Bartlett Revisited: New Mexico Tort Law Twenty Years after the Abolition of Joint and Several Liability - Part One

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On the twentieth anniversary of the abolition of joint and several liability in New Mexico, this article reviews the development of the New Mexico law of several liability. Part One, published here, focuses on the substantive scope of the doctrine, tracing the judicial and legislative developments that have established the breadth and the limits of several liability. Part Two, which is forthcoming, will explore the myriad procedural issues that have arisen in the litigation of several liability cases and the changes in litigation strategies occasioned by the movement from joint and several liability to several liability. In both Part One and Part Two, the article compares New Mexico law to that set forth in the recently adopted Restatement (Third) of Torts: Apportionment of Liability in order to test the soundness of New Mexico's evolving law and to provide New Mexico's two decades of experience with several liability as a counterpoint to jurisdictions that might consider adopting the Third Restatement.

INTRODUCTION

In 1981, the New Mexico Supreme Court substituted pure comparative negligence\(^1\) for the prior doctrine of contributory negligence, which had barred a plaintiff from any recovery if plaintiff's negligence contributed to the plaintiff's injuries.\(^2\) The decision was not surprising. Although the Restatement (Second) of Torts, published in 1965, advocated the doctrine of contributory negligence,\(^3\) New Mexico joined thirty-five other states that had rejected the doctrine in favor of some version of comparative negligence.\(^4\)

More surprising was the ruling one year later, in 1982, that the logic of comparative negligence in apportioning liability between plaintiff and defendant also called for the abolition of the doctrine of joint and several liability between defendants. In Bartlett v. New Mexico Welding Supply, Inc.,\(^5\) the court of appeals concluded that defendants whose concurrent negligence caused an injury to the plaintiff would be only severally liable—liable solely for the percentage of the plaintiff's total damages that corresponds to that defendant's comparative fault. In expanding comparative fault principles to apportionment among defendants, New Mexico moved into largely uncharted territory. Not only had the Restatement

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\(^2\) "Pure" comparative negligence follows "the principle of requiring wrongdoers to share the losses caused, at the ratio of their respective wrongdoing," and occurs "regardless of the degrees of comparative fault of the parties." Scott v. Rizzo, 96 N.M. 682, 689, 634 P.2d 1234, 1241 (1981). In contrast, a typical "modified" system of comparative negligence "allows a 49% negligent plaintiff to recover 51% of his damages, but denies any recovery at all to one who is found to have contributed 50% of the total negligence." \textit{Id.}

\(^3\) Scott, 96 N.M. at 682, 634 P.2d at 1234.

\(^4\) \textit{Re} \textit{statement (Second) of Torts} § 467 (1965). The drafters acknowledged in a "Special Note" that "in several states... statutes... have abrogated the rule stated in this Section, and have substituted reduction of the damages to be recovered by the negligent plaintiff in proportion to his fault." \textit{Id.}

\(^5\) Scott, 96 N.M. at 689, 634 P.2d at 1241.

embraced joint and several liability, but the Bartlett court could not identify another jurisdiction in which a state had adopted several liability by judicial opinion rather than by statute. Finding itself almost alone, New Mexico struggled to develop a common law jurisprudence of several liability largely without guidance from other jurisdictions. In 1986, the New Mexico legislature adopted the Several Liability Act, which affirmed the judiciary's adoption of several liability while creating some exceptions to which joint and several liability would apply. Several liability had a profound impact on other aspects of New Mexico law. Numerous issues, both substantive and procedural, have arisen, most to be resolved by judicial decision, some by the 1986 legislation, and many still unresolved.

In 2000, the relevant portions of the Restatement were replaced with the Restatement (Third) of Torts: Apportionment of Liability. The Third Restatement is divided into five "Topics." The first Topic establishes rules governing the effect of plaintiff's negligence in tort actions. Because all but five jurisdictions have adopted some form of comparative negligence, the Third Restatement rejects the doctrine of contributory negligence enshrined in the Second Restatement, endorses the doctrine of pure comparative negligence, and proposes rules for determining comparative fault between plaintiff and defendant.

The second Topic covers the liability of tortfeasors among themselves for injuries caused to the plaintiff. Noting a lack of consensus on the issue of whether joint and several liability should be replaced with several liability and if so, the form of several liability to adopt, the drafters chose not to incorporate a single doctrine into the Third Restatement. Instead, mirroring the division of views among the states, Topic Two contains five separate "Tracks" or alternative formulations of the law applicable to liability among multiple tortfeasors. Track A applies to jurisdictions that have decided to maintain the doctrine of joint and several liability for multiple tortfeasors. Track B proposes the appropriate law to apply in jurisdictions that have adopted a form of pure several liability, while Tracks C, D, and E reflect the fact that there is no majority rule on this question.

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7. Bartlett, 98 N.M. at 154, 646 P.2d at 581 ("The question has been answered in several states; most of these decisions are not helpful because the answer depended upon the contents of the comparative negligence statute."). Surveying the law of the four jurisdictions that had adopted pure comparative negligence by judicial decision, the court of appeals conceded that none of the courts had been persuaded thereafter to abolish joint and several liability. Id. at 154-57, 646 P.2d at 581-84.
10. Id. §§ 1-9.
11. Id. § 7 cmt. a ("Now only five jurisdictions—Alabama, Maryland, North Carolina, Virginia and the District of Columbia—continue to use contributory negligence.").
12. Id. § 7.
13. Id. §§ 1-E21.
14. The "five parallel, alternative Tracks (A-E) reflect the fact that there is no majority rule on this question." Id. at 3.
15. Id. § 17 cmt. a.
16. Id. §§ A18-A19.
17. Id. §§ B19-B20.
18. Track C provides for joint and several liability unless a defendant jointly and severally liable is unable to collect a judgment for contribution from a joint tortfeasor, in which case the percentages of fault are reallocated among the remaining parties. Id. §§ C18-C21.
JOINT AND SEVERAL LIABILITY

D, 19 and E 20 deal with variations of several liability that some jurisdictions have adopted. After Topic Two addresses its five tracks, Topics Three, Four, and Five set forth basic principles applicable to contribution, 21 indemnity, 22 the effect of settlement by some tortfeasors, 23 and the treatment to be given to causally-distinct injuries. 24

The general provisions of the Third Restatement relevant to New Mexico law are Topic One, focusing on comparative negligence between plaintiff and defendant, and Topics Three, Four, and Five, which address indemnity, contribution, divisible injury cases, and the effect of settlement by fewer than all tortfeasors. In addition, because New Mexico has adopted several liability in Bartlett 25 and in the Several Liability Act, 26 Track B (“Several Liability”) of the second Topic, concerning liability of tortfeasors among themselves, contains provisions relevant to New Mexico law. Though many of the Restatement positions coincide with New Mexico law, many do not. New Mexico several liability law preceded the Restatement by almost twenty years and often has taken positions different from those in the Restatement.

This article traces the New Mexico history of the adoption of comparative negligence and several liability. It then analyzes the development in New Mexico of the substantive law of several liability and also focuses on the extent to which the adoption of several liability has compelled changes in procedural rules and the litigation tactics of the parties in tort actions. The article compares New Mexico law and the Third Restatement, noting where they differ and where New Mexico law or the Restatement has addressed an issue that the other has not considered. Where New Mexico has not yet resolved an issue for which a Restatement provision applies, the Restatement position is analyzed to determine its wisdom in the context of the developed New Mexico law.

TO WHAT DOES SEVERAL LIABILITY APPLY?

With one important exception, 27 the New Mexico Several Liability Act 28 provides the core structure for determining when the doctrine of several liability applies. The Act requires a two-step process. First, one must determine the claims to which the Act applies. Second, if the Act applies, one must determine whether one of the

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19. Track D applies in jurisdictions in which joint and several liability applies to tortfeasors whose percentage of fault exceeds a certain threshold, while those below the threshold are only severally liable. Id. §§ D18-D19, § D18 cmt. b.

20. Track E applies in jurisdictions in which joint and several liability applies to one type of damages (e.g., economic damages), while several liability applies to different damages (e.g., non-economic damages). Id. §§ E18-E19.

21. Id. § 23.

22. Id. § 22.

23. Id. § 24. Section 25 deals with the effect of payment of judgments by one judgment debtor on the responsibility of other judgment debtors.

24. Id. § 26.


27. See infra notes 178-246 and accompanying text.

exceptions listed in the Act, authorizing the continued application of joint and several liability, applies. This section follows the same two-part approach, first exploring the scope of the Act and then the exceptions in the Act. The Several Liability Act is sometimes redundant because in some situations the Act does not provide that several liability applies and then also states that the same situation is covered by an exception to the Act that calls for the continued application of joint and several liability. Where the Act both excludes several liability and an exception in the Act imposes joint and several liability, this section addresses each of the two reasons why the doctrine of several liability is not applicable.

New Mexico and the *Third Restatement* take significantly different approaches to the issue of the scope of several liability. New Mexico limits several liability to particular causes of action independent of the type of damages sought to be recovered. In contrast, the *Restatement* applies several liability to any cause of action so long as the damages sought are for death, personal injury, or physical injury to property.

The *Third Restatement* thus extends comparative negligence and the rules of apportionment of liability among tortfeasors to “intentional torts, negligence, strict liability, nuisance, breach of warranty, misrepresentation, or any other theory of liability,” though a separate provision of the *Restatement* imposes joint and several liability on intentional tortfeasors even in jurisdictions adopting several liability. The *Restatement* rejected the cause of action-by-cause of action approach adopted in New Mexico because “single lawsuits often contain claims based on several different theories of liability, and it is desirable that a single system of apportionment apply to all the claims.”

New Mexico’s focus on causes of action to formulate the scope of several liability was influenced by the genesis of several liability in the adoption of comparative negligence. In *Scott v. Rizzo*, the supreme court held that comparative negligence shall substitute for contributory negligence for “a plaintiff suing in negligence,” and when other “negligence-related concepts are a basis for liability,” while declining to rule on the possible extension of comparative negligence to cases in which plaintiff pursued a theory of strict tort liability. Thus, the outer boundaries of fault-based apportionment were set by reference to the plaintiff’s legal theory rather than the type of harm plaintiff suffered.

29. Id. § 41-3A-1(C).
30. Id. § 41-3A-1(A).
31. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 (2000). The Restatement includes within the phrase “personal injury” both emotional distress and consortium. Id.
32. Id. § 1 cmt. b.
33. Id. § 12 cmt. a. In addition, the *Restatement* acknowledges that some statutory causes of action may be outside the scope of the *Restatement*. Id. § 1 cmt. d.
34. Id. § 1 cmt. b. The *Restatement* also discerns “conceptual tensions” in any attempt to apply different apportionment rules to different parties of multi-party and multi-claim cases: Causes of action focus on different policy concerns that underlie each cause of action, while “[t]he intellectual underpinning of comparative responsibility is that a single injury is more or less unitary.” Id. § 1 cmt. a.
35. 96 N.M. at 682, 634 P.2d at 1234.
36. Id. at 690, 634 P.2d at 1242.
37. Id. at 688, 634 P.2d at 1240.
38. Id.
Foreshadowing the adoption of several liability, the Scott court stated that in multiple party cases, the factfinder "will address the question of liability between each plaintiff and each defendant, to reflect such apportionment." This oblique reference to several liability in a comparative negligence case limiting its holding to negligence-related causes of actions suggested that the scope of the doctrine of several liability similarly would be confined to claims for negligence and negligence-related causes of action.

In Bartlett v. New Mexico Welding Supply, Inc., the court of appeals ruled that the logic of Scott compelled not only that comparative fault take the place of contributory negligence, but also that several liability of multiple defendants supersede the doctrine of joint and several liability among multiple tortfeasors. Judge Wood implicitly acknowledged that the limits set in Scott for the adoption of comparative negligence would also apply to the doctrine of several liability when he framed the appellate issue to be whether several liability should apply "in a comparative negligence case" and found no reason to retain joint and several liability "in our pure comparative negligence system." The common law of several liability thus set the limit of the doctrine’s application at negligence and negligence-based causes of action, equating the scope of several liability with the scope of the comparative negligence doctrine from which it sprang.

The Several Liability Act incorporates the Scott/Bartlett approach of limiting several liability to particular causes of action. The Act declares that the doctrine of several liability applies to "any cause of action to which the doctrine of comparative fault applies," unless the statute provides an exception. In this context, "comparative fault" is the affirmative defense that reduces the defendant's liability by the percentage of fault attributable to the plaintiff—the doctrine created in Scott. Unless a provision of the Several Liability Act provides otherwise, several liability applies to any cause of action to which the partial affirmative defense of comparative negligence applies to plaintiff’s cause of action.

The controlling issue, then, is determining to which of a plaintiff’s causes of action the doctrine of comparative fault provides a partial affirmative defense. Often this will be simple to ascertain. Where contributory negligence was once a defense, Scott substituted comparative negligence and the Several Liability Act imposes

39. Id.
40. 98 N.M. at 152, 646 P.2d at 579.
41. Id. at 154, 646 P.2d at 581.
42. Id. at 159, 646 P.2d at 586.
43. Though the outer limits of several liability were the outer limits of comparative negligence, Judge Wood indicated that in certain kinds of negligence cases the doctrine of several liability might not apply even if the comparative negligence doctrine did apply. He confined the adoption of several liability to "concurrent tortfeasors." Id. at 159, 646 P.2d at 586. This resulted in the exclusion of the doctrine from cases involving "successive" tortfeasors, see Lujan v. Healthsouth Rehab. Corp., 120 N.M. 422, 902 P.2d 1025 (1995), and has led to creation of a distinct set of rules applicable to actions involving successive tortfeasors. See infra notes 209–22, 231–33, and accompanying text; Lewis v. Samson, 131 N.M. 317, 35 P.3d 972 (2001).
44. N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996).
several liability. Thus, in a negligence case, the doctrine of comparative negligence applies and the Several Liability Act also applies.

On occasion, determining whether contributory or comparative negligence is a defense to a cause of action will be complicated for one of two reasons. First, New Mexico precedent may not have resolved whether the former doctrine of contributory negligence was a defense to a particular cause of action. Second, it is possible that New Mexico precedent, influenced by the harshness of the common law doctrine of contributory negligence, formerly may have ruled the defense inapplicable, but courts might now overrule the decision based on the ameliorating effect of the doctrine of comparative negligence. The supreme court in Scott suggested that such common law exemptions from the defense of contributory negligence may not apply after the adoption of comparative negligence.

Strict Products Liability Claims

New Mexico has long applied the doctrine of strict products liability contained in Section 402A of the Second Restatement. Drafted when contributory negligence was a complete defense, the Second Restatement provides that the most common form of contributory negligence—failure of the plaintiff to discover the defect—is not a defense to an action under Section 402A, though voluntarily and unreasonably proceeding to encounter a known risk (i.e., assumption of risk) is a defense. New Mexico initially adopted the Second Restatement position, ruling that ordinary contributory negligence was not a defense to a strict products liability action. Thus, prior to the adoption of comparative negligence, only unreasonable assumption of risk barred the plaintiff from recovery.

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46. Scott, 96 N.M. at 682, 634 P.2d at 1234.
47. N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996); Reichert v. Atler, 117 N.M. 623, 624-25, 875 P.2d 379, 380-81 (1994) (“Because the doctrine of comparative negligence applied, the Court of Appeals also held, relying on Bartlett…that the Atlers should not be jointly and severally liable for the damages…We agree…”).
48. For example, no New Mexico case has decided whether contributory negligence was a defense to a cause of action alleging nuisance based on defendant engaging in an ultrahazardous activity. Cf. RESTATEMENT (SECOND) OF TORTS § 840B(3) (1979) (“Some forms of contributory negligence constitute a defense to a nuisance action based on ultrahazardous activity by defendant.”).
49. See, e.g., Lester v. Atchison, Topeka & Santa Fe Ry. Co., 275 F.2d 42, 43 (10th Cir. 1960) (“The law of New Mexico recognizes that a defendant’s negligent act may be commenced under such aggravated circumstances as to deny to defendant the right to interpose plaintiff’s contributory negligence as a defense.”); Werner v. City of Albuquerque, 89 N.M. 272, 274, 550 P.2d 284, 296 (1976) (“Contributory negligence not available as defense to statutory cause of action ‘where the effect of the statute, ordinance or regulation is to place the entire responsibility upon the defendant for plaintiff’s injury.’”).
50. Scott, 96 N.M. at 687, 634 P.2d at 1239 (“Under comparative negligence, rules designed to ameliorate the harshness of the contributory negligence rule are no longer needed.”).
52. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).
53. Id.
54. Rudiasale v. Hawk Aviation, Inc., 92 N.M. 575, 577, 592 P.2d 175, 177 (1979) (“Conventional contributory negligence is not an affirmative defense to strict liability...The existence of due care on the part of the consumer is irrelevant.”). The Restatement’s exception for conduct involving the unreasonable decision to encounter a known risk had been earlier acknowledged as a complete defense in a product liability action in New Mexico. Bendorf v. Volkswagenwerk Aktiengesellschaft, 88 N.M. 355, 359, 540 P.2d 835, 839 (Ct. App. 1975), cert. denied, 88 N.M.319, 540 P.2d 249.
Joint and Several Liability

In *Scott*, the supreme court declined to decide whether the substitution of the more benign doctrine of comparative fault in negligence actions would lead to reversal of the decision not to take into account plaintiff's conventional negligence in a products liability case. Thereafter, the court of appeals concluded that the adoption of comparative negligence justified a reversal of the prior doctrine barring conventional contributory negligence as a defense and held that "plaintiff’s negligence is a partial defense to a products liability claim in that the percentage of plaintiff’s fault, due to negligence, reduces the amount of the damages that plaintiff may recover." Because comparative negligence now is a defense in a products liability action, the Several Liability Act applies. This does not mean, however, that those found strictly liable for defective products will always be able to lay off fault on others. While the Several Liability Act applies to strict products liability cases, the Act contains an exception providing that in some situations a strictly liable product supplier will not be able to lay off fault on others. When multiple defendants are strictly liable for the same product, such as where the manufacturer, the wholesaler, and the retailer of a product are each joined as defendants and charged with strict products liability, each of the defendants is liable without negligence and there is no logical basis for comparing their relative negligence. Recognizing this conceptual problem, the drafters of the Several Liability Act concluded that where multiple defendants are each liable for the sale of the same defective product, their liability, when premised solely on strict products liability, shall be joint and several rather than several.

In addition to defendants in the chain of distribution, products liability cases may involve additional tortfeasors who are charged with negligence rather than strict products liability. In such cases, the principle remains the same but application of...
the principle will change. For example, a manufacturer and retailer may be sued for strict products liability along with an independent repairer of the product. Under existing law, the latter is not liable under a theory of strict liability but only for negligence.\textsuperscript{62} In such a case, the manufacturer and retailer will not be liable for the percentage of fault attributable to the repairer but will be jointly and severally liable only for the percentage of the responsibility attributable to their strict products liability.\textsuperscript{63}

More complex is the proper allocation of responsibility when the plaintiff sues defendants in the chain of distribution, pleading and proving both strict products liability and negligence. The factfinder will allocate fault for the negligence claims but the Several Liability Act provides for joint and several liability for the strict products liability claim.\textsuperscript{64} New Mexico law provides no answer to the question of which cause of action will control the entry of judgment. The explicit statutory mandate of joint and several liability should apply, thus making the defendants jointly and severally liable.\textsuperscript{65} Yet it would seem inappropriate to ignore completely the factfinder’s allocation of fault among the parties. Perhaps the best solution is to impose joint and several liability based on their strict products liability while using the factfinder’s determination of comparative fault in the negligence claim to determine the amount of contribution between the jointly and severally liable tortfeasors.\textsuperscript{66}

\textbf{Intentional Torts}

For two reasons, intentional tortfeasors do not get the benefit of several liability and are fully liable for the harm their intentional wrongdoing proximately causes to the plaintiff. First, contributory or comparative negligence is not a defense to an intentional tort and thus the core triggering provision for several liability—that it


\textsuperscript{63} See Schultz & Occhialino, supra note 45, at 492 (“The strictly liable marketers are treated as a single unit whose collective culpability is compared to that of the negligent co-tortfeasors. Each strictly liable marketer is jointly and severally liable for the percentage of culpability attributed to the marketing unit, but is not liable for the percentage of fault attributed to the negligent co-tortfeasor.”).

\textsuperscript{64} N.M. STAT. ANN. § 41-3A-1(C)(3) (Michie 1996).

\textsuperscript{65} The Several Liability Act provides generally for several liability “except as otherwise provided hereafter,” Id. § 41-3A-1(A), and section (C) thereafter provides that “joint and several liability shall apply” to strict product liability claims. Id. § 41-3A-1(C)(3).

\textsuperscript{66} As jointly and severally liable tortfeasors, the manufacturer and the marketers are subject to the Uniform Contribution Act. Id. § 41-3-1. Normally, complete indemnity of the marketer by the manufacturer would be appropriate if neither the manufacturer nor the marketer were guilty of negligence. In re Consolidated Vista Hills Litigation, 119 N.M. 542, 546, 893 P.2d 438, 442 (1995). Where, however, the marketer and manufacturer are each actively negligent, contribution, rather than indemnity, will determine their rights between themselves, Id. at 549, 893 P.2d at 445, and the amount of contribution among tortfeasors is based on comparative degrees of fault, N.M. STAT. ANN. § 41-3-2(D) (Michie 1996).

\textsuperscript{67} Reichert v. Adler, 117 N.M. 628, 633, 875 P.2d 384, 389 (Ct. App. 1992), rev’d on other grounds, 117 N.M. 623, 875 P.2d 379 (1994) (“At common law, the defense of contributory negligence was not available where the acts resulting in injury to a plaintiff were occasioned by the intentional misconduct of a defendant.”); \textsc{restate ment (second) of torts} § 481 (1965) (“The plaintiff’s contributory negligence does not bar recovery against a defendant for a harm caused by conduct of the defendant which is wrongful because it is intended to cause harm to some legally protected interest of the plaintiff or a third person.”).
applies when the doctrine of comparative fault applies—68—is absent. Second, the Several Liability Act explicitly imposes joint and several liability upon wrongdoers who act with the intent of inflicting injury.69 It is unlikely that the ameliorating effect of the substitution of comparative for contributory negligence in New Mexico will lead to a different result. In Reichert v. Atler,70 a case decided after the adoption of comparative negligence, the supreme court affirmed that an intentional tortfeasor is fully liable for harm the tortfeasor proximately causes.

The Third Restatement reaches the same result through similar reasoning. Although the Restatement applies generally to all actions for personal injury whatever the legal theory,71 a provision in the Restatement, similar to one in the Several Liability Act,72 provides that any person who commits an intentional tort is jointly and severally liable for the injury caused.73

The Third Restatement leaves some room for jurisdictions to modify the rule of joint and several liability for intentional wrongdoing. A comment to the section imposing joint and several liability for intentional wrongdoing suggests that there may be cases in which the defendant is guilty of an intentional tort but his culpability is "quite modest, for example a defendant who committed a battery based on an unreasonable, yet honest, belief that the conduct was privileged."74 The comment leaves to individual states the determination whether it is more appropriate to apply several liability to the intentional tortfeasor in such cases.75 There is no indication in New Mexico law that New Mexico will act on this suggestion, and the language of the Several Liability Act leaves no room for creation of such an exception.76

Though the intentional tortfeasor is fully liable for all harm proximately caused, tortfeasors whose negligence combined with the intentional tortfeasor’s conduct to cause the harm can lay off fault on the intentional tortfeasor. This is so even when the plaintiff demonstrates that the negligent defendant’s failure to protect the plaintiff from the intentional tortfeasor allowed the intentional tortfeasor to injure the plaintiff. In Reichert v. Atler,77 a bar patron was shot and killed by a fellow patron when the bar owners negligently failed to protect the patron from the assailant. The plaintiff argued that if the owners were able to lay off fault on the intentional wrongdoer, the factfinder would surely attribute most of the fault to the intentional wrongdoer, thus diminishing the landowner’s incentive to protect the plaintiff from the intentional wrongdoer.78 The supreme court rejected the trial court’s ruling imposing full liability on the bar owners. Instead, the court allowed

68. N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996).
69. Id. § 41-3A-1(C)(1).
70. 117 N.M. 623, 626, 875 P.2d 379, 382 (1994).
74. Id. § 12 cmt. b.
75. Id.
76. "The doctrine of joint and several liability shall apply...to any person or persons who acted with the intention of inflicting injury or damage." N.M. STAT. ANN. § 41-3A-1(C) (Michie 1996).
77. 117 N.M. 623, 875 P.2d 379 (1994).
78. Id. at 626, 875 P.2d at 382.
them to lay off fault on the assailant. 79 Acknowledging that this might diminish the incentive of the landowner to prevent intentional wrongs to visitors, the court fashioned a special jury instruction designed to counteract the tendency of the factfinder to place most blame on the intentional tortfeasor. 80

The Third Restatement reaches the opposite conclusion. Section 14 provides that "[a] person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share...assigned to the person." 81 The reasons for the Restatement’s position are interrelated: First, the factfinder may be persuaded to assign most of the fault to the intentional wrongdoer; second, because intentional tortfeasors often are insolvent, the injured person often would not receive compensation; and, third, allowing the negligent person to lay off fault may diminish the person’s incentive to take precautions to prevent the intentional wrongdoing. 82 The Reichert court concluded that the specially crafted jury instruction would suffice to prevent the factfinder from laying off most fault on the intentional tortfeasor and thus would provide sufficient incentive to the negligent tortfeasor to comply with its duty to protect the plaintiff from the intentional tortfeasor. 83 The Restatement’s concern for leaving the plaintiff with an uncollectable judgment against impecunious intentional tortfeasors was not addressed in Reichert and is unlikely to provide a rationale for the adoption of the Restatement position in New Mexico. Bartlett itself left the plaintiff with an uncollectable claim against an unknown tortfeasor. 84 Judge Wood was of the view that "it seems startling to find that plaintiffs, as a class, have a greater claim upon the court’s sympathy than defendants" 85 and rejected the argument that joint and several liability should continue to exist in order to afford plaintiff a greater chance of recovery when one tortfeasor is insolvent or unknown. 86 If litigants are to make inroads on the courts' current blanket rejection of joint and several liability in such cases, they may attempt do so with public policy arguments similar to, but necessarily more persuasive than, those that support Section 14 of the Third Restatement. 87

79. Id. The arguments for and against this ruling were expansively articulated in the court of appeals opinion. Reichert, 117 N.M. at 628, 875 P.2d at 384.
80. Id. at 626, 875 P.2d at 382. The core provision of the jury instruction is that "the proportionate fault of the [owner] [occupant] is not necessarily reduced by the increasingly wrongful conduct of the third person." N.M. U.J.I. Civ. 13-1320.
81. Restatement (Third) of Torts: Apportionment of Liability § 14 (2000). A comment notes that the provision purposely does not impose joint and several liability on a person who breaches a duty to protect a person from harm negligently inflicted, although it leaves open the door for such a ruling if compelling reasons exist for doing so. Id. cmt. b.
82. Id. § 14 cmt. b.
83. Reichert, 117 N.M. at 626, 875 P.2d at 382.
84. Bartlett, 98 N.M. at 152, 646 P.2d at 579.
85. Id. at 158, 648 P.2d at 585 (quoting with approval from Erwin E. Adler, Allocation of Responsibility after American Motorcycle Association v. Superior Court, 6 PEPPE. L. REV. 1 (1978)).
86. Id.
87. N.M. STAT. ANN. § 41-3A-1(C)(4) (Michie 1996) (When there is proof of a "sound basis in public policy" for doing so, a court may impose joint and several liability.); see infra notes 305–60 and accompanying text.
Negligent Misrepresentation

One might expect that the comparative negligence defense would apply in an action for negligent misrepresentation, but New Mexico law is to the contrary. In Neff v. Bud Lewis Co., the court of appeals rejected the application of the defense of contributory negligence to a cause of action for negligent misrepresentation. As an element of the cause of action, plaintiff must prove that he justifiably relied upon the defendant's misrepresentation. Though the issue of justifiable reliance raises an issue similar to contributory negligence, the court determined that this issue "does not speak in terms of contributory negligence as a defense" and held that "[t]he doctrine of negligent misrepresentation did not afford the defendants a defense of contributory negligence." If contributory negligence is irrelevant to a claim for negligent misrepresentation, the Several Liability Act does not impose several liability.

National law tends to the contrary. Section 552A of the Second Restatement provides that in an action for pecuniary loss due to negligent misrepresentation, "the action is founded solely upon negligence, and the ordinary rules as to negligence liability apply." Moreover, the majority view is that the defense of comparative negligence is available in negligent misrepresentation cases. In accordance with its focus on the type of injury suffered rather than the cause of action asserted, the Third Restatement includes within its scope misrepresentation cases that involve personal injury or physical damage to tangible property but excludes those involving other types of injuries.

Under existing New Mexico law set forth in Neff, a defendant guilty of negligent misrepresentation will be fully liable and cannot lay off fault on other tortfeasors. However, a means exists to bring negligent misrepresentation cases within the Several Liability Act. The requirement that plaintiff must demonstrate that he justifiably relied upon the misrepresentation is obviously similar to a statement that if the plaintiff lacked reasonable care in evaluating the representation the plaintiff cannot recover. If framed in the latter form, as an affirmative defense of contributory negligence, the defense would then be transformed from contributory negligence to comparative negligence as a result of the adoption of comparative negligence in Scott.

Given the "ameliorative principles of comparative negligence...which strongly favor letting a jury determine the relative accountability of our citizens for an
Injury, it might be appropriate to transform “justifiable reliance” from an all-or-nothing element of plaintiff’s prima facie case to the affirmative defense of comparative negligence. The New Mexico Supreme Court acted similarly in dealing with the “open and obvious danger” rule that barred recovery of persons who encountered negligently created but “open and obvious dangers” on land. Under former law, a landowner owed no duty to a visitor to warn or fix an open and obvious danger on the land. In *Klopp v. Wackenhut Corp.*, the New Mexico Supreme Court determined the issue was more properly framed as whether the danger was unreasonable and whether the landowner should reasonably anticipate that a visitor would not discover or realize the danger. The plaintiff successfully argued that the open and obvious danger bar to recovery was in reality equivalent to applying the complete defense of contributory negligence to bar her recovery, a result that was incompatible with the doctrine of comparative negligence. The court agreed to eliminate this total bar, following cases from other jurisdictions that did so “in light of adoption of comparative negligence.” In similar fashion, the current requirement that plaintiff prove justifiable reliance as an element of a negligent misrepresentation case may be incompatible with comparative negligence principles and perhaps should be transformed from an element of plaintiff’s case to the affirmative defense of comparative negligence. The Several Liability Act and the doctrine of several liability would then apply to claims for negligent misrepresentation.

**Fraud**

Persons guilty of fraud will continue to be jointly and severally liable despite the passage of the Several Liability Act. Because plaintiff’s negligence is not a defense to a fraud action, the statute imposing several liability where comparative fault is a defense is not applicable. Moreover, fraud is an intentional tort and the Several Liability Act provides that joint and several liability applies to persons who act with the intent to cause harm. In *Otero v. Jordan Restaurant Enterprises*, decided well after the adoption of comparative negligence and the passage of the

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102. Id. at 158, 824 P.2d at 298.
103. Id. at 156, 824 P.2d at 296.
104. Id. at 158, 824 P.2d at 296.
106. Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1337 (10th Cir. 1984) (interpreting N.M. law) (“[C]ontributory negligence has no place in...fraud actions.”).
110. 122 N.M. at 187, 922 P.2d at 569.
Several Liability Act, the supreme court explicitly ruled that a defendant guilty of fraud could not lay off fault on other tortfeasors.\textsuperscript{111}

\textit{Nuisance}

An action for nuisance can be premised upon negligence, intentional wrongdoing, or liability for ultra-hazardous activities in the absence of fault.\textsuperscript{112} When the plaintiff relies upon negligent conduct of the defendant to prove nuisance, the defense of contributory negligence historically has applied.\textsuperscript{113} The Second Restatement provides that the doctrine of contributory negligence applies to negligence-based nuisance cases "to the same extent as in other actions founded on negligence."\textsuperscript{114} With the widespread substitution of comparative fault for contributory negligence, most jurisdictions substitute comparative negligence for the former defense of contributory negligence in nuisance actions founded on negligence.\textsuperscript{115} A California court explained that "there is no reason to allow negligent plaintiffs to sue on a simple allegation of nuisance in order to avoid the consequences of their comparative fault" if the nuisance is premised on negligence.\textsuperscript{116}

In a pre-comparative negligence case, the New Mexico Supreme Court suggested that "where nuisance results from negligence...the defense of contributory negligence is [a] good defense to such nuisance action."\textsuperscript{117} This is consistent with national law\textsuperscript{118} and New Mexico almost certainly will conclude that comparative negligence, substituting for contributory negligence, is now a defense to a negligence-based nuisance action.\textsuperscript{119} If so, the Several Liability Act dictates the application of several liability to defendants found liable for negligence-based nuisance actions.\textsuperscript{120}

New Mexico has had no occasion to determine whether plaintiff's negligence is a defense when a nuisance action is based on intentional wrongdoing. The Second Restatement states that when nuisance is based on intentional misconduct,\textsuperscript{121} contributory negligence is not a defense.\textsuperscript{122} Because New Mexico does not apply the

\begin{thebibliography}{9}
\bibitem{111} Id. at 192, 922 P.2d at 574.
\bibitem{113} \textit{RESTATEMENT (SECOND) OF TORTS § 840B (1979).}
\bibitem{114} Id.
\bibitem{115} \textit{Id.}
\bibitem{117} Tint, 259 Cal. Rptr. at 907.
\bibitem{118} Seiler v. City of Albuquerque, 57 N.M. 467, 471, 260 P.2d 375, 377-78 (1953).
\bibitem{119} \textit{RESTATEMENT (SECOND) OF TORTS § 840B (1979).}
\bibitem{120} \textit{Id.}
\bibitem{111} \textit{Scort, 96 N.M. at 690, 634 P.2d at 1242 (noting that "a pure comparative negligence standard shall supersede prior law [of contributory negligence]").}
\bibitem{121} N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996). If it is possible to allocate responsibility among the multiple wrongdoers based on their causal contribution to the nuisance, liability will be apportioned in accordance with the relative causal contributions rather than in accordance with their comparative fault. \textit{Id. § 41-3A-1(D). See also RESTATEMENT (SECOND) OF TORTS § 433A cmt. d (1965).}
\bibitem{121} The definition of "intentional" for this purpose requires a finding that the defendant's interference with the plaintiff's rights be done "for the purpose of causing it," or that the resulting injury is "substantially certain to result" from the defendant's conduct. \textit{RESTATEMENT (SECOND) OF TORTS § 825 (1979).}
\bibitem{122} \textit{Id. §§ 840B-840C (1979).}
\end{thebibliography}
doctrine of comparative negligence to intentional torts,\textsuperscript{123} it is probable that a defendant liable for intentional nuisance will not be able to lay off fault on other tortfeasors.\textsuperscript{124} This likely result is buttressed by the provision in the Several Liability Act that preserves joint and several liability for intentional wrongdoing.\textsuperscript{125}

When nuisance is premised upon a defendant engaging in an ultra-hazardous or abnormally dangerous activity, the Second Restatement provides that only the form of contributory negligence that constitutes a voluntary and unreasonable decision by plaintiff to encounter the risk is a defense.\textsuperscript{126} No New Mexico case deals with the applicability of the defense of contributory or comparative negligence in such cases. The Second Restatement’s limitation of the defense to this one form of negligence, however, is the same as that contained in Section 402A of the Second Restatement dealing with defenses to strict product liability.\textsuperscript{127} In Marchese v. Warner Communications, Inc.,\textsuperscript{128} the court of appeals ruled that the adoption of comparative negligence called for the extension of the defense of comparative negligence beyond unreasonable assumption of risk to all forms of comparative negligence.\textsuperscript{129} By a parity of reasoning, comparative negligence in all its forms may be a partial defense to a nuisance action based on ultra-hazardous or abnormally dangerous activity.\textsuperscript{130} Whether the limited form of contributory negligence or the full spectrum of contributory negligence applies, Scott transformed the defense to comparative negligence and the Several Liability Act therefore allows defendants in such cases to lay off fault on other wrongdoers.\textsuperscript{131}

### Breach of Contract Actions

It is not necessary for a plaintiff to prove fault to succeed in a breach of contract action.\textsuperscript{132} Nor is contributory negligence or comparative negligence of the plaintiff

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  \item[123.] Reichert, 117 N.M. at 633, 875 P.2d at 389.
  \item[124.] Several liability applies only to a “cause of action to which the doctrine of comparative fault applies.” N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996). See also Fletcher v. City of Independence, 708 S.W.2d 158, 169 n.2 (Mo. App. W.D. 1986) (noting that comparative fault defense is inapplicable to action for intentional nuisance).
  \item[125.] N.M. STAT. ANN. § 41-3A-1(C)(1) (Michie 1996).
  \item[126.] Restatement (Second) of Torts § 840B(3) (1979).
  \item[127.] Id. § 402A cmt. n. (“The form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.”).
  \item[128.] 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983), cert. denied, 100 N.M. 259, 669 P.2d 735.
  \item[129.] Id. at 319, 670 P.2d at 119. The court relied in part on supreme court dicta in Scott v. Rizzo that suggested that the adoption of comparative negligence would probably result in the application of comparative fault principles for all forms of fault, despite the language of Section 402A, comment n, limiting the defense. See Scott, 96 N.M. at 688, 634 P.2d at 1240.
  \item[130.] Possibly the two doctrines should not be equated. Some commentators are of the view that it is not true that the policies behind strict liability for abnormally dangerous activities are the same as those relied on by courts moving to strict products liability,” Dix W. Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 116 (1972), but are significantly different. A reappraisal of Contributory Fault in Strict Products Liability Law, 2 Wm. Mitchell L. Rev. 235 (1976).
  \item[131.] The Act imposes several liability in all actions in which comparative fault applies. N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996).
  \item[132.] Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 212, 880 P.2d 300, 309 (1994) (“[C]ontract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.” (quoting Allan Farnsworth, Farnsworth on Contracts § 12.8 (3d ed. 1990)).
a defense to a contract action. As a result, actions for breach of contract are outside the scope of the Several Liability Act. Persons liable for breach of contract, therefore, are jointly and severally liable for harm caused by their breaches and may not use the Several Liability Act to lay off fault on others, whether the others also breached contracts or are tortfeasors.

The application of joint and several liability to contract breachers could be harsh. Not only is the contract breacher liable for all of plaintiff's compensable harm, but the breacher has no mechanism to seek contribution from other wrongdoers who contributed to the plaintiff's injuries. The statute allowing contribution applies only to joint tortfeasors and the common law doctrine of complete indemnity, though available to persons liable for breach of contract, is of limited scope. To remedy this perceived deficiency in the law, the supreme court has created a doctrine—proportional indemnification—that allows persons fully liable for breach of contract to thereafter recover from others whose conduct contributed to the plaintiff's injury. The amount of recovery is based upon the percentage of fault attributable to the other persons. The doctrine does not modify the rule imposing joint and several liability for breach of contract, but it serves as a mechanism for a fully liable contract breacher who pays the judgment to thereafter seek partial indemnification from other culpable persons.


134. Allsup's Convenience Stores, 1999-NMSC-006, ¶ 23, 976 P.2d at 11 ("Because the doctrine of comparative fault does not apply to contract actions, the Several Liability Act does not apply to breach of contract actions.").

135. N.M. STAT. ANN. § 41-3-2 (Michie 1996).


137. Id. at 546, 893 P.2d at 442 ("[T]he right to indemnification involves whether the conduct of the party seeking indemnification was passive and not active or in pari delicto."). See also id. at 546-47, 893 P.2d at 442-43 (describing the terms "active", "passive" and "in pari delicto").

138. Id. at 552, 893 P.2d at 448 ("[T]o establish an equitable system in which a defendant who cannot raise the fault of a concurrent tortfeasor as a defense because of the plaintiff's choice of remedy, we adopt the doctrine of proportional indemnification under which a defendant who is otherwise denied apportionment of fault may seek partial recovery from another at fault.").

139. Id. at 553, 893 P.2d at 449 ("[I]f Shollenbarger's alleged negligence caused Amrep to breach its contract with the homeowners, Amrep should be able to seek proportional indemnification for that percentage of fault attributable to Shollenbarger."). Although it is not necessary that fault be proven to establish a breach of contract, there will be situations when the contract breacher is demonstrably guilty of fault and the third person's percentage of responsibility will be determined by comparing his fault with that of the contract breacher. Where the contract breacher is guilty of no fault, the third person's fault will be 100 percent of the fault as between the third person and the no-fault contract breacher. This may result in practice in full indemnification from the third person to the contract breacher. If there are several negligent third persons, the proportional indemnification will depend upon the relative fault of each, and that of the contract breacher, if any. It is not clear how proportional indemnification will work if the contract breacher is guilty of no fault and the third person is also a no-fault contract breacher. Comparing fault when no one is guilty of fault is not possible. Perhaps in such cases the proportions should be "equal shares" as the contribution statute once provided, Commercial Union Assurance Cos. v. W. Farm Bureau Ins. Cos., 93 N.M. 507, 508, 601 P.2d 1203, 1204 (1979), before the statutory adoption of comparative contribution in 1987. Act of Apr. 7, 1987, ch. 141, § 3(D), 1987 N.M. Laws 852, 854 (codified in N.M. STAT. ANN. § 41-3-2(D) (Michie 1996)).

140. In re Consolidated Vista Hills, 119 N.M. at 552, 893 P.2d at 448-49 ("[W]e...modify the common-law right to indemnification when an indemnitee has been adjudged liable for full damages on a third-party claim that was not susceptible under law to proration of fault among concurrent tortfeasors. Such proportional indemnification applies only when contribution or some other form of proration of fault among tortfeasors is not available.").
When provided the choice of suing for negligence or breach of contract, therefore, it is to the advantage of a plaintiff to frame the action as one for breach of contract. The contract breacher is fully liable for the harm to the plaintiff, and the breacher, rather than the plaintiff, bears the burden of suing others and the risk that they will lack the resources to reimburse the contract breacher for proportional indemnification.

A claim for breach of contractual warranties also may benefit a plaintiff more than a strict product liability cause of action. The Several Liability Act provision imposing joint and several liability in strict product liability actions applies only to the portion of liability attributable to those in the chain of distribution. The Act does not impose joint and several liability on product sellers for all damages when those in the chain of distribution can demonstrate that another tortfeasor’s negligence contributed to the plaintiff’s injuries. Thus, if the manufacturer and wholesaler are sued for strict product liability for defective brakes in the vehicle sold to plaintiff, those defendants can lay off fault upon the driver of another vehicle whose negligence combined with the defective brakes to cause an accident and injuries to the plaintiff. The manufacturer and wholesaler are jointly and severally liable only for the percentage of fault attributable to their shared liability for strict products liability. By phrasing the claim against the manufacturer and wholesaler as one for breach of warranty, plaintiff can avoid existing New Mexico law that allows the manufacturer and wholesaler to lay off fault on the other tortfeasor. Manufacturers liable for breach of contract are fully liable for all harm, though they may later pursue proportional indemnification from the contributing negligent tortfeasors.

The Third Restatement position, rejecting a theory-by-theory approach to several liability in favor of one that applies the Restatement to all legal theories, here is superior to the New Mexico approach. It is doubtful that sound policy reasons justify the different results achieved by labeling a personal injury claim as one in contract rather than tort. A claim for breach of warranty and a claim for strict product liability are most often essentially the same. Merely characterizing the claim as a contractual warranty action should not change the scope of liability of one whose liability for personal injury can be stated as either a tort or a breach of contract. The adoption of proportional indemnification in contract cases provides a step in that direction; however, that doctrine is not the same as several liability. It does not reduce the liability of the contract breacher to the plaintiff as does several liability but merely provides for a remedy similar to comparative contribution after the contract breacher makes full payment to the plaintiff.

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142. Schultz & Occhialino, supra note 45, at 492-93.
143. Id.
144. Allsup’s, 1999-NMSC-006, § 23, 976 P.2d at 11 (“Because the doctrine of comparative fault does not apply to contract actions, the Several Liability Act does not apply to breach of contract actions”).
145. In re Consolidated Vista Hills, 119 N.M. at 552, 893 P.2d at 448.
146. The Restatement applies to all legal theories when the plaintiff seeks damages for personal injury or injury to tangible property. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 (2000).
147. See, e.g., In re Consolidated Vista Hills, 119 N.M. at 552, 893 P.2d at 448.
148. Id. at 552-53, 893 P.2d at 448-49.
The ideal solution might be to treat personal injury actions for breach of warranty as essentially a strict product liability action, imposing the rules applicable to defendants liable in tort for strict product liability upon defendants charged with breach of warranty. New Mexico courts have already begun to limit the respective spheres of tort and contractual warranty cases based on the type of harm suffered. Strict tort liability is inapplicable to actions between contracting parties for deficiencies in a product that cause harm only to the product itself. It may be equally appropriate to limit personal injury actions to tort theories that are more finely attuned than are contract claims to the policies unique to actions involving harm to persons. It is doubtful, however, that the courts alone can effectuate such a change. The Uniform Commercial Code clearly authorizes recovery for personal injuries in breach of warranty actions, and this statutory scheme might act as a barrier to common law reform. Perhaps the judicial adoption of proportional indemnification is the most that the judiciary can accomplish without the help of the legislature.

**Statutory Causes of Action**

Most tort actions are based on common law theories, but the legislature has power to create causes of action and to modify existing common law causes of action. When this happens, the issue arises whether the statutory cause of action is subject to the doctrine of several liability. If the legislation contains an explicit provision addressing the several liability issue, there is no problem. Absent an explicit statutory provision, the Several Liability Act provides the basis for resolving the issue: If the defense of comparative negligence applies to the statutory cause of action, the Several Liability Act applies to the cause of action. In only one statute, dealing with liability of persons whose lack of reasonable care while excavating causes harm to underground utilities, has the legislature specifically incorporated the concept of comparative negligence into a statutory cause of action.

Where the legislature created the statutory cause of action prior to the adoption of comparative negligence, a problem of construction might arise. If the statute provides that contributory negligence is a defense, the court must determine whether the legislature intended to enshrine contributory negligence as a complete defense.
or was merely incorporating the then-applicable common law rule into the statute. If the latter, the court then can rule that, the common law doctrine having changed, the reference to contributory negligence should now be construed as incorporating the doctrine of comparative negligence. This, in turn, will trigger the application of the Several Liability Act to the statutory cause of action.\textsuperscript{154}

In adopting comparative negligence, the supreme court signaled that it would likely construe statutory references to contributory negligence as susceptible to the substitution of comparative negligence. In \textit{Scott v. Rizzo},\textsuperscript{155} the opponents of comparative negligence argued that the court could not adopt the doctrine because the legislature had incorporated contributory negligence into several statutes that could be changed only by the legislature.\textsuperscript{156} The court disagreed, stating that "legislative enactments designed to make the judge-made rule [of contributory negligence] work...cannot be taken as legislative integration of the rule into statutory law."\textsuperscript{157} The clear implication is that comparative negligence will substitute for contributory negligence at least in statutes passed prior to the adoption of comparative negligence.\textsuperscript{158}

One example is the Ski Safety Act,\textsuperscript{159} which limits the duties owed by ski area operators, imposes duties on skiers, and identifies the inherent risks of skiing assumed by the skier. Passed in 1969\textsuperscript{160} and amended in 1979,\textsuperscript{161} before the adoption of comparative negligence, the Ski Safety Act does not explicitly state that contributory negligence is a complete defense, but in effect it so provides. The Act states that if the skier violates any of the duties imposed on the skier by the Act, the skier "shall not be able to recover from the ski area operator for any losses or damages where the violation of duty is causally related to the loss or damage suffered."\textsuperscript{162} Despite this language barring recovery, the court of appeals in \textit{Lopez v. Ski Apache Resort},\textsuperscript{163} construed the Act as authorizing comparative negligence as a partial defense. The court found that "the doctrine of comparative negligence...is

\textsuperscript{154} Id. § 41-3A-1(A).
\textsuperscript{155} 96 N.M. 682, 634 P.2d 1234 (1981).
\textsuperscript{156} Opponents of comparative negligence argued that "the legislature has recognized the common-law rule of contributory negligence as a part of the law...because it has enacted certain statutes which were intended to mesh with or provide exceptions to the traditional effect of a contributory negligence finding. Thus, they argue, the legislature has integrated the doctrine into the statutory law of New Mexico." \textit{Scott}, 96 N.M. at 686, 634 P.2d at 1238.
\textsuperscript{157} Id. at 687, 634 P.2d at 1239.
\textsuperscript{158} Among the statutes the \textit{Scott} court considered were N.M. \textit{STAT. ANN.} § 63-3-6 (Michie 1999) (contributory negligence not a defense in action against railroad under specified circumstances) and N.M. \textit{STAT. ANN.} § 52-3-7 (Michie 1991) (in common law action by employee against employer who did not purchase Workers' Compensation insurance, neither assumption of risk nor contributory negligence is a defense). \textit{Scott}, 96 N.M. at 686, n.6, 634 P.2d at 1238, n.6.
\textsuperscript{160} Ski Safety Act, ch. 218, 1969 N.M. Laws 787.
\textsuperscript{161} Id. ch. 1, 1979 N.M. Laws 988.
\textsuperscript{162} N.M. \textit{STAT. ANN.} § 24-15-13 (Michie 2000).
not incompatible with the objectives or provisions of the Act." The court buttressed its argument by referring to the supreme court’s ruling in another case that applied comparative negligence to actions under the Dram Shop Act. Although the court did not address the issue of whether several liability would apply, the Several Liability Act provides that it applies whenever, as in the Ski Safety Act, the doctrine of comparative negligence applies.

Occasionally, pre-comparative negligence statutes sought to overcome the harshness of the complete defense of contributory negligence by barring the defense. For example, a New Mexico statute precludes a finding of contributory negligence under some circumstances when the plaintiff is blind. Statutes of this type, designed to ameliorate the harshness of the complete bar of contributory negligence, probably will not be construed as barring the application of comparative negligence.

More often the statutory cause of action mentions neither several liability nor contributory or comparative negligence. The Several Liability Act applies to such statutes if the doctrine of comparative negligence is a partial defense to claims for violation of the statute. The New Mexico Dram Shop Act, for example, deals with claims against liquor licensees who serve alcohol to intoxicated customers who thereafter cause injury to themselves or others. The legislature promulgated the statute in 1983, one year after the New Mexico courts first authorized a common law cause of action against licensees. Though passed after the adoption of comparative negligence and the adoption of several liability, the Act and its subsequent amendments mention neither. In Baxter v. Noce, the supreme court nonetheless concluded that when an intoxicated patron sues the licensee, the licensee may avail
itself of the defense of comparative negligence.\textsuperscript{174} In part the court reasoned that comparative negligence applies to Dram Shop Act cases "because the action sounds in negligence and because fault is the predicate for liability."\textsuperscript{175} Because comparative negligence applies to a Dram Shop Act case, the Several Liability Act applies.\textsuperscript{176} As a result, a licensee sued for violation of the Dram Shop Act should be severally liable and may lay off fault on other wrongdoers unless one of the four pockets of joint and several liability set forth in the Several Liability Act\textsuperscript{177} provides otherwise.

**Successive Tortfeasors**

The most intractable problem created by New Mexico's adoption of several liability has been the integration of the successive tortfeasor doctrine into the fabric of several liability. The issue usually arises when multiple tortfeasors cause harm that might be capable of division into separate injuries caused by each tortfeasor. This typically occurs when an initial tortfeasor causes harm to the victim who then suffers additional harm because of medical malpractice during the treatment for the initial harm,\textsuperscript{178} or when a person who suffers injuries in a motor vehicle accident alleges that a design defect in the motor vehicle caused additional injuries.\textsuperscript{179} There are additional scenarios, having in common that a victim suffers an initial injury at the hands of a tortfeasor and arguably suffers a causally-distinct second injury due to the fault of another tortfeasor.\textsuperscript{180} Scenarios analogous to those presented by successive tortfeasors also might arise when there is only one tortfeasor.\textsuperscript{181}

New Mexico courts have long distinguished between concurrent and successive tortfeasors, though not in the context of several liability law. Prior to 1982, courts

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  \item \textsuperscript{174} In *Baxter*, the plaintiff was a passenger in the vehicle driven by the intoxicated driver. The plaintiff had also been drinking to excess at the defendant's establishment. Defendant asserted the defense of "complicity which bars recovery under a dramshop act to anyone who actively contributes to, procures, participates in or encourages the intoxication of the inebriated driver." 107 N.M. at 50, 752 P.2d at 242. The court characterized complicity as "only a hybrid form of contributory negligence" and ruled that the successor doctrine to contributory negligence, comparative negligence, was thus a defense in dram shop cases in New Mexico. Id. at 51, 752 P.2d at 243.

  \item \textsuperscript{175} The Dram Shop Act now permits the intoxicated patron-driver to sue for injuries he suffers but only if the tavernkeeper is guilty of "gross negligence and reckless disregard for the safety" of the intoxicated patron. N.M. STAT. ANN. § 41-3A-1(B) (Michie 1996). The logic of the *Baxter* opinion almost certainly applies to permit the partial defense of comparative negligence when the intoxicated driver sues for his own injuries under the statute.

  \item \textsuperscript{176} Baxter, 107 N.M. at 52, 752 P.2d at 244. The court also reasoned that the statute did not actually create a new cause of action but rather "merely limited [the] scope" of the pre-existing common law cause of action. Id.

  \item \textsuperscript{177} N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996).

  \item \textsuperscript{178} Id. § 41-3A-1(C); see infra notes 306-61 and accompanying text (concerning possible public policy exception in these cases).


  \item \textsuperscript{180} See, e.g., Norwest Bank of N.M., N.A. v. Chrysler Corp., 1999-NMCA-070, 981 P.2d 1215.


  \item \textsuperscript{181} The successive tortfeasor doctrine requires more than one tortfeasor. However, a related problem arises when a person is initially injured through no one's fault or his own fault and is subsequently injured by the fault of a tortfeasor. See Hebenstreit v. Athchison, Topeka & Santa Fe Ry., 65 N.M. 301, 336 P.2d 1057 (1959) (Plaintiff, already suffering from disease, asserted that negligence of railroad enhanced the preexisting condition by accelerating the progress of the disease.). Successive injury problems also may arise where the tortfeasor causing the initial injury and the tortfeasor causing the enhanced injury are the same person. Couch v. Astec Indus., Inc., 2002-NMCA-084, ¶ 34, 132 N.M. 631, 639, 53 P.3d 398, 406 ("We assume, but do not decide, that Defendant's status as both the alleged original tortfeasor and the 'crashworthiness' tortfeasor does not preclude application of the enhanced injury doctrine.").
\end{itemize}
spoke of concurrent negligence as it related to contributory negligence, noting that where the negligence of the plaintiff "continues up to the very moment of the injury and is contemporaneous and concurrent with the negligence of the defendant," the defense of contributory negligence barred the plaintiff from any recovery. This notion of contemporaneous acts of negligence as characteristic of concurrent negligence was also applied in "last clear chance" cases in which courts concluded that usually the last clear chance doctrine "cannot be invoked where there is concurrent negligence, such as where the injured party's negligence continues up to the very moment of the injury." Concurrent negligence was contrasted with situations where the negligence of plaintiff and defendant "are not actually concurrent, but one succeeds the other by an appreciable interval." These attempts to distinguish concurrent from successive negligence based solely on whether one followed the other in time later led to difficulty in distinguishing concurrent from successive tortfeasors for purposes of determining the applicability of several liability.

Few persons perceived the relevance of the distinction between concurrent and successive tortfeasors when the court of appeals adopted several liability in Bartlett. One who apparently did was the author of the Bartlett opinion. Framing the issue, Judge Wood limited the question presented to "whether a tortfeasor is liable for all of the damage caused by concurrent tortfeasors under a theory of joint and several liability." He also carefully cabined the court's holding adopting several liability to cases in which the defendant is "a concurrent tortfeasor."

Shortly after Bartlett, in Duran v. General Motors Corp., the court of appeals first explored the significance of the limitation of several liability to concurrent negligence cases. The plaintiff was injured when the van in which she was a passenger overturned. The plaintiff did not claim that defects in the van caused it to overturn but asserted that manufacturing and design defects in the van caused all of her injuries. Because plaintiff asserted that all of the injuries were caused by the vehicle's defects, Duran did not present the issue of how to deal with successive, separate injuries. Nonetheless, the court addressed the issue. The court noted that in crashworthiness cases, the manufacturer is liable only for the additional injury caused by the vehicle defect and not for any initial injuries that would have occurred

185. See, e.g., Lewis, 1999-NMCA-145, ¶ 79, 992 P.2d at 300 (Hartz, J., concurring in part, dissenting in part) ("[T]he terms 'concurrent tortfeasors' and 'successive tortfeasors'...suggest focusing on the temporal relationship between separate causes of the plaintiff's injuries; such a focus can cause one to miss the real issue—whether the jury has a basis for dividing the damages between two different causes or sets of causes.").
187. Id. at 154, 646 P.2d at 581.
188. Id. at 159, 646 P.2d at 586.
190. The court of appeals reversed a jury verdict for the plaintiff because she failed to prove that any of her injuries were caused by inadequate safety features. Id. at 753, 688 P.2d at 790. See also Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1989) (finding all damages were caused by crashworthiness defect).
anyway.\textsuperscript{191} In such cases, the court ruled, "the concurrent tortfeasor concept is not applicable."\textsuperscript{192} If the initial tortfeasor and the vehicle-defect tortfeasor are not concurrent tortfeasors, the doctrine of several liability, limited as it was in Bartlett to concurrent tortfeasors, would not apply.

The Duran court proposed a method of analysis for cases in which there may be two injuries—the first caused by the initial collision and the enhanced injury caused by defects in the vehicle. The plaintiff who seeks recovery for an enhanced injury must prove\textsuperscript{193} that the faulty design "caused injuries over and above those which otherwise would have been sustained,"\textsuperscript{194} must "demonstrate the degree of 'enhancement,'"\textsuperscript{195} and must also prove "what injuries, if any, would have resulted had the alternative, safer design been used."\textsuperscript{196} These dicta played a significant role in the resolution of later successive tortfeasor cases.

The court of appeals next discussed the successive tortfeasor doctrine in Martinez \textit{v. First National Bank of Santa Fe}.\textsuperscript{197} Plaintiff was riding in the bed of Juan Martinez’s pickup truck when it overturned, causing plaintiff to suffer an injury that was treated by Dr. Alkire. Plaintiff sued only Dr. Alkire,\textsuperscript{198} alleging that his negligent treatment caused additional injury. Dr. Alkire raised as affirmative defenses that Martinez’s negligent driving and plaintiff’s negligent decision to ride in the back of the truck should be compared to the fault of Dr. Alkire and should reduce his liability. The plaintiff appealed the trial court’s decision to allow Dr. Alkire to lay off fault on Martinez.\textsuperscript{199} The court of appeals assumed that Martinez and Dr. Alkire were successive rather than concurrent tortfeasors\textsuperscript{200} but found it unnecessary to explore the liability of successive tortfeasors because the court of appeals ruled that there was no proof that Martinez’s negligence, if any, was a proximate cause of the plaintiff’s initial injuries.\textsuperscript{201} The court did suggest that if Martinez were negligent and a proximate cause of the plaintiff’s enhanced injuries together with Dr. Alkire, Dr. Alkire could lay off fault on Martinez, thus reducing Dr. Alkire’s liability for the enhanced injury.\textsuperscript{202} This suggestion ultimately was rejected by the supreme court.\textsuperscript{203}

\textsuperscript{191} \textit{Id.} at 750, 688 P.2d at 787.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.} The court quoted with approval from \textit{Hebenstreit v. Archison, Topeka & Santa Fe Ry. Co.}, 65 N.M. 301, 336 P.2d 1057 (1959), which ruled that "the burden of proving with reasonable certainty the extent of the aggravation was on the plaintiff." 65 N.M. at 306, 336 P.2d at 1061.
\textsuperscript{194} \textit{Duran}, 101 N.M. at 749-50, 688 P.2d at 786-87.
\textsuperscript{195} \textit{Id.} at 750, 688 P.2d at 787.
\textsuperscript{196} \textit{Id.} The court borrowed much of its analysis from \textit{Huddell v. Levin}, 537 F.2d 726 (3d Cir. 1976).
\textsuperscript{198} Dr. Alkire died before suit was filed. The action was brought against the estate of Dr. Alkire. 107 N.M. at 269, 755 P.2d at 607.
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} The parties agreed that they were not concurrent tortfeasors, \textit{id.} at 270, 755 P.2d at 608, and the court treated the case as one involving successive tortfeasors. \textit{Id.}
\textsuperscript{201} \textit{Id.} at 271, 755 P.2d at 609.
\textsuperscript{202} 107 N.M. at 270, 755 P.2d at 608 ("[D]amages should be apportioned among those negligently contributing to the (enhanced ) injury if that negligence was a proximate cause of the injury.").
This slow progression in case law toward a resolution of the problem of successive tortfeasors was interrupted by the passage of the Several Liability Act of 1985. The Act provides that in cases involving causally-distinct harms, "the fault of each of the persons proximately causing one harm shall not be compared to the fault of persons proximately causing other distinct harms. Each person is severally liable only for the distinct harm which that person proximately caused." The drafters intended by this provision, contrary to the dicta in Martinez, that the doctor should be fully liable for the distinct enhanced injury and thus could lay off fault neither on another tortfeasor who caused the accident and initial injury nor on the plaintiff whose negligence might have contributed to the accident and initial injury.

The supreme court first addressed the successive tortfeasor issue in 1995 in Lujan v. Healthsouth Rehabilitation Corp. Lujan suffered a fractured femur, allegedly due to the negligence of Jaramillo. After initial medical treatment, Lujan received rehabilitation services from Healthsouth. During the rehabilitation, more than a month after the initial injury, a Healthsouth employee allegedly enhanced the original injury through negligent manipulation of the injured leg. Lujan initially filed suit only against Jaramillo. That claim was settled and a release was entered into between Lujan and Jaramillo. Lujan then sued Healthsouth for malpractice in the treatment of the fracture. In resolving the issue of whether the release of Jaramillo also released Healthsouth, the supreme court fully addressed the issue of the relationship of several liability and successive tortfeasors.

The court first acknowledged that enhanced injury cases involve "successive tortfeasors" in contrast to "concurrent tortfeasors." Lujan established the core rules of substantive liability applicable to cases involving an allegation that an initial injury was followed by an enhanced injury due to negligent medical treatment of the initial injury. The court determined the following:

- "Concurrent tortfeasors" exist "[w]hen the negligent acts or omissions of two or more persons combine to produce a single injury."
- New Mexico has abolished joint and several liability for concurrent tortfeasors, in favor of an apportionment of liability based upon comparative fault.
- "Successive tortfeasors" are such "by reason of divisible and causally-distinct injuries." Thus, a tortfeasor is successive rather than concurrent when that

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204. N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996).
205. Id. § 41-3A-1(D).
206. Schultz & Occhialino, supra note 45, at 495. The drafters disagreed on the different issue of whether the original tortfeasor should be liable for the enhanced injury as well as for the initial injury and intended that the courts resolve the issue. Id. In Lujan, the supreme court ruled that where the original tortfeasor is determined to be a proximate cause of the enhanced injury as well as the initial injury, the original tortfeasor is jointly and severally liable with the successive tortfeasor for the enhanced injury. 120 N.M. 426-27, 902 P.2d 1029-30.
207. 120 N.M. at 422, 902 P.2d at 1025.
208. Surprisingly, the court ignored the obviously relevant Several Liability Act and instead resolved the issue as a matter of common law.
209. 120 N.M. at 425-26, 902 P.2d at 1028-29.
210. Id. at 425, 902 P.2d at 1028.
211. Id. at 425-26, 902 P.2d at 1028-29. See N.M. STAT. ANN. § 41-3A-1 (Michie 1996).
212. Lujan, 120 N.M. at 426, 902 P.2d at 1029.
tortfeasor's "separate causal contribution to plaintiff's harm can be measured."\textsuperscript{213} The court noted that in determining whether tortfeasors are successive, some courts find useful five other factors,\textsuperscript{214} but the court rooted the distinction between successive and concurrent tortfeasors not in those factors, but in the requirement that "the original injury and the subsequent enhancement of that injury are separate and causally-distinct injuries."\textsuperscript{215}

- A successive tortfeasor is not liable for the entire harm to the plaintiff but only for the additional, or enhanced, harm caused by the successive tortfeasor's conduct.\textsuperscript{216}
- A successive tortfeasor is fully liable for the separate and causally-distinct injury even if the original tortfeasor is also liable for the enhanced injury.\textsuperscript{217}
- The original tortfeasor is alone liable for the initial injury.\textsuperscript{218}
- The original tortfeasor will be liable for the separate and causally-distinct enhanced injury as well as the original injury if the negligence of the successive tortfeasor was a foreseeable result of the original tortfeasor's conduct and the successive tortfeasor's conduct does not break the natural and continuous sequence of events required to find the original tortfeasor to be a proximate cause of the enhanced injury.\textsuperscript{219}
- When both the original tortfeasor and the successive tortfeasor are proximate causes of the enhanced injury, their liability for the enhanced injury is joint and several, rather than several.\textsuperscript{220} The fault of the tortfeasor causing the original injury is not compared to the fault of the successive tortfeasor who caused the enhanced injury.\textsuperscript{221}
- If the original tortfeasor satisfies the joint and several liability for the enhanced injury, the original tortfeasor normally will have a right to full indemnity from the successive tortfeasor.\textsuperscript{222}

\textsuperscript{213} Id. at 427, 902 P.2d at 1030.
\textsuperscript{214} "In defining tortfeasors as successive rather than concurrent, courts have considered several other factors that are relevant, including: 1) the identity of time and place between the acts of alleged negligence; 2) the nature of the cause of action brought against each defendant; 3) the similarity or differences in the evidence relevant to the causes of action; 4) the nature of the duties allegedly breached by each defendant; and 5) the nature of the harm or damages caused by each defendant." Id. at 426, 902 P.2d at 1029 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 n.2 (4th ed. 1971)).
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 427, 902 P.2d at 1030.
\textsuperscript{217} See id.
\textsuperscript{218} See id. at 426, 902 P.2d at 1029.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 427, 902 P.2d at 1030. The Third Restatement differs from this aspect of New Mexico law. Instead of imposing joint and several liability on the tortfeasors whose fault combines to proximately cause the enhanced injury, the Third Restatement provides that after the damages are divided into indivisible parts, "each individual part is apportioned by responsibility," RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. a (2000), with the result that the Third Restatement "apportions liability among persons causing any component part according to that person's comparative share of responsibility." Id. at cmt. d. Though Lujan did not cite the Several Liability Act in support of its conclusion that liability for the enhanced injury is joint and several, it was the intent of the drafters of the Act that liability be joint and several for the enhanced injury. Schultz & Occhialino, supra note 45, at 495; see N.M. STAT. ANN. § 41-3A-1(D) (Michie 1996). One judge on the New Mexico Court of Appeals preferred the Third Restatement approach. See Lewis v. Samson, 1999-NMCA-145, ¶¶ 92-97, 992 P.2d 282, 303-04 (Hartz, J., concurring in part, dissenting in part), rev'd 2001-NMSC-035, 35 P.3d 972.
\textsuperscript{221} Lujan, 120 N.M. at 427, 902 P.2d at 1030.
\textsuperscript{222} Id.
In Lewis v. Samson, another case involving original injuries allegedly enhanced by medical malpractice by treating physicians, the supreme court reviewed Lujan's core principles and explored issues Lujan did not address. Griego stabbed Lewis eight times. Dr. Samson and Dr. Ortiz treated Lewis's injuries, but Lewis died. His personal representative sued Samson and Ortiz but not Griego. Plaintiff asserted that the doctors were successive tortfeasors fully liable for the death of Lewis because but for their negligence Lewis would not have died from his stab wounds. Plaintiff filed pre-trial motions seeking to prevent the doctors from introducing trial evidence showing the fault of Griego. Plaintiff relied on Lujan's ruling that the fault of the original tortfeasor was not to be compared to the fault of the successive tortfeasor sued for causing an enhanced injury, here the death of Lewis. The trial court refused to bar evidence of Griego's fault. At trial, the defendants "generally presented a comparative-fault defense to the jury." The trial court instructed the jury to compare the fault of Griego and the doctors if the doctors were negligent and caused harm to Lewis. The court entered judgment for the defendants after the jury returned a special verdict finding that the defendants were not negligent.

Plaintiff appealed, claiming that the trial court's erroneous ruling admitting evidence of Griego's fault contaminated the jury's finding that the doctors were not negligent. Plaintiff argued that Lujan had ruled that comparative fault of an initial tortfeasor was not relevant to the issue of the liability of a successive tortfeasor for a separate and causally-distinct injury.

The supreme court first addressed the issue of whether Lujan established as a matter of law that doctors who negligently treat an injury caused by an initial tortfeasor are always successive tortfeasors. The court concluded that Lujan did not establish a legal principle making the doctors always successive tortfeasors. Whether treating doctors are successive tortfeasors depends in each case on whether

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223. 2001-NMSC-035, 35 P.3d 972 [hereinafter Lewis (SC)].
224. In Lewis (SC), the supreme court explicitly limited its holding to cases involving subsequent medical malpractice and disclaimed any intention "to examine in detail the distinction between concurrent and successive tortfeasors. 2001-NMSC-035, ¶ 32 n.3, 35 P.3d at 984 n.3.
225. There is no indication in the opinions that plaintiff alleged in the alternative that if the doctors were not successive tortfeasors they were nonetheless concurrent tortfeasors with Griego because their negligence combined with Griego's tortious conduct to cause Lewis's death.
226. Lewis v. Sampson, 1999-NMCA-145, ¶ 16, 992 P.2d 282, 287 [hereinafter Lewis (CA)] (Apodaca, J.), rev'd, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972. Defendants also may have tried to use evidence of Griego's conduct to negate their causal connection to Lewis's death. For example, "Dr. Samson's counsel argued...that the case was not a medical malpractice case but a case of 'cowardly back-stabbing murder.'" Lewis (CA), 1999-NMCA-145, ¶ 17, 992 P.2d at 287-288 (Apodaca, J.).
227. In the court of appeals, Judge Hartz, dissenting from Judge Apodaca's opinion for the court, perceived the court as holding that in all cases of alleged medical malpractice in treatment of initial injuries, the doctors are successive tortfeasors, a position with which Judge Hartz disagreed. Lewis (CA), 1999-NMCA-145, ¶ 74, 992 P.2d at 298 (Hartz, J., concurring in part, dissenting in part).
228. Although the supreme court in Lujan did not determine that doctors were always successive tortfeasors, the court did rule that the original tortfeasor always is liable as a matter of law for any enhanced injury caused by a doctor's foreseeable negligence: So long as the enhanced injuries are not "so remote from the original injury as to be unforeseeable," New Mexico "impose[s] as a 'positive rule of decisional law' the requirement of joint and several liability upon the original tortfeasor for the original and enhanced injuries." Lewis (SC), 2001-NMSC-035, ¶ 33, 35 P.3d at 985.
there is sufficient evidence to prove the required elements—an enhanced injury and the degree of the enhancement.\textsuperscript{229}

The court then considered the criteria to be used to determine whether there was an enhanced injury and the degree of enhancement. The court of appeals had split on the question of whether separate “injuries” or separate “damages” must be proven.\textsuperscript{230} The supreme court ruled that it is an enhanced “injury” that must be proven if successive tortfeasor treatment is to be accorded to the parties.\textsuperscript{231} This ruling is consistent with prior supreme court precedent holding that in an action alleging medical malpractice and seeking recovery for enhanced injuries, “[u]ncertainty as to the amount of damages one may be entitled to receive will not prevent a recovery.”\textsuperscript{232}

The supreme court also definitively set forth the proof required to establish that tortfeasors are successive. The party who claims that the treating doctor is a successive tortfeasor must prove

\begin{quote}
(1) that the successive tortfeasor’s negligence resulted in injuries separate from and in addition to the injuries which would have otherwise been caused by the initial tort; and (2) the degree of enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent the doctor’s negligence.\textsuperscript{233}
\end{quote}

Implicit in this formulation is the requirement that the proponent of successive tortfeasor treatment “must still prove that the doctors’ negligence proximately caused an enhancement of the initial harm suffered at the hands of the original tortfeasor.”\textsuperscript{234} The court also determined that if the proponent “fail[s] to introduce any evidence of the injuries that [plaintiff] would have received absent negligence

\begin{footnotes}
\item[229] Id. \S 34, 35 P.3d at 985.
\item[230] In the court of appeals, Judges Apodoca and Hartz disagreed on the test for determining if tortfeasors are successive. Judge Apodaca concluded that the test is whether there are “divisible and causally distinct injuries.” Lewis (CA), 1999-NMCA-145, \S 43, 992 P.2d at 292 (Apodaca, J.) (emphasis added), and did not find fault with the Lujan court’s apparent endorsement of an additional five factors that Lujan suggested may be considered in determining if torts are concurrent or successive. Id. Judge Hartz proposed a different and more stringent test. Instead of requiring proof of separate and causally-distinct “injuries,” he would require proof “showing what damages would have been suffered if the alleged ‘successive tort’ had not occurred.” Id. \S 73, 992 P.2d at 298 (Hartz, J., concurring in part, dissenting in part) (emphasis added). Judge Hartz’ proposed test is based upon the Restatement (Third) of Torts: Apportionment of Liability, which refers to “damages” instead of “injuries” when stating what must be capable of division by causation. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY \S 26 (2000). The comments to the Restatement, however, imply that the use of the word “damages” was not intended as a conscious rejection of the requirement for the division of “injuries” as found in New Mexico law. Id. \S 26 cmt. f.
\item[231] Lewis (SC), 2001-NMSC-035, \S 34, 35 P.3d at 985 (holding that the proponent of successive tortfeasor treatment must prove “injuries separate from and in addition to the injuries which otherwise would have been caused by the initial tort.”) (emphasis added).
\item[232] Hebenstreit v. Atchison, Topka & Santa Fe Ry. Co., 65 N.M. 301, 306, 336 P.2d 1057, 1061 (1959). The court qualified this ruling when it noted that “conjecture, surmise or speculation” would not suffice to sustain a jury verdict. Id.
\item[233] Lewis (SC), 2001-NMSC-035, \S 34, 35 P.3d at 985. The court declined to address the question of whether the “five factors” identified in Lujan v. Healthsouth Rehab. Corp., 120 N.M. 422, 426, 902 P.2d 1025, 1029 (1995), as relevant to the analysis would assist in this inquiry. Lewis (SC), 2001-NMSC-035, \S 32 n.3, 35 P.2d at 984 n.3.
\item[234] Lewis (SC), 2001-NMSC-035, \S 35, 35 P.3d at 986.
\end{footnotes}
on the part of [the medical] Defendants,” the proponent “fail[s] to satisfy the second element” of the Lujan test for successive tortfeasors.\textsuperscript{235}

The supreme court also affirmed that when the plaintiff seeks to recover from the physician for an enhanced injury, the plaintiff bears the burden of proving an enhanced injury and the degree of enhancement.\textsuperscript{236} The court did not have occasion to determine whether a defendant who seeks to prove that he is a successive tortfeasor would then bear the burden of proof of the required elements. In the court of appeals, Judge Hartz had noted that it is not always the plaintiff who will want tortfeasors to be successive.\textsuperscript{237} The plaintiff sometimes may prefer to treat the injury as indivisible and the contributing tortfeasors as concurrent, with the result that the liability of each tortfeasor would depend upon that tortfeasor’s comparative fault.\textsuperscript{238} In such cases, a defendant may prefer that the law applicable to successive tortfeasors apply. Both Judge Apodaca and Judge Hartz agreed that whichever party seeks to prove that tortfeasors are successive must bear the burden of proof of the causal divisibility of the injuries.\textsuperscript{239} There is no reason to think that the supreme court will rule differently when the issue arises.

The supreme court did not address a related question that the court of appeals considered: Must a party who wants the tortfeasors to be treated as concurrent prove that the plaintiff’s injuries are not divisible? Judge Hartz concluded that when causal division is not proven, “the injury is indivisible,”\textsuperscript{240} and thus no party has to present evidence demonstrating that the injury was indivisible in order to have the court treat the tortfeasors as concurrent. In effect, there would be a rebuttable presumption that an injury is indivisible unless one party proves that it can be separated causally. In accordance with this view, if a plaintiff proves that the combined fault of two tortfeasors proximately caused an injury to the plaintiff, comparative fault principles applicable to concurrent tortfeasors will apply unless the plaintiff or a defendant pleads and proves that the injuries are separate and causally-distinct.\textsuperscript{241}

Judge Apodaca took a different position. He would impose a duty on the plaintiff who is satisfied with application of the several liability doctrine to plead and prove not only that the tortfeasors each were proximate causes of an injury but also to prove affirmatively that the injury was indivisible.\textsuperscript{242}

Judge Hartz’ position is preferable. Tortfeasors who proximately contribute to an injury should be severally liable in accordance with concurrent tortfeasor principles,
absent proof that the injury is causally divisible. The Third Restatement supports Judge Hartz’ view that several liability for indivisible injuries is the norm, and that whoever prefers joint and several liability has the burden of establishing causally-distinct injuries: “A party alleging that damages are divisible has the burden to prove that they are divisible. Unless sufficient evidence permits the factfinder to determine that injuries are divisible, they are indivisible.”

The portions of Lewis that refine the determination of when tortfeasors are successive provide useful guidelines that are consistent with prior precedents. Other aspects of the opinion are dealt with in Part Two of this article, as are matters concerning trial procedure in successive tortfeasor cases that were ruled on by the court of appeals but not reviewed by the supreme court in Lewis.

CONTINUING POCKETS OF JOINT AND SEVERAL LIABILITY

The Bartlett court adopted several liability, apparently without exception, for all cases of concurrent tortfeasors. In the two years between Bartlett and the passage of the Several Liability Act, New Mexico courts had no occasion to determine whether exceptions to several liability were appropriate. In adopting the Several Liability Act, the legislature determined that there were three specific situations in which joint and several liability should continue to apply. The legislature acknowledged that other types of cases might also be appropriate for joint and several liability and delegated to the judiciary the authority to create additional exceptions when required by sound public policy. To the four statutory exceptions, the supreme court added a fifth exception. Rejecting legislative history that suggested that the drafters intended to include successive as well as concurrent tortfeasors within the ambit of several liability, the supreme court ruled that successive tortfeasors are not subject to several liability but instead are jointly and severally liable for the harm they cause.

These five exceptions are of great significance to tort litigators. Injured persons will always prefer joint and several liability to several liability because they need not sue all tortfeasors to recover fully and because the inability of any one tortfeasor to pay a judgment is offset by the ability to recover all of one’s damages from any other tortfeasoar.

243. See N.M. STAT. ANN. § 41-3A-1(D) (Michie 1996) (providing that only when separate injuries are proven does the general rule of several liability give way to successive tortfeasor principles.).
244. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (2000).
245. For example, Lewis (SC) properly held that the comparative fault of Griego was not available as a partial defense to the doctors because they were jointly and severally liable for the enhanced injury. 2001-NMSC-035, ¶ 41, 35 P.3d at 988. Yet, the court ruled that “[d]efendants were entitled to rely on evidence of Griego’s fault in their argument that Griego’s tortious actions were the sole proximate cause of Lewis’s death.” Id.
246. For example, the court of appeals dealt with the issues of who decides whether tortfeasors are successive, Lewis (CA), 1999-NMCA-145, ¶¶ 38, 55, 992 P.2d at 291, 295, when the determination is made, id. ¶¶ 38-45, 992 P.2d at 291-293, and the procedural steps that should be followed when it is not clear at the beginning of trial whether the parties are successive or concurrent tortfeasors. Id. ¶ 55, 992 P.2d at 295.
247. 98 N.M. at 159, 646 P.2d at 581.
249. Id. § 41-3A-1(c)(4).
250. Schultz & Occhialino, supra note 45, at 487.
251. Lujan, 120 N.M. 422, 902 P.2d 1025; Lewis (SC), 2001-NMSC-035, ¶ 41, 35 P.3d at 988. See supra note 178-246 and accompanying text.
Joint and Several Liability

Intentional Wrongdoers

Still jointly and severally liable are tortfeasors "who acted with the intention of inflicting injury or damage." The provision reflects a legislative determination that persons guilty of intentional misconduct are too culpable to be afforded the benefits of several liability.

Culpable conduct greater than negligence but less than intentional is not within this exception. An earlier draft of the Several Liability Act provided that joint and several liability also applied to persons "whose conduct is found to be malicious, willful or wanton." Another draft would have continued joint and several liability for all causes of action other than negligence. These proposals were eliminated from the final bill.

The Several Liability Act imposes joint and several liability on intentional wrongdoers but does not define "intentional." Proponents of joint and several liability may seek to expand the definition of "intentional" beyond its standard meaning to a more inclusive definition. The Second Restatement, for example, provides that a person acts with "intent" not only when "the actor desires to cause consequences of his act," but also when the actor "believes that the consequences are substantially certain to result from it." The latter definition, more easily met than the "desires" provision, has been incorporated into the New Mexico law of battery. Moreover, in a different context, the New Mexico Supreme Court recently has shown a willingness to expand the types of culpable conduct by a wrongdoer that can trigger greater benefits to injured persons.

The normative basis for imposing full liability on intentional tortfeasors is only sometimes reflected in the rules concerning contribution and indemnity. The Third Restatement, for example, imposes full liability on intentional tortfeasors but allows them thereafter to seek contribution from a tortfeasor who was merely

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255. Id. at 511, app. B, §§ 2(A), 2(D).
256. While inclusion of heightened forms of culpability within this specific exception is probably foreclosed, the exception allowing for joint and several liability when sound public policy dictates, N.M. STAT. ANN. § 41-3A-1(C)(4) (1996 Michie), could be the source of a successful argument that joint and several liability should apply to claims asserting conduct more egregious than negligence but not rising to the level of an intentional tort.
258. California First Bank v. State, 111 N.M. 64, 73, n.6, 801 P.2d 646, 655, n.6 (1990) (noting that to constitute a battery, one need not desire to bring about a harm: "[T]he term 'intent' also denotes 'that the actor believes that the consequences are substantially certain to result from [the action taken.]'"). But see Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 847 P.2d 761 ( Ct. App. 1993), cert. denied, 115 N.M. 79, 847 P.2d 313 (declining to apply "substantial certainty" definition in determining whether worker can sue employer for common law tort of battery), overruled by Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 34 P.3d 1148, 1156 (rejecting "actual intent" as sole test and adding "willfulness" alternative in Workers' Compensation non-exclusivity cases).
259. Delgado, 2001-NMSC-034 § 26, 34 P.3d at 1156 (holding that a worker may sue employer in common law action when employer "expects the intentional act or omission to result in the injury or has utterly disregarded the consequences").
negligent. In contrast, at common law or by statute, some jurisdictions bar intentional tortfeasors from obtaining contribution from other wrongdoers. This dichotomy also exists with regard to the issue of whether a negligent tortfeasor can obtain full indemnification from an intentional tortfeasor. Some jurisdictions provide that a negligent tortfeasor who is partly responsible for the plaintiff's damages may collect full indemnity from an intentional tortfeasor who also contributed to the plaintiff's injuries. The Third Restatement reaches the opposite conclusion.

New Mexico has not resolved the question of whether intentional tortfeasors who discharge the full liability to an injured person are entitled to contribution from other wrongdoers. The issue involves the same weighing of competing policies that determine whether intentional tortfeasors should be able to take advantage of several liability and the conclusion therefore should be the same. New Mexico imposed joint and several liability on intentional tortfeasors because "the intentional wrongdoer forfeits his right to the equitable principle of apportionment of liability based upon fault." The forfeiture should apply equally to impose joint and several liability and to bar intentional tortfeasors from contribution or indemnity.

The statutory exception bars the intentional tortfeasor from laying off fault on others. It does not bar a negligent tortfeasor from laying off fault on the intentional tortfeasor. When an intentional and a negligent tortfeasor combine to cause harm to the plaintiff, the intentional tortfeasor is fully liable for the injuries but the negligent tortfeasor may reduce his liability by the percentage of fault attributable to the intentional wrongdoer. Acknowledging that juries may have a tendency to attribute more fault to intentional wrongdoing than to merely negligent conduct, the supreme court has promulgated a Uniform Jury Instruction designed to check the proclivity of juries to do so.

261. Id. § 23 cmt. 1 ("A person who can otherwise recover contribution is not precluded from receiving contribution by the fact that he is liable for an intentional tort.").
266. New Mexico courts are committed to the principle that "apportionment of the total damages resulting from...loss or injury [should be] in proportion to the fault of each party," Scott, 96 N.M. at 688, 634 P.2d at 1240, but temper that principle by denying the benefits of several liability to intentional tortfeasors, N.M. STAT. ANN. § 41-3A-1(C)(1) (Michie 1996), because of the greater moral culpability of an intentional tortfeasor. Schultz & Occhialino, supra note 45, at 488.
267. The only argument for distinguishing between them would be that the rejection of several liability benefits the plaintiff by providing a single source for full recovery while allowing contribution thereafter may be permissible because there is then no need for a rule favoring the plaintiff. But that policy argument is forcefully countered by Judge Woods' declaration that there is no rational reason for writing rules favoring plaintiffs. Bartlett, 98 N.M. at 158, 646 P.2d at 585.
268. Schultz & Occhialino, supra note 45, at 488.
269. Reichert, 117 N.M. 623, 875 P.2d 379.
270. Id.
271. N.M. U.J.I. Civ. 13-1320 (1996). The instruction, as drafted, applies only to landowners whose negligence consists of failure to use care to prevent an intentional wrongdoer from injuring a visitor on the land: "[T]he proportionate fault of the [owner] [occupant] is not necessarily reduced by the increasingly wrongful conduct
Vicarious Liability

The statutory exception imposing joint and several liability when a person is vicariously liable for the conduct of another person is premised upon the fact that a vicariously liable person is guilty of no fault but is held liable for the fault of another for reasons of policy. There is thus no basis for comparing fault when only one person is at fault but two persons are liable for the resulting harm.

The most common example of vicarious liability is respondeat superior. The statutory exception is not so limited but extends to any theory of recovery by which vicarious liability is imposed on one person for the wrongs of another. For example, when one of the exceptions to the general rule that an employer of an independent contractor is not vicariously liable for the contractor’s torts applies, the employer will be jointly and severally liable with the contractor for the fault attributable to the contractor.

In an opinion decided under Bartlett, rather than the Several Liability Act, the court of appeals significantly expanded the scope of what is now the Act’s “vicarious liability” exception. In Medina v. Graham’s Cowboys, Inc., a person with a known history of getting into fights with fellow bar patrons was hired by the bar to “maintain[] peace and order...using force if necessary.” On the night he struck Medina outside the bar, the employee was not on duty but was present because he had been asked to come to the bar to work if needed. The trial court ruled that respondeat superior was not applicable because the employee was not in the scope of his employment when he assaulted the patron. The trial court ruled, instead, that the bar was liable for negligent hiring and training of the employee and that the bar was jointly and severally liable with Medina for the patron’s injuries. On appeal, the bar asserted that it should have been permitted to reduce its liability by the percentage of fault of the employee who assaulted the plaintiff.

The court of appeals affirmed the ruling imposing full liability on the bar. The court acknowledged that, unlike joint and several liability imposed on an employer under respondeat superior, negligent hiring and supervision imposes liability upon

of the third person.” Id. With suitable modifications, it can be used in other situations in which a person owes a duty to protect a person from intentional wrongdoers. E.g., Sarracino v. Martinez, 117 N.M. 193, 870 P.2d 155 (Ct. App. 1994) (addressing a duty to prevent intentional injury to intoxicated person of whom the defendant has taken control).


273. Schultz & Occhialino, supra note 45, at 490. See also Medina v. Graham’s Cowboys, Inc., 113 N.M. 471, 475, 827 P.2d 859, 863 (Ct. App. 1992) (“Because liability is not predicated on the fault of the employer, the abolition of joint and several liability does not eliminate respondeat superior liability.”).

274. “The law in New Mexico is well settled that, under the doctrine of respondeat superior, an employer can be vicariously liable for the negligent acts of an employee when committed during the course and scope of the employee’s employment.” Baer v. Regents of the Univ. of California, 118 N.M. 685, 690, 884 P.2d 841, 846 (Ct. App. 1994).


276. Schultz & Occhialino, supra note 45, at 490-91.


278. Id. at 472, 827 P.2d at 860.
the employer for its own fault.\textsuperscript{279} The court nonetheless imposed joint and several liability when negligent hiring is a proximate cause of the infliction of intentional harm to a person by the negligently hired employee. The court found it to be “a natural extension of the doctrine of respondeat superior” to hold the employer “vicariously liable” for the torts of the negligently hired employee.\textsuperscript{280} The court further extended the potential scope of its ruling by suggesting that “the doctrine of respondeat superior might properly be extended to impose upon employers vicarious liability for any tort by a servant that is a reasonably foreseeable result of the employment relationship.”\textsuperscript{281}

Though never challenged, \textit{Medina} has not been followed or extended.\textsuperscript{282} The court’s premise that vicarious liability can follow from the employer’s own negligence would greatly expand the scope of the vicarious liability exception in the Several Liability Act. Proponents of extending vicarious liability to cases where the employer is negligent in hiring or supervising an employee will have to overcome the existing common law definition of vicarious liability, which excludes situations where the liability is imposed because of the fault of the employer.\textsuperscript{283}

It is likely that the vicarious liability exception to several liability applies when plaintiffs seek to hold some defendants liable for the conduct of other negligent actors if all of them are part of a joint enterprise. In \textit{Roderick v. Lake},\textsuperscript{284} the injured plaintiff, seeking to overcome the problem of identifying the actual negligent actor, alleged that the actors were engaged in a joint venture, thus making each jointly and severally liable for the acts of all.\textsuperscript{285} The trial court agreed, reasoning that “a joint venture is a partnership for a single transaction...and partners are jointly and severally liable for the obligations of a partnership.”\textsuperscript{286} The court of appeals reversed because there was insufficient evidence of a joint venture, while “[a]ssuming, without deciding, that a joint venture between two or more concurrent tortfeasors would make them jointly and severally liable.”\textsuperscript{287} The \textit{Third Restatement} provision imposing joint and several liability whenever “liability is imposed based on the tortious acts of another” also is broad enough to cover joint ventures.\textsuperscript{288}
New Mexico recognizes a cause of action for civil conspiracy,\textsuperscript{289} to which the court of appeals has stated the doctrine of joint and several liability applies: "The purpose of a civil conspiracy claim is to impute liability to make members of the conspiracy jointly and severally liable for the torts of any of its members."\textsuperscript{290} Consistently with New Mexico's position, the \textit{Third Restatement} provides that persons who act in concert are jointly and severally liable for the share of fault attributable to any person engaged in the concerted activity.\textsuperscript{291} In addition to the usual scenarios, a \textit{Restatement} comment states that a person who directs tortious conduct by another, even though not an employer of that person, is jointly and severally liable for the torts committed by the person being directed.\textsuperscript{292} Injured persons, seeking the benefits of joint and several liability increasingly will turn to theories of civil conspiracy and joint venture to come within the statutory exception imposing joint and several liability on parties vicariously liable for the torts of others.

The joint and several liability of the vicariously liable person may not be for the full amount of the plaintiff's damages. The Several Liability Act imposes joint and several liability only for the portion of the total fault that is attributable to the tortfeasor for whom the defendant is vicariously liable.\textsuperscript{293} Thus, if an employee is found thirty percent at fault and a third person is seventy percent at fault, the defendant liable vicariously for the tort of the employee is jointly and severally liable with the employee for only thirty percent of the total damages. Once the vicariously liable tortfeasor pays the joint and several judgment, a claim for full indemnification from the employee normally will be available to the vicariously liable tortfeasor.\textsuperscript{294}

\textsuperscript{289} Ettleson v. Burke, 2001-NMCA-003, 17 P.3d 440 (Ct. App. 2001). The elements of civil conspiracy are "(1) that a conspiracy between two or more individuals existed; (2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and (3) that the plaintiff was damaged as a result." Silva v. Town of Springer, 121 N.M. 428, 434, 912 P.2d 304, 310 (1995). In addition, a civil conspiracy is not actionable "unless a civil action in damages would lie against one of the conspirators." Armijo v. Nat'l Sur. Corp, 58 N.M. 166, 178, 268 P.2d 339, 347 (1954); Ettleson, 2001-NMCA-003, ¶ 12, 17 P.3d at 445.

\textsuperscript{290} Ettleson, 2001-NMCA-003, ¶ 12, 17 P.3d at 445. When the conspiracy is formed in order to commit intentional torts, joint and several liability will apply under the "intentional tortfeasor" exception, N.M. STAT. ANN. § 41-3A-l(C)(1) (Michie 1996), if not under the "vicarious liability" exception.


\textsuperscript{292} Id. § 15 cmt. b.

\textsuperscript{293} N.M. STAT. ANN. § 41-3A-l(C)(2) (1996 Michie).

\textsuperscript{294} Employers' Fire Ins. Co. v. Welch, 78 N.M. 494, 495, 433 P.2d 79, 80 (1967) ("[A] tortfeasor's employer who has been held liable on the theory of respondeat superior may recover indemnification from the tortfeasor only where the employer's liability is based solely upon that doctrine and where there is not actual or active negligence on the part of the employer.").
Because strict products liability is a no-fault theory of recovery, there is no basis for comparing the fault of those whose liability is premised solely on strict products liability. The factfinder is thus unable to compare the fault of manufacturers, wholesalers, and retailers, each of whom is strictly liable for marketing defective products. Acknowledging the problem, the legislature has determined that all persons strictly liable for the manufacture and sale of defective products are jointly and severally liable for the full portion of the liability attributable to the defective product.

Where plaintiff's injuries were caused in part by the defective product and in part through the fault of a third person, the joint and several liability of the manufacturers and distributors is limited to the portion of the damages attributable to the defective product. Thus, for example, the manufacturer and retailer of a car with defective brakes can lay off fault on the driver of another vehicle whose negligent driving combined with the defective brakes of the car's owner to cause injury to the owner of the car.

The injured person might assert claims alternatively for negligence and for strict products liability against the manufacturer and distributors of a defective product. If the factfinder concludes that negligence of two or more of the defendants in the chain of distribution caused plaintiff's injuries, those defendants will be severally liable in accordance with their comparative fault. If also found liable for strict products liability, the same defendants are jointly and severally liable. The plaintiff who obtains verdicts on both theories will prefer entry of joint and several liability judgments against each defendant rather than a partial judgment against each based on comparative fault. Presumably the court would enter the joint and several liability judgment or would enter judgments reflecting both the negligence and the strict liability verdicts, leaving the plaintiff to choose which to enforce.

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295. Hinger v. Parker & Parsley Petroleum Co., 120 N.M. 430, 437, 902 P.2d 1033, 1040 (Ct. App. 1995), cert. denied, 120 N.M. 312, 900 P.2d 962 ("[O]ne of the hallmarks of a strict liability lawsuit [is] liability without negligence. Under strict products liability...suppliers of goods are absolutely liable for defects which pose an unreasonable risk of injury. In other words, reasonable care on the part of the supplier is no defense.").

296. Schultz & Occhialino, supra note 45, at 492.


298. Id. (noting that strict products liability applies "only to that portion" of the total liability attributed to those strictly liable).

299. Schultz & Occhialino, supra note 45, at 492-93.

300. Trujillo v. Berry, 106 N.M. 86, 89, 738 P.2d 1331, 1334 (Ct. App. 1987), cert. denied sub nom. H & P Equip. Co. v. Berry, 106 N.M. 24, 738 P.2d 518 ("Strict products liability does not...preclude liability against a retailer based upon the alternative ground of negligence of the seller where such negligence can be proved.").

301. N.M. STAT. ANN. § 41-3A-1(A) (Michie 1996).

302. Id. § 41-3A-1(C)(3).

303. Just as the plaintiff has a choice of theories and cannot be compelled to plead or go to the jury on a cause of action that the plaintiff declines to pursue, Enriquez v. Cochran, 126 N.M. 196, 217, 967 P.2d 1136, 1157 (Ct. App. 1998), the plaintiff should be able to forego a verdict based on negligence in preference to entry of a judgment consistent with the portion of the verdict finding strict product liability.

304. A plaintiff might want judgments reflecting the negligence verdicts even when victorious at trial on the strict liability theory as a fallback position in case the strict liability judgments are reversed on appeal.

305. If the plaintiff collects the full amount of the joint and several liability judgment from one tortfeasor, that tortfeasor can pursue a claim for comparative contribution based upon the percentages of fault allocated in the negligence action. See N.M. STAT. ANN. § 41-3-2 (Michie 1996) (contribution among joint tortfeasors based on
Public Policy

The drafters of the Several Liability Act considered many exceptions to several liability. In the three situations where there was agreement, the Act creates exceptions. Where consensus was lacking, the drafters chose not to decide between competing positions but to leave to the courts the task of identifying and creating additional pockets of joint and several liability. The Several Liability Act provides that in addition to the three listed exceptions, joint and several liability applies "to situations...having a sound basis in public policy." The judiciary has construed this delegated authority broadly, the court of appeals noting that "[t]here are no specific limitations in the public policy exception itself which would restrict the traditional common-law function of the courts in this area." The policies supporting the three existing exceptions to several liability provide guidance in determining when to create additional exceptions. The vicarious liability exception and the strict products liability exception primarily are premised upon the functional difficulty of comparing fault when one or more potential defendants is not guilty of fault. Where there is no basis for apportioning fault, joint and several liability is a practical necessity. The supreme court acknowledged this when it confirmed that because contract liability is not based on fault, several liability has no place in determining the scope of a contract breacher’s liability to the plaintiff. Where the liability of each possible defendant is based only on no-fault theories of recovery, joint and several liability is appropriate. Where, however, a defendant’s liability is premised on a no-fault theory, that defendant can lay off fault on others who were negligent. The products liability exception, for example, prevents certain persons who are each liable without fault from laying off fault on one another but provides for several liability based on fault allocations where some tortfeasors are guilty of negligence and others are chargeable only with strict products liability. Thus, joint and several liability is justified not simply when one tortfeasor is liable on a no fault theory, but rather when two or more tortfeasors are each liable without fault, with the result that there is no basis for comparing fault.
The legislative determination that intentional tortfeasors are jointly and severally liable is not based upon inability to compare fault, but on a determination that persons guilty of egregious misconduct forfeit the right to enjoy the liability-reducing benefits of several liability. Courts will undoubtedly confront the question of what conduct short of intentional wrongdoing suffices to trigger joint and several liability. The legislative history of the exception for intentional misconduct suggests that the legislature did not reject joint and several liability for conduct more culpable than negligence and less culpable than intentional, but "signal[ed] a lack of consensus and a decision to leave to the court, in construing the 'public policy' exception, the resolution of the issue." Any such expansion of joint and several liability in New Mexico will occur without the approval of the Third Restatement, which declines to extend joint and several liability to tortfeasors whose conduct constitutes "gross negligence, recklessness or similar conduct." Courts also will consider whether plaintiffs generally or particular plaintiffs are deserving of the additional financial security afforded by joint and several liability. The argument in favor of plaintiffs as a class is unlikely to be successful. 

Bartlett rejected the proposition that joint and several liability should be maintained in order to favor plaintiffs as a class over defendants and reversal of that policy choice is not likely. Certain categories of plaintiffs, however, have arguments peculiar to their circumstances that may persuade a court to impose joint and several liability. For example, an early draft of the Several Liability Act would have distinguished between plaintiffs who were free of negligence and those who were guilty of comparative negligence. The former, not needing the benefit of the substitution of comparative negligence for contributory negligence, would not suffer the loss of joint and several liability, while the latter, dependent upon comparative fault principles for recovery, would have comparative fault principles applied to reduce their recovery from each tortfeasor. That the legislature did not adopt this proposal does not foreclose the possibility that public policy would be best served by its adoption.

315. Schultz & Occhialino, supra note 45, at 488.
316. Id. at 489. Omitted from the final version of the Several Liability Act was a provision in an earlier draft extending joint and several liability not only to intentional tortfeasors but also to those whose conduct is found to be malicious, willful or wanton." Id. at 514, app. E.
318. Bartlett, 98 N.M. at 158, 646 P.2d at 585.
319. Schultz & Occhialino, supra note 45, at 510, app. B.
320. Id.
321. Id. at 489. Adoption of this exception often would pose tactical problems for the parties. Until the factfinder determined at the end of the trial whether the defense of comparative negligence was proven, the plaintiff and defendant would not know whether several or joint and several liability applied. Yet litigation tactics that must be formulated much earlier in the proceeding depend upon the answer to the question. Faced with this uncertainty, the plaintiff probably would have to assume that the factfinder would find him guilty of comparative negligence and thus that several liability would apply. This would compel plaintiff to identify and to sue all potential tortfeasors, an effort that would be unnecessary if the factfinder later concluded that plaintiff was not negligent and thus that several liability would apply. Likewise, defendants would have to assume that several liability would apply and thus that they had to introduce evidence of one another's fault at trial, though the evidence would be irrelevant if joint and several liability applied because the plaintiff was found not negligent.
Legislative policies embedded in particular legislation also might influence a court construing the public policy exception in the Several Liability Act. The supreme court has acknowledged that the legislature is the primary source of state public policy, and when statutes create causes of action or assist in determining whether common law duties have been violated, the policies underlying the statute may inform a court’s decision whether to create an additional pocket of joint and several liability.

New Mexico courts have created only a single public policy exception to date. In *Saiz v. Belen School District*, a thirteen-year-old boy was electrocuted at a night football game due to faulty wiring installed ten years earlier by an independent contractor employed by the school district. The supreme court ruled that when an employer hires an independent contractor to do work that a reasonable person would recognize as likely to create a peculiar risk of harm to others if reasonable precautions are not taken, the employer is liable when those precautions are not taken. The employer’s liability is not vicarious; it does not depend on a finding that the independent contractor is liable to the injured person. Instead, it is a direct, strict liability of the employer, imposed even in the absence of proof of fault of the independent contractor, and is based on the breach of the duty of the employer to assure that adequate precautions are taken to prevent harm to others.

In cases to which *Saiz* applies, “the employer is jointly and severally liable for harm apportioned to any independent contractor” who failed to take necessary precautions. The imposition of joint and several liability is pursuant to the public policy exception in the Several Liability Act and “is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage

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322. Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (“With deference to constitutional principles, it is the particular domain of the legislature, as the voice of the people, to make public policy.”).
324. Id. at 395, 827 P.2d at 110.
325. Id. (“[W]e reject any requirement...that liability of the employer is dependent upon failure of the independent contractor to exercise reasonable care. The focus is on the presence or absence of a necessary precaution, not on whether an independent contractor’s failure to take the precaution may be excused or justified under a reasonably prudent person standard.”). Had the court characterized its holding as creating another exception to the oft-excepted general rule that employers of independent contractors are not liable for the torts of the contractor, see id. at 393-94, 827 P.2d at 108-09, there would have been no need to use the public policy exception. The specific exception imposing joint and several liability upon a person vicariously liable would have applied. See N.M. STAT. ANN. § 41-3A-1(C) (Michie 1996). In *Saiz*, a vicarious liability approach would not have benefited the plaintiff because the independent contractor was shielded from liability to the plaintiff by a statute of repose. See *Saiz*, 113 N.M. at 401, 827 P.2d at 116.
326. 113 N.M. at 394, 821 P.2d at 109 (defining “direct strict liability”). The threshold for establishing liability is to demonstrate that the work involves a “peculiar risk,” which is work that is “inherently or intrinsically dangerous” in that it “is very likely to cause harm if a reasonable precaution...is not taken.” Id. at 396, 823 P.2d at 111. For conduct creating a peculiar risk, “[t]he test of liability is the presence or absence of precautions that would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed; and liability is dependent on neither the lack of care taken by the contractor nor the lack of care taken by the employer to ensure that the contractor takes necessary precautions.” Id. at 394-95, 821 P.2d at 109-10.
327. Id. at 395, 821 P.2d at 110.
328. Id. at 400, 823 P.2d at 115. The employer, if liable, would be jointly and severally liable not only for the conduct of the contractor who installed the electrical system but also for the fault, if any, of an architect who supervised installation and inspected the system. Id. The employer would also be solely liable for any fault that the factfinder attributed to the employer. Id.
conscientious adherence to standards of safety where injury likely will result in the absence of precautions." 329

In numerous cases, plaintiffs have tried to impose Saiz liability upon defendants. The cases focus on whether a peculiar risk is present and most conclude that the Saiz requirements have not been met. 330 In Enriquez v. Cochran, 331 the court of appeals did apply Saiz. Enriquez, an employee of the Conquistador Council, a local chapter of the Boy Scouts of America (BSA), was injured while felling trees at a BSA camp. He received workers’ compensation benefits from the Conquistador Council and then sued BSA. In the trial court, Enriquez asserted that BSA was liable for its own tortious conduct and jointly and severally liable for the Council’s share of the liability. 332 The jury assigned 75 percent of the fault to BSA, 15 percent to the Council, and 10 percent to Enriquez. The exclusivity provision of the Workers’ Compensation Act barred Enriquez from recovering from the Council the 15 percent attributed to the Council’s fault. 333 Enriquez sought to collect that percentage from BSA by arguing that BSA’s tree-cutting created a peculiar risk of harm under Saiz, thus making BSA liable for its own fault and also jointly liable for the fault of the Council. The trial court disagreed and entered judgment against BSA only for 75 percent of plaintiff’s damages. In a well-crafted opinion, the court of appeals extensively reviewed and applied the elements of a Saiz claim and concluded that BSA was jointly and severally liable pursuant to Saiz for the 15 percent of the damages attributable to the Council’s fault. 334

Saiz provides three benefits to plaintiffs. First, Saiz imposes strict liability upon the employer of the independent contractor, thus eliminating the need to prove fault of the employer or of the contractor. 335 In addition, because the employer’s Saiz liability is not premised on or dependent upon the contractor’s fault but is a strict liability of the employer, the employer is liable to plaintiff for the damages attributable to the fault of the independent contractor even when the contractor would not be liable to the plaintiff. 336 Finally, and directly relevant to apportionment

329. Id.
332. Id. at 218, 967 P.2d at 1158.
333. See N.M. STAT. ANN. § 52-1-6(E) (Michie 1991).
334. BSA asserted that Saiz was distinguishable because BSA had not hired the Council as an independent contractor. The court ruled that Saiz applied to a fact pattern distinguishable from Saiz itself: “the Saiz rationale can be applied to a factual situation not involving a property owner or other employer of an independent contractor.” 126 N.M. at 221, 967 P.2d at 1161.
335. Saiz, 113 N.M. at 394, 821 P.2d at 109 (applying “direct strict liability”).
336. Id. at 401, 827 P.2d at 116 (“We see no reason not to impose full responsibility on a joint tortfeasor subject to strict liability for breach of a nondelegable duty despite the fact that the plaintiff’s direct suit against the other tortfeasors is barred...”). Saiz and Enriquez illustrate the importance of this benefit. In Saiz, a statute of repose protected the contractor from liability to the plaintiff, so that recovery for the contractor’s misconduct only could come from the employer school district. Id. See also N.M. STAT. ANN. § 37-1-27 (Michie 1990) (limiting actions for defective or unsafe conditions caused by construction of improvements to real property). In Enriquez, plaintiff could not successfully sue the Council because his sole remedy against his employer, the Council, was for Workers’ Compensation. Enriquez, 126 N.M at 201, 967 P.2d at 1141. See also N. M. STAT. ANN. § 52-1-9 (Michie 1991).
issues, the employer’s strict liability encompasses any fault attributable to the independent contractor, making the employer fully liable for the fault of the independent contractor as part of its own strict liability. The plaintiff, therefore, need not join the independent contractor as a defendant in order to recover for any fault attributed to the contractor, need not worry about defenses the contractor has, nor be concerned about whether the contractor is able to pay its comparative share of the plaintiff’s judgment. Instead, plaintiff can focus on establishing the elements of a Saiz claim against the employer.

It is difficult to determine whether Saiz and Enriquez will serve to extend broadly the public policy exception beyond cases involving employers and independent contractors. The Saiz court focused on the justification for and the elements of the strict liability claim against the employer rather than upon the justification for imposing joint and several liability. The court’s rationale for joint and several liability was limited to finding “a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety....”

That the court will not broadly create exceptions whenever the danger is great and injury likely to occur is demonstrated by the court’s ruling in Reichert v. Atler. The danger to patrons was obviously great at the A-Mi-Gusto Lounge, “one of the most dangerous bars in Bernalillo County and...the scene of numerous shootings, stabbings and assaults.” Castillo was a patron of the bar when he was confronted by a belligerent, intoxicated fellow patron, Ochoa. The bartender knew of rumors that Ochoa was dangerous, had been in fights before, carried a handgun, and had killed someone once before, but did nothing to protect Castillo from Ochoa. Ochoa shot Castillo six times, killing him, and fled the bar. Castillo’s estate sued the bar owners alleging a negligent failure to protect Castillo from the foreseeable risk of violence at the hands of Ochoa. The trial court found the bar owners negligent, refused to allow the bar owners to lay off fault on Ochoa, and held them jointly and severally liable with Ochoa for the death of Castillo. The court of appeals reversed, holding that there was no basis for refusing to allow the bar owners to reduce their liability by laying off blame on Ochoa. The supreme court granted certiorari and ruled that no public policy justified the imposition of joint and several liability on the owners of the bar.

Plaintiff argued that without joint and several liability the owners’ incentive to protect patrons would be diminished because they could shift most of the blame to

337. Saiz, 113 N.M. at 400, 821 P.2d at 115.
338. Id. at 400, 827 P.2d at 115. Enriquez reiterates the “public policy concern to maximize the care taken by persons...sufficiently connected with inherently dangerous activity to have some influence on its conduct,” Enriquez, 126 N.M at 224, 967 P.2d at 1164, while also noting that compared to the Council, the BSA “is much better equipped than local councils, financially and in terms of staff to deal with the safety issues.” Id. at 225, 967 P.2d at 1165.
340. Id. at 624, 875 P.2d at 380.
342. 117 N.M. at 625, 875 P.2d at 381 (“We cannot find a sound basis in public policy to abrogate the legislature’s determination that comparative-fault principles should apply; rather, we believe that public policy would support a holding that the bar owner may reduce his liability by the percent of fault attributable to a third party.”).
the intentional wrongdoer. The court acknowledged that other jurisdictions imposed joint and several liability under these circumstances and agreed that premises owners must be encouraged to protect patrons but concluded that imposing joint liability was not necessary to accomplish the goal. Instead, the court proposed a Uniform Jury Instruction designed to remind jurors that, in cases involving harm to persons on the business premises of another, "the proportionate fault of the [owner] [operator] is not necessarily reduced by the increasingly wrongful conduct of the third person." Reichert concluded that the fact that it was a foreseeable intentional tortfeasor who the landowner failed to protect the patron from was not a basis for imposing joint and several liability on the land owner. It is difficult to conclude that the risk of electrocution more than ten years after the negligent installation of a lighting system in a football stadium is more dangerous and thus more worthy of joint and several liability than the risk of being shot by a drunk fellow patron in a notorious bar.

Despite the Reichert opinion rejecting joint and several liability in this class of cases, Saiz continues to offer some opportunity for the application of joint and several liability to cases in which a person breaches a duty to protect persons from intentional tortfeasors. The case for limiting or overruling Reichert is made in the Third Restatement. Section 14 provides that "a person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person." The Restatement provision is intended to avoid the likelihood that a plaintiff otherwise would go largely uncompensated because juries will often allocate the greatest percentage of fault to the intentional tortfeasor who likely will lack the resources to compensate the victim. The provision also seeks to reduce the likelihood of injury by imposing joint and several liability as an additional incentive for care for those responsible for protecting others from the acts of intentional wrongdoers. The Restatement provision applies only when the harm

343. Id. at 626, 875 P.2d at 382.
344. Id. The proposed instruction was adopted by the Committee on Uniform Jury Instructions for Civil Cases. N.M. U.J.I. Civ. 13-120 (1996). The court of appeals noted that the deterrent effect of an award of punitive damages would provide additional incentive for landowners to fulfill their duty to protect patrons from third persons. Reichert, 117 N.M. at 636, 875 P.2d at 392.
345. Reichert, 117 N.M. at 625, 875 P.2d at 381 ("[T]he question whether the conduct of the third party is intentional, negligent, or otherwise is not determinative in the application of comparative-fault principles in situations similar to the one presented in this case.").
346. The quick answer is that Saiz does not apply to risks that are common and not unexpected by the public. In Saiz, the court stated that a "peculiar risk" involved "a risk that is unusual or 'not a normal routine matter of customary human activity'...and that is different from one to which persons commonly are subjected by ordinary forms of negligence." Saiz, 113 N.M. at 396, 827 P.2d at 111. In Enriquez, 126 N.M. at 221, 967 P.2d at 1161, the court of appeals refined the Saiz definition of "unusual" as one requiring "the relative rarity of the activity and the concomitant lack of contact or experience with the activity and its dangers by the general public." In Gabaldon v. Erisa Mortgage Co., 128 N.M. 84, 87, 990 P.2d 197, 200 (1999), the court adopted the language from Enriquez, concluding that "if an activity is a 'common, every-day occurrence' and the public is familiar with the dangers associated with the activity, the activity is not inherently dangerous." Presumably, bar patrons are aware that intoxicated patrons are a routine risk in bars.
348. Id. § 14 cmt. b.
349. Id.
the defendant must guard against is an intentional tort by the third person. Where
the defendant negligently fails to protect the plaintiff from harm caused by the
negligence of a third person, Section 14 does not apply.

The Reichert court agreed that juries might attribute the bulk of the fault to the
intentional tortfeasor and thus undermine the incentive of land owners to protect the
plaintiff from intentional wrongdoers but decided that an adequate alternative to
joint and several liability is the jury instruction suggesting that juries be more subtle
in their assessment of relative fault. The court did not address the concern that the
fault assessed to the intentional tortfeasor may result in an uncollectable judgment
because the intentional tortfeasor will lack resources to pay or may have fled the
jurisdiction.

Subsequent New Mexico cases demonstrate that the state will not likely stray
from the Reichert decision soon. After Reichert, the New Mexico Supreme Court
rendered an almost identical decision in Barth v. Coleman, reaffirming the
Reichert holding that the fault of the bar owner and the intentional actor should be
compared. The court reiterated that holding the premises owner fully responsible
when the intentional actor caused the injuries would be inconsistent with New
Mexico's commitment to holding tortfeasors liable only in accordance with their
share of fault.

Barth, like Reichert, was a premises liability case. The same issue arises in other
contexts, as well. In Torres v. State, police allegedly failed to exercise reasonable
care to investigate a murder and apprehend the murderer. As a result, allegedly, two
other persons were killed by the murderer. The personal representatives of the two
later victims sued the police for wrongful death. The New Mexico Supreme Court
held that, if the failure of the police to investigate the first crime contributed to the
deaths of the plaintiffs' decedents, the fault of the police would be compared to the
fault of the assailant. Additional cases illustrate fact patterns in which the issue may arise in the future, though in

350. Id.
351. The Restatement does not reject the application of joint and several liability to one who negligently fails
to protect the plaintiff from harm caused negligently by a third person. Instead, "the Restatement takes no position" on
the issue. Id. The comments note, however, that expansion of joint and several liability for negligent failure to
protect from negligent third persons would extend joint and several liability so broadly that it could "undermine the
policies embodied in a jurisdiction's decision to abrogate joint and several liability." Id.
353. Bartlett stated that the law has no reason to favor the plaintiff over a defendant. See Bartlett, 98 N.M.
at 158, 646 P.2d at 585. This rationale is undercut when the specific basis for imposition of a duty on the defendant
is to protect the plaintiff from the intentional wrongdoer.
354. 118 N.M. 1, 878 P.2d 319 (1994).
355. Id. at 4, 878 P.2d at 323.
356. Id.
358. Id. at 616, 894 P.2d at 393. In Sen v. New Mexico State Police, 119 N.M. 471, 474, 892 P.2d 604, 607
(Ct. App. 1995), the jury compared the fault of a police officer who negligently allowed a driver to continue driving
after smelling alcohol on his breath with the fault of the driver in causing the accident. The court of appeals reversed
the judgment on other grounds. Schear v. Bd. of County Comm'rs of Bernalillo County, 101 N.M. 671, 687 P.2d
728 (1984) (discussing negligence claim stated against police for failing to respond promptly to call of assault in
progress; no discussion of joint and several liability).
359. 119 N.M. at 616, 894 P.2d at 393.
each case the appellate court had no occasion to determine whether joint and several or only several liability would apply.360

The hesitancy in Reichert and Barth to deviate from the general rule of several liability suggests that the public policy exception will not be expanded beyond Saiz without creative arguments addressing concerns raised in those cases. Judge Wood set the bar high in Bartlett when he declared several liability to be the fairest method of allocating responsibility among concurrent tortfeasors and rejected appeals to preserve to plaintiffs the historic benefits of joint and several liability.361 By allowing for a public policy exception to the statutory command of several liability, the legislature encouraged litigants to seek to expand the scope of joint and several liability, but the courts to date have shown no enthusiasm for the task.

Statutory Causes of Action

Legislation affects common law causes of action in different ways. Some statutes acknowledge a common law cause of action but adjust the elements or defenses.362 The common law that has not been modified continues to apply to the cause of action.363 Other statutes substitute a new statutory cause of action for an existing common law cause of action364 or create a cause of action unknown to the common law.365 Issues then arise as to whether common law principles, such as comparative negligence, apply to the statutory cause of action and whether the Several Liability Act affects the statutory cause of action. In addition, the legislative intent in creating or modifying causes of action may significantly influence the application of the public policy exception in the Several Liability Act.

The Dram Shop Act of New Mexico exemplifies the complicated relationships among a statute addressing a particular cause of action, the Several Liability Act, and the common law defense of comparative negligence. New Mexico law has

360. In Sarracino v. Martinez, 117 N.M. 193, 870 P.2d 155 (Ct. App. 1994), the court recognized that a person who takes charge of a helpless person has a duty of care to protect the person. The defendant agreed to take the intoxicated plaintiff home and defendant’s subsequent negligence allowed an intentional wrongdoer to assault the plaintiff. In Davis v. Bd. of County Comm’rs of Doña Ana County, 127 N.M. 785, 987 P.2d 1172 (Ct. App. 1999), the plaintiff was sexually assaulted by an employee at a psychiatric hospital who had been hired by the hospital based on favorable recommendations given by his former supervisors at the Doña Ana County Detention Center. Although the detention center had disciplined the employee for sexual harassment, the positive recommendation given to the hospital by the officers was unqualified. In recognizing a duty to protect those who could be harmed by the recommendation, the court did not rule on the issue of whether the detention center would be liable for the acts of the assaulter. In De Matteo v. Simon, 112 N.M. 112, 812 P.2d 361 (Ct. App. 1991), the court ruled that one who negligently entrusts a vehicle to a person is liable for harm done when the driver’s negligence causes injury to a third person. The court did not address the issue of whether the negligent entruster could lay off fault on the negligent driver.


362. For example, the original Dram Shop Act, ch. 328, 1983 N.M. Laws 2103, provided certain limitations upon the common law cause of action first recognized in Lopez v. Maes, 98 N.M. 625, 651 P.2d 1269 (1982): “The title and entire tenor of the statute represents a legislative intent to narrow the scope of tavernkeeper and social host liability. The statute was an obvious response to Lopez.” Trujillo v. Trujillo, 104 N.M. 379, 383, 721 P.2d 1310, 1314 (Ct. App. 1986).

363. Trujillo, 104 N.M. at 383, 721 P.2d at 1314.

364. Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 61, 607 P.2d 597, 599 (1980) (“Workers’ compensation statutes, for example, provide the exclusive remedy for a worker against his employer and ‘all other common law and statutory actions are barred by the Act.’”).

evolved from a complete bar against recovery from a licensee who serves intoxicated patrons who then get into auto accidents to a mixture of statutory claims and common law claims partially modified by statute. Currently, a licensee who serves an intoxicated patron can be liable to an innocent third person injured by the patron’s negligence if the third person can demonstrate that the licensee violated the standard of reasonable care defined in the Dram Shop Act. The intoxicated patron-driver, however, may recover for his injuries from the licensee only if the licensee was guilty of gross negligence and reckless disregard of the safety of the patron-driver. When two patrons each become intoxicated and one drives while the other is a passenger in the vehicle, the intoxicated patron-passenger need not prove gross negligence and reckless disregard for safety but can recover upon a showing that the licensee breached the statutorily defined standard of reasonable care.

Left unanswered by the Dram Shop Act are questions concerning the defense of comparative negligence and the applicability of the Several Liability Act. Because the claim of the innocent third person against the licensee is a common law action in which only the licensee’s standard of care has been modified by the Dram Shop Act, it is most probable that the common law defense of comparative negligence will be available to the licensee. This, in turn, means that the Several Liability Act will apply and the licensee will be able to lay off fault on the intoxicated driver unless the public policy exception is invoked to bar the licensee from shifting part of the blame on the intoxicated driver. The same result will occur when a licensee continues to serve alcohol to both the driver and a passenger, and the passenger later sues the licensee for injuries caused by the intoxication of the driver.

The cause of action of the intoxicated patron-driver, in contrast, is solely a creation of the Dram Shop Act, which requires that the driver establish that the

368. Id. § 41-11-1 (B) (Michie 1996).
370. Baxter, 107 N.M. at 50, 752 P.2d at 242 (“The enactment of Section 41-11-1-1 in 1983 did not create or abolish a cause of action; instead it narrowed the liability of tavernkeepers...[and] set out the elements which could constitute a breach of the duty established in Lopez.”).
371. No case so holds, but the court in Baxter held that when an intoxicated passenger sued the licensee who served the intoxicated driver, the licensee could avail itself of the defense of comparative negligence “because the action sounds in negligence and because fault is the predicate for liability” under the Dram Shop Act. Baxter, 107 N.M. at 52, 752 P.2d at 244. The rationale for the application of comparative negligence is equally applicable whether the action is brought by an intoxicated patron or by a third person whose negligence combines with that of the licensee to cause injury to that person.
373. In Baxter, 107 N.M. 48, 752 P.2d 240, the court held that the intoxicated passenger had a common law cause of action against a licensee who violated the standard of care set in the Dram Shop Act, and that the passenger’s intoxication provided a partial defense as a form of comparative negligence: “[W]e hold that because the action sounds in negligence and because fault is a predicate for liability under Section 41-11-1(A), comparative negligence theories must govern this case.” Id. at 52, 752 P.2d at 244.
374. In creating the common law action against the licensee, the supreme court limited its holding to cases in which the breach of the duty of care of the licensee in serving the intoxicated person “is found to be the proximate cause of injuries to a third person.” Lopez, 98 N.M. at 632, 651 P.2d at 1276 (emphasis added). The original 1983
licensee was guilty of both gross negligence and reckless disregard of the safety of the patron-driver. The Act does not state whether the comparative negligence of the patron-driver is an affirmative defense available to the licensee and thus also does not resolve the issue of the availability of the Several Liability Act to the patron-driver’s statutory cause of action. There can be little doubt, however, that the patron-driver’s damage award will be reduced by the percentage of fault of the patron-driver. There is no reason to treat the drunk driver more favorably than the innocent third party or the intoxicated patron-passenger, both of whom are subject to the defense.

Because comparative negligence is a defense to each of the three categories of plaintiffs who may sue the licensee, unless the public policy exception applies, the licensee will be able to lay off fault on the intoxicated patron-driver when sued by the innocent third party, the patron-passenger, or the patron-driver. At first blush, the public policy exception seems unlikely to apply. In Reichert v. Atler, the supreme court rejected the application of the public policy exception and allowed the bar owner to lay off fault on an intoxicated patron who shot the plaintiff. Reichert is distinguishable in one important manner, however. In Reichert, the plaintiff framed the case against the bar as a premises liability case rather than as a case asserting liability pursuant to the Dram Shop Act. The policies that underlie the Dram Shop Act are sufficiently compelling to lead to a different result from a case involving only premises liability.

The policy rationale supporting joint and several liability in Saiz v. Belen School District equally supports the conclusion that the licensee should be jointly and severally liable with the intoxicated patron who injures third persons. In Saiz, the court held an employer of an independent contractor jointly and severally liable both for the employer’s liability and for that of the independent contractor when the employer hired an independent contractor to undertake inherently dangerous

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version of the Dram Shop Act did not provide a remedy for the intoxicated patron. Trujillo, 104 N.M. at 382, 721 P.2d at 1313. In 1985 the legislature amended the act to provide a cause of action for the intoxicated patron who could demonstrate that the licensee was guilty of gross negligence and reckless disregard for the safety of the intoxicated patron. Act of Apr. 4, 1985, ch. 191, N.M. Laws, 1035. The same provision continues in the current version of the statute. N.M. STAT. ANN. § 41-11-1(B) (Michie 1996).

375. N.M. STAT. ANN. § 41-11-1(B) (Michie 1996).
376. The court in Baxter, 107 N.M. 48, 752 P.2d 240, held that when an intoxicated passenger sued the licensee who served the intoxicated driver, the licensee could avail itself of the defense of comparative negligence “because the action sounds in negligence and because fault is the predicate for liability” under the Dram Shop Act. Id. at 52, 752 P.2d at 244. The rationale for the application of comparative negligence is equally applicable whether the action is brought by an intoxicated patron or by a third person whose negligence combines with that of the licensee to cause injury to that person. Though the intoxicated patron’s cause of action is solely a creation of statute, the statutory cause of action also “sounds in negligence” and bases liability upon fault, id., and thus should also be subject to the defense of comparative negligence.
377. Omitted from this discussion is the separate question of whether comparative negligence and several liability apply to claims brought against social hosts pursuant to the Dram Shop Act. See N.M. STAT. ANN. § 41-11-1(E) (Michie 1996).
378. Id. § 41-3A-1(A).
379. Id. § 41-3A-1(C)(4) (Michie 1996).
381. Plaintiff “alleged that the [licensees] breached a duty to provide adequate security to protect patrons of the bar.” Id. at 624, 875 P.2d at 380.
382. 113 N.M. 387, 827 P.2d 102.
activities.\textsuperscript{383} The court grounded this exception to several liability in the public policy "to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions."\textsuperscript{384} "Inherently dangerous" activities are those in which there is a "high probability or relative certainty that harm will arise in the absence of reasonable precautions."\textsuperscript{385}

Liquor licensees who negligently serve intoxicated patrons fit within the Saiz rationale for joint and several liability. It is a violation of the Liquor Control Act for a licensee to serve a person if the licensee knows or should know that the person is already intoxicated.\textsuperscript{386} Such conduct is also criminal.\textsuperscript{387} It is indisputable that violation of these statutes is an inherently dangerous activity because the violation creates a high probability that harm will result, particularly in New Mexico.\textsuperscript{388} Moreover, the Liquor Control Act seeks to encourage conscientious adherence to safety. The legislature has declared that the sale of alcoholic beverages in New Mexico must be regulated "to protect the public health, safety and morals of every community in the state."\textsuperscript{389}

In addition to the Saiz rationale, explicit legislative intent demands that licensees be jointly and severally liable with intoxicated patrons whom they serve. The legislature has declared that "[i]t is the intent of the Liquor Control Act that each person to whom a license is issued shall be fully liable and accountable for the use of the license, including but not limited to liability for all violations of the Liquor Control Act."\textsuperscript{390} The command to make licensees fully liable and the subsequent adoption of the Several Liability Act containing the public policy exception strongly suggest that the legislature has concluded that joint and several liability should apply under the public policy exception of the Several Liability Act in tort actions based upon violations of the Liquor Control Act. Had Reichert been litigated as a Dram Shop Act case instead of as a premises liability case, therefore, the result might have been different.

The application of joint and several liability in Dram Shop Act cases would make common sense, as well as legal sense. There is a qualitative difference between a premises liability case and a Dram Shop Act action. In the premises liability case, the owner's fault merely consists of failing to use care to protect patrons from harm by third persons. In the Dram Shop lawsuit, the licensee's fault consists of actively participating in the creation of a menacing third person by providing an intoxicated
person with alcoholic beverages. In effect, the licensee creates a monster and then seeks to lay off fault on his creation. It makes no sense to allow that result in light of Saiz and of the New Mexico Legislature’s declaration of policy to require full liability.

Imposing joint and several liability on the licensee will not result in a windfall benefit to the intoxicated patron. If the intoxicated patron-driver sues the licensee for injuries to the driver, the licensee can avail himself of the defense of the comparative negligence of the patron-driver to reduce his liability. When a third person is injured and sues, the intoxicated driver should be fully liable for the plaintiff’s compensable injuries even though the licensee also is fully liable. Moreover, the intoxicated driver will be subject to a claim for contribution by the licensee who pays the joint and several judgment.

CONCLUSION

The New Mexico Legislature has chosen to link the application of several liability to causes of action to which the defense of comparative negligence applies. That choice is consistent with the New Mexico Supreme Court’s decision in Scott to apply comparative negligence as well as the Scott court’s implicitly adopted several liability doctrine “if negligence or negligence-related concepts are a basis for liability.” The decision is also consistent with the Bartlett court’s explicit adoption of several liability “in a comparative negligence case.”

391. That the intoxication results from the active participation of the licensee who serves the drinks and the patron who consumes them suggests an alternative route to achieve joint and several liability. In some ways, this cooperative effort to achieve the goal of intoxication is analogous to a joint venture. See Roderick v. Lake, 108 N.M. 696, 778 P.2d 443 (Ct. App. 1989), cert. denied, 108 N.M. 681, 777 P.2d 1325. Participants in a joint venture are probably jointly and severally liable for all acts of each member in furtherance of the common goal, id. at 700, 778 P.2d at 447 (“[a]ssuming without deciding, that a joint venture between two or more tortfeasors would make them jointly and severally liable”), thus coming within the joint and several liability exception for persons vicariously liable. N.M. STAT. ANN. § 41-3A-1(B) (Michie 1996).

392. The intoxicated patron-driver must establish that the licensee was guilty of gross negligence and reckless disregard of safety in order to recover. N.M. STAT. ANN. § 41-11(B) (Michie 1996). Even a grossly negligent defendant can avail itself of comparative negligence. See Scott, 96 N.M. at 687, 634 P.2d at 1239 (noting that in assessing comparative fault, the distinction between gross negligence and ordinary negligence is abolished). The intoxicated patron-passenger who sues the licensee also would continue to be subject to the defense of comparative negligence. Baxter, 107 N.M. 48, 752 P.2d 240.

393. The arguments in favor of joint and several liability focus on the reasons that the licensee should be fully liable for the harm done to third persons at the hands of the intoxicated patron. Whether the intoxicated person should also be jointly and severally liable is a separate question. The Saiz rationale suggests that the intoxicated patron should also be jointly and severally liable. The patron-driver’s conduct is certainly inherently dangerous as that phrase is defined in Saiz, 113 N.M. at 396, 827 P.2d at 111, and the legislative determination that drunk driving is a crime, N.M. STAT. ANN. § 66-8-102 (Michie 2002), seeks to protect the public from the perils of drunk driving. When the intoxicated patron causes harm to others in ways unconnected to driving, as occurred in Reichert, where the intoxicated person shot a fellow patron, a separate analysis of the rationale for holding the intoxicated patron fully liable will be necessary.

394. See N.M. STAT. ANN. § 41-3-2 (Michie 1996) (stating that a joint tortfeasor who pays judgment is entitled to contribution based on comparative fault from other tortfeasors).

395. Id. § 41-3A-1(A).

396. The Scott court foreshadowed several liability when it declared that “[i]n multiple party cases, interrogatories will address the question of liability between each plaintiff and each defendant, to reflect such apportionment (based on comparative fault).” Scott, 96 N.M. at 688, 634 P.2d at 1240.

397. Id.

398. “The question is whether, in a comparative negligence case, a concurrent tortfeasor is liable for the entire
Linking several liability to causes of action in which the defense of comparative negligence applies has posed problems. First, determining whether comparative negligence is a defense to particular causes of action often is not easy: The courts have never addressed the issue as to some causes of action, and where they had previously held that contributory negligence was not a defense, the courts have to reconsider the ruling in light of the ameliorating effect of comparative negligence. Second, as to some causes of action in which several liability is not applicable because comparative negligence is not a defense, the courts have had to create new doctrines to redistribute losses that are now imposed fully on a defendant who is jointly liable.

Finally, the cause of action-by-cause of action approach has complicated litigation in which plaintiffs pursue multiple theories of liability, some of which are subject to several liability while others are subject to joint and several liability.

The Third Restatement approach largely ignores differences among causes of action and instead broadly imposes several liability for almost all causes of action for almost all types of damages. The drafters of the Restatement concede that there is some merit to a cause of action-by-cause of action approach such as that of New Mexico because when "states of mind or culpability change, the policy concerns of tort law also change." Nonetheless, the Restatement opts for pragmatism over theory: "[A] litigation system must be workable. It does little to advance underlying policy goals to have a system that is too complex for trial courts and jurors...to implement.

Despite twenty years of experience with New Mexico’s approach to the determination of the scope of the several liability doctrine, it is still too early to determine whether the practical difficulties of the cause of action-by-cause of action approach will outweigh the benefits that flow from maintaining traditional distinctions between different causes of action. If changes become necessary, the Several Liability Act may provide sufficient flexibility for accommodating practical concerns while maintaining doctrinal consistency. The Act’s public policy exception is an invitation to and an opportunity for the judiciary to make any changes in the scope of the doctrine of several liability that are appropriate in light of the practical problems that might surface in the future. Indeed, the Third Restatement and jurisdictions considering adoption of the Third Restatement would benefit from the inclusion of an explicit public policy exception in Tracks A and B, the portions of the Restatement that deal with comparative fault and several liability.

400. The Restatement "applies to all claims...for death, personal injury (including emotional distress or consortium), or physical damage to tangible property, regardless of the basis of liability." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 (2000). Another section of the Restatement provides an exception for claims for intentional torts. Id. § 10. Another exception applies when the damages consist of "purely intangible economic loss." Id. § 1 cmt. b.
401. Id. § 1 cmt. b.
402. Id.