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TORTS—Sovereign Immunity: *Caillouette v. Hercules*

I. INTRODUCTION

This note examines *Caillouette v. Hercules, Inc.*¹ which clarifies New Mexico's jurisprudence on the doctrine of sovereign immunity and its waiver under the New Mexico Tort Claims Act. This note begins with a brief history of the doctrine of sovereign immunity followed by an explanation of the mechanics of the Tort Claims Act. The specific facts of *Caillouette* are then discussed in the context of existing New Mexico law and policy.

A. Sovereign Immunity

The doctrine of sovereign immunity protects the government from being sued without its consent.² Sovereign immunity, rooted in the idea that "the King could do no wrong,"³ essentially prevents the public treasury from being diminished or obliterated by judgments awarded against government entities. Under the doctrine, governmental liability is disallowed, thereby leaving public funds available for their intended purposes rather than being used to satisfy judgments against the state.⁴

Practically speaking, when a private individual is harmed by the negligence of another, she has a cause of action available under tort law. When, however, the individual is harmed by the negligence of a public employee acting within the scope of her employment, there is no cause of action available unless the state has waived immunity for the particular negligent act of its employee.⁵

In New Mexico, prior to 1975, the doctrine of sovereign immunity was solidly in place.⁶ New Mexico common law assured that the state was immune from suit as were its municipalities. Realizing the inherent injustice of strict sovereign immunity, the New Mexico Supreme Court, in 1975, abolished the doctrine.⁷

B. The New Mexico Tort Claims Act⁸

The New Mexico legislature's response to the judiciary's abolition of sovereign immunity was the enactment of the Tort Claims Act in 1976.⁹

1. 113 N.M. 494, 827 P.2d 1306 (Ct. App. 1992).

2. Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 8 N.M. L. REV. 249 (1976).

3. Jamie McAlister, Comment, *The New Mexico Tort Claims Act: The King Can Do "Little" Wrong*, 21 N.M. L. REV. 441 n.10 (1991).

4. Kovnat, *supra* note 2, at 250.

5. *Id.*

6. *See Sangre de Cristo Development Corp., Inc. v. City of Santa Fe*, 84 N.M. 343, 346-47, 503 P.2d 323, 326-27, *cert. denied*, 411 U.S. 938 (1973).

7. *See Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975).

8. *See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 131, at 1044-45 (5th ed. 1984) for a discussion of how New Mexico's immunity compares with immunity in other states.

9. McAlister, *supra* note 3, at 444. The Tort Claims Act is currently codified at N.M. STAT. ANN. §§ 41-4-1 to -29 (Repl. Pamp. 1989).

In general, the Act reinstated sovereign immunity; however, the legislature excepted eight instances for which government immunity is waived, thereby permitting suits against government entities.¹⁰

In its legislative declaration, the New Mexico legislature acknowledged the inequitable results which flow from a strict application of sovereign immunity.¹¹ Nevertheless, the legislature emphasized that "the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done."¹² Furthermore, the legislature granted immunity to government entities and public employees; however, immunity from liability was waived in the specific instances set forth in sections 41-4-5 to -12 of the Tort Claims Act.

II. *CAILLOUETTE V. HERCULES, INC.*

A. *Statement of the Case*

Nancy Caillouette, as the personal representative of the decedent, Latha Caillouette, brought an action for wrongful death.¹³

Hercules, Inc., an explosives manufacturer, hired a truck owned by Tri-State Motor Transit in order to transport solid propellant explosives. On May 29, 1987, the truck overturned north of Alamogordo on U.S. Highway 54. The trailer burst, causing cartons of explosive powder to break. As a result, explosive powder was spilled throughout the trailer.¹⁴

Lt. Arthur Archibeque of the New Mexico State Police responded to the accident scene. Once there, he called a wrecking company and requested the necessary equipment as well as a crew to clean up the spill. Archibeque supervised the work of the clean-up crew. He then had the damaged trailer containing the broken cartons and the spilled explosive powder towed to a wrecker yard in Alamogordo, and subsequently left the scene of the accident.¹⁵ Once at the wrecker yard, a representative of Hercules, Inc. assumed supervision of the clean-up of the damaged trailer.¹⁶

One week later, under Tri-State's direction, the damaged trailer was moved to H & R Automotive Company for repair. The damaged trailer was still contaminated with a residue of explosive powder. The repair of the trailer was supervised by an employee from Tri-State.¹⁷

Plaintiff's decedent, Latha Caillouette, was an employee at H & R Automotive. On June 6, 1987, he was repairing the roof of the damaged trailer with a cutting torch. The torch ignited the residue of explosive

10. McAlister, *supra* note 3, at 444 n.41.

11. N.M. STAT. ANN. § 41-4-2(A) (Repl. Pamph. 1989).

12. *Id.*

13. *Caillouette*, 113 N.M. at 494, 827 P.2d at 1308.

14. *Id.* at 493-94, 827 P.2d at 1307-08.

15. *Id.* at 494, 827 P.2d at 1308.

16. *Id.*

17. *Id.*

powder left in the trailer, causing severe burns. On June 14th, Latha died as a result of the burns.¹⁸

Plaintiff filed suit against Tri-State, Hercules, Archibeque, and the Department of Public Safety [hereinafter the Department].¹⁹ Plaintiff's complaint alleged negligence, nuisance, and strict liability.²⁰ Defendants moved for summary judgment, arguing that the decedent was not a foreseeable victim, or, alternatively, that decedent's use of a cutting torch constituted an intervening, superseding cause. The Department also argued that it had not received timely notice of the claim. Both motions for summary judgment were denied by the trial court.²¹

Before trial, Tri-State settled with Plaintiff. At trial, after the close of Plaintiff's evidence, Defendants Archibeque and the Department moved for a directed verdict, arguing that they were immune from suit because the Tort Claims Act did not contain a relevant waiver of immunity. The court granted this motion and dismissed the claims against the government tortfeasors. The jury found Hercules negligent and awarded damages to Plaintiff.²²

B. Issues²³

The *Caillouette* court considered whether the Tort Claims Act waived immunity when a government entity is involved in cleaning up a hazardous waste accident on a highway and someone is subsequently killed by dangers remaining from the accident.²⁴ Ms. Caillouette pointed to three sections of the Tort Claims Act to support her contention that the government had waived immunity in this case.²⁵

First, Ms. Caillouette claimed that immunity was waived under the law enforcement exception to the Tort Claims Act.²⁶ Plaintiff relied on this section on the grounds that Archibeque's negligence while acting in the scope of his duties as a law enforcement officer resulted in a battery on Latha Caillouette.²⁷ The court found this argument unpersuasive,

18. *Id.*

19. The Department, Archibeque's employer, was joined as a defendant under the doctrine of respondeat superior.

20. *Caillouette*, 113 N.M. at 494, 827 P.2d at 1308.

21. *Id.* at 495, 827 P.2d at 1309.

22. *Id.* Three percent of the fault was attributed to Archibeque and twenty percent to the Department.

23. For a more detailed discussion of the court's rationale in resolving each issue, see *infra* part III.

24. *Id.* at 496, 827 P.2d at 310.

25. *Id.*

26. Section 41-4-12 of the Tort Claims Act provides:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989).

27. *Caillouette*, 113 N.M. at 496, 827 P.2d at 1310.

stating that the harm which befell the decedent was an accident rather than a battery.²⁸

Plaintiff also relied on section 41-4-12 to argue that Archibeque's conduct constituted a breach of a statutory duty which deprived Caillouette of the rights of life, property, and happiness, which are "secured by the constitution and laws of . . . New Mexico."²⁹ The court found this argument unpersuasive as well, stating that Plaintiff had failed to provide sufficient evidence to show a breach of a statutory duty.³⁰ The court, therefore, concluded that immunity was not waived under section 41-4-12 of the Act.³¹

Ms. Caillouette also asserted that immunity was waived as a result of Defendant Archibeque's negligent maintenance of a motor vehicle pursuant to section 41-4-5 of the Tort Claims Act.³² She argued that Archibeque negligently maintained Tri-State's truck while acting in the scope of his duties as a public employee.³³ The court noted that this argument was misplaced because maintenance was not at issue here;³⁴ it was the removal of the trailer from the highway rather than the repair of the trailer with which Archibeque was involved.³⁵ The court, therefore, characterized Plaintiff's claim as one of negligent supervision rather than negligent maintenance,³⁶ and it declined to extend liability to the state in this instance.³⁷ Consequently, the court concluded that immunity was not waived under section 41-4-5 of the Act.³⁸

Finally, Ms. Caillouette argued that immunity was waived because Defendant Archibeque negligently operated or maintained machinery or equipment while acting in the scope of his duties as a public employee.³⁹

28. *Id.* For the definition of battery, see N.M. STAT. ANN. § 30-3-4 (Repl. Pamp. 1984).

29. *Caillouette*, 113 N.M. at 497, 827 P.2d at 1311 (quoting N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989)).

30. *Id.* at 497-98, 827 P.2d at 1311-12.

31. *Id.* at 498, 827 P.2d at 1312.

32. Section 41-4-5 of the Tort Claims Act provides:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft.

N.M. STAT. ANN. § 41-4-5 (Repl. Pamp. 1989).

33. *Caillouette*, 113 N.M. at 498, 827 P.2d at 1312.

34. Maintenance of a motor vehicle under § 41-4-5 means keeping the vehicle safe for public use. See *McCurry v. City of Farmington*, 97 N.M. 728, 731, 643 P.2d 292, 295 (Ct. App. 1982).

35. *Caillouette*, 113 N.M. at 498, 827 P.2d at 1312.

36. *Cf. Romero v. State*, 112 N.M. 332, 815 P.2d 628 (1991) (holding that maintenance could include the State Highway Dept. supervising the county's maintenance of a road in order to bring the Dept. within the waiver granted by § 41-4-11). The court of appeals concluded that *Romero* was inapplicable to *Caillouette* because Archibeque had only a general supervisory responsibility in removing the trailer from the highway; therefore, his actions did not constitute maintenance of a highway.

37. *Caillouette*, 113 N.M. at 498-99, 827 P.2d at 1312-13.

38. *Id.* at 499, 827 P.2d at 1313.

39. Section 41-4-6 of the Tort Claims Act provides:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death

The court rejected this argument for reasons similar to its rejection of section 41-4-5 as a waiver of immunity.⁴⁰ That is, Defendant Archibeque played a supervisory role and was not involved in the operation or maintenance of machinery or equipment.⁴¹ In addition, the court noted that the machinery or equipment at issue in this case was privately owned and operated whereas section 41-4-6 waives immunity when the injury is caused by property owned and operated by the government.⁴² The court concluded that immunity was not waived under section 41-4-6 of the Act.⁴³

III. NEW MEXICO CASE LAW INTERPRETING THE TORT CLAIMS ACT

A. Case Law on Which the *Caillouette* Court Relied

Traditionally, the New Mexico Court of Appeals has interpreted waivers of immunity restrictively.⁴⁴ On the other hand, the New Mexico Supreme Court has been more willing to find a waiver of immunity under the Act.⁴⁵ True to this general trend, the court of appeals denied that immunity had been waived in *Caillouette*.⁴⁶

1. Section 41-4-12 Does Not Provide a Waiver of Immunity

In defining the parameters of the law enforcement exception, the court first considered *Methola v. County of Eddy*.⁴⁷ In *Methola*, the New Mexico Supreme Court held that section 41-4-12 waives immunity when the actions of a law enforcement officer caused one of the specifically enumerated intentional torts articulated in that section.⁴⁸

or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

N.M. STAT. ANN § 41-4-6 (Repl. Pamp. 1989).

40. *Caillouette*, 113 N.M. at 499, 827 P.2d at 1313.

41. *Id.*

42. *Id.*

43. *Id.*

44. See e.g. *McDermitt v. Corrections Corporation of America*, 112 N.M. 247, 814 P.2d 115 (Ct. App. 1991) *rev'd*, 112 N.M. 332, 815 P.2d 628 (1991); *Romero v. State*, 112 N.M. 291, 814 P.2d 1019 (Ct. App. 1991); *Armijo v. Department of Health and Environment*, 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989); *Martinez v. Kaune Corp.*, 106 N.M. 489, 745 P.2d 714 (Ct. App. 1987); *Chee Owens v. Leavitts Freight Service*, 106 N.M. 512, 745 P.2d 1165 (Ct. App. 1987). *But see Ortiz v. New Mexico State Police*, 112 N.M. 249, 814 P.2d 117 (Ct. App. 1991).

45. See e.g. *Bober v. New Mexico State Fair*, 111 N.M. 644, 808 P.2d 614 (1991); *Romero v. State*, 112 N.M. 332, 815 P.2d 628 (1991); *California First Bank v. State*, 111 N.M. 64, 801 P.2d 646 (1990); *Castillo v. County of Santa Fe*, 107 N.M. 204, 755 P.2d 48 (1988); *Miller v. New Mexico Department of Transportation*, 106 N.M. 253, 741 P.2d 1374 (1987); *Methola v. County of Eddy*, 95 N.M. 329, 622 P.2d 234 (1980).

46. The New Mexico Supreme Court denied cert. on February 18, 1992, so the decision of the court of appeals will stand.

47. 95 N.M. 329, 622 P.2d 234 (1980).

48. *Id.* at 333-34, 622 P.2d 238-39.

Ms. Caillouette relied on *Methola* on the grounds that Defendant Archibeque's alleged negligence caused a battery on Latha Caillouette.⁴⁹ The court declined to apply *Methola* to the case at bar, finding that the harm which resulted in death was an accident.⁵⁰ The court pointed out that, though *Methola* waives immunity for the negligence of a police officer, that negligence must cause an intentional tort.⁵¹ The court reiterated: "[I]mmunity is not waived for negligence standing alone."⁵² The court noted that the supreme court applied a similar analysis in *Bober v. New Mexico State Fair*⁵³ where it stated that "no case has held that simple negligence in the performance of a law enforcement officer's duty amounts to commission of one of the torts listed in [section 41-4-12]."⁵⁴ The court, relying on *Methola* and its progeny, concluded that Caillouette's claim was for personal injury resulting from negligence alone. Thus, the first portion of section 41-4-12 did not provide a waiver of immunity.

Ms. Caillouette's second argument in support of a waiver of immunity was that Latha Caillouette was deprived of rights secured by the constitution and laws of New Mexico and that this deprivation caused the injury which led to death.⁵⁵ In rejecting this contention, the court relied primarily on *California First Bank v. State*.⁵⁶ There, the court considered whether the state can be held vicariously liable for the negligent enforcement of liquor control laws when that negligent enforcement resulted in a battery done by a third person.⁵⁷ The supreme court held that Plaintiff stated a cause of action based on the county's vicarious liability for the failure of sheriff's deputies to enforce liquor control laws which violated a right secured by New Mexico law.⁵⁸ The *California First Bank* court further held that this violation of a right secured by New Mexico law was sufficient to waive immunity under section 41-4-12.⁵⁹

The *Caillouette* court noted that *California First Bank's* construction of the latter portion of section 41-4-12 requires a breach of a statutory duty or a constitutional violation.⁶⁰ In *California First Bank*, the Sheriff's deputies failed to enforce the state's liquor control laws which brought the case within the ambit of section 41-4-12. In *Caillouette*, however, that court claimed that there was insufficient evidence to show a breach

49. *Caillouette*, 113 N.M. at 496, 827 P.2d at 1310.

50. *Id.* Unlike the conduct in *Methola*, Archibeque's conduct did not create a risk that a third person would intentionally harm Plaintiff's decedent.

51. *Id.* at 497, 827 P.2d at 1311.

52. *Id.*; see also *McDermitt v. Corrections Corp. of America*, 112 N.M. 247, 814 P.2d 115 (Ct. App. 1991), in which the court of appeals held that when a law enforcement officer negligently trains or supervises a subordinate, and this subordinate subsequently commits one of the specifically enumerated intentional torts, § 41-4-12 waives the immunity of the supervisor.

53. 111 N.M. 644, 808 P.2d 614 (1991).

54. *Caillouette*, 113 N.M. at 497, 827 P.2d at 1311 (quoting *Bober*, 111 N.M. at 654, 808 P.2d at 615).

55. *Id.* at 497, 527 P.2d. at 1311.

56. 111 N.M. 64, 801 P.2d 646 (1990).

57. *Id.*

58. *Id.* at 71, 801 P.2d at 653.

59. *Id.* at 75, 801 P.2d at 657.

60. *Caillouette*, 113 N.M. at 497, 827 P.2d at 1311.

of a statutory duty or constitutional right; therefore, there was no "deprivation of any rights."⁶¹ Consequently, the court concluded that Plaintiff failed to show that immunity was waived by section 41-4-12 of the Tort Claims Act.

2. Section 41-4-5 Does Not Provide a Waiver of Immunity

Plaintiff relied on section 41-4-5 as the basis for a waiver of immunity, arguing that Defendant Archibeque negligently operated or maintained a motor vehicle.⁶² The court pointed out that "[t]he activity on which Plaintiff's claim appears to depend is the trailer's removal from a public highway in a particular condition, rather than its subsequent repair."⁶³ The court decided that the nature of Caillouette's claim was not negligent maintenance, but instead, negligent inspection or supervision.⁶⁴ The court, after characterizing Plaintiff's claim as one of negligent inspection, concluded that section 41-4-5 was inapposite. In doing so, the court relied primarily on *Armijo v. Department of Health and Environment*.⁶⁵

Though the *Armijo* court was not faced with the task of construing section 41-4-5, it did construe section 41-4-9 of the Act,⁶⁶ which has the term "operation" in common with section 41-4-5. Plaintiff in *Armijo* sued the Department of Health and Environment (HED) claiming that its employees were public employees that "operated" a mental health facility within the meaning of section 41-4-9.⁶⁷ The *Armijo* court noted that the term "operation," both in section 41-4-9 and section 41-4-5, has been narrowly construed.⁶⁸ On the other hand, the term "maintenance" as used in the Act has been expansively construed.⁶⁹ The *Armijo* court,

61. *Id.* Plaintiff cites § 74-4B-5 of the Emergency Management Act (EMA) as the basis of her argument that a statutory duty had been breached. The court concluded there was a lack of evidence to support a finding that Defendants failed to enforce the EMA. Additionally, the court pointed to two other provisions of the EMA to support its position. Section 74-4B-10 of the EMA states: "Nothing in the [EMA] . . . shall be construed to relieve hazardous materials owners, shippers or carriers of their responsibilities and liability in the event of an accident." Section 74-4B-4(C) states: "Nothing in the [EMA] shall be construed as a waiver or alteration of the immunity from liability granted under the Tort Claims Act." N.M. STAT. ANN. §§ 74-4B-5 & -10 & 4(C) (Repl. Pamp. 1992).

62. *Caillouette*, 113 N.M. at 498, 827 P.2d at 1312.

63. *Id.*

64. *Id.*

65. 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989).

66. Section 41-4-9 of the Tort Claims Act provides:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities.

N.M. STAT. ANN. § 41-4-9 (Repl. Pamp. 1989).

67. *Armijo*, 108 N.M. at 616, 775 P.2d at 1333.

68. *Id.* at 618, 775 P.2d at 1335. See *Adams v. Japanese Car Care*, 106 N.M. 376, 743 P.2d 635 (Ct. App. 1987); *Chee Owens v. Leavitts Freight Serv., Inc.*, 106 N.M. 512, 745 P.2d 1165 (Ct. App. 1987).

69. *Armijo*, 108 N.M. at 618, 775 P.2d at 1335; see also *Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 741 P.2d 1374 (1987); *Castillo v. County of Santa Fe*, 107 N.M. 204, 755 P.2d 48 (1988).

however, qualified the traditionally expansive definition of "maintenance" by pointing to *Martinez v. Kaune Corp.*⁷⁰ which held that "operation or maintenance" as used in section 41-4-6 did not extend to the state's licensing or inspection of a dairy farm or food store.⁷¹

The *Armijo* court declined to expand the narrowly construed term "operation" to include "regulation." The court concluded that the legislature's "use of the more narrowly construed word 'operation' in section 41-4-9 indicates an intent not to extend liability to all activities licensed or regulated by the state."⁷² therefore, HED, was held to be immune under section 41-4-9.⁷³

The *Caillouette* court repeated its *Armijo* analysis by stating that the use of the phrase "operation or maintenance" in section 41-4-5 does not extend to all activities which the state supervises.⁷⁴ Here, Defendant Archibeque played only a supervisory role when he ordered that the damaged trailer be removed from the highway.⁷⁵ The court concluded, therefore, that his actions did not constitute "operation or maintenance" within the meaning of section 41-4-5.⁷⁶ Consequently, immunity was not waived by section 41-4-5 of the Act.⁷⁷

3. Section 41-4-6 Does Not Provide a Waiver of Immunity

Plaintiff relied on section 41-4-6 as the basis for a waiver of immunity, arguing that Defendant Archibeque negligently operated or maintained machinery or equipment.⁷⁸ Because section 41-4-6, like section 41-4-5, contains the phrase "operation or maintenance," the court relied on its analysis of section 41-4-5 to conclude that section 41-4-6 was also inapplicable to the case at bar.⁷⁹ In addition, the court relied on *Castillo v. County of Santa Fe*⁸⁰ to support its conclusion that section 41-4-6 was inapplicable. The *Castillo* court concluded that section 41-4-6 waived immunity "where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government."⁸¹ Since the property at issue in *Caillouette* was privately owned and operated, the court concluded that section 41-4-6 did not provide a waiver of immunity.

70. 106 N.M. 489, 745 P.2d 714 (Ct. App. 1987).

71. *Cf. Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 741 P.2d 1374 (1987) (holding that issuance of an oversize-vehicle permit falls within the meaning of maintenance of a highway as used in § 41-4-11).

72. *Armijo*, 108 N.M. at 618, 775 P.2d at 1335.

73. *Id.*

74. *Caillouette*, 113 N.M. at 499, 827 P.2d at 1313.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 107 N.M. 204, 755 P.2d 48 (1988).

81. *Id.*

IV. POLICY

A. *Policy Behind Caillouette v. Hercules, Inc.*

As discussed previously at some length, the court of appeals held that sovereign immunity was not waived in *Caillouette*; therefore, Defendants were not held liable for Caillouette's death. The general policy behind the court's decision seems to be that it is not feasible to hold the government responsible when an accident is too attenuated from the action of a government employee. A contrary holding waiving sovereign immunity regardless of the nature or the remoteness of the action from the injury would have effectively circumvented the statutory scheme which waives government immunity in eight instances.

Ms. Caillouette had the burden of showing that the nature of Defendant's action fell within one of the waiver provisions of the Act. In addition she needed to show that Defendant's action caused the injury. Plaintiff failed on both accounts.

The court's decision that immunity was not waived under either sections 41-4-5 or -6 is based on sound policy. On the other hand, the court's decision that immunity was not waived under section 41-4-12 appears to be a sleight of hand.

1. Policy Used to Reject Claim Under Section 41-4-5

As discussed above, the court concluded that Lt. Archibeque's actions did not constitute "operation or maintenance" of a motor vehicle within the meaning of section 41-4-5. As the court of appeals has stated in the past, "the maintenance of motor vehicles connotes the act of keeping them safe for public use."⁸² Clearly, this case does not fall within such a scenario. Had the court found a waiver of immunity under section 41-4-5, it would have stretched the legislature's intent beyond reason. Government entities would be held liable for accidents far removed from the public employee's actions. In addition, every time there was an accident similar to the one in this case, the police officer would not only be responsible for supervising the clean-up of the highway but also for supervising the repair of all vehicles involved in the accident. Finally, if immunity was waived under this section, the government would be responsible for damage caused by privately-owned vehicles not under its control. It was not Lt. Archibeque's duty either to operate or maintain the trailer, under established definitions of these words. Therefore, it was reasonable and sound for the court to conclude that section 41-4-5 did not waive immunity in this case.

2. Policy Used to Reject Claim Under Section 41-4-6

The court also concluded that Lt. Archibeque's actions did not constitute "operation or maintenance" of machinery or equipment within the mean-

82. *McCurry v. City of Farmington*, 97 N.M. 728, 731, 643 P.2d 292, 295 (Ct. App. 1982).

ing of section 41-4-6. As the court of appeals previously stated, section 41-4-6 "waives immunity for injuries sustained due to defects in buildings, and is in general intended to allow people to sue in premises liability situations."⁸³ Not only is this case not about premises liability, but government property is not at issue at all here.⁸⁴ Had the court found a waiver of immunity under this section, the government would effectively be held liable for operating and maintaining privately-owned machinery or equipment. Moreover, the phrase "operation and maintenance of machinery or equipment" would be extended to cover Archibeque's role in supervising the clean-up of the highway. Interpreting the eight exceptions so broadly that they encompass any situation where a public employee acts, would eliminate the policy of retained partial immunity. Here again, the court's conclusion that immunity was not waived under section 41-4-6 was a sound policy decision.

3. Policy Used to Reject Claim Under Section 41-4-12

Plaintiff used both portions of section 41-4-12 to argue that immunity had been waived. The first portion provides a waiver of immunity when the actions of a law enforcement officer cause one of the specifically enumerated intentional torts, resulting in wrongful death. The second portion of section 41-4-12 provides a waiver of immunity for wrongful death resulting from a deprivation of rights secured by law. The court rejected the first claim because there was no intentional tort involved. New Mexico case law has clearly established that negligence alone without the occurrence of an intentional tort is not enough to waive immunity.⁸⁵ The policy behind these cases is that if law enforcement officers were liable for every act of negligence, the principle of partial sovereign immunity would be significantly curtailed. According to *Methola*, the legislature intended to waive immunity only for negligence which leads to one of the enumerated intentional torts.

Plaintiff relied on section 29-1-1,⁸⁶ section 41-2-1,⁸⁷ and section 74-4B-5⁸⁸ to argue that violation of these statutes deprived Latha Caillouette of rights secured by law which waives immunity under section 41-4-12. Plaintiff also relied on Article II, section 4 of the New Mexico Constitution⁸⁹ to argue that immunity under section 41-4-12 was waived since Archibeque's actions deprived Caillouette of his life.

83. *Rivera v. King*, 108 N.M. 5, 12, 765 P.2d 1187, 1194 (Ct. App. 1988).

84. Immunity was waived in a premises liability situation involving government property under § 41-4-6 in *Castillo v. County of Santa Fe*, 107 N.M. 204, 755 P.2d 48 (1988).

85. See, e.g., *Methola*, 95 N.M. 329, 622 P.2d 234 (1980); *Bober*, 111 N.M. 644, 808 P.2d 614 (1991).

86. Stating that it is a peace officer's duty to investigate all violations of criminal laws. N.M. STAT. ANN. § 29-1-1 (Repl. Pamp. 1990)

87. The wrongful death statute. N.M. STAT. ANN. § 41-2-1 (Repl. Pamp. 1989).

88. Stating the duties of the state police emergency response officer under the Emergency Management Act. N.M. STAT. ANN. § 74-4B-5 (Repl. Pamp. 1992).

89. Life, property, and happiness are inherent rights. N.M. CONST. art. II § 4.

The court stated that "Plaintiff's reliance on the wrongful death statute and the state constitution is misplaced."⁹⁰ However, the court here ignored Plaintiff's reliance on section 29-1-1. The supreme court has specifically held that section 29-1-1 secures an individual right under New Mexico law, the deprivation of which provides a waiver of immunity under section 41-4-12.⁹¹ The following policy argument buttressed the court's decision in *California First Bank*: "allowing personal injury actions under the Tort Claims Act against the governmental entities employing law enforcement officers encourages the development of better training and supervision programs, rather than simply imposing cumulative punishment on the officers themselves."⁹²

The court just as quickly dismissed Plaintiff's reliance on section 74-4B-5 which sets out the duties of the state police emergency response center, stating that there was insufficient evidence of a breach of a statutory duty under the Emergency Management Act (EMA). Therefore, the court felt it unnecessary to reach the question of whether section 74-4B-5 "secures a right or rights 'for the violation of which Section 41-4-12 provides an independent waiver of immunity.'"⁹³

Admittedly, counsel for Plaintiff failed to argue effectively that section 74-4B-5 created an individual right the deprivation of which immunity would be waived under section 41-4-12.⁹⁴ But the court seems to give short shrift to the notion that a breach of a statutory duty occurred under the EMA. The court simply stated, "we cannot conclude that Archibeque or the center failed to enforce the EMA"⁹⁵ without devoting much discussion to *exactly* what is required under the Act.

Perhaps the court would have been more amenable to finding that immunity was waived under section 41-4-12 had there been no private defendants involved from whom Plaintiff could recover damages. From a policy standpoint, the court may have thought that since Plaintiff could recover from two private defendants, there was no reason to open the government up to liability in this instance. The weight of the doctrine of sovereign immunity would have been heavier to bear had Ms. Caillouette been precluded from recovering damages at all.

It is worth noting that Plaintiff did not rely on section 41-4-11 of the Tort Claims Act as the basis for a waiver of immunity. Section 41-4-11 waives immunity for wrongful death "caused by the negligence of public employees while acting within the scope of their duties during the

90. *Caillouette*, 113 N.M. at 497, 827 P.2d at 1311.

91. *California First Bank v. State*, 111 N.M. 64, 75, 801 P.2d 646, 657 (1990).

92. *Id.* It is true that *Caillouette*, unlike *California*, does not involve the failure to investigate the violation of a criminal law. It could be argued, therefore, that § 29-1-1 is not applicable to *Caillouette*. Perhaps, however, § 29-1-1 should be extended to situations such as *Caillouette* where there is a possible violation of a regulatory, as opposed to a criminal, law.

93. *Caillouette*, 113 N.M. at 497, 827 P.2d at 1311.

94. See Plaintiff-Appellant's Answer Brief at 15 and Plaintiff-Appellant's Reply Brief at 8, *Caillouette* (No. 12,464). Nowhere in her Brief-in-Chief does Plaintiff make such an argument.

95. *Caillouette*, 113 N.M. at 497, 827 P.2d at 1311.

construction, and in subsequent maintenance of" a highway.⁹⁶ This section has traditionally been interpreted broadly. Indeed, our supreme court has gone as far as to say that the Department of Transportation's issuance of an oversize-vehicle permit falls within the meaning of maintenance of a highway.⁹⁷ Perhaps it would have been equally as willing to say that state police responding to and dealing with a hazardous waste accident on a highway falls within the meaning of maintenance of a highway. Admittedly, the event which caused Latha Caillouette's death did not happen on the highway. However, one could argue that improperly removing from the scene of a highway accident a vehicle laden with explosive residue which will foreseeably cause harm at the location to which it is moved constitutes maintenance of a highway.

V. CONCLUSION

In the case of *Caillouette v. Hercules, Inc.*, the New Mexico Court of Appeals found no waiver of immunity under sections 41-4-5, -6, or -12 of the Tort Claims Act. Nancy Caillouette, therefore, was able to collect damages for the death of her husband, Latha Caillouette, from two private defendants but not from the government defendants, Lt. Archibeque and the Department of Public Safety.

CAREN I. FRIEDMAN

96. N.M. STAT. ANN. § 41-4-11 (Cum. Supp. 1992).

97. *Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 741 P.2d 1374 (1987).