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TORTS

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The *Survey* year saw important appellate decisions dealing with professional malpractice, governmental liability, landowner liability, defamation, products liability, assault and battery, and practice, procedure and damages peculiar to tort actions. Because the 1980 Legislature passed no noteworthy legislation affecting tort law, the course of events in this area was left to common law development. The purpose of this review is to discuss the interesting and significant cases, not to summarize the status of New Mexico tort law.

I. PROFESSIONAL MALPRACTICE

Although much has been written about legal malpractice in the last decade, only in the last year did the New Mexico courts begin to develop guidelines for litigating this area.[1] *George v. Caton*[2] was the first New Mexico decision to discuss the circumstances giving rise to the attorney's duty, the standard of care, and the procedure for trial that should apply in legal malpractice cases. The plaintiff filed a complaint against the defendants for negligence and misrepresentation, claiming that they had failed to file a wrongful death action before the statute of limitations had expired. The lower court granted summary judgment for the attorneys, finding that no attorney-client relationship existed because there was no formal contract between the parties. The court of appeals reversed, holding that such a relationship may be implied from the conduct of the parties.

The court held that to recover in negligence the plaintiff must prove (1) that the attorney was employed, (2) that he neglected his duty, and (3) that the negligence caused the client's loss. A lawyer who contracts to prosecute an action implicitly represents (1) that he possesses the requisite learning, skill, and ability ordinarily possessed by others in his profession, although he is not bound to know all the

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1. A 1972 case had decided issues concerning expert testimony in legal malpractice cases. *See* Sanders v. Smith, 83 N.M. 706, 496 P.2d 1102 (Ct. App.), *cert. denied*, 83 N.M. 698, 496 P.2d 1094 (1972).

2. 93 N.M. 370, 600 P.2d 822 (Ct. App.), *cert. quashed*, 93 N.M. 172, 598 P.2d 215 (1979).

law; (2) that he will exercise his best judgment in the course of the litigation, but will not be liable for an error in judgment as long as he acts in the good faith belief that his advice is well founded and in the best interest of his client; and (3) that he will exercise reasonable and ordinary care and diligence in pursuing the client's cause.

In *George,* the fact that local professional standards required a formal contract arrangement to establish an attorney-client relationship was irrelevant where no contract arrangement was discussed specifically. This decision should put to rest any lingering doubt about whether a "locality" standard will apply in legal malpractice cases. The court clearly said that a lawyer is subject to the same rules of law applicable to physicians and other professional people. New Mexico previously had rejected the "locality" standard in medical malpractice cases.[3]

The decision in *George* concludes with guidelines on proof and procedure. Expert testimony is not required to establish the negligence of an attorney who causes the client to lose the value of his claim. The measure of damages is the value of the lost claim—that amount which would have been recovered but for the attorney's negligence.[4] To establish the value of this lost claim, the plaintiff must prove by a preponderance (1) the probability of his recovery against the parties in the underlying action, (2) the amount of the judgment and (3) the likelihood of collecting on the judgment. In so holding, the court followed a New Jersey case[5] which viewed a malpractice action as a trial within a trial. The *George* court recommends a bifurcated trial in a malpractice action, with the negligence issue being tried first, followed by a determination of the lost value of the underlying case. No more than one day should separate the two trials. The recommended bifurcation departs from the usual practice in medical malpractice cases, particularly, as well as in other negligence-based claims.[6]

In another legal malpractice decision, the supreme court decided

3. The locality involved and the ways it differs from the locality about which the expert testifies is only one factor for the fact finder to consider. Pharmaseal Laboratories, Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977).

4. Even the defendant attorney can be called to testify concerning the value of the lost claim.

5. Hoppe v. Ranzini, 158 N.J. Super. 158, 385 A.2d 913 (1978).

6. The difficult burden of trying two cases, or the "case within a case," to establish liability and damages is readily apparent. The rigors of practice in this field, including discussion of the "case within the case" bifurcation and matters not discussed in *George,* such as whether the defendant attorney should be credited for the attorney's fees he would have received in the underlying case, are fully discussed in R. Mullen and V. Levit, Legal Malpractice (1977); Defense Research Inst., Professional Liability, Liability of Attorneys (No. 2, 1975).

when the statute of limitations for malpractice begins to run. In *Jaramillo v. Hood*[7] apparently there was no dispute as to which statute of limitations applied.[8] The court proposed that the cause of action may accrue either when actual loss or damage results, or when the matters complained of are ascertainable by the injured party. Ample authority supports both positions. The court decided that the cause of action should accrue when the harm is ascertainable. Summary judgment for the defendant was affirmed because the complaint was filed more than four years after the harm was discovered.[9]

In *Garcia v. Presbyterian Hospital Center,*[10] the court of appeals considered a similar issue in the context of medical malpractice. Plaintiff had surgery three times during the summer of 1972. He consulted attorneys in March, 1973. In September, 1974, plaintiff's counsel learned that the third surgery had been necessary because of the previous negligence of the hospital's employees. The complaint was not filed until July 12, 1976. The lower court granted defendant's motion for summary judgment because the three-year statute of limitations[11] had expired. The court of appeals interpreted the lower court's determination as a finding of laches on the part of the plaintiff and his attorneys in failing to exercise due diligence in discovering the negligent treatment.[12] The court found, however, that the existence of a factual issue regarding plaintiff's diligence precluded the entry of summary judgment. Furthermore, the court held that the statute was tolled because the hospital, which stood in a confidential relationship to the plaintiff, breached its duty to disclose all material facts to the plaintiff. The decision assumes, without reference, that the statute of limitations does not begin to run until the injury is manifested and is ascertainable.[13]

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7. 93 N.M. 433, 601 P.2d 66 (1979).

8. The court considered, without comment, the four-year statute of limitations for unwritten contracts, injuries to property, and fraud. N.M. Stat. Ann. § 37-1-4 (1978). Accrual of a cause of action for fraud or mistake begins at the time of discovery. *Id.* A legal malpractice action would usually arise out of a breach of written or oral contract and the representations and standards inherently implied by undertaking the legal work. The cause of action for written contract has a six-year statute of limitations. *Id.* § 37-1-3.

9. The decision was not unanimous, with two justices dissenting. The dissent did not indicate whether their disagreement was with the majority's decision on accrual or on other grounds. 93 N.M. at 434, 601 P.2d at 67.

10. 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979).

11. N.M. Stat. Ann. § 37-1-8 (1978).

12. The court has defined laches in Cave v. Cave, 81 N.M. 797, 802, 474 P.2d 480, 485 (1970) (quoting Morris v. Ross, 58 N.M. 379, 271 P.2d 823 (1954)).

13. In Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (Ct. App.), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977), the court of appeals held that the limitations period runs from the time the injury is manifested in an objective manner and is ascertainable.

II. GOVERNMENTAL LIABILITY

A. *Wrongful Suicide Death.*

In *City of Belen v. Harrell,*[14] the New Mexico Supreme Court affirmed the principle that, while a custodian has a duty to exercise reasonable and ordinary care to protect the life and health of a person in custody, this duty does not always make the custodian liable for harm. The decedent in this case was a seventeen-year-old boy who was taken to jail after being apprehended by the police for armed robbery. His threats to commit suicide were carried out shortly after he was incarcerated. The decedent's mother sued the city for wrongful suicide.[15] The trial court found for the plaintiff and the court of appeals affirmed. The supreme court reversed and remanded, holding that the trial court erred in not instructing the jury on whether the decedent's suicide constituted an independent intervening cause or contributory negligence, which would relieve the defendant of liability.

The court of appeals had held that, because public policy absolved the prisoner of any duty of due care while in custody, by definition he could not be contributorily negligent.[16] The supreme court, in reversing on these issues, did not explain its reasoning, except to say that under these facts the decedent's capacity to be contributorily negligent was a question for the jury. Clearly, the act of suicide chronologically followed any reasonable steps the custodian could have taken to prevent self-inflicted injury. The claimed intervening act, however, is the exact harm that the custodian has a duty to guard against. The supreme court suggested that independent intervening cause was an issue simply because the suicide occurred. The supreme court in *Harrell* condoned the "two bites of the apple" defense that it previously had criticized eloquently in discarding certain affirmative defenses.[17] The act of suicide is the factual basis for both contributory negligence and independent intervening cause. Arguably, independent intervening cause alone is a legitimate singular defense. The focus of the custodian's negligence and the intervening act theories is the foreseeability issue. A decision on the claim of contributory negligence, reached first, should end the issue. Allowing it to reappear on the claim of intervening cause injects a false issue into the case.

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14. 93 N.M. 601, 603 P.2d 711 (1979).
15. This is a case of first impression in New Mexico.
16. 93 N.M. at 615, 602 P.2d at 725.
17. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973) (unavoidable accident); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971) (assumption of risk).

B. Tort Claims Act.

At present, the Tort Claims Act[18] is generating substantial litigation in the courts. The cases decided last year are the first chapter in a long text interpreting an awkward governmental claims practice.[19] In *McClure v. Town of Mesilla,*[20] the trial court granted the defendant's motion for summary judgment and the court of appeals affirmed, with leave to the plaintiff to file a new claim for inverse condemnation. The plaintiff had claimed that his property was damaged as a result of overflow from a liquid waste disposal system owned by the City. The court, relying on the New Mexico Constitution[21] and eminent domain,[22] decided that the law clearly contemplated a remedy for damages by inverse condemnation. The court swiftly disposed of plaintiff's attack on the constitutionality of section 41-4-8(B)(2),[23] which exempts governments from liability for liquid waste collection.

Another exception to governmental immunity was the basis for plaintiff's claim in *City of Albuquerque v. Redding.*[24] In *Redding,* the supreme court held that the City was not immune from suit for injuries sustained where a bicycle slipped through a drainage grate, because the grate was not a primary part of an overall plan or design of roadways for which the Act provided immunity.[25] The court hinted at its dissatisfaction with the rule of contributory negligence. It noted that, in states which have not adopted the more enlightened rule of comparative negligence, courts have softened the impact of contributory negligence by holding, as in New Mexico, that this issue is almost always a question of fact.[26]

18. N.M. Stat. Ann. § § 41-4-1 to -26 (1978 and Supp. 1980).

19. The legislature recognized in the purpose provision of the Act that absolute sovereign immunity is unfair and inequitable, but government should not have the duty to do everything that might be done. Therefore, the legislature provided for only eight areas where immunity will be excepted (with notable exceptions to the exceptions). To arrive at such a result, the legislature would have to have investigated the myriad of hypothetical situations in which liability could be claimed and made the reasonable decision that a government should not have a duty in all but the eight areas. To believe that the legislature could have undertaken such an effort is fanciful. The only way to segregate the areas to be protected is through a general grant of waiver with certain identified exceptions in those areas peculiar to governmental action. In particular, areas should include policy making decisions at discretionary levels of government and those matters where the public treasury is sensitive. This is the approach used in the Federal Tort Claims Act, 28 U.S.C. § § 2671-2680 (1976).

20. 93 N.M. 447, 601 P.2d 80 (Ct. App. 1979).

21. N.M. Const. art. 2, § 20.

22. N.M. Stat. Ann. § 42-1-23 (1978).

23. *Id.* § 41-4-8(B)(2).

24. 93 N.M. 757, 605 P.2d 1156 (1980).

25. N.M. Stat. Ann. § 41-4-11(B)(1) (1978).

26. The plaintiff was not looking at the grate in the roadway when she rode over it. However, the City had designated the area as a bicycle path and had erected signs near the grate so indicating. Reasonable minds could differ on contributory negligence under these

In *Holiday Management Co. v. City of Santa Fe,*[27] the New Mexico Supreme Court held that the City could not claim immunity under the Tort Claims Act for failure to maintain an existing sewer system. The court rejected the City's claim that it was immune from liability under section 41-4-4(A),[28] which grants immunity for failure to provide adequate services. The court found that the City had not failed to provide adequate service, but had negligently maintained its services. The court forcefully said that the legislative purpose in passing the Tort Claims Act was not to sweep this type of negligence under the "governmental immunity rug,"[29] noting that such a construction of the Act would be inconsistent with *Hicks v. State,*[30] the case abolishing sovereign immunity in New Mexico.

In *Candelaria v. Robinson,*[31] the court of appeals was faced with the issue of absolute immunity for defamation. The plaintiff, a sheriff's deputy, sued the District Attorney and his special assistant for allegedly making defamatory statements in a letter to plaintiff's employer. The issue in the case was whether the defendants were immune from liability either under the common law or under the Tort Claims Act. Under the common law, if the defendants were acting within the scope of their duty as public employees at the time of the alleged defamation, they could take advantage of immunities accorded them by the nature of their office. However, since they were acting within their duty as public employees, they were also immune from liability by operation of the Tort Claims Act. Therefore, the court never reached the issue of common law immunity. The court affirmed dismissal of some claims and remanded others for further disposition by the lower court on the question of whether the acts involved occurred within the scope of defendant's employment.[32]

III. LANDOWNER AND OCCUPIER LIABILITY

In *Gutierrez v. Rio Rancho Estates, Inc.,*[33] the New Mexico Supreme Court refused to extend the doctrine of strict liability to all

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facts; thus, the court held that the trial court's grant of summary judgment should be reversed. *See, e.g.,* Strickland v. Roosevelt County Rural Electrical Coop., 94 N.M. 459, ___, 612 P.2d 689, 694 (1980), where the court cites the factors that ameliorate the harshness of contributory negligence.

27. 94 N.M. 368, 610 P.2d 1197 (1980).

28. *Id.* at ___, 610 P.2d at 1198.

29. *Id.*

30. 88 N.M. 588, 544 P.2d 1153 (1975).

31. 93 N.M. 786, 606 P.2d 196 (Ct. App. 1980).

32. Note that the defendants were not law enforcement officers and did not fit within the waiver exception. N.M. Stat. Ann. § 41-4-12 (1978).

33. 93 N.M. 755, 605 P.2d 1154 (1980).

impounded waters. The plaintiff's land was flooded by water discharged from a retention dam located on the property of an adjacent landowner. The jury was instructed on strict liability. The supreme court held that this instruction was in error, and reaffirmed the liability principles announced in previous decisions.[34] Under these principles, for liability to be found the retained water must flow in a different manner, and with a more injurious result or in greater volume, than it would if it were not diverted. Upon proof of these elements, the burden shifts to the defendant to prove any defense applicable in an ordinary negligence case.

In *Gutierrez,* the court noted that the doctrine of strict liability has been applied to impounded waters under the doctrine of "abnormally dangerous activity" (formerly "ultrahazardous activity").[35] The court's reluctance to apply strict liability in this case may be based on a locality distinction. It specifically mentioned that strict liability often is applied to water storage in cities, but where water is stored in rural areas, as was the case in *Gutierrez,*[36] strict liability has been applied less often. The court also noted that the Uniform Jury Instruction on ultrahazardous activity is confined to the use of explosives.[37] The court offered no explanation, however, as to why strict liability could not apply to the facts of this case.

IV. DEFAMATION

In *Den-Gar Enterprises v. Romero,*[38] the court of appeals affirmed an award of damages for slander of title and quieted title in the plaintiffs.[39] The court defined the slander of title tort as "when one who,

34. *See* Little v. Price, 74 N.M. 626, 397 P.2d 15 (1964); Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952); Rix v. Town of Alamogordo, 42 N.M. 325, 77 P.2d 765 (1938); Groff v. Circle K Corp., 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974).

35. 93 N.M. at 757, 605 P.2d at 1156. According to the Restatement (Second) of Torts § 520 (1977), the necessary elements of abnormally dangerous activities are: (1) existence of a high degree of risk of some harm to the person, land or chattels of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk by exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) the extent to which its value to the community is outweighed by its dangerous attributes.

36. 93 N.M. at 757, 605 P.2d at 1156.

37. N.M.U.J.I. Civ. 16.1.

38. 94 N.M. 425, 611 P.2d 1119 (Ct. App.), *cert. denied,* ___N.M. ___, 614 P.2d 545 (1980).

39. *Id.* at ___, 611 P.2d at 1123. The defendant attacked the trial court's award of damages on the grounds that the quiet title action could not be joined with a request for damages (citing Chavez v. Gomez, 77 N.M. 341, 423 P.2d 31 (1967)). The court pointed out, however, that damages recovered were for the slander of title count, not the quiet title count, of the complaint. Therefore, the court of appeals held that the trial court appropriately granted damages to the plaintiffs.

without the privilege to do so, willfully records or publishes matter which is untrue and disparaging to another's property rights in land, as would lead a reasonable man to foresee that the conduct of a third purchaser might be determined thereby."[40] Malice is essential to prove a claim for slander of title.[41] The trial court held, and the court of appeals affirmed that the deed recorded by the defendant was made without the requisite intent to pass title and, therefore, was not "legally delivered." By recording that deed, the defendant knowingly cast a cloud on the plaintiff's title.[42] Because such conduct would affect a reasonable man's purchase from the plaintiffs, the court of appeals held that the defendant had slandered the plaintiff's title.

The court of appeals also affirmed the trial court's award of special damages because the plaintiffs had proven actual pecuniary damages in the form of attorney's fees and other costs incurred to quiet title. The court distinguished an award of attorney's fees, as a mere expense of litigation, from attorney's fees incurred under a slander of title suit, which themselves will be a measure of pecuniary and special damages.[43]

V. PRODUCTS LIABILITY

Whether a strict liability claim based on failure to warn was properly submitted to the jury was the issue before the Tenth Circuit Court of Appeals in *Trujillo v. Uniroyal Corp.*[44] The plaintiff appealed a jury verdict for defendant, arguing that the trial court erred in ruling that his evidence and proposed jury instructions on failure to warn fell outside the scope of issues framed by the pre-trial order.[45]

The plaintiff, Trujillo, was injured when an undersized tire exploded while being mounted on the rim. He contended the tire was defective because there was no warning of the risk of serious personal injury in attempting either to mount the tire or to inflate it while mounting. The defendant argued that warnings would not have prevented the explosion because the plaintiff was aware of the danger in mounting the undersized tire and that over-inflation was not the cause of the explosion.[46]

The court recognized that under New Mexico law a user need not

40. *Id.* at ___, 611 P.2d at 1124.
41. *Id.*
42. *Id.* at ___, 611 P.2d at 1123. The defendant knew that the alleged grantor did not intend to pass title with the deed he delivered.
43. *Id.* at ___, 611 P.2d at 1124.
44. 608 F.2d 815 (10th Cir. 1979).
45. *Id.*
46. *Id.* at 816.

be warned of a danger known to him.[47] It held, however, that a warning may be necessary even if the plaintiff believes there is a risk.[48] The court distinguished the plaintiff's belief that the mounting operation might damage the tire, or even cause him injury, from the knowledge of risk of explosion and serious bodily harm. A warning of danger might be necessary when a risk is known but "the nature and degree of the risk" is not appreciated.[49] The court held that the plaintiff should be permitted to show the jury that he did not *appreciate* the danger involved in mounting the tire.[50] As for defendant's claim that over-inflation of the tire did not cause the explosion, the court held that it was not harmless error to exclude evidence to the contrary. The court ruled that the plaintiff could take that issue to the jury.[51]

In *Grammer v. Kohlhaas Tank and Equipment Co.*[52] a mechanic was injured when a compressor tank manufactured by the defendant ruptured at a welded seam. The district court entered judgment for the plaintiff under a strict liability theory. The defendant appealed, claiming that the trial court should have granted his motions for a directed verdict and judgment notwithstanding the verdict because the plaintiff proved neither the existence of a defect nor that the defect proximately caused the accident.[53]

The court of appeals held that the plaintiff had made a prima facie case of the existence of a defect in the weld. The court said that, in order to establish that the plaintiff had insufficient evidence to submit to the jury, the defendant must set forth all evidence, facts, and testimony together with all reasonable inferences favorable to the plaintiff's evidence. Because the defendant failed to show a complete lack of evidence sustaining the plaintiff's case, his argument about the plaintiff's theories was "valueless."[54] In addition, expert testi-

47. *Id.* at 819 (citing Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977)).

48. 608 F.2d at 819. The plaintiff admitted that he knew a 16-inch tire could not be mounted on a 16.5-inch rim.

49. *Id.*

50. *Id.* The court distinguished other New Mexico cases involving universally recognized risks: Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977) (where adoption of a safety device was held unnecessary because of adequate warnings to users concerning the danger of any part of the crane touching electrical wires) and Garrett v. Nissen Corp., 84 N.M. 16, 498 P.2d 1359 (1972) (warning covering the danger of trampoline use was unnecessary for an experienced user). *See also* First Nat'l Bank in Albuquerque v. NorAm Agricultural Prod., Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App.), *cert. denied,* 88 N.M. 29, 536 P.2d 1085 (1975).

51. 608 F.2d at 819.

52. 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979).

53. *Id.* at 688, 604 P.2d at 826-27. *See* Restatement (Second) of Torts, § § 394-395 (1977).

54. 93 N.M. at 689, 604 P.2d at 827.

mony created issues of fact concerning a defect in the weld; therefore, the trial court was not in error in denying the defendant's directed verdict.

The court of appeals also held that the trial court properly admitted testimony regarding the American Society of Mechanical Engineers design standards for tanks. The defendant argued that this testimony was extremely prejudicial. The court of appeals affirmed the trial court on this point, even though Occupational Safety and Health Administration regulations were held irrelevant and inadmissible in *Skyhook Corp. v. Jasper.*[55]

In addition, the court held that evidence of defendant's insurance coverage was admissible for impeachment purposes.[56] The contractor's former insurance representative offered testimony that the defendant company told him that the tank might have ruptured because of a defective welding at the seam, thus contradicting the company vice president's testimony at trial. The court of appeals recognized that the trial court's decision to admit this evidence is discretionary and is reversible error only in the event of abuse.

VI. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

In *Sanchez v. City of Espanola,*[57] the court of appeals determined the proper apportionment of damages under the Uniform Contribution Among Tortfeasors Act[58] for tortfeasors who are liable under different tort theories. The plaintiff recovered in negligence from the City of Espanola after a volleyball stand purchased from the City fell on the plaintiff's foot. The store selling to the City (Tiano's) and the manufacturer (Aalco) were held liable under a strict products liability theory. The defendants cross-claimed for contribution or indemnity. The trial court held that one-half of the judgment should be paid by the City and the other half by Aalco, who indemnified Tiano's by separate agreement.[59] The court found that because the seller's lia-

55. 89 N.M. 98, 547 P.2d 1140 (Ct. App. 1976), *rev'd on other grounds,* 90 N.M. 143, 560 P.2d 934 (1977).

56. 93 N.M. at 691-92, 604 P.2d at 830. N.M.R. Evid. 411 reads:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.

57. ___N.M. ___, 615 P.2d 993 (Ct. App. 1980).

58. N.M. Stat. Ann. § § 41-3-1 to -8 (1978).

59. Although it is not clear from the record, Tiano's and Aalco apparently entered into an indemnity agreement prior to the lawsuit. The court did not reach the question of indemnity as between the two parties. ___N.M. at ___, 615 P.2d at 994.

bility was derivative and purely technical, the seller was merely a party in the chain of supply, and therefore was not an active tortfeasor.

The court of appeals reversed the trial court. It found that, even though the seller and the manufacturer were liable under a different tort theory, they were equally liable to the plaintiff for her injuries. Therefore, since it was established that there were three tortfeasors, each liable directly to the plaintiff for her injuries, each had a right of contribution equalling one-third of the judgment.

In *Commercial Union v. Western Farm Bureau Insurance Cos.*,[60] the supreme court defined "pro rata share" under the Uniform Contribution Among Tortfeasors Act.[61] In New Mexico "pro rata" means an equal share, not a proportionate share. The wrongful death suit brought in this case was settled,[62] but the two insurers disagreed on the amount to be contributed by their respective insureds and sought a declaratory judgment to resolve that issue. The trial court granted summary judgment for Commercial Union, finding the liability of the tortfeasors to be based on equal liability, rather than on their proportionate interest in the property. The supreme court affirmed the lower court's decision on the basis that it previously had rejected the doctrine of comparative negligence.[63] Even though this case concerns the relationship between co-defendants rather than between defendants and plaintiffs, the court said that the same principles should apply in determining liability under the contribution statute.[64]

The court, therefore, adopted Professor Prosser's view that apportionment of liability should be made on the basis of individual liability, which is calculated by dividing the total damages by the number of tortfeasors. Because the duty owed by each property owner is the same, each tenant-in-common has an equal right of contribution as against the others.[65]

VII. OTHER TORTS

A. Negligent Hiring and Retention.

In *F. & T. Co. v. Woods*,[66] the New Mexico Supreme Court clarified the standard for liability in New Mexico for negligent hiring or

60. 93 N.M. 507, 601 P.2d 1203 (1979).

61. N.M. Stat. Ann. § 41-3-2 (1978).

62. 93 N.M. at 508, 601 P.2d at 1204. The suit involved a wrongful death of a child who fell into a well and drowned on the property owned by the four defendants, two of whom were insured by Commercial Union and the other two by Western Farm Bureau. Western Farm Bureau's insureds owned 20% of the total interest in the property, while Commercial Union's insureds owned 80% of the total interest in the property.

63. Syroid v. Albuquerque Gravel Prods. Co., 86 N.M. 235, 522 P.2d 570 (1974).

64. 93 N.M. at 508, 601 P.2d at 1204.

65. *Id. See* Prosser, Handbook of the Law of Torts § 50 (4th Ed. 1971).

66. 92 N.M. 697, 594 P.2d 745 (1979).

retention of an employee. The plaintiff, a rape victim, brought an action for damages against the employer of the alleged rapist for negligently hiring and retaining the employee.[67] The employer, who was aware of the employee's previous criminal record, was contacted by detectives concerning a rape case in which the employee was under suspicion. Plaintiff claimed that the defendant knew or should have known that the employee was dangerous. The court held that this knowledge was insufficient grounds for holding the employer liable because he could not have foreseen that the employee would rape the plaintiff.[68] Additionally, the court held that the defendant's hiring and retention of the employee was not a proximate cause of the injury caused by the rape.[69]

The court decided the case on the basis of foreseeability and proximate cause, but discussed an additional policy justification for the ruling. The court observed that to hold the defendant liable under these facts would extend tort principles too far: "To hold defendant liable under the facts in this case would make every employer, including the State and all governmental subdivisions, an insurer of the safety of any person who may at any time have had a customer relationship with that employer."[70] The court was unwilling to allow that expansion. Although the court explicitly stated that its decision did not foreclose all actions against employers based upon the negligent hiring or negligent retention of an employee, the standards and policies behind the *Woods* decision will make it extremely difficult to bring such an action.

B. Battery.

In *Rael v. Cadena,*[71] the court of appeals decided an issue of first impression in the law of battery in New Mexico. The trial court found that a non-active participant who verbally encourages an assailant can be held jointly and severally liable to the plaintiff for the battery. The non-active participant appealed on the grounds that liability could only be imposed if he was an active participant, had acted in concert with the assailant, or if the injury had resulted from his encouragement. The court of appeals upheld the judgment and squarely rejected

67. For a detailed analysis of this case, *see* Note, *Negligent Hiring and Retention–Availability of Action Limited by Foreseeability Requirement,* 10 N.M.L. Rev. 491 (1980).

68. 92 N.M. at 701, 594 P.2d at 749.

69. *Id.* At the trial level the jury found for the plaintiff. On appeal the court of appeals reversed the trial court for its failure to sustain defendant's motion for a directed verdict on the negligent hiring theory and affirmed the trial court's denial of the defendant's motion for directed verdict on the negligent retention theory. *Id.* at 698, 594 P.2d at 745.

70. *Id.* at 701, 594 P.2d at 749.

71. 93 N.M. 684, 604 P.2d 822 (Ct. App. 1979).

the defendant's statement of law on these facts. It applied the rule of imposing civil liability for assault and battery on any person who by any means aids or encourages the act.[72]

C. Dog Bites.

In *Aragon v. Brown*,[73] a father and son sued the defendant for injuries sustained when the defendant's dog bit the son.[74] The court of appeals held that it is unnecessary to instruct a jury on negligence and contributory negligence in dog bite cases. It found that under New Mexico Rule of Civil Procedure 51(D), the use of New Mexico Uniform Jury Instruction 5.3, concerning the liability of owners or keepers of dogs, was mandatory.[75] Since that instruction covered all necessary elements in determining liability and non-liability in dog bite cases, it was in error for the district court to give jury instructions on negligence and contributory negligence. Such instructions confused the jury by raising false issues.

D. Res Ipsa Loquitur.

In *Deakin v. Putt*,[76] the court of appeals set out the elements of *res ipsa loquitur*.[77] In *Deakin*, a cafe owner spilled hot coffee in the plaintiff-patron's lap when a coffee pot came apart. Summary judgment for the defendant was inappropriate because he failed to establish that this event would not have occurred absent negligence. The

72. *Id.* at 684-85, 604 P.2d at 823.

73. 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979).

74. *Id.* at 647, 603 P.2d at 1104. At trial the jury found for the defendant, so the plaintiffs appealed on grounds that the jury was improperly instructed on the issues of negligence, contributory negligence, and trespass. The defendant cross-appealed on the grounds that the trial court erred in denying his directed verdict and for the trial court's refusal to tender jury instructions regarding the unlawful use of alcohol by minors (which would have gone toward the theory of contributory negligence).

75. N.M.R. Civ. P. 51(D) (Repl. 1980) provides:

> Whenever New Mexico jury instructions prepared by the New Mexico Supreme Court committee on Uniform Jury Instructions and approved by the supreme court for publication contains an instruction applicable to the case and the trial court determines that the jury should be instructed on the subject, the UJI shall be used unless under the facts or circumstances of the particular case the published UJI is erroneous or otherwise improper, and the trial court so finds and states of record its reason.

N.M.U.J.I. Civ. 5.3, Liability of Owner or Keeper of Dog, addresses the burden of proof and methods for determining the character of the dog and the owner's knowledge thereof.

76. 93 N.M. 58, 596 P.2d 271 (Ct. App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1976).

77. *Id.* at 60-61, 596 P.2d at 273. A defendant contesting the plaintiff's *res ipsa loquitur* theory at the summary judgment stage of litigation must make a prima facie showing that (1) the instrumentality was not in the defendant's exclusive control, and (2) that the accident was one which ordinarily would not happen absent the defendant's negligence. This commonly requires the defendant to offer evidence, short of guess or speculation, that any potential negligence on his part, which would have caused the incident, did not occur.

court distinguished the holding in *Rekart v. Safeway Stores, Inc.*,[78] on which the defendant relied, by showing that there was a difference between a permissible inference under a negligence analysis and the doctrine of *res ipsa loquitur.* The court specifically said that under *res ipsa loquitur* the question before the court is not whether a permissible inference can be drawn, but whether the accident would have occurred if the defendant had exercised due care.[79]

E. Workmen's Compensation as a Defense to a Tort Claim.

The issue of when an alleged intentional tort committed by an employer upon an employee may be brought outside the Workmen's Compensation Act[80] was before the court in *Sanford v. Presto.*[81] In this case the plaintiff sought damages from her employer alleging that the employer committed a battery by intentionally permitting a hazardous work condition to exist and by knowingly ordering her to perform a dangerous job.[82] The court of appeals held that merely claiming that an injury is intentional and amounts to a battery does not give an employee a common law action outside the Workmen's Compensation Act. To determine if a battery was committed which gives rise to a common law action, the court examined the nature of the battery. It found that, because the employer did not commit a wanton and deliberate act beyond aggravated or willful negligence, he was not liable in tort. Although the defendant intentionally permitted a hazardous work condition to exist, plaintiff's injuries were deemed "accidental" within the meaning of the Workmen's Compensation Act. Therefore, the Act provided the plaintiff's exclusive remedy.[83]

In *Matkins v. Zero Refrigerated Lines,*[84] the court of appeals decided a number of difficult questions involving the relationship between tort and workmen's compensation. The deceased and his co-driver were employed as truck drivers by a trucking company. The trucking company entered into a lease agreement with a licensed interstate common carrier, in which the trucking company agreed to furnish a truck and two drivers. The contract complied with Interstate

78. 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970).

79. 93 N.M. at 61, 596 P.2d at 274. Under *Rekart*, if there was circumstantial evidence showing that an inference could be made to show the defendant caused the plaintiff's injury, then the jury would be permitted to make the finding of negligence upon the facts adduced.

80. N.M. Stat. Ann. § § 52-1-1 to -69 (1978).

81. 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).

82. At trial the defendant moved to dismiss on the ground that the plaintiff's exclusive remedy arose under the Workmen's Compensation Act. N.M. Stat. Ann. § 52-1-9 (1978). The motion was granted and the plaintiff appealed the decision to the court of appeals.

83. 92 N.M. at 747-48, 594 P.2d at 1204.

84. 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

Commerce Commission regulations by providing that the carrier have exclusive possession, control, and use of the contractor's equipment. In addition to this assumption of responsibility by the carrier, the contract expressly provided that the carrier pass on to the contractor responsibility for workmen's compensation insurance. In the course of his employment, the deceased was killed while riding as a passenger in the leased truck. The deceased's estate recovered workmen's compensation benefits from the trucking company through a settlement agreement. In addition, the estate brought a wrongful death action against the carrier and the co-driver.[85]

First, the carrier urged the court to find as a matter of law that an employer-employee relationship existed between it and the deceased, so that the carrier could invoke the exclusionary provision of the Workmen's Compensation Act.[86] The carrier argued that, because the contract gave it the exclusive right to control, the major test in New Mexico for determining an employment relationship for purposes of workmen's compensation was met. The test requires that the employer have "the right of control of the details of the work."[87] To find a sufficient relationship, the court rejected the appellee's argument concerning control. Instead, it decided that because the carrier had contracted away its burden of providing workmen's compensation insurance, it had relinquished its right to invoke the exclusionary provisions of New Mexico's Workmen's Compensation Act.[88]

The second issue concerned the lessee-carrier's liability for the negligence of its lessor's employees. The court said that the ICC regulations are intended principally to provide the public with financially responsible carriers. The plaintiff should have the right to seek recovery from the carrier whose lessor's employees negligently performed the lease agreement. Therefore, the negligence of the driver, as the lessor's employee, was imputed to the lessee because there was a sufficient relationship to do so,[89] as well as for policy reasons.

The third issue concerned the common law liability for the trucking company's employee-driver. The court of appeals held that the trial court was correct in granting summary judgment for the defendant-driver. The New Mexico Workmen's Compensation Act provides that when an employer has complied with the requirements of the Act, his employee is not subject to liability under the common law

85. *Id.* at 512-13, 602 P.2d at 196-97.
86. N.M. Stat. Ann. § 52-1-8 (1978).
87. *Id.* at 514, 602 P.2d at 198 (quoting Shipman v. Macco, 74 N.M. 174, 392 P.2d 9 (1964)).
88. 93 N.M. at 515, 602 P.2d at 199.
89. *Id.* at 517, 602 P.2d at 201.

for the injury or death of a co-employee.[90] Although there was not sufficient control to allow the carrier to benefit from the exclusionary provision of the Workmen's Compensation Act, there was a sufficient relationship so that the plaintiff could bring a wrongful death action against the carrier.[91]

VIII. DAMAGES

In *Aragon v. Brown,*[92] the court of appeals considered a question of first impression in applying the collateral source rule in New Mexico. The issue before the court was whether payment made to the plaintiff under the medical payment provisions of the defendant's insurance policy would be credited against damages awarded to the plaintiffs. The court of appeals affirmed the trial court's ruling, which provided that, if the plaintiff prevailed, the defendants would be entitled to credit the $1,000 already paid by their insurance company against any damages awarded. "It is the well-reasoned and majority rule that where the benefits derive from the defendant himself or from a source identified with him, he is entitled to credit for it. . . ."[93]

In *Amador v. Lara,*[94] a wife brought an action to recover damages, including lost income, resulting from injuries sustained in an automobile accident. The injuries prevented the wife from working as a part-time helper in the family business partnership. The trial court held that the action for loss of income belonged to the husband and because he was not a party to the action, he could not make a claim. The court of appeals found that the loss of earnings due to her inability to work was community earnings. The defendant argued that, if it was a business venture, the only proper party would be the partnership. The court, however, characterized the relationship as a marital partnership, and in that regard any lost earnings were community assets.[95]

The community property statute,[96] in conformity with the equal rights amendment to the New Mexico Constitution,[97] permits either spouse to manage, control and dispose of community property and function as the "head of household" in matters concerning community personal property. Therefore, the court held that the wife could

90. N.M. Stat. Ann. § § 52-1-6(D), -8 (1978).
91. 93 N.M. at 515, 602 P.2d at 199.
92. 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979).
93. *Id.* at 648, 603 P.2d at 1105.
94. 93 N.M. 571, 603 P.2d 310 (Ct. App. 1979).
95. 93 N.M. at 575, 603 P.2d at 314.
96. N.M. Stat. Ann. § 40-3-7 (1978).
97. N.M. Const. art. 2, § 18 (1912, amended 1973).

sue as head of the household for all of the community property loss of income to the family business.

In *Christman v. Voyer,*[98] the defendant appealed a trial court's award of exemplary damages. The plaintiff had brought suit for injunctive relief, alleging breach of a lease and interference with business relations. The trial court granted the injunction and found that the defendant's conduct constituted grounds for exemplary damages, notwithstanding the plaintiff's failure to supply clear proof as to the specific amount of compensatory damages.[99]

The court recognized the clear rule that punitive damages alone cannot be recovered in tort actions. Rather, the plaintiff must suffer actual compensable loss before exemplary damages can be awarded. Punitive damages must be related to the injuries and be based upon actual damages so as to show reason and justice, not passion and prejudice. This test, although not exact, requires that the amount of actual damages and the award of punitive damages stand in a reasonable ratio. The court of appeals vacated the trial court's award of exemplary damages because the necessary predicate of nominal or compensatory damages was missing.[100]

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98. 92 N.M. 772, 595 P.2d 410 (Ct. App. 1979).

99. *Id.* at 774, 595 P.2d at 412. In New Mexico, exemplary damages are recoverable in actions for damages based on tortious acts. The award is meant to punish the offender and warn others, not to compensate the party wronged. *See* Bank of New Mexico v. Rice, 78 N.M. 170, 429 P.2d 368 (1967); Sanchez v. Securities Acceptance Corp., 57 N.M. 512, 260 P.2d 703 (1953); Colbert v. Journal Publishing Co., 19 N.M. 156, 142 P. 146 (1914).

100. 92 N.M. at 775, 595 P.2d at 413.