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Tort Law - The Supreme Court Provides a Remedy for Injured Plaintiffs under the Theory of Loss and Chance - Alberts v. Schultz

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TORT LAW—The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance—*Alberts v. Schultz*

I. INTRODUCTION

In *Alberts v. Schultz*,[1] the New Mexico Supreme Court confirmed the decision of the New Mexico Court of Appeals in *Baer v. Regents of the University of California*[2] to adopt the loss of chance doctrine as a theory of tort recovery in New Mexico. Under this doctrine, a person with a preexisting medical condition whose chance of recovery was reduced because of medical negligence may recover for that reduced chance, even if the odds of recovery would have been less than fifty percent with the correct medical treatment.[3] Interestingly, the doctrine imposes no additional duties on defendants. *Alberts* establishes that the loss of chance claim is evaluated using duty, breach, causation and damages; the same elements used in other claims of negligence.

While the supreme court's recognition and adoption of the loss of chance doctrine may promote equality in the treatment of plaintiffs injured by the negligence of others, the doctrine's strict proof of causation requirements render it useless for some legitimately injured plaintiffs. Moreover, the method of calculating damages under the doctrine is unclear and leaves several unanswered questions. This Note reviews the establishment of the loss of chance doctrine in New Mexico, analyzes the court's opinion, and explores the potential implications of the doctrine.

II. STATEMENT OF THE CASE

Plaintiff Dee Alberts, who had a history of peripheral vascular disease, saw his primary care physician, Dr. Russell C. Schultz, on July 14, 1992, complaining of severe pain in his right foot in the absence of activity or exercise.[4] This "rest pain" is a recognized symptom of impending gangrene, which can lead to the amputation of the affected limb.[5] At that visit, Dr. Schultz observed that Mr. Alberts' foot was dusky in color. Nonetheless, he did not order or perform any further tests, even though an arteriogram[6] and motor sensory exams may have given him more information about the severity of Mr. Alberts' problem.

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1. 126 N.M. 807, 975 P.2d 1279 (1999).
2. 126 N.M. 508, 972 P.2d 9 (Ct. App. 1998).
3. *See id.*; *see also* PROPOSED N.M. U.J.I. CIV. 13-1635 (1999).

> A party is liable for negligence resulting in another's lost chance for [a better outcome to] [survival from] a preexisting condition. This lost opportunity is an injury in itself. For _____ to recover on this claim a medical expert must have established that, as a result of _____'s negligence, _____ lost a measurable opportunity to avoid [loss of limb], [loss or life], [_____ (other)].

Id.

4. *See Alberts*, 126 N.M. at 808, 975 P.2d at 1280 (defining peripheral vascular disease as "a chronic progressive narrowing of the blood vessels which restricts the flow of blood to a particular area of the body."). All facts and proceedings are taken from *Alberts*, 126 N.M. at 808-09, 975 P.2d at 1280-81, unless otherwise specified.
5. *See id.*
6. An arteriogram is the x-ray visualization of an artery after injection of a dye that will be visible on the x-ray. *See* WEBSTER'S 3RD INTERNATIONAL DICTIONARY (unabridged 1976). The *Alberts* court defined it simply as "a diagnostic test that assists in evaluating the condition of blood vessels." *Alberts*, 126 N.M. at 808, 975 P.2d at 1280.

Mr. Alberts requested a referral to Dr. Gopal Reddy, a vascular surgeon who had seen him previously for this condition. Dr. Schultz approved the referral, knowing that Dr. Reddy was on vacation and would not be immediately available.[7] On July 27, 1992, thirteen days later, Dr. Reddy saw Mr. Alberts and examined his foot. Mr. Alberts was immediately sent to the hospital for further testing. An arteriogram and angioplasty were performed that day. Those procedures were unsuccessful and bypass surgery was conducted the following day. Despite the efforts of Dr. Reddy, by August 1, 1992 Mr. Alberts' leg showed no improvement and was amputated below the knee.

The Alberts[8] brought suit against both doctors for medical malpractice, alleging that their negligence resulted in amputation of Mr. Alberts' leg. Specifically, the Alberts asserted that Dr. Schultz failed to inform Mr. Alberts of the severity of the condition in his foot; that Dr. Schultz was negligent because he did not perform appropriate examinations on the foot; and that Dr. Schultz failed to refer him to a specialist in a timely manner. The Alberts also alleged that Dr. Reddy had not properly warned Mr. Alberts about the condition in his foot and that he failed to perform the appropriate diagnostic tests and procedures on the foot in a timely manner. Finally, the Alberts claimed that the thirteen-day delay in treatment decreased the probability that Mr. Alberts' leg could be saved.

The trial court issued partial summary judgment in favor of the defendant-doctors, concluding that the Alberts had not established to a reasonable degree of medical probability that the actions and/or inactions of Dr. Schultz or Dr. Reddy caused Mr. Alberts' injury.[9] Nevertheless, the trial court found an issue of material fact regarding whether the allegedly negligent conduct of either or both doctors increased the risk that Mr. Alberts' leg had to be amputated. Seeking guidance from the state's appellate courts in determining whether New Mexico recognizes a cause of action for loss of chance, the trial court certified the following issues for interlocutory appeal to the New Mexico Court of Appeals:[10]

> (1) whether New Mexico should recognize a patient's claim that, in the treatment of a medical condition, a health giver's negligence has resulted in the loss of a chance for a better result; and (2) if New Mexico does recognize loss of chance, whether the Alberts could recover under such claim.

The court of appeals determined that the issue involved was of substantial public interest and certified the questions to the New Mexico Supreme Court.[11]

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7. *See Alberts*, 126 N.M. at 808, 975 P.2d at 1280.

8. Both Dee Alberts and Mildred Alberts filed suit together as husband and wife, plaintiffs.

9. *See id.*; *see also* N.M. R. CIV. P. 1-056 (providing for summary judgment when there is no dispute as to any material fact and the moving party is entitled to a judgment as a matter of law).

10. N.M. STAT. ANN. § 39-3-4 (1991) allows a district judge to issue a written interlocutory order when the judge believes the decision involves a "controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order or decision would materially advance the ultimate termination of the litigation . . . ."

11. N.M. STAT. ANN. § 34-5-14(C)(2) (1996) grants the New Mexico Supreme Court jurisdiction in matters "appealed to the court of appeals, but undecided by that court, if the court of appeals certifies to the supreme court that the matter involves . . . an issue of substantial public interest that should be determined by the supreme court."

The New Mexico Supreme Court answered the first certified question in the affirmative, finding it appropriate for New Mexico to recognize the loss of chance theory of recovery.[12] In answering the second certified question, whether the Alberts could recover for loss of chance, the court applied the doctrine to the facts of the case and held that the Alberts' claim must fail.[13] The court found that the Alberts had not sufficiently established the causation element in their negligence claim.[14] Specifically, the court found that the Alberts had not demonstrated, to a reasonable degree of medical probability, that either doctor's negligence was the proximate cause of Mr. Alberts' loss of the chance of saving his leg.[15]

Justice Maes, writing separately, favored the adoption of the loss of chance doctrine but dissented with respect to summary judgment for the defendants.[16] Justice Maes argued that the majority had weighed the evidence on appeal.[17] She disagreed with the majority's statement that the testimony of the plaintiffs' expert physician, Dr. Hutton, was based on mere speculation.[18] She noted that an expert's opinion is admissible so long as the expert "gives a satisfactory explanation" as to how he or she arrived at that opinion.[19] Applying that standard, Justice Maes found that Dr. Hutton's opinion that the success rate of the bypass procedure would have been greater than 90 percent was a reasonable inference that could be drawn from the facts presented at trial.[20] Therefore, viewing the evidence in the light most favorable to the plaintiff, Justice Maes found that the expert's testimony created an issue of material fact, requiring reversal of the summary judgment and remand to the lower court for further proceedings.[21]

III. BACKGROUND

Before New Mexico state courts considered the loss of chance doctrine, the Tenth Circuit Court of Appeals addressed the issue in *Alfonso v. Lund*.[22] There, the federal court rejected the plaintiff's plea of loss of chance, concluding that the theory should not be addressed by the federal court without being first addressed by

12. *See Alberts*, 126 N.M. at 810, 975 P.2d at 1282.
13. *See id.* at 815, 975 P.2d at 1287.
14. *See id.*
15. *See id.*
16. *See id.* at 817-18, 975 P.2d at 1289-90.
17. *See id.* at 818, 975 P.2d at 1290.
18. *See id.* at 817, 975 P.2d at 1289.
19. *Id.* (citing Sanchez v. Molycorp, Inc., 103 N.M. 148, 152, 703 P.2d 925, 929 (Ct. App. 1985)).
20. *See id.*
21. *See id.* at 818, 975 P.2d at 1290.
22. 783 F.2d 958 (10th Cir. 1986); *see also* Appellant's Brief-in-Chief at 12, *Alberts* (No. 24,936). In *Alfonso*, a seventeen-year-old male severed two fingers on his right hand with a power saw. At the hospital, the on-call surgeon, Dr. Lund, informed the boy's mother that he could not re-attach the fingers because too much time had elapsed since the incident. Some time later, the family learned from another physician that the boy's fingers could have been reattached. The Alfonsos brought suit against Dr. Lund, alleging that his negligence caused permanent loss of the boy's fingers. The court issued a directed verdict because the plaintiff's expert testified that he could only speculate as to whether the fingers could have been saved. On appeal, the plaintiffs argued that they were entitled to recover because any chance to save the boy's fingers had been lost. The court noted New Mexico case law holding that establishing causation in medical malpractice cases required proof that the physician's negligence probably caused the ultimate injury. The court also surveyed other jurisdictions, which where split on the question of whether loss of chance was a viable theory of recovery.

New Mexico state courts.[23] At that time, the loss of chance doctrine was not widely accepted among jurisdictions and states were still in disagreement as to its utility.[24]

New Mexico state courts did not address the theory until twelve years after its rejection in *Alfonso*. In *Baer v. Regents of the University of California*,[25] the New Mexico Court of Appeals directly examined and accepted the doctrine. By that time, Professor Joseph H. King's article on the principles underlying the loss of chance claim had been cited with approval in numerous jurisdictions and was influential in the adoption of the loss of chance theory in many states.[26] By the time of the *Baer* decision, a majority of states had recognized the loss of chance theory in some form, a recognition that was influential in the *Baer* court's decision to adopt the doctrine.[27]

In *Baer*, Helmut Baer, an employee of Los Alamos National Laboratories (LANL), underwent annual physical exams as required by his employer.[28] In 1985 a chest x-ray revealed a lesion in his right lung.[29] One year later the lesion was re-examined and interpreted as benign. The LANL doctor recommended that Mr. Baer submit to periodic exams and x-rays to monitor the lesion. In July 1989, Mr. Baer was seen by a physician's assistant, not a doctor, and for the first time since the discovery of the lesion on his lung in 1985, he did not receive a chest x-ray. In 1990, Mr. Baer was diagnosed with lung cancer by an independent physician, and, despite undergoing subsequent medical treatment, died in October 1991.

Mrs. Baer brought a wrongful death action against the physician's assistant, alleging that his failure to take an x-ray in 1989 was the proximate cause of Mr. Baer's death. At trial, the plaintiff's expert conceded that it would be "absolutely pure speculation" to say whether Mr. Baer's cancer would have been detected in 1989 if an x-ray had been taken at the time. The trial court entered a directed verdict for the defendant, finding that the plaintiff had failed to establish that the physician assistant's failure to take an x-ray was the proximate cause of either Mr. Baer's death or his loss of chance for survival. The plaintiff appealed, arguing that New Mexico should adopt the loss of chance doctrine.

The *Baer* court noted that New Mexico courts had "never directly addressed the question of whether a person with a preexisting medical condition, whose chance of recovery is reduced because of medical negligence, can recover for that lost chance if the odds of recovery would have been less than fifty percent even with the correct medical treatment."[30] The court explained that tort law traditionally provided relief only for damages caused by a defendant's negligence when the plaintiff had a better-than-even (greater than fifty percent) chance of recovery or

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23. *See Alfonso*, 783 F.2d at 964.
24. *See id.*
25. 126 N.M. 508, 972 P.2d 9 (Ct. App. 1998).
26. *See id.* at 511-12, 972 P.2d at 12-13 (noting the influence of Joseph H. King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981)).
27. *See id.* at 512, 972 P.2d at 13.
28. All facts and proceedings are taken directly from *Baer*, 126 N.M. at 512, 972 P.2d at 13, unless otherwise specified.
29. *See id.*
30. *Id.*

survival, while denying recovery to those victims whose chances of survival were not as favorable (less than fifty percent) before the negligent act.[31] Nonetheless, the *Baer* court determined that New Mexico should adopt the loss of chance doctrine.

In reaching this conclusion, the court noted that the loss of chance doctrine is consistent with the *Restatement (Second) of Torts* section 323(a),[32] which imposes liability on those who fail to exercise reasonable care in performing services.[33] In addition, the court noted that the loss of chance doctrine is consistent with the principle of apportioning damages based on causation as articulated in the proposed *Restatement (Third) of Torts* section 50(b).[34]

The court also explained that the loss of chance theory is consistent with principles of traditional New Mexico tort law in that New Mexico recognizes a cause of action for enhancement or aggravation of a patient's preexisting condition.[35] The court further acknowledged that the theory is also consistent with contemporary New Mexico tort law in which damages are apportioned in accordance with the comparative fault of each individual tortfeasor.[36] Moreover, the *Baer* court emphasized that public policy in New Mexico, as articulated in past decisions of the New Mexico Supreme Court, indicates that injured individuals should be compensated for the wrongs committed against them,[37] and that the wrongdoer should be condemned for his actions.[38] Thus, the *Baer* court concluded that compensating plaintiffs under the lost chance theory was completely consistent with public policy in New Mexico, and adopted the loss of chance theory.[39]

III. RATIONALE

In February 1999, in *Alberts v. Schultz*,[40] the New Mexico Supreme Court formally adopted the loss of chance theory from the court of appeals' decision in *Baer*. In *Baer*, the court of appeals treated the loss of chance injury as separate and

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31. *See id.* at 510-11, 972 P.2d at 11-12.

32. *See id.* at 512, 972 P.2d at 13.

33. RESTATEMENT (SECOND) OF TORTS § 323(a) (1965) states the following:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . . his failure to exercise such care increases the risk of such harm . . . .

34. *See Baer*, 126 N.M. at 512, 972 P.2d at 13. The RESTATEMENT (THIRD) OF TORTS § 50(b) (Proposed Final Draft No. 1, 1998), states that:

> (b) Damages can be divided by causation when there is a reasonable basis for the factfinder to determine: (1) that any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery and (2) the amount of damages separately caused by that conduct.

35. *See Baer*, 126 N.M. at 513, 972 P.2d at 14 (citing Lujan v. Healthsouth Rehabilitation Corp., 120 N.M. 422, 427, 902 P.2d 1025, 1030 (1995)).

36. *See id.* at 513-14, 972 P.2d at 14-15 (citing Scott v. Rizzo, 96 N.M. 682, 689, 634 P.2d 1234, 1241 (1981)).

37. *See id.* at 514, 972 P.2d at 15 (quoting Trujillo v. City of Albuquerque, 110 N.M. 621, 624, 798 P.2d 571, 574 (1990), *rev'd on other grounds*, 125 N.M. 721, 965 P.2d 365 (1998)).

38. *See id.*

39. *See id.*

40. 126 N.M. 807, 975 P.2d 1279 (1999).

distinct from the ultimate or resulting injury.[41] The *Alberts* court agreed, stating that the loss of chance injury can be described either as the exacerbation of the presenting problem,[42] or the destruction of the chance of survival.[43] The court explained that the "essence of the patient's claim is that, prior to the negligence [of the health care provider], there was a chance that he or she would have been better off with adequate care."[44] Yet, because of the negligent act, the chance has been either reduced or eliminated altogether.[45]

The *Alberts* court examined how other jurisdictions viewed the loss of chance doctrine,[46] noting some resistance to the theory, partly because of its terminology.[47] The court explained that some jurisdictions, concerned that the term "lost chance" implies that the claim is for something indeterminate or intangible, have instead labeled the claim "increased risk of harm."[48] In some jurisdictions the claim is not expressly recognized, but juries are permitted to evaluate a claim based on "proof of a less-than-even chance of a cure."[49] One jurisdiction requires that the loss of chance claim be measured in terms of statistical probabilities.[50] After consideration of the various jurisdictional approaches to the loss of chance doctrine, the *Alberts* court concluded that the *Baer* approach was appropriate and should be adopted. The court then explained the parameters of the loss of chance injury and the elements of the claim.

A. The Elements of a Loss of Chance Claim

The court noted that most claims of this type begin with the patient entering the health care setting with a presenting problem.[51] That presenting problem can be a disorder, an illness, fear, pain, discomfort or a combination of these.[52] The problem can also be either acute or chronic.[53] Additionally, there must be a "negligent denial by a healthcare provider of the most effective therapy for a patient's presenting problem."[54] The negligence can be an incorrect diagnosis, the application of inappropriate treatment, or a delay in providing the proper treatment.[55] As a result, the patient is deprived of the chance for recovery.[56]

The *Alberts* court outlined the basic test to be used in evaluating a loss of chance claim. The court explained that the elements required for establishing a loss of

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41. *See Baer*, 126 N.M. at 512, 972 P.2d at 13.
42. *See Alberts*, 126 N.M. at 813, 975 P.2d at 1285.
43. *See id.* at 811, 975 P.2d at 1283.
44. *Id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.* at 810, 975 P.2d at 1282 (citing Gardner v. Pawliw, 696 A.2d 599, 613 (N.J. 1997)).
49. *See* Richmond County Hosp. Auth. v. Dickerson, 356 S.E.2d 548, 550 (Ga. Ct. App. 1987)).
50. *See Alberts*, 126 N.M. at 811, 975 P.2d at 1283. As examples, the court noted that Missouri and Louisiana have used statistics to analyze the loss of chance claims. *See* Wollen v. DePaul Health Ctr., 828 S.W.2d 681, 684 (Mo. 1992); Smith v. State Dep't of Health & Hosp., 676 So. 2d 543, 548 (La. 1996).
51. *See Alberts*, 126 N.M. at 810, 975 P.2d at 1281.
52. *See id.*
53. *See id.*
54. *Id.*
55. *See id.*
56. *See id.*

chance claim vary from the elements in other medical malpractice actions only in the nature of the injury for which relief is sought.[57] Specifically, the plaintiff must establish the basic elements of duty, breach of duty, loss or damage, and causation.[58]

The duty requirement is no different than that for a standard malpractice claim.[59] Health care providers owe a "duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified health care providers practicing under similar circumstances, giving due consideration to the locality involved."[60] The court cautioned that this duty does not have any guarantee of beneficial results, infallible accuracy, the best use of modern technology or unexcelled expertise.[61] It is measured only in terms of the reasonableness of the physician under the circumstances at the time.[62]

The second element of the loss of chance claim, breach of the established duty, is evident when the healthcare provider fails to act reasonably or departs from the recognized standards of medicine.[63] The *Alberts* court phrased this element as "whether that duty was breached by the defendant's failure to timely or properly diagnose the presenting problem and follow an appropriate course of treatment."[64] As in other claims of negligence, after a duty has been established, the element of breach is critical in determining whether the plaintiff's claim shall advance because the essence of the assertion of wrongdoing is proof of the healthcare provider's departure from the accepted standard of care.

The third element of the loss of chance claim is causation.[65] Any departure from the standard of care must have been the cause or a contributing cause of the plaintiff's injury.[66] Regarding proximate cause, the plaintiff is required to prove that the defendant's negligence resulted in the lost chance for a better result.[67] A plaintiff "can be compensated if he can demonstrate, to a reasonable degree of medical probability, a causal link between the doctor's negligence and the loss of that chance."[68] Causation, however, does not have to be proven by medical certainty but by a reasonable medical probability.[69] The court sought to avoid any confusion that may have been created by the *Baer* decision regarding the standard of proof to be used for causation.[70] In *Baer*, the court of appeals appeared to approve both the medical certainty and the medical probability standards.[71] The *Alberts* court clarified that the standard to be used in New Mexico will be"proof to a reasonable

57. *See id.* at 811, 975 P.2d at 1283.
58. *See id.* at 812, 975 P.2d at 1284.
59. *See id.*
60. *Id.* (quoting N.M. U.J.I. Civ. 13-1101).
61. *See id.*
62. *See id.* (quoting Snia v. United Med. Ctr., 637 So.2d 1290, 1294 (La. Ct. App. 1994)).
63. *See id.*
64. *Id.*
65. *See id.* at 813-14, 975 P.2d at 1285-86.
66. *See id.* at 814, 975 P.2d at 1286.
67. *See id.*
68. *Id.*
69. *See id.* (quoting Hurley v. United States, 923 F.2d 1091, 1094 (4th Cir. 1991)).
70. *See id.*
71. *See id.*

degree of medical probability."[72] This standard requires that the negligence involved is more likely than not to have caused the injury.[73] The court reasoned that it is appropriate in loss of chance cases to not require the plaintiff to prove the causal link with absolute certainty because the physician's malpractice makes it impossible to know how the patient would have turned out in the absence of the physician's negligence.[74]

The final element of a loss of chance claim is the injury. It is the alleged injury, loss, or damage that makes loss of chance claims different from other medical malpractice claims.[75] The injury is not the physical harm itself, but the lost chance of avoiding the physical harm.[76] The court compared the patient's chance for a better result to "a window of time that existed before the malpractice took place."[77] Yet, "[t]hrough negligent misdiagnosis, inappropriate therapy, or unnecessary delays, the window of time was closed."[78] Thus, the claim is not for the subsequent injury, but for the lost chance of avoiding the injury or correcting the problem.[79]

The court limited the injury to actual harm and warned against consideration of any form of speculation or prognosis of future harm.[80] Accordingly, to determine the actual injury caused by the negligence in loss of chance cases, courts must be aware of "the underlying injury caused by the presenting problem and the exacerbation of the presenting problem which evinces the chance that has been lost."[81] The court explained that "the deterioration of the presenting problem is evidence that the chance of a better result has been diminished or lost."[82]

The *Alberts* court explained the method of calculating damages in the loss of chance claim, and adopting the approach taken in *Baer*, the court concluded that damages would be awarded proportionally by the percentage value of the chance for a better outcome.[83] Accordingly, damages are calculated using the difference between the patient's chance of survival before and after the occurrence of the negligence, as measured in terms of a percentage. The value of the chance of a better result is apportioned as a percentage of the value of the life or limb of that person in its entirety.[84] After giving examples of how courts should calculate these

72. *Id.*
73. *See id.*
74. *See id.* at 815, 975 P.2d at 1287.
75. *See id.* at 812, 975 P.2d at 1284.
76. *See id.* at 813, 975 P.2d at 1285.
77. *See id.*
78. *Id.*
79. *See id.*
80. *See id.*
81. *Id.* at 813, 975 P.2d at 1285 (citing Todd S. Aagaard, Note, *Identifying and Valuing the Injury in Lost Chance Cases*, 96 MICH. L. REV. 1335, 1341 (1998)).
82. *See id.*
83. *See id.* at 815, 975 P.2d at 1287.
84. *See id.*

percentages,[85] the court cautioned that the resulting numerical values obtained in quantifying damages are not precise, but are only fair approximations based on evidentiary proof.[86]

B. *Application of Loss of Chance to the Alberts' Claim*

Applying the loss of chance doctrine to the facts of the Alberts' claim, the court concluded that the Alberts failed to establish the necessary causation element.[87] The court concluded that the Alberts neither demonstrated to a reasonable degree of medical probability that the defendant doctors' actions caused the harm[88] nor demonstrated the existence of a window of time during which measures could have been implemented to eliminate the need to amputate Mr. Alberts' leg.[89] In addition, the Alberts failed to show that Mr. Alberts was a suitable candidate for bypass surgery at his initial visit with Dr. Reddy because their expert did not make any authoritative conclusions about the integrity of the major arteries or veins in Mr. Alberts' leg.[90] Lastly, the testimony of the expert failed to prove that absent any negligence by either doctor, Mr. Alberts' had a chance to escape further deterioration of the leg.[91] For these reasons the court held that the Alberts failed to prove their claim under the loss of chance theory.[92]

V. ANALYSIS

Analyzing the *Alberts* decision, several points are noteworthy. First, because *Alberts* is an expansion of the *Baer* decision, the reader should also understand the reasoning of that decision.[93] Second, the adoption of the loss of chance doctrine follows the direction of existing New Mexico law and places no new obligations on defendants. Third, while the *Alberts* court suggested that providing a remedy for the chance lost is not over-inclusive, the doctrine may be under-inclusive because of the limitations inherent in the harm in-fact requirement. Under the harm-in-fact standard a plaintiff may not bring a cause of action against a negligent defendant until he can show evidence of physical progression of his condition.[94] Thus, plaintiffs who have not suffered physical harm within three years of the act of negligence may be left without a remedy.

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85. As an example, the court explained that "the value of a patient's fifty-percent chance of survival is fifty percent of the value of their total life. If medical malpractice reduced that chance of survival from fifty to twenty percent, that patient's compensation would be equal to thirty percent of the value of their life." *Id.* In another example, the court noted that "the value of the a plaintiff's twenty-percent chance of saving a limb is twenty percent of the value of the entire limb. If that plaintiff lost the entire twenty-percent chance of saving the limb, their compensation would be twenty percent of the value of that limb." *Id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.* at 816, 975 P.2d at 1288.

91. *See id.*

92. *See id.*

93. *See supra* part III.

94. *See id.* at 813, 975 P.2d at 1285.

A. *The Court's References to Baer*

To fully understand the *Alberts* court's adoption of the loss of chance doctrine, the reader must also reference *Baer*.[95] While *Alberts* acknowledged *Baer's* role in defining and explaining the doctrine, the *Alberts* court sought to clarify the doctrine for the bench and bar.[96] Specifically, the *Alberts* court recognized that *Baer* provided historical background for the loss of chance doctrine and the reasons for adopting the doctrine in New Mexico.[97] Building on this foundation, the *Alberts* court sought to describe the parameters, elements and standards of proof of the doctrine.[98] The court's reliance on the *Baer* opinion,[99] however, makes it difficult for *Alberts* to stand alone as a complete declaration of the loss of chance doctrine in New Mexico. Therefore, it is suggested that these cases be read concurrently.[100]

B. *Adoption of Loss of Chance is Consistent With Existing New Mexico Tort Law*

Loss of chance is not a concept new to New Mexico law.[101] The principle underlying the loss of chance doctrine is conceptually related to well-established theories of recovery in New Mexico tort law.[102] For example, loss of chance is substantially similar to the principles underlying enhancing or aggravating pre-existing conditions, as recognized in *Martinez v. First National Bank*.[103] Under both theories the plaintiff's medical problem or condition is made worse by the negligence of the defendant. Loss of chance is also similar to the comparative negligence theory recognized in *Scott v. Rizzo*.[104] Under both theories the defendant is liable for the percentage or portion of the damage he caused. Finally, loss of chance is similar to a failure to diagnose cause of action, as recognized in *Gonzales*

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95. *See supra* part III.

96. *See Alberts*, 126 N.M. at 810, 975 P.2d at 1282.

97. *See id.*; *see also* Baer v. Regents of the Univ. of Cal., 126 N.M. 508, 510-14, 972 P.2d 9, 11-15 (Ct. App. 1998).

98. *See Alberts*, 126 N.M. at 810, 975 P.2d at 1282.

99. See references to *Baer* in *Alberts*, 126 N.M. at 810-15, 975 P.2d at 1282-87.

100. *See supra* part III.

101. *See Alberts*, 126 N.M. at 811, 975 P.2d at 1283; *see also* Plaintiffs-Appellants' Reply to Defendants-Appellees' Response to Plaintiffs-Appellants' Brief in Chief at 2, *Alberts* (No. 18,193).

102. *See id.*

103. 107 N.M. 268, 270, 755 P.2d 606, 608-09 (Ct. App. 1987). In that case the plaintiff presented to the defendant-physician with a dislocated and fractured elbow. The defendant took an x-ray, attempted to reduce the dislocation by 'popping' the elbow back into place, and preceded to place a cast on the plaintiff's arm. No x-rays were taken prior to placing the cast on the elbow or 4-weeks later when the cast was removed. The plaintiff continued to have pain and sought the opinion of another physician. It was determined by x-ray that the attempted correction of the dislocated elbow failed, the elbow was fractured, and a muscle was torn in the arm. The expert witness testified that because of the time delay in removing the bone fragments created by the defendant doctor, the plaintiff suffered more extensive injury to his elbow, thus enhancing a pre-existing condition. The defendant doctor's estate was held liable. *See id.* at 269, 755 P.2d at 607.

104. 96 N.M. 682, 634 P.2d 1234 (1981). The Supreme Court of New Mexico abolished the doctrine of contributory negligence, which allowed the plaintiff to bear the entire loss when the plaintiff's own acts contributed (even if minutely) to the harm caused and allowed other wrongdoers to avoid liability. The court noted that justice was not being achieved with this archaic rule and adopted comparative negligence as a more humane and more equitable system of assigning liability in accordance with the respective fault. *See id.* at 687, 634 P.2d at 1239; *see also* Appellant's Brief in Chief at 11, *Alberts* (No. 24,936).

v. Sansoy,[105] where, because of the defendant's omission or delay in treatment the plaintiff suffered damage which could have been avoided.[106]

C. *The Doctrine Imposes No New Duties on Defendants*

The loss of chance doctrine does not expand the scope of defendants' potential liability.[107] A loss of chance claim cannot proceed without a showing of breach of duty by the defendant. In any physician-patient relationship the physician has a duty to "possess and apply the knowledge and to use the skill and care ordinarily used by reasonable well-qualified [health-care providers] practicing under similar circumstances."[108] Only when the physician negligently fails to adhere to this duty of care can the physician be held liable for damages caused to the plaintiff.[109] Thus, the loss of chance doctrine does not expand the physician's duty in any way, nor does it change the standard by which that duty is measured.

D. *The Loss of Chance Doctrine is Not Over-inclusive*

The *Alberts* court stated that providing a remedy for the chance lost would not be over-inclusive.[110] Although the adoption of the loss of chance doctrine in New Mexico has the potential to allow claims where the diminished chance may be of negligible significance, the court did not see this as a valid reason to limit the doctrine to instances in which the chance of recovery has been completely lost.[111] Rather, the court suggested that in the future, courts might chose to limit recovery to those cases where the loss of a chance is sizeable enough to be material, as determined by the jury.[112] Additionally, the court reasoned that the cost of litigation would discourage claims that are insignificant, ultimately eliminating any over-inclusiveness of the loss of chance doctrine.[113]

E. *The Loss of Chance Doctrine May Be Under-inclusive*

The *Alberts* court opined that recovery will not be allowed until the harm has actually occurred.[114] The court emphasized that the injury "is not in any way speculative . . . [it] does not involve prognostication about future injury or harm . . . [and] is manifested by actual physical harm."[115] This harm-in-fact requirement

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105. 102 N.M. 136, 692 P.2d 522 (1984).

106. *See id.* at 137, 692 P.2d at 523.

107. *See Alberts*, 126 N.M. at 812, 975 P.2d at 1284; *see also* Plaintiff-Appellants' Reply to Defendants-Appellees' Response to Plaintiffs- Appellants' Brief-in-Chief at 12, *Alberts* (No. 18,193).

108. *Alberts*, 126 N.M. at 812, 975 P.2d at 1284 (quoting N.M. U.J.I. CIV. 13-1101).

109. *See id.*

110. *See id.* at 813, 975 P.2d at 1285.

111. *See id.*

112. *See id.* at 813, 975 P.2d at 1285 (citing Wollen v. DePaul Health Center, 828 S.W.2d 681, 685 n.3 (Mo. 1992)).

113. *See id.* (quoting James Lockhart, Annotation, *Cause of Action for Medical Malpractice Based on Loss of Chance of Cure*, *in* 4 CAUSE OF ACTION 2D 1, 45-46 (1994)).

114. *See id.* at 813, 975 P.2d at 1285.

115. *Id.* at 813, 975 P.2d at 1284.

denies plaintiffs a remedy where the ultimate harm has not occurred within the three-year statute of limitations imposed by the Medical Malpractice Act.[116]

For example, in *Cummings v. X-Ray Associates*,[117] a woman underwent a pre-employment physical in February 1986, which included x-ray procedures performed by X-Ray Associates.[118] The x-ray showed a mass on her left lung but failed to detect an additional mass on her right kidney.[119] The mass on her left lung was later diagnosed as an arteriovenous malformation (AVM)[120] by a follow-up CT-scan in June of 1986.[121] Ms. Cummings had an additional chest x-ray by X-Ray Associates in August of 1988 as part of her pre-op procedure before undergoing a hysterectomy.[122] This x-ray also showed the mass on her left lung, but it was not until February of 1990 that medical reports confirmed that the masses on her left lung and right kidney were cancerous.[123]

Ms. Cummings filed suit against X-Ray Associates for failing to properly diagnose the cancerous mass in her lung.[124] She claimed that she was injured when the cancer metastasized in 1992 and argued that her suit against X-Ray Associates filed in December 1993 was within the three-year limitation period for medical malpractice claims.[125] The court pointed out that Ms. Cummings could have brought suit within the limitations period at any time after she learned that the masses on her kidney and lungs were cancerous.[126] The court indicated a willingness to recognize Ms. Cummings' increased risk as a cause of action, reasoning that "[i]t was certainly possible for Cummings to have demonstrated some harm or increased risk, even if metastasis could not be detected."[127] The supreme court, however, held that the limitations period began to run under the applicable statute in 1988, thus Ms. Cummings suit was effectively barred by the New Mexico Medical Malpractice Act.[128]

The supreme court appeared to be saying that Ms. Cummings could recover for an increased risk of death from the cancer or for a lost chance of successful treatment resulting from the negligent misdiagnosis, even though the cancer had not yet metastasized. In contrast, the *Alberts* court evidently would not recognize a claim for lost chance under the harm in-fact requirement until the plaintiff had actually died or there was proof of metastasis of the cancer. Only then would the plaintiff be able to show evidence of a loss or physical harm.[129]

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116. *See* N.M. STAT. ANN. § 41-5-13 (1996). The New Mexico Medical Malpractice Act requires that a medical malpractice action be brought within three years after the occurrence of the event that caused the injury. *See id.*; *see also* Cummings v. X-Ray Assoc., 121 N.M. 821, 832-33, 918 P.2d 1321, 1332-33 (1996).

117. 121 N.M. 821, 918 P.2d 1321 (1996).

118. *See id.* at 826, 918 P.2d at 1326.

119. *See id.*

120. *See id.* AVM is defined as an abnormal shape or structure of arteries and veins. *See* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 143, 1075 (16th ed. 1989).

121. *See Cummings*, 121 N.M. at 826, 918 P.2d at 1326.

122. *See id.*

123. *See id.*

124. *See id.* at 825, 918 P.2d at 1325.

125. *See id.* at 827, 918 P.2d at 1237.

126. *See id.* at 836-37, 918 P.2d at 1336-37.

127. *See* id. at 837, 918 P.2d at 1337; *see also*, Appellant's Brief-in-Chief at 11, *Alberts* (No. 18,193).

128. *See Cummings*, 121 N.M. at 837, 918 P.2d at 1337.

129. *See Alberts*, 126 N.M. at 813, 975 P.2d at 1285.

As in *Cummings*, although x-rays may reveal a lesion or mass on an exam, it usually takes several years of follow-up x-rays to note any suspect changes in the mass that warrant further testing and even longer before metastasis of the cancer is detected.[130] Other life threatening and debilitating conditions may not manifest injury or show exacerbation until years after initial discovery. For instance, HIV, which ultimately leads to AIDS and death, can lie dormant in the human body for more than five years after transmission.[131] Therefore, a patient who may have been negligently exposed to HIV by a medical professional may not be able to prove any harm caused until after expiration of the three-year statute of limitation under New Mexico's Medical Malpractice Act. The loss of chance claim could develop late, effectively turning the suit into a survivor's claim and stripping the injured patient of any benefit of a favorable judgment.[132]

In sum, patients often have no way of knowing that they have been injured early enough to comply with the harm in-fact standard of *Alberts*. The three-year statute of limitations would effectively bar every suit. Therefore, the loss of chance doctrine may fail to provide a remedy to those plaintiffs who suffer damages stemming from diseases such as cancer and AIDS, which can go undetected for several years. One solution to this problem would be a more relaxed standard of proving the harm caused, such as a standard of increased risk of harm.

VI. IMPLICATIONS

The adoption of the loss of chance doctrine has potential effects on plaintiffs, defendants, and the judicial system. The process used to calculate damages in these cases may cause problems for expert witnesses who attempt to value the lost chance numerically. In many instances, one group's response to the doctrine could have a snowball effect and ultimately impact another group, including non-legal groups such as insurance companies.

A. Plaintiffs' Responses to the Adoption of the Loss of Chance Doctrine

Patients with less compelling claims may seek recovery when they would not have before the adoption of the doctrine.[133] More patients may seek recovery merely because they received undesirable results or ineffective treatment.[134] For example, if a person with uncontrolled diabetes requires amputation of a foot due to arteriosclerosis,[135] that person could sue the physician for medical malpractice, alleging that the doctor's treatment was ineffective and resulted in the loss chance of saving the foot. The potential increase in the number of claims could contribute to an explosion of medical malpractice litigation and result in an excess burden on

130. *See id.* at 832, 918 P.2d at 1332.

131. *See* definition of AIDS, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 53 (16th ed. 1989).

132. *See* J. Stephen Phillips, *The "Lost Chance" Theory of Recovery*, 27 COLO. LAW. 85, 86-87 (1998).

133. *See* Michelle L. Truckor, *The Loss of Chance Doctrine: Legal Recovery for Patients on the Edge of Survival*, 24 U. DAYTON L. REV. 349, 363 (1999).

134. *See id.* at 363-64.

135. Arteriosclerosis is the thickening and hardening of the arteries which leads to altered function in tissues and organs. Untreated and uncontrolled diabetes is a risk factor of arteriosclerosis. *See* TABERS CYCLOPEDIC MEDICAL DICTIONARY 142 (16th ed. 1989).

court dockets.[136] The *Alberts* court rejected this argument, suggesting that any flurry of suits would be short lived because of the cost of litigation.[137]

B. Defendants' Responses to the Adoption of the Loss of Chance Doctrine

The adoption of the loss of chance doctrine could affect patient care through physician responses. Reacting to a potential increase in loss of chance claims, physicians may be more cautious in their treatment of patients and may begin to practice defensive medicine for fear of liability.[138] Physicians could begin to order unnecessary tests and procedures and require more hospital admissions and longer hospital stays in order to avoid liability.[139] Alternatively, some physicians may be less willing to treat patients who are seriously ill or dying. They may also try to avoid procedures that are risky for fear of a bad outcome. The physician may change the nature and extent of his practice in order to avoid liability in cases in which a patient's survival is unlikely.[140] In addition, this increased fear of liability could cause insurance companies to increase their malpractice insurance rates. Unfortunately, it is more likely than not that the increased insurance rates would be passed on to the consumer in the form of increased costs of health care services.

On the other hand, the loss of chance doctrine could encourage a different response from physicians. The doctrine could serve as a deterrent to negligence in the treatment of patients whose prospects for recovery are poor. Physicians may be more likely to adhere to the ethical and professional duties owed to patients.[141] They may listen more attentively to patients' complaints or requests, which in turn could lead to a reduction of medical malpractice claims.[142]

C. The Impact of the Loss of Chance Doctrine on Managed Care Organizations

The loss of chance doctrine may lead managed care and health maintenance organizations to provide additional patient treatment rather than risk the possibility

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136. *See* Truckor, *supra* note 133, at 363.

137. *See* Alberts v. Schultz, 126 N.M. 807, 813, 975 P.2d 1279, 1285 (1999).

138. *See* David Klingman et al., *Measuring Defensive Medicine Using Clinical Scenario Surveys*, 21 J. HEALTH POL., POL'Y & L. 185, 189 (1996). Physicians practice positive defensive medicine when they order tests, procedures, or visits, primarily (but not necessarily solely) to reduce their exposure to malpractice liability; and in the alternative, physicians practice negative defensive medicine when they avoid certain patients or procedures in order to reduce their exposure to malpractice liability. *Id.*

139. *See* Lisa Perrochet et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, 621 (1992).

140. *See* Truckor, *supra* note 133, at 369.

141. *See* Herbert Swick et al., *Teaching Professionalism in Undergraduate Medical Education*, 282 JAMA 830 (1999). Swick and his colleagues conducted a survey which showed that many medical schools recognize the need to address professionalism when educating medical students. This survey looked at four attributes of professionalism, "(1) subordinating one's self-interest to the interest of patients; (2) adhering to high ethical and moral standards; (3) responding to societal needs; and (4) evincing core humanistic values (e.g. empathy, integrity, altruism, trustworthiness)." *Id.* at 831.

142. *See* Ezekiel J. Emanuel & Nancy N. Dubler, *Preserving the Physician-Patient Relationship in the Era of Managed Care*, 273 JAMA 323, 324 (1995) (explaining that good communication between the doctor and patient can mitigate the occurrence of negative events that lead to medical malpractice litigation); *see also* Lisa Cooper-Patrick et al., *Race, Gender, and Partnership in the Patient-Physician Relationship*, 282 JAMA 583, 589 (1999) ("Improving cross-cultural communication in health care settings may lead to more patient involvement in care, adherence to recommended treatment, higher quality of care, and better health outcomes.").

of liability under a loss of chance claim. In an effort to reduce the costs of health care, managed care plans use a variety of cost-saving techniques.[143] Some techniques are directed at the behavior of subscribers. These techniques restrict subscribers to a particular group of physicians who have agreed to, or have a history of, practicing medicine at lower costs, and deny subscribers access to a specialist until they obtain the approval of the primary care physician.[144] Managed care plans also restrict physicians' ability to order tests and perform procedures that the plan has determined to be unnecessarily costly or medically inappropriate.[145] As a result, both the doctor-patient relationship and quality of care received by the patient may be compromised.[146] After *Alberts*, managed care and health maintenance organizations in New Mexico are no longer able to look solely at how much money is being saved in the under-treatment of patients. These organizations may see a greater necessity to balance more equitably the health care needs of the patient against cost-cutting measures that may be inconsistent with quality care.

D. The Uncertainty of Damage Calculation in Loss of Chance Cases

The damage calculation standard in *Alberts* assumes that medicine is more of a science than an art, that all patients follow a precise, predetermined pathway in the manifestation of an illness or condition and that physicians can predict a patient's outcome or response to particular medical procedures or treatments based on "medical cookbooks" providing these answers.[147] The use of the *Alberts'* damage calculation standard may result in increased pressure on physicians testifying as medical witnesses to provide precise numbers representing the patient's chance lost, even without a scientific way to prove the accuracy of their answers.[148] Formulation of a number describing the percentage of a chance lost cannot be very precise. No one can honestly and accurately give an exact number; they can only guess or estimate.[149] Physicians don't have "crystal balls" that will give them exact answers to these problems.[150] They derive their answers from a combination of intuition, experience, and education.[151] The *Alberts* court acknowledged that the valuation of life and limb is imprecise.[152] How can we expect physicians to come up with exact numbers? When they do, will their answers be taken at face value or will they be subjected to scrutiny? A court's heavy reliance on precise numbers poses the threat of a *Daubert*-like challenge anytime a physician testifies on the issue of damages.[153]

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143. *See* AMA Council on Ethical and Judicial Affairs, *Ethical Issues in Managed Care*, 273 JAMA 330 (1995).

144. *See id.*

145. *See id.*

146. *See id.* at 331 (citing the U.S. Department of Health and Human Services as expressing its concerns about allegations received of eight instances of insufficient patient care practices by HMO's); *see also*, David Blumenthal, *Health Care Reform at the Close of the 20th Century*, 340 NEW ENG. J. MED. 1916, 1918 (1999).

147. Pia Salazar, Address at the Tort Update Seminar (Albuquerque, NM, April 30, 1999).

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See Alberts*, 126 N.M. at 815, 975 P.2d at 1287.

153. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). In *Daubert*, the Supreme Court held that Federal Rule of Evidence 702 governs expert testimony and superseded the Frye "generally accepted" test.

VI. CONCLUSION

The adoption of the loss of chance doctrine can be read as a response by the New Mexico courts to public policy demands for the fair apportionment of damages. The *Alberts* opinion offers plaintiffs with a less than fifty percent chance of survival a cause of action previously unavailable to them. Unfortunately, because of the harm in-fact requirements of proving the loss of chance injury, this new doctrine may not offer a remedy to some plaintiffs with valid injuries.

Nevertheless, the loss of chance doctrine helps to redistribute the injured party's economic burden and serves to deter negligent conduct by health care practitioners toward patients with preexisting conditions or those patients whose prospects for recovery are poor. As such, the New Mexico Supreme Court's adoption of the loss of chance doctrine is consistent with existing tort law and public policy in New Mexico.

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The *Daubert* test requires that an expert's testimony regarding scientific evidence be supported by the methods and procedures of science. The scientific theory or technique offered must be 1) tested or capable of being tested, 2) subjected to peer review and publication, 3) provide a known or potential rate of error, and 4) have some aspects of general acceptance. *See id.* at 593-94.