Tort Law—No Duty for Physician To Warn Guards of Inmate's Communicable Disease—*Seebold v. Prison Health Services, Inc.*, 57 A.3d 1232 (Pa. 2012)

One of the critical elements of any action in negligence is the existence of a duty that one party owes to another.[1] Generally a defendant has no duty to protect someone who is at risk due to occurrences that the defendant had no part in generating, but there are exceptions to this rule where courts have imposed such a duty.[2] In *Seebold v. Prison Health Services, Inc.*,[3] the court considered whether to create an additional exception to the general rule and impose a common-law duty on a physician who treats prisoners to warn guards that a particular inmate has a communicable disease.[4] The court held that physicians do not have such a duty to warn at common law.[5]

Michelle Seebold worked as a corrections officer at the State Correctional Institution at Muncy, Pennsylvania where Prison Health Services, Inc. (PHS) provided medical services to prisoners.[6] During that time, PHS allegedly misdiagnosed cases of methicillin-resistant staphylococcus aureus (MRSA), a contagious bacterial infection, among twelve inmates as "spider bites."[7] In her role, Seebold was charged with strip searching female inmates prior to, and following, their meetings with visitors, and as a result of this physical contact was infected with MRSA.[8] Due to this infection, Seebold filed a negligence

1. *See* Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994) (stating negligence based on existence of duty); David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1674 (2007) (listing duty as one of five elements of negligence); Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 55 (1934) (citing how duty became "essential" to negligence through development of common law); *see also* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 672 (2008) (implicitly acknowledging central nature of duty while discussing its current tumultuous state in tort law); William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 12-13 (1953) (detailing emergence of duty in English cases during middle of nineteenth century).

2. *See* Buch v. Amory Mfg. Co., 44 A. 809, 811 (N.H. 1898) (stating no duty to protect another against harm under ordinary circumstances); Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) (citing Restatement (First) of Torts for idea that no duty imposed when observing another's peril); RESTATEMENT (FIRST) OF TORTS § 314 (1934) (stating realization of necessity of aid to save another from peril imposes no duty). *But see* Emerich v. Phila. Ctr. for Human Dev., Inc. 720 A.2d 1032, 1040 (Pa. 1998) (recognizing mental health professionals' affirmative duty to warn identifiable victims of patients' threatened violence); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976) (imposing duty on therapist to warn intended victim of patient's threats of violence).

3. 57 A.3d 1232 (Pa. 2012).

4. *See id.* at 1234.

5. *See id.* at 1250 (concluding court would not impose new affirmative duty on physicians).

6. *See id.* at 1234.

7. *See* 57 A.3d at 1234.

8. *See id.*

claim against PHS, alleging that its staff knew or should have known of the infections among the prisoners and owed a duty of reasonable care to prison staff and inmates.[9]

PHS asserted in preliminary objections that it owed no affirmative duty of care to Seebold as a third-party nonpatient.[10] The trial court sustained PHS's objections, held that it did not owe Seebold a duty of care, and listed several factors that can be used to prove a duty does exist.[11] Moreover, the trial court distinguished an earlier Pennsylvania case that imposed a duty of care to a nonpatient third party from the case at hand because it involved a failure by the physician to properly advise the patient about the risks of a communicable disease, rather than the physician's failure to notify the third party directly.[12] Seebold appealed to the Pennsylvania Superior Court, which vacated the lower court's ruling, holding that the physician's duty could be extended to Seebold in this case because she was in a narrowly defined group of foreseeable plaintiffs.[13] PHS then appealed to the Pennsylvania Supreme Court, which

9. *See id.* (listing Seebold's allegations against defendant). Seebold also claimed that the doctors breached their alleged duty by not properly testing inmates for MRSA, not having infected inmates removed from the general population, and not advising staff on how to handle such inmates. *See id.*

10. *See id.* (describing PHS's objections). PHS also objected to Seebold's failure to "delineate all material facts necessary to state a claim" by not identifying PHS staff members allegedly at fault or describing their actions. *See id.* PHS further argued that its employment of medical personnel did not itself create the power to direct its workers' behavior in the doctor-patient relationship, and that the facts alleged by Seebold did not support causation. *See id.*

11. *See* 57 A.3d at 1234 (describing holding of common pleas court); Althaus *ex rel.* Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000) (compiling nonexclusive list of factors that help determine a duty exists). In order to determine whether a duty of care exists courts will examine: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." Althaus *ex rel.* Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000).

12. *See* 57 A.3d at 1235 (expanding upon common pleas court's holding); *see also* DiMarco v. Lynch Homes-Chester Cnty., Inc., 583 A.2d 422, 424-25 (Pa. 1990) (applying Restatement (Second) of Torts to find doctor owed patient's boyfriend duty of care). In *DiMarco*, the Pennsylvania Supreme Court reasoned that because the risk of the disease spreading to the patient's boyfriend was foreseeable, the doctor owed the boyfriend the duty of correctly counseling the patient on how to prevent the spread of the disease. *See* DiMarco v. Lynch Homes-Chester Cnty., Inc., 583 A.2d 422, 424-25 (Pa. 1990)*; see also* RESTATEMENT (SECOND) OF TORTS § 324A (1965) (describing standard for liability to third persons for negligent performance of undertaking). The Restatement (Second) of Torts provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

13. *See* 57 A.3d at 1238 (explaining the reasoning of the Superior Court); *see also* Troxel v. A.I. Dupont Inst., 675 A.2d 314, 322 (Pa. Super. Ct. 1996) (stating doctor has duty to third party to disclose risk of patient infecting unborn children). In *Troxel*, the doctor failed to warn a mother that her child's disease could be

reversed the Superior Court, holding that the Superior Court erred in determining that Seebold had stated a cause of action under Pennsylvania law, and further declined to impose an affirmative duty on doctors to warn third-party nonpatients.[14]

The concept of duty as a vital ingredient of negligence was developing around the same time that negligence itself was emerging as an independent basis for liability in the English courts during the early to mid-nineteenth century, and was firmly in place towards the close of that century.[15] The essential inquiry behind whether a duty exists is whether there is some type of relationship between the parties that entitles one to the reasonable care of the other.[16] Determining whether a certain type of relationship implicates a duty of care to another is often difficult and rooted in nebulous public policy considerations, with a general split among courts that mirrors the differing views between the majority and dissent in the famed case of *Palsgraf v. Long Island Railroad Co.*[17] In *Palsgraf*, Justice Cardozo and the majority held that

spread to pregnant women, leading to the infection of their unborn children. *See* Troxel v. A.I. Dupont Inst., 675 A.2d 314, 316 (Pa. Super. Ct. 1996). A pregnant friend of the mother came in contact with the child and the friend's own infant died three months after birth. *See id.* The court held that the doctor owed a duty to the friend to warn the child-patient's mother of the risks that the disease might spread. *See id.* at 322.

14. *See* 57 A.3d at 1250 (reversing judgment of Pennsylvania Superior Court and reinstating order of trial court). The Pennsylvania Supreme Court found that the trial court did not err in taking the default approach by declining to impose a new, affirmative duty. *See id.*

15. *See* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.) 404-05 (holding supplier of defective coach not liable to third-party, injured driver). Lord Arbinger held the defendant supplier of a defective coach was not liable to the plaintiff driver because the driver was not in privity of contract with the supplier. *See id.*; *see also* Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 (C.P) 492-93 (recognizing duty to use one's property so as not to harm others). In *Menlove*, the defendant stacked hay in a way that made it susceptible to catching fire despite warnings from the neighbors. *See* Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 (C.P) 490-91 (recognizing duty to use one's property so as not to harm others). The haystack caught fire and damaged neighboring property. *See id*. at 491. In his decision, Chief Justice Tindal recognized that one has a duty to use his land so as not to harm another's and reasoned that people should be liable for the foreseeable harm they cause. *See id.* at 493; *see also* Langridge v. Levy, (1837) 150 Eng. Rep. 863 (Exch.) 867-68 (declining to impose duty on vendors to those not in privity of contract); Heaven v. Pender, (1883) 11 Q.B.D. 503 at 509 (Eng.) (stating duty of care arises when reasonable person would recognize care necessary to prevent injury); Prosser, *supra* note 1, at 13 (citing importance of English cases in development of duty); Winfield, *supra* note 1, at 58 (detailing development of duty in English common law).

16. *See* Heaven v. Pender, (1883) 11 Q.B.D. 503 at 509 (Eng.) (describing how relation between parties gives rise to duty); *see also* Prosser, *supra* note 1, at 13 (noting universal acceptance of idea that relation gives rise to duty).

17. 162 N.E. 99 (N.Y. 1928). The plaintiff in *Palsgraf* was a passenger standing on the platform while waiting for a train. *Id.* A man with a nondescript package under his arm was running to catch another train and a porter attempted to help him aboard. *Id.* In the attempt, the package, which was a bundle of fireworks, was dislodged, fell beneath the train, and exploded. *Id.* This explosion caused scales a number of feet away on the platform to become dislodged and fall, injuring the plaintiff. *Id.* The New York Court of Appeals held that plaintiff could not recover against the railroad largely because harm to her was not foreseeable. *See id.* at 100. *But see id.* at 101-05 (Andrews, J., dissenting) (arguing against application of foreseeability requirement). According to Prosser, humanity's concept of relations shift over time and, with that change, duty evolves. *See* Prosser, *supra* note 1, at 13-15. In addition, Prosser described the notion of duty as being built on "shifting sands." *Id.* at 15; *see id.* at 16-17 (describing general split in courts regarding concept of foreseeability and

the foreseeability of the risks posed by an action defines the relationship that creates the duty, while Justice Andrews and the dissenters believed that the key to the relationship was the connection between the defendant and those who were in fact injured.[18] Cardozo's view, which followed the Restatement (First) of Torts, emerged as the dominant common-law view in America, while Andrews' conception of duty was relegated to the minority.[19] Foreseeability of harm, however, is not the sole factor in determining whether a duty exists, as that determination is also based on an accumulation of policy considerations that amount to the idea that protection is due to a plaintiff, and this idea changes over time along with the attitude of society.[20]

Both this concept of relationship and its connection to foreseeability have led to the general rule that there is no duty to protect a person who is in peril due to circumstances the defendant did not create.[21] There are, however, exceptions to this general rule that impose affirmative duties on actors, which typically arise out of special relationships between the parties, such as a doctor-

duty); *see also* Joseph W. Little, *Palsgraf Revisited (Again)*, 6 PIERCE L. REV. 75 (2007) (conjecturing that *Palsgraf* is most remembered common-law case from law school among lawyers); *Prosser, supra* note 1, at 1 (describing *Palsgraf* as "perhaps the most celebrated" case in tort law partly due to controversy). *Compare* Langridge v. Levy, (1837) 150 Eng. Rep. 863 (Exch.) 867-68 (implying gun maker owes no duty based on negligence to nonpurchaser injured by defect), *with* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) (establishing liability for carmaker to nonpurchaser injured by defect).

18. *See* Palsgraf v. Long Island R.R. Co. 162 N.E. 99, 100 (N.Y. 1928). Justice Cardozo wrote, "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Id.* In his dissent, Justice Andrews wrote that negligence "does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might reasonably expect his act would injure; rather, a relationship between him and those whom he does in fact injure." *Id.* at 102 (Andrews, J., dissenting).

19. *See* Doyle v. S. Pittsburgh Water Co., 199 A.2d 875, 878 (Pa. 1964). In *Doyle*, the Pennsylvania Supreme Court held that when contracting parties owe each other duties and it is foreseeable that a breach of the contract would harm certain third parties, the contracting parties owe a duty to "all those falling within the foreseeable orbit of risk of harm." *Id.*; *see also* Little, *supra* note 17, at 80-83 (describing development of courts' conceptions of duty since *Palsgraf*); Prosser, *supra* note 1, at 4-5 (detailing influence discussion of draft of Restatement (First) of Torts had on Cardozo in *Palsgraf*). *But see* RESTATEMENT (THIRD) OF TORTS § 7 (2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."); Little, *supra* note 17, at 85-86 (explaining departure of Restatement (Third) of Torts from previous restatements).

20. *See* Althaus *ex rel.* Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000) (listing foreseeability as one factor to determine existence of duty); Leong v. Takasaki, 520 P.2d 758, 764 (Haw. 1974) (stating total duty inquiry includes consideration of all factors that entitle plaintiff to legal protection); *see also* Estate of Witthoeft v. Kiskaddon, 733 A.2d 623, 630 (Pa. 1999) (declining to hold doctor liable for injury caused by patient with poor vision). In *Estate of Witthoeft*, a doctor did not report a patient's poor eyesight to the state's Department of Transportation. Estate of Witthoeft v. Kiskaddon, 733 A.2d 623, 624-25 (Pa. 1999). Subsequently, the patient killed a bicyclist while driving. *Id.* The court implied that the bicyclist was a foreseeable plaintiff, but declined to impose liability on the doctor, reasoning that other policy considerations outweighed imposing liability in this instance. *See id.* at 630; Cardi & Green, *supra* note 1, at 678 (noting courts often decline to impose duty notwithstanding presence of foreseeability for various reasons); Prosser, *supra* note 1, at 16 (stating that foreseeable risk and duty do not always coincide).

21. *See supra* note 2 and accompanying text (discussing general no-duty rule and its exceptions); *see also* Cardi & Green, *supra* note 1, at 677 (describing general principles of duty).

patient relationship.[22] One of the most prominent examples of an affirmative duty is the one created by the California Supreme Court in the landmark case of *Tarasoff v. Regents of the University of California*,[23] which imposed a duty upon mental health professionals to warn an ascertainable third party of a patient's threatened violence against him or her.[24] Similarly, duties to third parties have also been extended to physicians who undertake the treatment of a patient with a communicable disease, such as the duty to properly inform the patient about the risks of infecting others so they can prevent the illness from spreading.[25]

These duties emphasize the idea that physicians owe a duty of care not only to their patients but also to identifiable third parties who will be harmed if the doctor negligently treats his patient.[26] This type of duty has been imposed, in part, through public policy justifications that physicians are in the best position to protect the public in certain situations.[27] Still courts have been reluctant to break from the general rule and impose these affirmative duties on defendants

22. *See supra* note 2 (discussing various exceptions to the general no-duty rule); *see also* Cardi & Green, *supra* note 1, at 712 (describing how affirmative duties often emerge from special relationships). *See generally* Tracy A. Bateman, *Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient*, 3 A.L.R. 5TH 370 (1992).

23. 551 P.2d 334 (Cal. 1976).

24. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976) (imposing duty on mental health professionals to warn third parties of patient's specific threats against them). The plaintiffs in *Tarasoff* were the parents of a woman who was murdered by the patient of a psychologist employed at Cowell Memorial Hospital at the University of California at Berkeley. *Id.* at 339. The parents claimed that the patient had earlier told the psychologist that he intended to kill their daughter. *Id.* The psychologist initially had the patient detained by campus police, but he was later released when he appeared rational. *Id.* at 339-40. The California Supreme Court held that plaintiffs could amend their complaint to state a cause of action against the psychologist and his employer. *See id.* at 340; *see also* Gregory M. Fliszar, Comment, *Dangerousness and the Duty To Warn,* Emerich v. Philadelphia Center for Human Development, Inc. *Brings Tarasoff to Pennsylvania*, 62 U. PITT. L. REV. 201, 203-04 (2000) (describing basis for affirmative duty to warn third party in limited contexts).

25. *See supra* notes 12-13 and accompanying text (discussing doctors' duty to third parties to disclose to patients risks of spreading communicable diseases); *see also* Jones v. Stanko, 160 N.E. 456, 458 (Ohio 1928) (examining duty of doctors treating patients with communicable diseases to third parties). *But see* Estate of Witthoeft v. Kiskaddon, 733 A.2d 623, 630 (Pa. 1999) (declining to create duty between doctor and foreseeable third-party injured due to patient's poor eyesight).

26. *See supra* notes 12-13 and accompanying text (describing certain duties owed by doctors to third parties); *supra* note 2 (discussing duties owed by mental health professionals to identifiable third parties); *see also* Matharu v. Muir, 29 A.3d 375, 387-88 (Pa. Super. Ct. 2011) (recognizing doctor owed duty to future child of pregnant patient because child was foreseeable victim); RESTATEMENT (SECOND) OF TORTS § 324A (1965) (stating liability to third party can be created through negligence in an undertaking).

27. *See* Emerich v. Phila. Ctr. for Human Dev., Inc. 720 A.2d 1032, 1039 (Pa. 1998) (stating public policy supports doctors' duty to warn identifiable victims of patients' specific threats); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976) (stating protection of public from violence can sometimes trump doctor-patient confidentiality); Matharu v. Muir, 29 A.3d 375, 387-88 (Pa. Super. Ct. 2011) (policy of protecting public health can support imposing additional duties on doctors); *see also* DiMarco v. Lynch Homes-Chester Cnty, Inc., 583 A.2d 422, 424 (Pa. 1990) (explaining justification of imposing duties on physicians because they are best positioned to protect public).

unless the consequences of such an imposition are reasonably foreseeable.[28]

In *Seebold v. Prison Health Services, Inc.*, the Pennsylvania Supreme Court held that there is no duty at common law for physicians who treat inmates with communicable diseases to warn guards that a particular inmate has such an illness.[29] The court concluded that the Superior Court erred in holding that *DiMarco v. Lynch Homes-Chester County, Inc.*[30] and *Troxel v. A.I. Dupont Institute*[31] controlled this case because the duty imposed on the doctors in those cases was to inform patients about the risks of spreading their diseases, not to seek out and warn third-party nonpatients.[32] The court stated that the only exception to the general rule in Pennsylvania is the narrowly defined holding in *Emerich v. Philadelphia Center for Human Development, Inc.*,[33] and, because there was no threat of imminent violence in the instant case, *Emerich* was inapplicable and thus did not create a duty to warn.[34]

While discussing the plaintiff's public policy argument for imposing the new duty, the court also reasoned that foreseeability alone does not create a duty of care, and that it is instead, one of a number of factors to be considered.[35] In addition, the court focused on the impact that imposing the duty allegedly sought by the plaintiff would have on physicians, including identifying the proper third parties, protecting doctor-patient confidentiality, and potentially greatly expanding liability.[36] The court then concluded that the instant case was not well suited for assessing whether public policy would support the imposition of a new affirmative duty on physicians.[37] Thus, the plaintiff failed to state a cause of action because there was no duty for a physician to warn the third-party nonpatient guard that one of the inmates had a communicable disease.[38]

In *Seebold v. Prison Health Services, Inc.*, the Pennsylvania Supreme Court

28. *See* Emerich v. Phila. Ctr. for Human Dev., Inc. 720 A.2d 1032, 1045 (Pa. 1998) (Flaherty, C.J., concurring) (expressing concerns regarding potentially ever-expanding duty of doctors to warn third parties); Hoven v. Kelble, 256 N.W.2d 379, 392 (Wis. 1977) (stating court must consider impact on society before changing common law).

29. *See* 57 A.3d at 1243-44 (concluding physicians owe no duty to guards to warn about infected inmates).

30. 583 A.2d 422 (Pa. 1990).

31. 675 A.2d 314 (Pa. Super. Ct. 1996).

32. *See* 57 A.3d at 1243-44 (describing superior court's errors).

33. 720 A.2d 1032 (Pa. 1998).

34. *See* 57 A.3d at 1244 (stating *Emerich* is sole exception to general rule). In *Emerich*, the Pennsylvania Supreme Court held that it was reasonable to impose a duty on mental health professionals to warn a third party "of an immediate, known and serious risk of potentially lethal harm." Emerich v. Phila. Ctr. for Human Dev., Inc., 720 A.2d 1032, 1039 (Pa. 1998). The court rationalized imposing this duty by reasoning that the "protection of the Commonwealth's citizens from harm" overrides countervailing policy arguments. *Id.*

35. *See* 57 A.3d at 1249 (stating foreseeability not dispositive in determining duty).

36. *See id.* at 1247 (discussing defendant's argument against imposing duty approvingly).

37. *See id.* at 1250-51 (stating case does not give court "an adequate foundation" to evaluate social policy).

38. *See id*. at 1243 (concluding defendant owed no duty).

misstated the issue before it, and thus decided the case incorrectly.[39] The key question was not whether the court should impose a new affirmative duty to warn on physicians, but rather whether they have a duty to a nonparty when they negligently misdiagnose a patient as not having an infectious disease.[40] The issue thus stated brought the instant case directly under *DiMarco* and *Troxel,* and as a result it was the physician's duty of reasonable care to the patient-prisoner upon which this case turns.[41] By erroneously focusing on whether an exception to the general no-duty rule should be granted, the court overlooked the fact that the duty to warn the guard was subsidiary to the duty to properly diagnose the patient.[42]

Further, the plaintiff in the instant case was in the narrow class likely to be harmed by a patient-prisoner if incorrect advice was given to that patient; thus, her complaint did state a cause of action because the physicians should have recognized that their proper care of the patient was essential for the protection of the guards who come into contact with them.[43] The court also misapplied section 324A of the Restatement (Second) of Torts as the plaintiff alleged that the physician failed to exercise reasonable care during the "original undertaking" of diagnosing the patient.[44] The harm caused to the plaintiff by the physician's breach of his duty owed to the inmate was foreseeable and, as a result, liability should be imposed.[45]

39. *See id.* at 1251-53 (McCaffery, J., dissenting) (discussing various issues before court); *supra* notes 12-13 and accompanying text (discussing nature of duty in certain third-party, communicable disease cases).

40. *See* 57 A.3d at 1251 (McCaffery, J., dissenting) (stating court's summarization of issue caused it to focus on wrong inquiry). The proper issue is whether a physician has a duty to a third-party when he negligently treats a patient as not having a communicable disease. *See id.*; *supra* notes 12-13 and accompanying text (describing cases where courts focus on doctor's treatment of patient when considering duty to third-party).

41. *See* 57 A.3d at 1251-52 (McCaffery, J., dissenting) (describing physician's duty to warn as secondary to duty to properly treat patient); s*ee also supra* notes 12-13 and accompanying text (explaining proper focus of courts on duty related to original undertaking).

42. *See* 57 A.3d at 1252 (McCaffery, J., dissenting) (explaining alleged duty to warn relates more to causation than duty). This is because the need for such a warning was the result of allegedly negligent care of the patient. *See id. But see* Fliszar, *supra* note 24, at 203-04 (discussing when imposition of affirmative duties appropriate).

43. *See* Palsgraf v. Long Island R.R. Co. 162 N.E. 99, 100 (N.Y. 1928) (stating that duty may properly extend to foreseeable plaintiffs); *cf. id.* at 102 (Andrews, J., dissenting) (stating relationship defining duty encompasses anyone in fact injured by wrongful act, regardless of foreseeability); *see also* DiMarco v. Lynch Homes-Chester Cnty., Inc., 583 A.2d 422, 424-25 (Pa. 1990) (establishing liability to third-party nonpatient where proper treatment necessary to protect third party); Doyle v. S. Pittsburgh Water Co., 199 A.2d 875, 878 (Pa. 1964) (explaining role of foreseeability of harm in creation of duty to third party); RESTATEMENT (THIRD) OF TORTS § 7 (2010) (implicitly eliminating foreseeability from duty determination); Little, *supra* note 17, at 85-86 (explaining elimination of foreseeability in duty question in Third Restatement).

44. *See* 57 A.3d at 1253-54 (McCaffery, J., dissenting) (arguing misapplication of Restatement allowed majority to disregard negligence as relating to original treatment); s*ee also supra* note 12 and accompanying text (describing content and application of Second Restatement).

45. *See supra* note 43 (discussing importance of foreseeability in duty determination for third parties); *see also* Cardi & Green, *supra* note 1, at 678 (explaining when other factors may be more important than foreseeability in the duty determination). The majority cited Cardi & Green for the proposition that in certain

The court also gave incorrect weight to a number of factors during its discussion of the public policy behind whether or not to impose a duty.[46] The court implicitly acknowledged that the harm to the plaintiff was foreseeable, but dismissed this factor by stating that foreseeability is "not alone determinative of the duty question."[47] In considering the plaintiff's additional argument that it is an important public policy to protect prison guards, the court's misstatement of the issue again caused it to reach the wrong result because on the other side of the scale it placed the imposition of a new affirmative duty on physicians in prisons, which, as the court pointed out, would have a number of negative consequences.[48] With a proper statement of the issue, one of the most important public policy factors to consider was the prevention of the spread of communicable diseases from prisoners to guards, which weighs heavily in favor of imposing a duty.[49]

In *Seebold v. Prison Health Services, Inc.*, the Pennsylvania Supreme Court considered whether a physician has a common-law duty to a nonpatient, third-party prison guard when treating a patient-inmate with a communicable disease. In holding that there was not an affirmative duty for the physician to warn the guard, the court did not focus on the proper question, which was whether the physician owed a duty to the guard to *properly diagnose the patient*. By misstating the issue, the court left an injured and foreseeable plaintiff, who society has a strong interest in protecting from harm, with no recourse. A foreseeable nonpatient third party should be able to seek recourse when harmed by a doctor's negligent misdiagnosis.

Douglas Sweeney

instances foreseeability may not be the most important factor of the duty question. 57 A.3d at 1249. The court, however, failed to address the fact that the examples given in the article of when such an instance occurs—stand-alone emotional harm and economic loss—are not analogous to the instant case where plaintiff is claiming physical injury. *See id.*

46. *See* 57 A.3d at 1249 (stating foreseeability may be given less weight than other factors but failing to address reasoning); *see also* 57 A.3d at 1252-53 (McCaffery, J., dissenting) (considering factors and citing *DiMarco* to conclude defendant owed plaintiff duty); *supra* note 20 and accompanying text (discussing approaches to duty determination).

47. 57 A.3d at 1249; *see supra* notes 45-46 and accompanying text (explaining issues with majority's evaluation of foreseeability in relation to the determination of duty). *But see supra* note 18 (showing how *Palsgraf*'s differing conclusions would both likely impose duty to injured and foreseeable plaintiffs).

48. *See* 57 A.3d at 1247-50 (discussing foreseeability and protection of prison guards versus alleged imposition of new duty for doctors); *see also supra* note 40 and accompanying text (explaining court's mischaracterization of issue before it).

49. *See supra* note 27 (discussing imposition of additional duties on doctors because of important public policy considerations); *see also* Troxel v. A.I. Dupont Inst., 675 A.2d 314, 323 (Pa. Super. Ct. 1996) (stating public policy may justify imposition of duties on doctors in certain situations).