of alleged medical malpractice, stating that "[i]t is . . . the consequences to the patient, and not to other persons, of deviations from the appropriate standard of medical care that should be the central concern of medical practitioners." The majority further asserts that a medical professional owes a duty of undivided loyalty to the patient and is not to be distracted or compromised by fear of liability to others, and relies on fears that an extension of liability will negatively affect physicians' treatment decisions and will cause physicians not to accept difficult cases for fear of third party liability. Although I agree that the physician owes an undivided loyalty to his patient, I reemphasize the fact that this doctrine does not affect that loyalty. The physician has to warn the patient in accordance with the standard of care for the given condition of the patient. This standard of care will not change, nor will it affect, in my view, the physician's decision to take difficult cases. The doctrine simply asks the physician to act in accordance with the required standard of care.

The majority additionally asserts that "[t]he proposed duty also would conflict with the public policy implicit in General Statutes § 14-46 of shielding health care providers from liability to members of the general public by providing that health care providers 'may' report any persons diagnosed with 'any chronic health problem which in [the physician's] judgment *will significantly affect the person's ability to safely operate a motor vehicle* . . . for the information of the commissioner [of motor vehicles] in enforcing state motor vehicle laws . . . [and] . . . for the purpose of determining the eligibility of any person to operate a motor vehicle on the highways of this state.' " (Emphasis in original.) I disagree. Although the legislature may have eliminated the requirement that health care providers must report persons to the department of motor vehicles, such a decision does not reflect any public policy in favor of not requiring health care providers to warn their own patients of the dangers associated with their medical

conditions. The requirement to report a patient to the department of motor vehicles may have a detrimental effect on the provider-patient relationship and involves divulging patient information to a third party. As I have discussed previously herein, requiring the physician to warn his own patient about the effects of a medical condition does not implicate those concerns. It is a duty, as alleged, that the physician already has to the patient under the existing standard of care. Accordingly, I am not persuaded that § 14-46 is relevant to the present case.

The majority further claims that the parties' expectations militate against recognizing the duty to warn in the present case. Specifically, the majority asserts that physicians do not expect to be held liable to members of the general public for decisions regarding patient treatment, and that members of the public injured in automobile accidents expect compensation from the party causing the accident, not the party's medical care providers. In effect, the majority claims that the plaintiff is attempting to make physicians insurers of highway safety by suggesting that such physicians could be liable to a vast category of unknown individuals that could be harmed by patients operating automobiles, including pedestrians, bicyclists, construction workers and out-of-state residents operating vehicles on Connecticut roads. Again, the plaintiff is not asking us to impose a new duty of care in favor of nonpatients. The doctrine requires the physician to do what is already required of him: warn his patient of the risk of driving with her condition. Further, as stated previously, there may be no recovery against the patient if she was not negligent. The record in the present case does not reflect why the case against Ambrogio was withdrawn. The plaintiff is not advocating that the physician become an insurer of highway safety. The plaintiff still has the burden of proof to demonstrate that Troncale breached the standard of care that he owed to Ambrogio. In my view, all physicians may expect to pay compensation to their patients when they breach the standard of care owed to their patients. This extension of the limited duty to warn extends liability to third parties as the result of the physician's negligence. As discussed previously, the fact that pedestrians or other drivers might be injured due to the driving impairment of the patient is certainly foreseeable.

Similarly, certain policy concerns that caused this court to decline invitations to extend the parameters of our negligence jurisprudence to third parties are not present in this case. For instance, in *Zamstein* v. *Marvasti*, 240 Conn. 549, 692 A.2d 781 (1997), this court declined to impose a duty on a psychiatrist who evaluated the plaintiff father's children to exercise due care for the benefit of the father, who was suspected of sexually abusing his children. This court concluded therein that the imposition of such a duty would conflict

with the public policy expressed by the legislature "of encouraging medical professionals and other persons to report actual and suspected child abuse to the appropriate authorities and agencies." Id., 559. The policy concern in *Zamstein* has no relevance to the present case. *Zamstein* involved potentially conflicting duties and incentives because the patients—the alleged victims of child abuse—may have had interests diametrically opposed to those of the nonpatient, the suspected abuser, whereas the present case involves identical duties and incentives. In the present case the interests of the patient, pedestrians, drivers and the general public are the same. Therefore, the proposed duty to warn serves each by ensuring that the patient is aware of a driving impairment that could cause injury to herself and others. See, e.g., 1 D. Dobbs & P. Hayden, supra, § 241D, pp. 237–38 (noting that proposed duty is sensible because patient's driving impairment necessarily puts patient and others at risk of foreseeable harm).

In *Jacoby* v. *Brinckerhoff*, supra, 250 Conn. 86, the plaintiff brought a direct negligence action against his ex-wife's psychiatrist, claiming the psychiatrist had acted negligently in rendering professional advice and treatment to her concerning marital problems, which ultimately caused a breakdown of the marriage. This court rejected the claim, principally because imposing on psychotherapists a duty to exercise care for the benefit of patients' spouses—in respect to providing therapy and treatment to the patient—would interfere with the "duty of undivided loyalty" that psychotherapists owe to their patients. Id., 97–98. The limited duty to warn that I would recognize would not give rise to a conflict of duties, let alone the sort of inevitable and irreconcilable conflict that counseled against adoption of the duty of care proposed in *Jacoby*. See, e.g., 1 D. Dobbs & P. Hayden, supra, § 241D, pp. 237–38 (duty to warn patient creates no conflict). Thus, the limited duty to warn the patient advances important public interests while avoiding the significant policy objections that have defeated other third party claims against medical professionals, including those in *Fraser*, *Zamstein* and *Jacoby*.

Although we are presented with a different set of facts in the present case, I would contend that the existence of an objective duty on the part of Troncale to warn Ambrogio of her driving impairment presents the necessary indicia to approve the doctrine. Further, the fact that Ambrogio may experience a blackout while driving—a routine act—and cause injury to a pedestrian, places the plaintiff within a class of victims that was foreseeable. Accordingly, I respectfully dissent.