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Tort Law - Foreseeability vs. Public Policy Considerations in Determining the Duty of Physicians to Non-Patients - Lester v. Hall

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TORT LAW—Foreseeability vs. Public Policy Considerations in Determining the Duty of Physicians to Non-Patients—*Lester v. Hall*

> [T]he problem of duty is as broad as the whole law of negligence, and . . . no universal test for it ever has been formulated.[1]

I. INTRODUCTION

In *Lester v. Hall*,[2] the New Mexico Supreme Court held that a physician owes no duty to a third party who is injured by the physician's patient as a result of prescription drug side effects.[3]

Prior to the *Lester* decision, the only New Mexico case addressing physician liability to third parties was *Wilschinsky v. Medina*.[4] In that case, the New Mexico Supreme Court held that a physician did owe a duty to a third party injured by a patient driving away from the physician's office immediately after the physician injected the patient with a drug known to impair judgment and driving ability.[5] However, the *Wilschinsky* court emphasized the intended narrowness of its holding.[6] Thus, *Lester* reaffirms the court's admonition in *Wilschinsky* that physician liability to third parties for medical malpractice is the exception, not the rule.

II. STATEMENT OF THE CASE

In June 1993, Dr. Hall, a licensed clinical psychiatrist, prescribed lithium[7] for his patient, Merlin Andersen, to treat his mood disorders.[8] After taking lithium for approximately one month, Andersen reported to Dr. Hall that he had been feeling "sick and shaky."[9] Despite these reported side effects, Dr. Hall increased

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1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 357-58 (5th ed. 1984) [hereinafter KEETON ET AL.].

2. 126 N.M. 404, 970 P.2d 590 (1998).

3. *See id.* at 405, 970 P.2d at 591.

4. 108 N.M. 511, 775 P.2d 713 (1989).

5. *See id.* at 515, 775 P.2d at 717.

6. *See id.* (admonishing that its holding does not create a general duty to the "entire public for any injuries suffered for which an argument of causation can be made"). The *Wilschinsky* court warned future courts to carefully consider whether the facts of a particular case are appropriate for the extension of physician duty to third parties under the *Wilschinsky* principles. *See id.*; *see also* Turpie v. Southwest Cardiology Assocs., 124 N.M. 787, 790, 955 P.2d 716, 719 (1998) (noting that "the [*Wilschinsky*] court intended to limit *Wilschinsky* to its specific circumstance" and that the court declined to "extend its rationale, as such, to the medical malpractice arena").

7. [Lithium carbonate] is indicated in the treatment of manic episodes of manic-depressive illness. Maintenance therapy prevents or diminishes the intensity of subsequent episodes in those manic-depressive patients with a history of mania. Typical symptoms of mania include pressure of speech, motor hyperactivity, reduced need for sleep, flight of ideas, grandiosity, elation, poor judgment, aggressiveness and possibly hostility. When given to a patient experiencing a manic episode, [lithium carbonate] may produce a normalization of symptomatology within 1 to 3 weeks.

PHYSICIAN'S DESK REFERENCE 3051 (53d ed. 1999).

8. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 5, Lester v. Hall, 126 N.M. 404, 970 P.2d 590 (1998) (No. 24,653). At the time Dr. Hall prescribed the lithium, Andersen was also taking Zoloft (an antidepressant), Synthroid (a thyroid medication), and Diazepam (Valium), also prescribed by Dr. Hall. *See id.*

9. *See* Plaintiff's Brief in Chief on Question Certified from the United States District Court at 5, *Lester* (No. 24,653) (citing testimony of Hall at Medical-Legal Panel on July 30, 1996, from partial transcription at 15).

Andersen's dose of lithium.[10] Five days after the dose increase, Andersen ran a red light,[11] struck the car in which Plaintiff Barbara Lester was a passenger, and seriously injured her.[12]

At least twelve hours after taking his last lithium pill, a blood test at University of New Mexico Hospital revealed that Andersen's lithium level was 1.34 MEQ/L.[13] This level was within the narrow therapeutic window of effectiveness for lithium, but extrapolating back twelve hours, Andersen's level at the time of the accident may have been toxic.[14]

The prevalent literature and medically-recognized standard of care require a prescribing physician to closely monitor the administration of lithium through frequent blood testing.[15] The physician should also recognize physical symptoms of toxicity exhibited by his patient and respond appropriately to them.[16]

In addition to monitoring lithium levels through blood tests and clinical observation of symptoms, the standard of care requires the prescribing physician to discuss potential side effects with the patient.[17] The physician should also warn the patient that these side effects could impair driving skills.[18] There are factual disputes as to whether Dr. Hall warned Andersen of the possible side effects of lithium and whether he followed the required standard of care for monitoring lithium levels.[19]

Lester brought a personal injury action in federal court against Dr. Hall, and prior to the trial, Judge Parker certified the following question to the New Mexico Supreme Court:[20]

> Does a physician owe a legal duty to a non-patient who is injured in a collision with a motor vehicle, operated by the physician's patient, who was last treated

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10. *See* Plaintiff's Brief in Chief at 5, *Lester* (stating that Dr. Hall raised Andersen's dose from 900 mg per day to 1200 mg per day) (citing deposition of Anderson at 23 and testimony of Hall at 17)).

11. Andersen has no conscious memory of the period of time immediately preceding the accident. *See* letter of Oct. 17, 1994 from Merlin Andersen to Judge James F. Blackmer at 2 (on file with the New Mexico Law Review).

12. *See* Lester v. Hall, 126 N.M. 404, 405, 970 P.2d 590, 591 (1998).

13. *See* Univ. of New Mexico Hosp. Toxicology Report, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at Ex. A, *Lester* (No. 24,653), *cited in* November 14, 1994 Deposition of Andersen at 7. Note that this was Andersen's first and only lithium level check after taking the drug for over a month. *See* Plaintiff's Brief in Chief at 4, *Lester*.

14. Patients with lithium serum levels of 2.0 to 3.0 MEQ/L are suffering from mild to moderate intoxication and are usually conscious, although they are experiencing "acute brain syndrome—confusion, disorientation, memory and intellectual impairment. . . . [with] varying degrees of neuro-muscular irritation and disturbance." *See* F. NEIL JOHNSON, HANDBOOK OF LITHIUM THERAPY 286 (1980).

15. *See* Affidavit of Fredman ¶ 4a, *Lester*. Initially, testing should be done every 2-3 days. *See* JOHNSON, *supra* note 14, at 13.

16. *See* Affidavit of Fredman ¶ 4c, *Lester*; JOHNSON, *supra* note 14, at 15. Barbara Lester filed suit against Dr. Hall for allegedly committing malpractice by failing to properly monitor Andersen's lithium levels, failing to adequately warn him of potential side effects of the treatment, and failing to recognize that Andersen was suffering symptoms of lithium toxicity. *See* Complaint for Damages Under New Mexico's Medical Malpractice Act at 3, *Lester*. Lester claimed that Dr. Hall owed a legal duty to her, he breached this duty during the course of his treatment of Andersen, and his breach was a proximate cause of her injuries and damages. *See id.*

17. *See* JOHNSON, *supra* note 14, 287.

18. *See* Affidavit of Fredman ¶ 4b, *Lester*.

19. *See Lester*, 126 N.M. 405, 970 P.2d at 590 at 591.

20. *See id.* at 404, 970 P.2d at 590 (noting that Judge Parker certified the question pursuant to N.M. R. APP. P. 607 regarding certification from federal courts).

> by the physician five days before the collision, and whose ability to drive a vehicle allegedly was impaired by medications prescribed by the physician, who (1) allegedly improperly monitored his patient's medication and (2) allegedly failed to warn his patient that the medication could impair the patient's driving ability?[21]

The New Mexico Supreme Court accepted certification of this question and, after full briefing and oral argument, answered the certified question in the negative, holding that Dr. Hall did not owe a duty to Barbara Lester stemming from his treatment of Andersen.[22]

III. BACKGROUND

Before a negligent defendant can be held liable for a plaintiff's damages, the court must determine whether the defendant owed the plaintiff a duty to exercise ordinary care.[23] From a moral viewpoint, one might argue that every person has a duty to exercise ordinary care toward every other person in the performance of every imaginable task.[24] Recognizing that this unbounded definition of duty would be impossible to enforce, common law courts have limited the universe of duty. They have chosen to impose a duty of care on a defendant only when the plaintiff's injury is foreseeable[25] and when the imposition of a duty is consistent with public policy.[26] In the process of assigning liability, the judge is responsible for answering the legal question of whether the defendant owed a duty to the plaintiff and, if a duty is owed, the jury is responsible for answering the factual question of whether the defendant breached his duty.[27]

Duty: A Question of Foreseeability and Policy

Foreseeability is the centerpin of Justice Benjamin Cardozo's majority opinion in *Palsgraf v. Long Island Railroad Co*,[28] "the most discussed and debated of all torts cases . . . ."[29] In *Palsgraf*, Chief Judge Cardozo, speaking for a majority of four members of the New York Court of Appeals, found the defendant not liable for lack

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21. *Id.*

22. *See id.* at 405, 970 P.2d at 591.

23. *See* Calkins v. Cox Estates, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990).

24. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting) (arguing that "[d]ue care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone").

25. *See Calkins*, 110 N.M. at 62, 792 P.2d at 39 (citing the majority opinion in *Palsgraf* for the proposition that "[a] plaintiff must show that defendant's actions constituted a wrong against *him*, not merely that defendant acted beneath a required standard of care") (emphasis added).

26. *See* KEETON ET AL., *supra* note 1, at 358 (explaining that "'duty' is . . . an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

27. *See Calkins*, 110 N.M. at 61, 66, 792 P.2d at 38, 43.

28. The facts of Palsgraf are as follows: As plaintiff stood on a platform of defendant's railroad, a train stopped at the station and two men ran forward to catch it. One of the men, carrying a package, jumped aboard the car, but appeared unsteady as if he were about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged and fell on the rails. The package contained fireworks that exploded when it fell. The shock of the explosion threw down a set of scales at the other end of the platform. The scales struck the plaintiff, causing the injuries for which she sued. *See Palsgraf*, 162 N.E. at 99 (N.Y. 1928).

29. KEETON ET AL., *supra* note 1, at 284.

of a duty owed to the plaintiff.[30] Negligence, Chief Judge Cardozo said, was a matter of relation between the parties, which must be founded upon the foreseeability of harm to the person injured.[31] Cardozo stated that "[t]he risk reasonably to be perceived defines duty . . . it is risk to another or to others within the range of apprehension."[32]

On the other hand, Judge Andrews, writing in dissent in *Palsgraf*, opined that everyone owes a duty to the world at large to refrain from acts that unreasonably threaten the safety of others.[33] He argued that "[n]ot only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone."[34] Judge Andrews pointed out that foreseeability is not a requirement: "It does not matter that [the injuries] are . . . unforeseeable. But . . . [t]he damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former."[35] Judge Andrews then gave the meaning of proximate cause in his approach to defining duty as "because of convenience, of *public policy*, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[36] Thus, Judge Andrews would not require foreseeability for duty, but would require a connectedness based on public policy.

In *Calkins v. Cox Estates*, the New Mexico Supreme Court recognized the concept of foreseeability in tort as integral to duty.[37] Relying on the famous Cardozo opinion in *Palsgraf*, the *Calkins* court required the plaintiff to show himself "within the zone of foreseeable danger created by the defendant's actions" in order to prove the defendant had a duty to use reasonable care.[38]

The *Calkins* court also recognized that public policy was established by New Mexico's precedent as key to determining duty.[39] When faced with public policy

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30. *See Palsgraf*, 162 N.E. at 101.
31. *See id.*
32. *Id.* at 100.
33. *See id.* at 103 (Andrews, J., dissenting).
34. *Id.* (Andrews, J., dissenting).
35. *Id.* (Andrews, J., dissenting).
36. *Id.* (Andrews, J., dissenting) (emphasis added).
37. *See* Calkins v. Cox Estates, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990). The facts of *Calkins* are as follows: Eight year old Daniel Enriquez lived with his grandparents in an apartment complex owned by the defendant. There was a playground behind the apartment complex that Enriquez was playing in on the day in question. Behind the playground was an arroyo leading to the Metropolitan Flood Control ditch, and then to an unfenced road adjoining Interstate 25, approximately 945 feet away. The playground was separated from the arroyo by a fence built by the landlord, but the fence had fallen into disrepair. Enriquez escaped through a hole in the fence and was killed by a car on the frontage road. *See id.*
38. *See id.* at 61, 792 P.2d at 38.
39. *See id.* at 63, 792 P.2d at 40; *see also* Brief of the New Mexico Trial Lawyers Association Amicus Curiae in Support of Plaintiff at 8, Lester v. Hall, 126 N.M. 404, 970 P.2d 590 (1998) (No. 24,653) (describing New Mexico's law of duty as well-grounded in the legal/policy component of foreseeability, as distinguished from the factual component of foreseeability). *See, e.g.*, Solon v. W.E.K. Drilling Co. Inc., 113 N.M. 566, 569, 829 P.2d 645, 648 (1992) (reaffirming that the issue of duty is one of social policy by defining duty as "where to draw the line against otherwise unlimited liability," and treating foreseeability as only one aspect of that policy analysis). Chief Justice Ransom explained that "while Chief Judge Cardozo held in *Palsgraf* that there can be no duty in relation to another person *absent* foreseeability ('risk reasonably to be perceived'), it does not follow that duty necessarily is present if risk of injury to that other person *is* foreseeable from one's acts and omissions." *Id.* at 572 (Ransom, C.J., specially concurring). Justice Ransom agreed with the social policy determination because it was "not reasonable to impose a duty to avoid" the risk at issue in *Solon*. *See id.* at 573; *see also* Gabaldon v. Jay-Bi

questions, the New Mexico courts first rely on the state legislature as the primary exposition of the public policy of the state,[40] then balance the policy interests involved.[41]

The *Calkins* court established that the defendant owed a duty to the plaintiff based on the landlord-tenant relationship by referencing New Mexico statutes and common law.[42] Having established a duty to maintain common areas reserved for tenants, the court looked to the foreseeability of the injury to establish the scope of the duty.[43] According to the majority, it was reasonably foreseeable that Enriquez, a tenant of defendant's apartment complex, would be harmed as a result of defendant's failure to exercise reasonable care in maintaining the fence enclosing the playground behind the complex.[44]

Judge Andrews' policy-based approach in determining duty in his *Palsgraf* dissent is still advanced, however. For example, Justice Ransom argued in his *Calkins* dissent that the crux of the duty analysis is a legal policy determination where foreseeability is not controlling.[45] The policy issue is whether it is reasonable to impose a duty to avoid a risk of injury which, although foreseeable, is remote.[46] Therefore, as a matter of public policy, absent an affirmative undertaking relied upon by the tenants,[47] Ransom stated that it was not reasonable to require the landlord to prevent Enriquez from leaving his apartment complex.[48]

Property Management, Inc., 122 N.M. 393, 395, 925 P.2d 510, 512 (1996) (recognizing the need for a "bright-line test" in determining duty). The particular bright-line test adopted in *Gabaldon* arose out of the court's recognition that "boundaries, however arbitrary" are needed to protect "against fraudulent claims and the expansion of [tort] liability out of all proportion to the tortfeasor's fault." *See id.* at 396, 925 P.2d at 513.

40. *See id. See, e.g.*, New Mexico Tort Claims Act, N.M. STAT. ANN. §§ 41-4-1 through 41-4-27 (1996 & Supp. 1999). In 1976, the New Mexico Legislature enacted the Tort Claims Act "in response to the judicial abrogation of sovereign immunity in *Hicks v. State*, 88 N.M. 588, 592, 544 P.2d 1153 (1975)." *See* N.M. STAT. ANN. § 41-4-1 (1999). The basic intent of the act was to reestablish governmental immunity while creating specific exceptions for which the government could be sued for tort liability. *See* Bd. of County Comm'rs v. Risk Management Div., 120 N.M. 178, 899 P.2d 1132 (1995). The legislature listed the following public policy concerns to justify its retention of partial governmental immunity:

> (1) . . . protect[ion] [of] the public treasuries; (2) . . . [the ability to] function unhampered by the threat of time and energy consuming legal actions which would inhibit the administration of traditional state activities; and (3) . . . [a desire] to effectively carry out its services, many of which are financially unprofitable and which would not be provided at a reasonable cost by private enterprise . . . .

N.M. STAT. ANN. § 41-4-1 (1999).

41. *See Calkins*, 110 N.M. at 63, 792 P.2d at 40.

42. *See id.* (obliging an owner to "keep common areas of the premises in a safe condition"); Torres v. Piggly Wiggly Shop Rite Foods, Inc., 93 N.M. 408, 411, 600 P.2d 1198, 1201 (Ct. App. 1979), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979) (holding a landlord liable for a slip and fall injury in a parking lot on leased premises where the landlord assumed responsibility and control over the parking lot)); N.M. U.J.I. CIV. 13-1314 (stating a landlord's duty to use ordinary care in making improvements or repairs), 1315 (stating landlord's duty to use ordinary care to keep common premises in safe condition); RESTATEMENT (SECOND) OF TORTS § 360 (1965) (affirming a lessor's liability for lessee's harm when caused by a dangerous condition upon land within the lessor's control if the lessor could have discovered the condition by the exercise of reasonable care).

43. *See Calkins*, 110 N.M. at 65, 792 P.2d at 42.

44. *See id.* Whether the defendant breached his duty to maintain common areas in a reasonably safe condition was a question of fact for the jury to answer on remand. *See id.* at 66, 792 P.2d at 43.

45. *See id.* at 67, 792 P.2d at 44 (Ransom, J., dissenting).

46. *See id.* (Ransom, J., dissenting).

47. The majority in *Calkins* found an affirmative undertaking by the landlord. *See id.* at 64, 792 P.2d at 41.

48. *See id.* at 68, 792 P.2d at 45 (Ransom, J., dissenting).

Liability to Third Parties

A more specific duty question to which both policy and foreseeability are relevant is the extension of duty to third parties, i.e., injured persons who were not the original victim of the tortfeasor's negligence. Because foreseeability of harm is always somewhat attenuated in third-party cases, they lend themselves to a public policy analysis.

New Mexico has an extensive history of cases in which its courts have held tortfeasors liable to third parties.[49] Examples include: *Lopez v. Maez*[50] (finding a duty owed by people serving alcohol to highways travelers), *Torres v. State of New Mexico*[51] (imposing a duty on police to unidentified members of the general public with respect to law enforcement activities), *Ramirez v. Armstrong*[52] (extending tortfeasor duties to third-party bystanders and spouses of victims), and *Steinberg v. Coda Robertson Construction Co.*[53] (finding professional duties to non-clients).

Professional Malpractice

Despite the rich history of New Mexico cases relating to liability to third parties, the only case in New Mexico concerning physician duty to third parties for malpractice before *Lester* was *Wilschinsky v. Medina.*[54] In *Wilschinsky*, the New Mexico Supreme Court held that a physician owed a duty to a member of the public who might be injured by a patient's impaired ability to drive after the physician injected the patient with powerful drugs in the physician's office.[55]

Wilschinsky filed suit in district court against Helen Medina, the driver of the car that struck and injured him. He amended his complaint to join Dr. Michael Straight, alleging that Dr. Straight negligently administered two drugs known to cause drowsiness and impair judgment to Medina.[56] Noting that the question was one of first impression, the court borrowed the three-pronged balancing test from *Kirk v. Michael Reese Hospital & Medical Center*[57] as the proper method of determining the duty of a medical provider to third parties injured by the doctor's patient. Under the *Kirk* standard, the *Wilschinsky* court analyzed (1) the likelihood of injury to the

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49. *See* Plaintiff's Brief in Chief at 9, *Lester*.

50. 98 N.M. 625, 651 P.2d 1269 (1982) (finding the extension of duty beyond the patron to the general public appropriate because the consequences of serving liquor to an intoxicated person whom the server knows or could know is driving a car is reasonably foreseeable in light of the use of automobiles and the increasing frequency of accidents involving drunk drivers).

51. 119 N.M. 609, 894 P.2d 386 (1995).

52. 100 N.M. 538, 673 P.2d 822 (1983); *see also* Romero v. Byers, 117 N.M. 422, 872 P.2d 840 (1994).

53. 79 N.M. 123, 440 P.2d 798 (1968) (holding that a contractor was liable for defects discovered by the subsequent purchaser, even though there was no direct contractual relationship between them); *see also* Wisdom v. Neal, 568 F. Supp. 4 (D.N.M. 1982); Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995) (finding that an attorney could be liable to one who was not his client but was the statutory beneficiary of wrongful death proceeds the attorney had recovered for the personal representative); Wilschinsky v. Medina, 108 N.M. 511, 775 P.2d 713 (1989).

54. 108 N.M. 511, 775 P.2d 713 (1989).

55. *See id.* at 517, 775 P.2d at 719.

56. *See id.* at 511, 775 P.2d at 713.

57. 513 N.E.2d 387 (Ill. 1987).

plaintiff, (2) the magnitude of the burden to the doctor of guarding against the injury and (3) the potential consequences of placing that burden on the doctor.[58]

The *Wilschinsky* court found that the likelihood of a vehicular accident immediately following the injection of a narcotic in combination with other drugs was great.[59] Under the second prong of the *Kirk* test, the court found that when the narcotic is administered by a doctor in his office, the burden of guarding against foreseeable danger is not unreasonable.[60] Finally, under the third prong, the court determined that if the scope of the doctor's duty is limited to the professional standards of acceptable medical practice, the additional burden on the doctor's treatment decisions is negligible.[61] Thus, under the *Kirk* balancing test, the *Wilschinksky* court determined that Dr. Straight owed a duty to the driving public when he administered the drugs to Medina under those particular circumstances.[62]

In addition to applying the *Kirk* test, the *Wilschinsky* court surveyed decisions from foreign jurisdictions that had grappled with the policy question of physician liability to third parties and was persuaded by the reasoning of those jurisdictions that found a duty to third parties.[63] Combining the results of its *Kirk* analysis with its determination that a majority of foreign jurisdictions found that the policy compelled such a duty, the *Wilschinsky* court held that Dr. Straight owed a duty to Wilschinsky.

IV. RATIONALE AND ANALYSIS

The *Lester* court's analysis of duty is legitimately concerned with both foreseeability and public policy, just as the *Kirk* standards combine a foreseeability inquiry and a public policy inquiry.

Foreseeability

The three-pronged *Kirk* test required the *Lester* court to assess the likelihood of Barbara Lester's injury, the magnitude of the burden on Dr. Hall of guarding against it, and the potential consequences of placing that burden on Dr. Hall.

In applying the first prong, the *Lester* court found that, because the effect of lithium on driving abilities was far less certain than the effect of the narcotic in *Wilschinsky*, it was less foreseeable that a person taking lithium would cause a car accident.[64] In addition to acknowledging that the effect of lithium on driving abilities is uncertain, the *Lester* court may have been at least partially persuaded by

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58. *See Wilschinsky*, 108 N.M. at 513, 775 P.2d at 715.

59. *See id.* at 514, 775 P.2d at 716.

60. *See id.* "The additional burden placed on doctors by this opinion is negligible because the duty we recognize is consistent with professional standards in the medical community and the liability falls under the rubric of the Medical Malpractice Act . . . ." *Id.* at 515, 775 P.2d at 717.

61. *See id.* at 514, 775 P.2d at 717. In the medical profession, doctors must use reasonable care based on any superior learning, experience, skills, knowledge or training they personally have over and above the normal professional standards. *See* KEETON ET. AL., *supra* note 1, at 185 (citing Prooth v. Wallsh, 432 N.Y.S.2d 668 (N.Y. Sup. 1980)).

62. *See Wilschinsky*, 108 N.M. at 515, 775 P.2d at 717.

63. *See, e.g.*, Gooden v. Tips, 651 S.W.2d 364, 369 (Tex. App. 1983); Wharton Transport Corp. v. Bridges, 606 S.W.2d 521, 527 (Tenn. 1980), Freese v. Lemmon, 210 N.W.2d 576, 578 (Iowa 1973); Kaiser v. Suburban Transport Systems, 398 P.2d 14, 16 (Wash. 1965).

64. *See* Lester v. Hall, 126 N.M. 404, 406, 970 P.2d 590, 592 (1998).

the argument of the New Mexico Medical Society that the symptoms Andersen described to Dr. Hall during his appointment on July 15th were not caused by lithium.[65] At the time Andersen experienced the reported symptoms, a policeman was monitoring him while he inventoried possessions in his garage that were being divided in a painful divorce on a hot and sticky July day.[66] The stress of these conditions, rather than lithium side effects, may have caused Andersen's symptoms. The New Mexico Medical Society argued in the alternative that if Andersen really did experience shakiness (hand tremor) as a result of his lithium therapy, it was an innocuous side effect that did not present a danger to him.[67]

The second prong of the *Kirk* test required the *Lester* court to analyze the magnitude of the burden on the physician of guarding against the harm to the third party. In applying this prong, the *Lester* court determined that assigning such a duty to Dr. Hall would be too burdensome.[68] The court contrasted the *Lester* facts with those in *Wilschinsky*, where the administration of narcotics in the doctor's office under his direction and timing made reasonable preventative measures of whatever type easier to implement.[69] At the same time, the in-office administration created a higher degree of patient reliance on the doctor's professional judgment.[70]

In *Wilschinsky*, however, the court applied the second *Kirk* factor and found that if a duty to third parties would only necessitate applying regularly accepted medical standards, it would not be an undue burden.[71] Acceptable medical standards require a physician to regularly monitor his patient's lithium level,[72] and to warn his patient of the possible side effects of lithium therapy.[73] Under the *Wilschinsky* approach, Dr. Hall could have fulfilled any duty he might have to Lester by adequately fulfilling his duty to Andersen. The *Lester* court sidestepped this aspect of *Wilschinsky* and focused instead on the factual distinction between the two cases.

The third prong of the *Kirk* test required an attempt to predict the consequences of placing a burden upon the defendant. The *Lester* court concluded that, if it extended a duty from Hall to Lester, the duty would cause a "potentially chilling effect on the use of prescription medication in medical care"[74] and a "potential intrusion upon the indispensable loyalty which physicians must maintain towards their patients regarding their medical care and treatment decisions."[75] The court opined that "doctors should not be asked to weigh notions of liability in their already complex universe of patient care."[76]

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65. *See* New Mexico Medical Society Amicus Brief at 10, *Lester* (No. 24,653).
66. *See id.*
67. *See id.*
68. *See Lester*, 126 N.M. at 406, 970 P.2d at 592.
69. *See id.*
70. *See* Wilschinsky v. Medina, 108 N.M. 511, 514-15, 775 P.2d 713, 716-17 (1989).
71. *See id.* at 515, 775 P.2d at 717. *Lester* is a more compelling duty case than *Wilschinsky* because, here, proper medical treatment by Dr. Hall would have entirely prevented the medical condition in Andersen which allegedly caused Lester's injuries. In *Wilschinsky*, on the other hand, the physician was required to take additional steps beyond his medical treatment to protect the motoring public. *See* Plaintiff's Brief in Chief at 12-23, *Lester*.
72. *See supra* text accompanying note 15.
73. *See* JOHNSON, *supra* note 14, at 287.
74. *See Lester*, 126 N.M. at 407, 970 P.2d at 593.
75. *See id.*
76. *See id.* (citing *Wilschinsky*, 108 N.M. at 516, 775 P.2d at 718).

Based on the three-pronged *Kirk* analysis, the court found that the facts of *Lester* did not warrant extending a duty to Dr. Hall for the injuries Andersen caused to Lester.

Public Policy

In undertaking its policy analysis, the *Lester* court first explained that policy also determines duty and it is the particular domain of the legislature, as the voice of the people, to create public policy.[77] The court then reasoned that the legislature, through the Medical Malpractice Act,[78] had acted to limit health care providers' liability out of a concern for the health of the citizens of New Mexico.[79]

The legislature's stated purpose in enacting the Medical Malpractice Act was to "promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico."[80] The legislature's determination that health care providers' liability must be limited in order to assure New Mexicans' access to medical care is demonstrated by damage caps,[81] a shorter statute of limitations,[82] and required evaluation and decision by the medical review commission.[83]

The *Lester* court reasoned that the most effective way it could prioritize the public health and welfare of New Mexicans was by not imposing a duty on Dr. Hall and thus, help to ensure continuing access to health care.[84] An imposition of duty in this case may have made it more difficult, and therefore less attractive, to practice medicine in New Mexico because of the expanded tort liability. This could in turn lead to a shortage of physicians and a resulting difficulty for New Mexicans in obtaining quality health care.

In expanding its public policy analysis, the court appears to have been swayed by several arguments made by the New Mexico Medical Society. First, the court was persuaded that if psychiatrists were held to have a duty to third persons because of side effects caused by effective treatment, it would result in an enormous disincentive against treating any potentially risky patient.[85] Second, were the court to impose a duty on a physician to consider the risk of harm to third persons before prescribing medication to a patient, it would force the physician to weigh the

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77. *See* Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (recognizing that "[c]ourts should make policy in order to determine duty only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the legislature").

78. N.M. STAT. ANN. §§ 41-5-1 to 29 (1996 & Supp. 1999). The legislature drafted the Medical Malpractice Act in response to the 1970s insurance crisis to promote the health and welfare of the people of New Mexico by securing the availability of professional liability insurance for health care providers. *See id.* The Act also imposed damage caps on malpractice claims, created a shorter statute of limitations for malpractice actions and required an evaluation of malpractice claims by the medical review commission. *See id.*

79. *See id.*; *see also* Wilschinsky v. Medina, 108 N.M. at 516, 775 P.2d at 718 (discussing the purpose of the Medical Malpractice Act).

80. N.M. STAT. ANN. § 41-5-2 (1996).

81. *See id.* § 41-5-6.

82. *See id.* § 41-5-13 (three year statute of limitations); *cf. id.* § 37-1-3 (1990) (six-year statute of limitations).

83. *See id.* § 41-5-15.

84. *See Lester*, 126 N.M. at 407-08, 970 P.2d at 593-4.

85. *See* New Mexico Medical Society Amicus Brief at 16, *Lester*.

welfare of unknown people against the welfare of his own patient.[86] In this situation, a physician might refrain from prescribing beneficial drugs for his patient if he thought the risk of liability to third parties was too high.

After applying the *Kirk* balancing test and surveying the case law and relevant public policy concerns of New Mexico, the court acknowledged that there was a split in authority in cases from other jurisdictions.[87] The *Lester* court declined to adopt any of the specific factors enumerated in the foreign cases. It did find, however, that the policy considerations underlying the cases that did not impose a third-party duty on physicians were much more compelling than those cases that extended a general duty from physicians to third parties in prescription cases.[88] Interestingly, this determination about policy considerations is directly contradictory to the determination by the *Wilschinsky* court, which was persuaded by the reasoning of jurisdictions that did find a duty to third parties.

VI. IMPLICATIONS

The effect of the *Lester* decision on New Mexico law is unclear, primarily because it did not overturn *Wilschinsky* and because of the way in which it distinguished that case. *Wilschinsky* remains good law with respect to the injection of narcotic drugs in the office where the physician has control over the patient, thus leaving some uncertainty in those cases that have attributes of both *Lester* and *Wilschinsky*.

For example, suppose that a physician prescribes a narcotic instead of lithium and his patient subsequently injures a third party as a result of the drug's side

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86. *See id.* at 17 (citing Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991)).

87. *See Lester*, 126 N.M. at 409, 970 P.2d at 595. The *Lester* court cites the following cases from foreign jurisdictions that hold a physician owes a duty to third party non-patients for negligently prescribing medication: Watkins v. United States, 589 F.2d 214, 219 (5th Cir. 1979) (concluding a physician owed a duty under Alabama law to a third party when prescribing Valium to a patient, even though the patient had a 0.16 blood alcohol level); Zavalas v. State Dept. of Corrections, 861 P.2d 1026, 1027-29 (Or. Ct. App. 1993) (finding a physician who negligently prescribed medicine to his heroin-addicted patient owed a duty to third parties); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 16 (Wash. 1965) (holding, without a discussion of duty, that a physician who failed to warn a bus driver of side effects of medication which may cause drowsiness owed a duty to injured bus passenger); Schuster v. Altenberg, 424 N.W.2d 159, 161-63 (Wis. 1988) (finding that a defendant therapist was negligent when failing to warn patient of a medication's side effects, failing to warn the patient's family, and failing to seek commitment of the patient). Conversely, the court cites the following jurisdictions as rejecting the proposition that physicians owe a duty to third parties for the negligent prescription of drugs: Estate of Warner v. United States, 669 F. Supp. 234, 235-37 (N.D. Ill. 1987) (concluding a doctor who allegedly prematurely released a psychiatric patient who was experiencing intoxication from barbiturates did not owe a duty to a third party non-patient because no special relationship existed); Werner v. Varner, Stafford & Seaman, P.A., 659 So. 2d 1308, 1309-10 (Fla. App. 1995) (holding that a doctor did not owe a duty to a third party even though he failed to warn a patient not to drive while under the influence of an epilepsy medicine because Florida has "specifically limited the physician's duty to known and identifiable parties" such as mother and child); Webb v. Jarvis, 575 N.E.2d 992, 995-97 (Ind. 1991) (finding that a doctor who prescribed anabolic steroids to a patient who subsequently shot the plaintiff owed no duty to the plaintiff because no "contract, special relationship, privity or reliance" existed between the plaintiff and the doctor); Conboy v. Mogeloff, 172 A.2d 912, 961-62 (N.Y. App. Div. 1991) (holding that a doctor owes no duty to a patient because a defendant has no legal duty to control the third party's conduct); Rebollal v. Payne, 145 A.D.2d 617 (N.Y. App. Div. 1988) (reasoning that a physician "does not undertake a duty to the public at large"); Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 395-99 (Ill. 1987) (concluding that "no patient-doctor relationship" between the defendant doctors and the plaintiff existed and no special relationship existed between the patient and the plaintiff).

88. *See Lester*, 126 N.M. at 412, 970 P.2d at 598.

effects. The physician would lack control of the patient, as Dr. Hall did in *Lester*, but the potential danger of the drug would be higher, as it was with the injected narcotic in *Wilschinsky*. A court could find, despite the lack of physician control, that the dangerous nature of the drug is sufficient to extend a third-party duty to the physician. Such an finding would emphasize foreseeability in determining a duty existed. Or, the court could hold that the lack of physician control is the critical factor and not extend a third party duty to the physician as a matter of policy.

Next, imagine that a physician administers a non-narcotic drug to a patient in his office and the patient, experiencing side-effects from the drug, injures a third party while driving home. In all ways except for the nature of the drug, this fact pattern is analogous to *Wilschinsky*. A court could reasonably hold as a matter of public policy that, because the patient was under the physician's control when he ingested the drug, the physician is liable to the third party despite the milder nature of the drug in question. Or, a court may find that the injury to the third party was not foreseeable because the drug did not generally cause dangerous side effects and hold the physician not liable.

Without knowing the critical element of either the *Lester* or the *Wilschinsky* fact patterns from the court's perspective, the implications of these decisions on physician liability to third parties remains a guessing game.

VI. CONCLUSION

Assuming that *Wilschinsky* is a narrow exception to a general rule of not imposing liability on third parties, it is critical to determine what it is about the *Lester* fact pattern that distinguishes it from *Wilschinsky*. Whether it is the nature of the drug in question, the in-office administration of the drug, or some other criterion, physicians need to understand, for their own peace of mind, how their actions might expose them to liability to third parties.

Unfortunately for physicians in New Mexico, the *Lester* decision does not make the critical distinction entirely clear. Physicians have no choice except to live with this ambiguity until the New Mexico Supreme Court issues an opinion that helps us better understand the parameters of liability to third parties.

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