



Summer 1995

## **Tort Law - New Mexico Examines the Doctrine of Comparative Fault in the Context of Premises Liability: Reichert v. Adler**

Pamela J. Sewell

### **Recommended Citation**

Pamela J. Sewell, *Tort Law - New Mexico Examines the Doctrine of Comparative Fault in the Context of Premises Liability: Reichert v. Adler*, 25 N.M. L. Rev. 353 (1995).

Available at: <https://digitalrepository.unm.edu/nmlr/vol25/iss2/15>

# TORT LAW—New Mexico Examines the Doctrine of Comparative Fault in the Context of Premises Liability: *Reichert v. Adler*

## I. INTRODUCTION

In *Reichert v. Adler*,<sup>1</sup> the New Mexico Supreme Court held that the fault of a premises owner who negligently failed to protect patrons from foreseeable harm may be compared to a third party intentional tortfeasor who caused the harm.<sup>2</sup> Before *Reichert*, a premises owner could be liable for all of a patron's injuries caused by third parties;<sup>3</sup> however, the *Reichert* court's holding diminished the premises owner's liability by allowing a negligent premises owner to apportion his liability among joint tortfeasors, whether their conduct was "intentional, negligent, or otherwise."<sup>4</sup> This Note provides a brief overview of the comparative fault doctrine in New Mexico, examines the rationale of *Reichert*, and explores the application of comparative fault to premises liability after *Reichert*.

## II. STATEMENT OF THE CASE

Pablo Ochoa killed Alfred Castillo<sup>5</sup> in the A-Mi-Gusto Lounge in Albuquerque on December 20, 1985.<sup>6</sup> Both Castillo and Ochoa were patrons of the bar at the time of the incident. Prior to the shooting, a bar employee observed Castillo and Ochoa arguing for almost five minutes but made no attempt to stop the confrontation or summon the police.<sup>7</sup> The argument subsided when Castillo went into the bar's office to cash his A-Mi-Gusto Lounge paycheck. Castillo told a bar employee that he feared Ochoa would act violently. Castillo also informed the employee that he knew Ochoa carried a gun, and that he had heard a rumor that Ochoa had killed someone in another state. Castillo then returned to the bar where the argument resumed and escalated. Finally, Ochoa pulled a pistol, shot Castillo six times, fled from the bar, and escaped apprehension.

---

1. 117 N.M. 623, 875 P.2d 379 (1994).

2. *Id.* at 625, 875 P.2d at 381.

3. *See Coca v. Arceo*, 71 N.M. 186, 189, 376 P.2d 970, 973 (1962) (recognizing the potential liability for a business owner who could have discovered the harmful act through the exercise of reasonable care and either controlled the harmful conduct or called the police).

4. *Reichert*, 117 N.M. at 625, 875 P.2d at 381.

5. Alfred Castillo was a sheetrock installer by trade as well as a musician who played at the A-Mi-Gusto Lounge. *Id.* at 624, 875 P.2d at 380.

6. *Id.* Unless otherwise cited, all subsequent references to the facts of this case refer to *Reichert*, 117 N.M. at 624, 875 P.2d at 380.

7. The A-Mi-Gusto Lounge had a reputation as being one of the most dangerous bars in Bernalillo County and had been the scene of numerous shootings, stabbings, and assaults. Nevertheless, the bar did not employ any professional security personnel. The bouncer that the bar employed did not arrive at the bar until after this incident. *Id.*

As personal representative of Castillo's estate, Joseph Reichert brought a wrongful death action<sup>8</sup> against Tony and Josie Adler.<sup>9</sup> Reichert claimed that the Adlers breached their duty as premises owners to provide adequate security to protect bar patrons from foreseeable harm. The Adlers attempted to place all the fault on Ochoa.<sup>10</sup> The trial court, however, found that the Adlers had breached their duty to Castillo, and held them liable for all damages. The Adlers appealed.<sup>11</sup> The New Mexico Court of Appeals held that the actions of the Adlers and Ochoa should be compared under the doctrine of comparative negligence.<sup>12</sup> The supreme court affirmed the court of appeals, allowing for comparison of fault between a negligent premises owner and a third party intentional tortfeasor.

### III. COMPARATIVE NEGLIGENCE IN NEW MEXICO

#### A. Apportionment of Fault between Plaintiff and Defendant

New Mexico abandoned the doctrine of contributory negligence<sup>13</sup> and adopted the doctrine of pure comparative negligence in *Scott v. Rizzo*.<sup>14</sup> Pure comparative negligence holds "all parties fully responsible for their own respective acts to the degree that those acts have caused harm" by

8. See N.M. STAT. ANN. §§ 41-2-1 to -4 (Repl. Pamp. 1989). New Mexico's Wrongful Death Act allows for a personal injury claim to survive the death of the injured. N.M. STAT. ANN. § 41-2-1. The Act requires that every such action "shall be brought by and in the name of the personal representative or representatives of such deceased person." N.M. STAT. ANN. § 41-2-3.

9. Tony and Josie Adler were the owners of the A-Mi-Gusto Lounge at the time of the shooting. *Reichert*, 117 N.M. at 623, 875 P.2d at 379.

10. *Id.*

11. *Id.* The Adlers raised the following three issues on appeal:

(1) whether the failure to join an indispensable party [whom the Adlers claim is the actual owner] constitutes a jurisdictional defect requiring reversal; (2) whether there was substantial evidence indicating that Defendants had notice that the decedent was in danger; and (3) whether the amount of the award against Defendants should be reduced under the doctrine of comparative fault.

*Reichert v. Adler*, 117 N.M. 628, 628, 875 P.2d 384, 384 (Ct. App. 1992), *aff'd*, 117 N.M. 623, 875 P.2d 379 (1994).

The court of appeals held that the Adlers could not prevail on the indispensable party claim because they made no showing of prejudice to the absent party. *Id.* at 630, 875 P.2d at 386. The court also held that the district court properly decided the second issue. *Id.* at 632, 875 P.2d at 388.

12. See *id.* at 635, 875 P.2d at 391. The court of appeals focused on the basic principle of fairness underlying the pure form of comparative negligence adopted in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). The court held that "to impose liability on a negligent tortfeasor beyond the percentage of that tortfeasor's comparative fault is to impose liability without fault." *Id.* at 636, 875 P.2d at 392.

13. Contributory negligence served as an absolute bar to a plaintiff's recovery of damages when there was a finding of any fault by the plaintiff. W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 65 at 451-52 (5th ed. 1984). The harshness of contributory negligence upon the plaintiff was readily apparent because it barred any recovery even when the plaintiff was only minimally at fault. See *id.*

14. 96 N.M. 682, 634 P.2d 1234 (1981). In *Scott*, the court did not address whether the comparative fault doctrine apportions fault to other than negligent tortfeasors. The court explicitly stated that the doctrine applies "between or among negligent parties whose negligence proximately causes any part of a loss or injury." *Id.* at 688, 634 P.2d at 1240 (emphasis added).

denying recovery for one's own fault and permitting recovery to the extent of another's fault.<sup>15</sup> In pure comparative fault, a plaintiff's contributory negligence does not bar his recovery altogether, but does serve to reduce his damages in proportion to his fault.<sup>16</sup> Thus, while the doctrine of comparative fault considers the plaintiff's misconduct when determining the liability arising from an accident, it abandons the "all-or-nothing" approach of contributory negligence.<sup>17</sup> However, a number of courts have declined to employ the doctrine of comparative fault when comparing the negligent acts of a plaintiff with the intentional tortious conduct of the defendant.<sup>18</sup>

## B. Apportionment of Damages between Joint Tortfeasors

### 1. New Mexico Applies Several Liability to Joint Tortfeasors

In *Bartlett v. New Mexico Welding Supply, Inc.*,<sup>19</sup> the court of appeals held that, in a comparative negligence case, one concurrent tortfeasor cannot be held liable for the fault of other concurrent tortfeasors.<sup>20</sup> The court reasoned that the adoption of pure comparative negligence involved more than the removal of contributory negligence as a bar to recovery; it also recognized the fact finder's ability to apportion degrees of fault among defendants.<sup>21</sup> The *Bartlett* court, therefore, expanded New Mexico's doctrine of comparative negligence by rejecting joint and several liability<sup>22</sup> in favor of the rule that each individual tortfeasor should be held responsible only for his or her percentage of the harm.<sup>23</sup>

---

15. *Id.* at 690, 634 P.2d at 1242.

16. See Joseph Goldberg, *Judicial Adoption of Comparative Fault in New Mexico: The Time is at Hand*, 10 N.M. L. REV. 3, 6 (1979).

17. *Id.*

18. By viewing intentional conduct as "different in kind" from negligence, these courts do not compare intentional acts with negligent acts. See, e.g., *Bell v. Mickelsen*, 710 F.2d 611 (10th Cir. 1983) (holding that an intentional tort is not "negligence" in the strict sense "since it involves intent rather than inadvertence, and is positive rather than negative"); *Lynn v. Taylor*, 642 P.2d 131 (Kan. App. 2d 1982) (concluding that because an intentional tort had no fault basis with which negligence could compare, it was difficult to envision how a court could apply comparative fault principles to intentional torts).

19. 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

20. *Id.* at 159, 646 P.2d at 586.

21. See *id.* at 155, 646 P.2d at 582. This line of reasoning logically follows the supreme court's recognition in *Scott* of the fact finder's ability to apportion degrees of negligence between the plaintiff and the defendant. See *id.* at 158, 646 P.2d at 585.

22. Joint and several liability allows a plaintiff to collect the entire judgment from any one tortfeasor even if the wrongdoing of that tortfeasor only contributed to a small part of the harm inflicted. See *KEETON ET AL.*, *supra* note 13, § 52, at 350-51.

23. *Bartlett*, 98 N.M. at 159, 646 P.2d at 586. *Bartlett* involved an automobile accident which resulted when a phantom driver swerved off and then back onto the road, causing the defendant to hit the plaintiff. The court determined that the fault of the phantom party must be considered because "[f]airness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis." *Id.* at 158, 646 P.2d at 585.

The New Mexico legislature codified *Bartlett's* abolition of joint and several liability in section 41-3A-1<sup>24</sup> of the New Mexico statutes, the Several Liability Act.<sup>25</sup> The Several Liability Act imposed several liability upon concurrent tortfeasors whenever the doctrine of comparative fault applies.<sup>26</sup> The statute provides for joint and several liability in situations involving intentional torts, vicarious liability, strict products liability, or in other situations having a sound basis in public policy.<sup>27</sup> These exceptions represent a compromise enacted by the New Mexico legislature;<sup>28</sup> the first three exceptions allow courts to apply joint and several liability where the facts are consistent with one of the enumerated exceptions, while the public policy exception offers courts flexibility to adapt to future circumstances.<sup>29</sup>

## 2. Apportionment of Damages in New Mexico between Negligent and Intentional Tortfeasors

New Mexico first addressed the apportionment of fault between a negligent and an intentional tortfeasor in *Medina v. Graham's Cowboys, Inc.*<sup>30</sup> The *Medina* court looked to the fairness notions embodied in both

24. N.M. STAT. ANN. §§ 41-3A-1 to -2 (Repl. Pamp. 1989).

In any cause of action to which the doctrine of comparative fault applies, the doctrine imposing joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished except as otherwise provided hereafter. The liability of any such defendants shall be several.

N.M. STAT. ANN. § 41-3A-1(A).

25. The Several Liability Act became effective on July 1, 1987, after Reichert filed the complaint against the Atlers. Thus, as the court of appeals noted, the statute has no application to the present proceeding. See *Reichert v. Atler*, 117 N.M. 628, 635, 875 P.2d 384, 391 (Ct. App. 1992), *aff'd*, 117 N.M. 623, 875 P.2d 379 (1994).

26. See N.M. STAT. ANN. § 41-3A-1(A) (Repl. Pamp. 1989), there are some exceptions to this liability, however. N.M. STAT. ANN. § 41-3A-1(B)-(G).

27. N.M. STAT. ANN. § 41-3A-1(C) provides as follows:

The doctrine imposing joint and several liability shall apply: (1) to any person or persons who acted with the intention of inflicting injury or damage; (2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, . . . (3) to any persons strictly liable for the manufacture and sale of a defective product, . . . or (4) to situations not covered by any of the foregoing and having a sound basis in public policy.

*Id.*

28. The original draft contained no exceptions to several liability; in essence, the proposal was for pure comparative fault which was ultimately amended to contain exceptions for intentional torts, vicarious liability, strict products liability, or a sound basis in public policy. Compare S. 164, 38th Leg., 1st Sess. (N.M. 1987) (containing no exceptions) with N.M. STAT. ANN. § 41-3A-1(C) (containing four exceptions).

29. *Saiz v. Belen School District*, 113 N.M. 387, 827 P.2d 102 (1992), is the only New Mexico case to employ the public policy exception of § 41-3A-1(C)(4) of the Several Liability Act. In *Saiz*, New Mexico addressed the apportionment of fault between concurrent tortfeasors when a wrongful death action was brought on behalf of a young boy electrocuted at a high school football game. *Id.* at 391, 827 P.2d at 106. The court reasoned that a special public policy exists "to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury will result in the absence of precautions." *Id.* at 400, 827 P.2d at 115.

30. 113 N.M. 471, 827 P.2d 859 (Ct. App. 1992). In *Medina*, a bar patron filed a personal injury complaint against the doorman and the bar owner after the doorman assaulted him in the bar parking lot. The complaint alleged negligent hiring and supervision of the doorman by the bar owner. *Id.* at 472, 827 P.2d at 860. The Several Liability Act did not apply to this case because the complaint was filed before the Act's enactment. *Id.* at 474, 827 P.2d at 862.

the adoption of pure comparative negligence in *Scott* and the abolition of joint and several liability between negligent tortfeasors in *Bartlett*.<sup>31</sup> The court suggested that “[i]t would seem inconsistent with this approach to hold a negligent tortfeasor responsible for the entirety of the damage if the concurrent tortfeasor happens to have committed an intentional tort rather than a negligent tort.”<sup>32</sup> Ultimately, however, the court determined that the abolition of joint and several liability “does not necessarily undermine principles of vicarious liability”<sup>33</sup> and held that joint and several liability applies to an employer who is liable for negligently hiring an intentional tortfeasor.<sup>34</sup>

#### IV. COMPARISON BETWEEN NEGLIGENT AND INTENTIONAL TORTFEASORS IN OTHER JURISDICTIONS

Few comparative negligence jurisdictions have directly addressed the question of whether and how to apportion fault between tortfeasors when the conduct of one is negligent and the conduct of the other is intentional. Moreover, the jurisdictions that have addressed this issue vary in their application of the doctrine of comparative negligence, leaving New Mexico without much helpful authority before *Reichert*.

Kansas has declined to allow comparison of fault between negligent and intentional joint tortfeasors, basing its decision on the special duty of the negligent tortfeasor to protect the patron-plaintiff from the intentional tortious acts of a third person.<sup>35</sup> In *Kansas State Bank & Trust Co. v. Specialized Transportation Service, Inc.*,<sup>36</sup> the Kansas Supreme Court expanded this doctrine to include negligent hiring and retention cases.<sup>37</sup> The court reasoned that the “intentional acts of a third party cannot be compared with the negligent acts of a defendant whose duty it is to protect the plaintiff from the intentional acts committed by the third party.”<sup>38</sup>

---

31. *Id.* at 474, 827 P.2d at 862.

32. *Id.* at 475, 827 P.2d at 863.

33. *Id.* Respondent superior renders a faultless employer liable for torts committed by an employee in the course and scope of employment. *Id.* (citing *Gonzales v. Southwest Security and Protection Agency*, 100 N.M. 54, 665 P.2d 810 (Ct. App. 1983)). “Because liability is not predicated on the fault of the employer, the abolition of joint and several liability does not eliminate respondent superior liability.” *Id.*

34. *Medina*, 113 N.M. at 475, 827 P.2d at 863.

35. See *Gould v. Taco Bell*, 722 P.2d 511 (Kan. 1986) (breach of duty of premises owner to protect invitees not subject to comparison with the intentional tort of another patron); *M. Bruenger & Co. v. Dodge City Truck Stop, Inc.*, 675 P.2d 864 (Kan. 1984) (comparing negligent acts of bailee to the intentional acts of a thief not allowed under the comparative negligence doctrine).

36. 819 P.2d 587 (Kan. 1991).

37. See *id.* at 606. The court stated that the general rule in Kansas is to “look to the nature of the duty owed in each instance” whether it be a bailment, premises liability, or a negligent hiring and retention case. *Id.* (quoting *Gould*, 722 P.2d at 517). In *Kansas State Bank & Trust Co.*, the court found that the defendants had a special duty stemming from the negligent hiring and retention of the third party. *Id.* This special duty encompassed the duty to prevent the intentional act of battery committed by the third party. *Id.*

38. *Id.* at 605-06 (citing *Gould*, 722 P.2d at 516).

Conversely, jurisdictions which allow for comparison between negligent and intentional tortfeasors have based their decisions on the notion that all parties should share fault in proportion to the culpability of their acts.<sup>39</sup> For example, in *Blazovic v. Andrich*, the New Jersey Supreme Court viewed intentional wrongdoing and negligence as "different in degree," not "different in kind."<sup>40</sup> In view of this distinction, the jury's apportionment of fault would reflect appropriate levels of each tortfeasor's culpability.<sup>41</sup>

Similarly, in *Weidenfeller v. Star and Garter*,<sup>42</sup> the California Court of Appeals limited the liability of a negligent tortfeasor to its percentage of fault when the intentional acts of a third party contributed to the plaintiff's damages.<sup>43</sup> The *Weidenfeller* court stated that failing to apply comparative fault principles to joint tortfeasors "not only frustrates the purpose of the statute but violates the common sense notion that a more culpable party should bear the financial burden caused by its intentional act."<sup>44</sup>

## V. RATIONALE OF THE *REICHERT* COURT

The New Mexico Supreme Court held in *Reichert* that the fault of a premises owner who negligently failed to protect patrons from foreseeable harm may be compared to a third party intentional tortfeasor who actually caused the harm. The *Reichert* court acknowledged that a premises owner has a duty to protect patrons from injury caused by third parties.<sup>45</sup> The court viewed a person's duty to protect another from the foreseeable act of a third party as an important determinant of liability and reiterated that "[t]he owner's duty to protect patrons extends to all foreseeable harm regardless of whether that harm results from intentional or negligent conduct."<sup>46</sup> The court held that the breach of this duty triggers comparative fault principles: the premises owner's negligent failure to protect patrons from injury may be compared to the third party whose intentional

39. See, e.g., *Blazovic v. Andrich*, 590 A.2d 222 (N.J. 1991). The court held that the apportionment of fault according to each party's relative degree of fault, whether it be intentional or negligent, is consistent with the evolution of comparative negligence and joint tortfeasor liability. *Id.* at 231.

40. *Id.*

41. *Id.* This view adheres to the guiding principle of comparative fault, which is "to distribute the loss in proportion to the respective faults of the parties causing that loss." *Id.*

42. 2 Cal. Rptr. 2d 14 (Cal. Ct. App. 1991).

43. See *id.* at 16.

44. *Id.*

45. See *Reichert*, 117 N.M. at 626, 875 P.2d at 382. *Reichert* relied on *Coca v. Arceo*, which held:

[T]he proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to guests who are upon the premises and who are injured by the harmful acts of third persons if, by the exercise of reasonable care, the proprietor could have discovered that such acts were being done or about to be done, and could have protected against the injury by controlling the conduct of the other patron.

*Id.* (quoting *Coca*, 71 N.M. at 189, 376 P.2d at 973).

46. *Reichert*, 117 N.M. at 626, 875 P.2d at 382.

conduct actually caused the injury.<sup>47</sup> Therefore, in accordance with *Bartlett's* abolition of joint and several liability, the court held each tortfeasor liable for the proportion of fault attributable to his conduct.<sup>48</sup>

In reaching its decision, the *Reichert* court rejected both the rationale and holdings of cases from other comparative negligence jurisdictions that refused to apportion fault between negligent and intentional joint tortfeasors.<sup>49</sup> The court adopted the result of jurisdictions that allow for comparison between negligent premises owners and intentional third party tortfeasors.<sup>50</sup> The court based its decision on New Mexico's adoption of comparative fault in *Scott* and its abolition of joint and several liability in *Bartlett*.<sup>51</sup>

Unlike the court of appeals, the supreme court also examined the Several Liability Act.<sup>52</sup> The court determined that public policy would support the holding that the bar owner may reduce his liability by the percentage of fault attributable to a third party.<sup>53</sup> Additionally, the court focused on the Act to support its rationale that an intentional party should not escape responsibility through the negligence of another party.<sup>54</sup>

The *Reichert* court recognized both the importance of the premises owner's duty to prevent the harmful conduct of a third party and the harshness of holding the premises owner fully liable for this conduct.<sup>55</sup>

---

47. See *id.* at 624, 875 P.2d at 380. The court narrowly defined its holding by stating that the issue of "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." *Id.* at 625, 875 P.2d at 381.

48. *Id.* (citing *Bartlett*, 98 N.M. at 159, 646 P.2d at 586). Ochoa would be jointly and severally liable if sued directly. See N.M. STAT. ANN. § 41-3A-1(C)(1) (Repl. Pamp. 1989). Comparative fault of an intentional tortfeasor only arises when he or she is brought into the case as a third party due to absence or insolvency; otherwise the intentional tortfeasor would be jointly and severally liable. See *id.*

49. See *Kansas State Bank & Trust Co.*, 819 P.2d at 606 (no comparison allowed between the negligent and intentional tortfeasors); *Gould*, 722 P.2d at 516, 517 (the special duty of the negligent tortfeasor to protect the plaintiff from the intentional tortfeasor's acts precludes comparison of fault); *M. Bruenger & Company, Inc.*, 675 P.2d at 867-70 (comparative negligence doctrine does not allow comparison of negligent acts of defendant with the intentional acts of a third party). See *supra* notes 35-44 and accompanying text.

50. See *Blazovic*, 590 A.2d 222 (fault apportionment allowed in accordance with each party's relative degree of fault); *Weidenfeller*, 2 Cal. Rptr. 2d 14 (comparison allowed between the negligent and intentional tortfeasors when both contributed to the plaintiff's damages). See *supra* notes 35-44 and accompanying text.

51. *Reichert*, 117 N.M. at 625, 875 P.2d at 381. "[T]he basis for comparative fault is that each individual tortfeasor should be held responsible only for his or her percentage of the harm." *Id.* (citing *Bartlett*, 98 N.M. at 159, 646 P.2d at 586).

52. N.M. STAT. ANN. § 41-3A-1. The supreme court failed to address the fact that the filing date preceded the enactment of the Several Liability Act even though the court of appeals explicitly stated that "the statute . . . has no application to the present proceeding." *Reichert v. Atler*, 117 N.M. 628, 635, 875 P.2d 384, 391 (Ct. App. 1992), *aff'd*, 117 N.M. 623, 875 P.2d 379; see *supra* note 25.

53. *Reichert*, 117 N.M. at 625, 875 P.2d at 381; see also *Bartlett*, 98 N.M. at 159, 646 P.2d at 586. The basis for comparative fault is that each individual tortfeasor should be held responsible only for his percentage of the harm. *Id.*

54. *Reichert*, 117 N.M. at 626, 875 P.2d at 382. Joint and several liability applies "to any person or persons who acted with the intention of inflicting injury or damage." N.M. STAT. ANN. § 41-3A-1(C)(1).

55. *Reichert*, 117 N.M. at 626, 875 P.2d at 382.

The court balanced these competing interests by proposing a jury instruction. The jury instruction seeks to inform the jury of the owner's duty to prevent foreseeable harm to patrons and "how that duty relates to the conduct of third persons."<sup>56</sup> The proposed jury instruction integrates the principle of comparative fault with premises liability:

If you find that the [owner][operator] of the [place of business] breached [his][her][its] duty to use ordinary care to keep the premises safe for use by the visitor, you may compare this breach of duty with the conduct of the third person(s) who actually caused the injury to the plaintiff(s) and apportion fault accordingly. In apportioning this fault, you should consider that the [owner's][operator's] duty to protect visitors arises from the likelihood that a third party will injure a visitor and, as the risk of danger increases, the amount of care to be exercised by the [owner][operator] also increases. Therefore, the proportionate fault of the [owner][operator] is not necessarily reduced by the increasingly wrongful conduct of the third party.<sup>57</sup>

Theoretically, this instruction allows the jury to consider the importance of the owner's duty to patrons and weigh the owner's failure to perform that duty with a third party's tortious conduct.

## VI. ANALYSIS AND IMPLICATIONS

The *Reichert* court's expansion of the comparative fault doctrine dramatically changes the traditional theory of premises liability in New Mexico. Prior to *Reichert*, a premises owner was generally liable for injuries to patrons caused by third parties when the premises owner could have both discovered the third parties' acts through reasonable care and protected against injury by controlling the third parties' conduct.<sup>58</sup> After *Reichert*, the premises owner is able to compare his breach of duty with the negligent, intentional or reckless conduct of a third party. This holding diminishes the duty owed by the premises owner to the patron, because the premises owner can seek to reduce his percentage of fault by comparing degrees of fault with the third party intentional tortfeasor. Moreover, in the case of an absent third party intentional tortfeasor, the jury might find it hard to resist bending the general rules if they construe the proposed jury instruction as unduly harsh on a premises-owner defendant.<sup>59</sup>

The *Reichert* court legitimized diminishing a premises owner's liability to patrons through the proposed jury instruction.<sup>60</sup> Even though the proposed jury instruction addresses the increasing duty of the premises

---

56. *Id.*

57. *Id.*

58. See *supra* note 45 and accompanying text.

59. See Goldberg, *supra* note 16, at 5 ("Even men who respect general rules find it hard to resist bending them in individual, touching cases . . .") (quoting LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 412 (1973)).

60. See *supra* text accompanying notes 56-57.

owner to exercise reasonable care in the face of intentional tortfeasors,<sup>61</sup> the interpretation and application of this instruction is left to the jury. The proposed jury instruction leaves the potential for unfairness to a plaintiff if the premises owner successfully shifts a disproportionate amount of blame to an intentional third party joint tortfeasor.<sup>62</sup>

The decision in *Reichert* and its subsequent discussion in the case of *Barth v. Coleman*<sup>63</sup> indicates the judiciary's willingness to expand the doctrine of comparative fault based on the *Scott* and *Bartlett* principles of fairness. In *Barth*, the supreme court addressed the identical issue faced by the *Reichert* court: whether the negligent failure of a premises owner to protect patrons from foreseeable harm should be compared to the intentional actions of the third party who actually caused the harm.<sup>64</sup> The *Barth* court had the opportunity to create a public policy exception to several liability under section 41-3A-1(C)(4) of the Several Liability Act;<sup>65</sup> instead, the court reaffirmed its holding in *Reichert*.<sup>66</sup>

In the future, the New Mexico courts should consider using the public policy exception to several liability in those premises liability cases that involve the sale of alcohol. As stated above, the Several Liability Act provides that joint and several liability shall apply to situations "having a sound basis in public policy."<sup>67</sup> New Mexico already recognizes a strong public policy to curb alcohol-related violence as demonstrated by New Mexico's Dramshop Act<sup>68</sup> and by *Lopez v. Maez*.<sup>69</sup> Thus, while the *Reichert* decision diminished a premises owner's liability, the proliferation of alcohol-related violence could result in the court creating a public policy exception by focusing on the nature of the premises in order to curb alcohol-related violence.

## VII. CONCLUSION

The *Reichert* court expanded the comparative fault doctrine to include apportionment of fault between a negligent defendant and a third party

---

61. "[T]he proportionate fault of the [owner][operator] is not necessarily reduced by the increasingly wrongful conduct of the third party." *Reichert*, 117 N.M. at 626, 875 P.2d at 382.

62. Unfairness arises for plaintiffs in the case of an absent or insolvent third party tortfeasor because of the diminished likelihood for the plaintiff recovering from this tortfeasor.

63. 118 N.M. 1, 878 P.2d 319 (1994) (holding that the negligent defendant's liability must be reduced by the percentage of fault attributable to the third party intentional tortfeasor).

64. *Barth* involved a verbal confrontation between two nightclub patrons that escalated into a fistfight. Before the fight, Barth reported the incident to a nightclub employee who took no subsequent action to control the situation or to prevent escalation of the verbal confrontation. *Id.* at 2, 878 P.2d at 320.

65. Barth brought suit several months after a February 1989 bar fight. Thus, the Several Liability Act, effective beginning July 1, 1987, was applicable to the proceeding.

66. The *Barth* court held that the negligent defendant's liability must be reduced by the percentage of fault attributable to the third party intentional tortfeasor. *Id.* at 4, 878 P.2d at 322.

67. N.M. STAT. ANN. § 41-3A-1(C)(4) (Repl. Pamp. 1989).

68. N.M. STAT. ANN. § 41-11-1 (Repl. Pamp. 1989) (imposing liability on bar owners who enhance the dangers of violence by serving alcohol to known dangerous, inebriated patrons).

69. 98 N.M. 625, 651 P.2d 1269 (1982). In *Lopez*, a victim of an automobile accident brought action against a liquor licensee for the negligent sale of liquor to the inebriated driver. The court held that a tavern owner may be held liable for the acts of intoxicated persons that were reasonably foreseeable. *Id.* at 632, 651 P.2d at 1269.

tortfeasor, regardless of whether the third party tortfeasor acted intentionally, negligently, or recklessly. The application of comparative fault to a negligent premises owner provides the premises owner with an avenue to reduce liability; the proposed jury instruction then compensates for the potential unfairness to the plaintiff by increasing the amount of care that the premises owner must exercise in the face of an increasing risk of danger. Ultimately, the jury is left to determine who bears the responsibility for the plaintiff's injuries, but the jury instruction provides a mechanism to apply the *Scott* and *Bartlett* principles of fairness.

PAMELA J. SEWELL