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Torts

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The two-year survey period covered by this Article saw New Mexico courts make sweeping changes in joint liability concepts and the law of slander and libel. For the first time they also recognized claims for bystander recovery and dram shop liability. Several decisions clarified the courts' interpretations of the Medical Malpractice Act[1] and the Tort Claims Act.[2] This Article covers all these subjects, not necessarily in the above order, along with some miscellaneous decisions which cannot be neatly cubbyholed.

I. JOINT LIABILITY AND COMPARATIVE NEGLIGENCE

In 1981, *Scott v. Rizzo*[3] introduced a new era of negligence law in New Mexico. The stir created by the adoption of pure comparative negligence in *Scott* was equaled if not surpassed by the court of appeals' much less expected abolition of joint and several liability and contribution among joint tortfeasors in most situations in *Bartlett v. New Mexico Welding Supply, Inc.*[4] and the cases which followed it.

In *Bartlett,* the trial court allowed the jury to compare the fault of the driver of the first of three vehicles involved in a collision, even though the first driver was not a party to the suit and was unidentified. The jury determined the defendant was thirty percent at fault and the unknown driver was seventy percent at fault.

Part of the holding in *Bartlett* involved the effect of comparative fault on New Mexico's Joint Tortfeasor's Act, which allowed one tortfeasor to compel other tortfeasors to share responsibility for paying damages.[5] Under the act, a tortfeasor who paid a judgment or settled with the plaintiff could try to collect a share of the amount he had paid the plaintiff from other tortfeasors through a suit for contribution. The issue for the *Bartlett* court was whether the defendant should be held liable under the act for

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1. N.M. Stat. Ann. §§ 41-5-1 to -28 (Repl. Pamp. 1982).
2. *Id.* §§ 41-4-1 to -29.
3. 96 N.M. 682, 634 P.2d 1234 (1981).
4. 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982).
5. N.M. Stat. Ann. §§ 41-3-1 to -8 (Repl. Pamp. 1982).

all the damages, including those caused by the phantom driver, or just for the thirty percent of the damages attributed to him.

In the past, the courts had held it was permissible to force one defendant to pay all the damages and then collect a portion from any other tortfeasors on the theory that "any accident was the result of one indivisible wrong."[6] The courts had also held it was fairer to make one defendant pay for all the damages than it was to have a plaintiff bear the risk of being unable to collect his judgment.[7]

The *Bartlett* court rejected these arguments and held a jury may ascertain the percentage of negligence of all participants to an occurrence.[8] It found the concept of one indivisible wrong to be obsolete and determined it was not fair to predicate the extent of liability of a defendant on the solvency of his co-defendant, rather than blameworthiness.[9]

Wilson v. Galt[10] reiterated and emphasized *Bartlett*'s de facto abolition of joint and several liability. The *Wilson* trial was held after the *Scott v. Rizzo* decision but before *Bartlett*.[11] In *Wilson*, the plaintiffs, in their capacities as the parents and the conservator of their brain-damaged minor son, sued the mother's obstetrician, a pediatrician, a hospital, and the hospital's lab supervisor for birth-related injuries to the child. All the defendants except the obstetrician and the lab supervisor settled before trial for more than the amount of damages subsequently assessed by the jury. The jury determined the obstetrician was not at fault, while the lab supervisor was fifteen percent at fault.[12]

The first issue the appellate court addressed in this portmanteau case[13] was:

> As a matter of law can an injured party recover an amount reflecting a nonsettling tortfeasor's negligence when the injured party has recovered, through settlement with other tortfeasors, an amount in excess of the entire damage award determined by the jury?[14]

The answer is 'Yes.' Joint and several liability was the rule at common law, and New Mexico's adoption of the Uniform Contribution Among Tortfeasors Act[15] created the right to contribution among joint tortfeasors.

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6. *Bartlett*, 98 N.M. at 154, 646 P.2d at 581.
7. *Id.* at 159, 646 P.2d at 586.
8. *Id.* at 158, 646 P.2d at 585.
9. *Id.*
10. 100 N.M. 227, 668 P.2d 1104 (Ct. App.), *cert. quashed*, 100 N.M. 192, 668 P.2d 308 (1983).
11. *Id.* at 230, 668 P.2d at 1107.
12. *Id.*
13. For a discussion of *Wilson*'s impact on the law of loss of consortium, *see infra* note 113 and accompanying text. The case also involves many issues not material to this Article.
14. 100 N.M. at 230, 668 P.2d at 1107.
15. N.M. Stat. Ann. §§ 41-3-1 to -8 (Repl. Pamp. 1982).

Once *Bartlett* eliminated joint and several liability, however, the need for contribution also vanished,[16] and the contribution act became a vestigial statute.

The *Wilson* court also held a settlement satisfies only the settling party's percentage of fault. If it turns out the settling defendant has paid more than his share, he is out of luck. If the plaintiff has accepted too little from any party, the bad luck is his, but he is still free to pursue his claims against the other defendants who have not settled; that is, he can collect their share of his damages in addition to the settlement amount.[17]

The court of appeals found its approach would encourage settlement and would fit New Mexico's view of comparative negligence. It also made sense from a practical point of view:

> This approach also discourages other tortfeasors from taking advantage of the good faith efforts of settling tortfeasors. If reduction of money damages is allowed, the non-settling tort feasor would likely sit back knowing not only that he could be liable in any event merely for his share, but also, if by chance the settling tortfeasor pays an amount greater than the total damages, as determined by the jury, he will not have to pay at all. He has the added advantage during the trial of placing the blame on the settling absent tortfeasors.[18]

In *Wilson,* however, the settlement agreement specifically barred recovery from the non-settling defendants if the amount of the settlement exceeded the plaintiffs' total damages as determined by the jury. The court of appeals upheld that provision of the agreement.[19]

The other major comparative fault case decided during the survey period is the only one where the court of appeals strayed from the course set by logic and by the holdings of *Scott* and *Bartlett.* In *Guitard v. Gulf Oil Co.,*[20] the plaintiff was an employee of Harrison Western Corp. (Harrison) when he was injured. Harrison was a contractor working under Gulf Oil Co. (Gulf), which was in charge of the project. Harrison paid worker's compensation benefits to Guitard following his injury.[21]

Guitard then sued Gulf, claiming it failed to inspect and to maintain equipment and failed to warn of defects in the equipment. Gulf brought Harrison into the case on a third-party complaint, saying it was entitled to indemnification from Harrison under a written agreement. Gulf also claimed Harrison had been negligent in causing the accident.[22]

16. 100 N.M. at 232, 668 P.2d at 1109.
17. *Id.*
18. *Id.*
19. *Id.* at 233, 668 P.2d at 1110.
20. 100 N.M. 358, 670 P.2d 969 (Ct. App. 1983). *See also,* Otten & Wilson *Commercial Law,* 15 N.M.L. Rev. ___ (1985), in this issue (discussing *Guitard*).
21. *Id.* at 359, 670 P.2d at 970.
22. *Id.*

The trial court granted Harrison's motion for summary judgment, finding the indemnification agreement violated N.M. Stat. Ann. section 56-7-2 (1978).[23] This statute nullifies indemnification provisions pertaining to mining operations if the damages arise from

> [t]he sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee or any independent contractor who is directly responsible to such indemnitee or from any accident which occurs in operations carried on at the direction or the supervision of the indemnitee or an employee or representative of the indemnitee or in accordance with methods and means specified by the indemnitee or employees or representatives of the indemnitee.[24]

The court of appeals reversed the summary judgment, basing its decision on the Wyoming case of *Mountain Fuel Supply Co. v. Emerson*.[25] The *Guitard* court determined the statutory language "'arising from the . . . concurrent negligence of the indemnitee,' . . . means only that the indemnitee cannot contract away liability for its own negligence."[26]

The *Guitard* court failed to recognize that under *Scott, Bartlett,* and *Wilson* Gulf would only be liable for that portion of Guitard's damages, if any, which Gulf caused. Therefore, there could be nothing for which Harrison would have to indemnify Gulf, since even the *Guitard* court recognized that Gulf, as the indemnitee, could not demand reimbursement from Harrison for the damages Gulf caused. The court's later assertion that "Gulf would be liable for 100% of the damages . . . even though it was only 1% negligent"[27] was wrong, as was the later statement that "Harrison Western will be responsible for its percentage of negligence, if any."[28]

The only reference to *Bartlett* in *Guitard* was in its holding that the fault of an absent tortfeasor could be compared with the fault of the parties to a case.[29] Despite its recognition of that principle, the court felt dismissing Harrison from the case "would mean that in a negligence action a party could never be brought in under N.M. Stat. Ann. 1978, Civ. P. R. 14 (Repl. Pamp. 1980)," the rule governing third party practice.[30] The court held "*Bartlett* did not intend such sweeping changes in third-party practice."[31] In fact, that was neither the intent nor really the result

23. *Id.*
24. N.M. Stat. Ann. § 56-7-2(A) (1978). This provision states that it shall not affect the validity of any insurance contract or any benefit conferred under worker's compensation law. *Id.*
25. 578 P.2d 1351 (Wyo. 1978).
26. 100 N.M. at 361, 670 P.2d at 972.
27. *Id.*
28. *Id.* at 363, 670 P.2d at 974.
29. *Id.* at 362, 670 P.2d at 973.
30. *Id.* (citing N.M. R. Civ. P. 14).
31. *Id.*

of *Bartlett*. While *Bartlett* certainly eliminates most if not all claims for contribution as the basis for a third-party complaint, N.M. R. Civ. P. 14 would still cover a valid claim for indemnification.[32]

II. BYSTANDER RECOVERY

Ramirez v. Armstrong[33] held that bystanders to an accident may recover damages for negligent infliction of emotional distress for witnessing injuries suffered by another, if the plaintiff can prove several elements. The elements are:

1. The plaintiff had a marital or intimate familial relationship with the victim of the accident. Only the victim's husband, wife, parents, children, brothers, sisters, grandparents, grandchildren, or persons standing in *loco parentis* to the victim can qualify.[34]
2. The plaintiff's shock must be severe *and* result from the plaintiff having a "contemporaneous sensory perception" of the accident.[35] Presumably, this means hearing an accident as it occurred might qualify, even if the plaintiff had not seen the accident.[36] For a shock to qualify as "severe," the distress "must be of a severity which no reasonable person could be expected to endure."[37] This is the same level of distress required for an actionable claim for intentional infliction of emotional distress.
3. As a result of his emotional distress, the plaintiff must have incurred a physical injury of his own, or at least a "physical manifestation" of the emotional distress.[38]
4. The victim of the accident must be injured or killed as a result of the accident.[39]

In *Ramirez*, the complaint alleged a vehicle struck and killed Jose Ramirez as he crossed a street. The plaintiff filed bystander recovery claims on behalf of three of Ramirez' children (Job and Elena, who allegedly saw the accident, and Bertha, who was not present) and a young girl named Karen who was living with the Ramirez family, but who was

32. While an employer may subject himself to more than worker's compensation liability by contract, City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), that contractual provision should be void if it would cause the employer to indemnify someone for that person's portion of fault.

33. 100 N.M. 538, 673 P.2d 822 (1983).

34. *Id.* at 541, 673 P.2d at 825.

35. *Id.* at 541-42, 673 P.2d at 825-26.

36. The court, however, expressly held that learning of the accident after its occurrence would not meet this portion of the requirements for bystander recovery. *Id.* at 542, 673 P.2d at 826. Thus, a plaintiff who sees or hears an accident but does not realize he is related to the victim until the moment of the collision or accident has passed probably would not meet the test.

37. *Id.* at 541 n.1., 673 P.2d at 825 n.1.

38. *Id.* at 542, 673 P.2d at 826.

39. *Id.*

not a family member. The supreme court upheld the trial court's dismissal of the suit as to Karen and Bertha, because they failed to meet elements one and two, respectively, but allowed it to proceed for Job and Elena.

However, in recognizing bystander recovery as a cause of action in New Mexico, the court specifically noted that comparative fault applied[40] and that this new cause "imposes no new obligation of conduct on potential defendants. Ordinary care is still required, and use of such ordinary care will relieve potential defendants from liability."[41]

III. DRAM SHOP LIABILITY

Since 1982, New Mexico has seen the supreme court adopt and the legislature subsequently contract "dram shop liability." In *Lopez v. Maez*,[42] the court abandoned New Mexico's common law rule that a third party could not hold a tavern keeper liable for injuries inflicted by an intoxicated person who had been served at the tavern. The basic issue in any given case, the court held, will turn on whether the acts of the bar's patron were or would have been "reasonably foreseeable" by the tavern owner.[43] Whether the acts of the patron constituted an independent intervening cause that would relieve the tavern owner of liability will be a question of fact in each case.[44]

In *MRC Properties, Inc. v. Gries*,[45] the defendants before the court were not bar owners, but social hosts. Conquistadores, Inc., had sponsored a Christmas party, catered by and held at a hotel, for its employees. At the party two adults each bought one beer for a nineteen-year-old employee of Conquistadores. The nineteen-year-old was the driver of a car involved in an accident after he left the party.[46]

On appeal, the court held both the employer and the hotel could be liable if they had violated a statute or regulation concerning the sale or furnishing of liquor and if the violation had proximately caused the plaintiff's damages.[47] Statutes which may impose liability for the sale or furnishing of alcoholic beverages include section 60-7A-16,[48] which prohibits furnishing alcohol to intoxicated persons, and section 60-7B-1,[49] which prohibits selling or giving liquor to a minor. In 1982, however,

40. *Id.*
41. *Id.*
42. 98 N.M. 625, 651 P.2d 1269 (1982).
43. *Id.* at 632, 651 P.2d at 1276.
44. *Id.*
45. 98 N.M. 710, 652 P.2d 732 (1982).
46. *Id.* at 711, 652 P.2d at 733.
47. *Id.* at 712, 652 P.2d at 734.
48. N.M. Stat. Ann. § 60-7A-16 (Repl. Pamp. 1981).
49. *Id.* § 60-7B-1.

the legislature passed section 41-11-1,[50] which eliminates liability under section 60-7A-16 for persons gratuitously serving liquor to a guest, unless the host provided the drinks "recklessly in disregard of the rights of others." The same statute relieves licensees of liability for serving intoxicated persons, unless it was reasonably apparent to the licensee the person was intoxicated or the licensee knew from the circumstances the person was intoxicated.

IV. LIBEL AND SLANDER

In *Gertz v. Robert Welsh, Inc.*,[51] the United States Supreme Court announced that states no longer could impose liability without fault for libel or slander in favor of a private individual and against a publisher or broadcaster.[52] As a result, in *Marchiondo v. Brown*,[53] the New Mexico Supreme Court adopted the elements of proof required by the Gertz Court in suits brought by "non-public" defamation plaintiffs.

In *Marchiondo*, however, the New Mexico court addressed the necessary standard of proof only after determining the plaintiff was not a "public figure."[54] The court held Marchiondo was not a public figure as far as the articles and editorials in question were concerned, because although he was a lawyer and "well known as a member of the Democratic Party," his influence in these roles "cannot be said to be pervasive."[55] Publication of the challenged statements, rather than anything the plaintiff had done, created the controversy in question.[56]

Because Marchiondo was not a public figure for the purposes of libel law, the court determined the principles which would apply in his case and any others brought by private individuals. First, the standard for liability of a publisher or broadcaster is set by the standards of ordinary negligence.[57] Second, if a plaintiff has shown only a lack of ordinary care rather than something more grievous, the plaintiff may collect only "actual damages." These may include out-of-pocket losses, impairment

50. N.M. Stat. Ann. § 41-11-1 (Cum. Supp. 1984).

51. 418 U.S. 323 (1974).

52. In other words, strict liability, or libel *per se*, no longer applies for actions brought by a non-public defamation plaintiff. *Gertz* gave states some latitude in defining the appropriate standard of liability so long as they do not impose strict liability. *See id.* at 341-48.

53. 98 N.M. 394, 649 P.2d 462 (1982).

54. The question of whether a plaintiff qualifies as a "public figure" is a preliminary question of law for the court. *Id.* at 399, 649 P.2d at 467. If the plaintiff is determined to be a public official or a public figure, or if the controversial statement involves a matter of public concern, the plaintiff must prove the defendant acted with reckless disregard for the truth or with knowledge the published statement was false in order to recover. *Id.* at 399-402, 649 P.2d at 467-70.

55. *Id.* at 399, 649 P.2d at 467.

56. *Id.* at 399-400, 649 P.2d at 467-68.

57. *Id.* at 402, 649 P.2d at 470.

of reputation and standing in the community, humiliation, and mental anguish and suffering.[58] If the private plaintiff wants to recover punitive damages, he must make the same showing a public figure must make to recover anything at all—that the defendant acted with a reckless disregard for the truth or with knowledge of the falsity of the published statements.[59]

The *Marchiondo* opinion also held the plaintiff was entitled to discovery on which of the defendants' employees made certain decisions about how and why the newspaper published some of the challenged articles or headlines. The court specifically rejected the defendants' argument that the first amendment protected the information sought.[60]

In another suit against a news organization, *Coronado Credit Union v. KOAT Television, Inc.*,[61] the plaintiff claimed a broadcast made by the defendant started a run on the credit union by depositors. One of the issues was whether the plaintiff was a public or private figure. The issue was important in this case because KOAT raised the defense of "fair comment," which is

> [p]redicated upon the principle that the interests of society are furthered through a free discussion of public affairs and matters of public interest. In order to come within the ambit of this defense it must be shown that the publication relates to a matter of public interest; that it does not impute dishonorable motives to the subject; and that it must constitute an expression of opinion on based [sic] truly stated facts.[62]

The defendant has the burden of establishing the plaintiff is a public figure by a preponderance of the evidence.[63] The court held the credit union was a public figure in this case, because it was chartered to serve members of the public, it was subject to supervision by the state, the broadcasts involved matters of public concern, and the public at large, as well as the credit union's 4,000 members, had an interest in plaintiff's financial condition.[64] The court also noted the "fair comment" defense is available only if the comments are accurate or a fair abridgment.[65]

Coronado Credit Union also involved a question of whether some of the statements were statements of fact or opinion, which is normally

58. *Id.* "A private defamation plaintiff must plead and prove special damages in order to recover them." *Id.* While this reference might be clearer, it appears the court was using the terms "special damages" and "actual damages" or "actual injury" interchangeably.

59. *Id.*

60. *Id.* at 398-99, 649 P.2d at 466-67.

61. 99 N.M. 233, 656 P.2d 896 (Ct. App. 1982).

62. *Id.* at 240, 656 P.2d at 903.

63. *Id.*

64. *Id.* at 241, 656 P.2d at 904.

65. *Id.* at 242, 656 P.2d at 905.

determined by the fact-finder.[66] In addressing that issue, the court noted if a statement does not disclose all the facts upon which an "opinion" is based, the statement may be considered factual and, therefore, a proper subject for a defamation suit. This is true if there are "implications in the statement that the writer has private, underlying knowledge to substantiate his comments about plaintiff, and such knowledge implies the existence of defamatory facts."[67]

The plaintiff in *Sands v. American G.I. Forum*[68] was also determined to be a public figure. The controversy involved in Sands arose when the defendant objected to the plaintiff's possible promotion to brigadier general from the rank of colonel in the United States Air Force.[69] The plaintiff, as a public figure, had to prove with "clear and convincing clarity" that the offending statements were made with actual malice; that is, with knowledge the statement was false or with reckless disregard for whether it was true. To be clear and convincing, the evidence must be "strong, positive and free from doubt"—somewhere between a preponderance of the evidence and beyond a reasonable doubt.[70]

In *Zuniga v. Sears, Roebuck, & Co.*,[71] the plaintiff sued for slander and wrongful discharge. The trial court granted the defendant's summary judgment, and the court of appeals affirmed.[72] The slander claim involved statements made to Sears management by a Sears security guard who suspected a theft, statements made by the management to the plaintiff, and statements made by Sears to the Employment Security Division during

66. In distinguishing between a statement of opinion and a statement of fact—a necessary distinction because opinion cannot be the basis of a defamation suit, while a statement appearing to be a statement of a false fact can—*Marchiondo* held the court should consider: (1) the entirety of a publication; (2) the extent speculation is necessary to determine whether the statement is true; and (3) whether a reasonably prudent person seeing or hearing the statement would consider it fact or opinion. 98 N.M. at 401, 649 P.2d at 469.

67. 99 N.M. at 239, 656 P.2d at 902.

68. 97 N.M. 625, 642 P.2d 611 (Ct. App. 1982).

69. The G.I. Forum sent an "affidavit or purported affidavit" to the Air Force in opposition to the plaintiff's promotion, accusing the plaintiff of having orders backdated to allow him to avoid serving in Vietnam. *Id.* at 626-27, 642 P.2d at 612-13.

70. 97 N.M. at 629, 642 P.2d at 615.

71. 100 N.M. 414, 671 P.2d 662 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983).

72. *Id.* at 416, 418, 671 P.2d at 664, 666.

The wrongful discharge claim could not stand because Sears fired the plaintiff for allegedly stealing merchandise, rather than for refusing to do something public policy would condemn or for performing an act public policy would encourage. *Id.* at 417, 671 P.2d at 665. Vigil v. Arzola, 22 N.M. Bar Bull. 868 (Ct. App. 1983), set out the elements of "wrongful discharge" suits in reversing a Rule 12(b)(6) dismissal for the defendants. However, the supreme court's opinion, 101 N.M. 687, 687 P.2d 1038 (1984), only held the complaint stated a cause of action. The court found the allegations that the plaintiff was fired even though procedures set out in an employment manual were not followed and that the manual constituted an employment contract to be sufficient. The supreme court did not address the question of whether wrongful discharge could be asserted as a cause of action in situations where there is no contract.

a hearing on the plaintiff's unemployment benefits.[73] The defendants claimed a qualified privilege because they were entitled to talk about an employee "if for a proper purpose and to one having a legitimate interest in the subject matter of the statements."[74] The court of appeals found the evidence supported the privilege. Because there was no evidence the privilege had been abused, the defendants were entitled to summary judgment. "An abuse of the privilege arises if the publisher lacks belief or reasonable grounds for belief in the truth of the alleged defamatory statements."[75]

V. TORT CLAIMS ACT

Most of the decisions concerning New Mexico's Tort Claims Act[76] involved procedural rather than substantive issues. *Wells v. County of Valencia,*[77] held the plaintiff, who claimed he tripped in a hole in his jail cell, could sue under both 42 U.S.C. section 1983 for infliction of cruel and unusual punishment and the Tort Claims Act.[78] The section 1983 suit did not bar the other claim because "not all tortious conduct amounts to constitutional deprivation."[79]

In *Tafoya v. Doe,*[80] the trial court found the mother received an incorrect Rh factor blood transfusion at Carrie Tingley, a state-run hospital, in 1972. She learned from her physician in 1979 that she had an Rh-positive sensitization in her blood; at that time, she was also told that the baby she was carrying probably would have a blood immunization problem. The baby was born August 26, 1979 and did, in fact, have the problem. The doctor advised the mother not to have any more children because of the immunization factor in her blood. The doctor also told her an earlier incorrect transfusion caused the condition. The mother then initiated the action against the hospital on her behalf and on behalf of her infant daughter.[81]

The issue in *Tafoya* concerned the question of notice to the state of the plaintiffs' claims. In *Tafoya,* the mother did not give written notice until July 31, 1980, when she discovered where she had received the incorrect transfusion.[82] Section 41-4-16 of the Tort Claims Act generally

73. 100 N.M. at 416-17, 671 P.2d at 664-65.
74. *Id.* at 417, 671 P.2d at 665.
75. *Id.* at 418, 671 P.2d at 666.
76. N.M. Stat. Ann. §§ 41-4-1 to -29 (Repl. Pamp. 1982).
77. 98 N.M. 3, 644 P.2d 517 (1982).
78. *Id.* at 6, 644 P.2d at 520.
79. *Id.* at 7, 644 P.2d at 521.
80. 100 N.M. 328, 670 P.2d 582 (Ct. App.), *cert. quashed,* 100 N.M. 327, 671 P.2d 580 (1983).
81. *Id.* at 330-31, 670 P.2d at 583-84.
82. *Id.*

requires all claimants to give written notice of their claims to certain public agencies within ninety days of the occurrence giving rise to the claim.[83] The court held that, if the hospital did not have actual notice of the incorrect transfusion in 1972, written notice was required for the mother's claim and that notice had to be given within ninety days of August 26, 1979, even if the mother did not remember where she received the earlier transfusion until July 1980.[84]

The baby, however, was *not* required to give notice within ninety days of her birth, even though the Tort Claims Act requires everyone except those incapacitated "by reason of injury," to give notice within 90 days of the occurrence.[85] The court held the ninety-day requirement unconstitutional for the baby's claim, because it violated due process.[86] The court implied its holding would have been different if the statute had a section similar to section 41-4-16(C) providing for notice to be given on the child's behalf.[87] Section 41-4-16(C) allows the personal representative of a deceased or a person claiming benefits from a wrongful death action to provide the required notice within six months of the date of death.[88]

In other tort claims decisions:

- The supreme court held a state police report of an automobile accident does not constitute actual notice of an accident to the state and all its agencies within the meaning of section 41-4-16.[89] To avoid the requirement for written notice of an accident, the particular agency causing the alleged harm must have received actual notice.
- The court of appeals determined governmental entities are immune from suit on strict liability claims, because the legislature, in adopting the Tort Claims Act, waived immunity only for claims of negligence in certain activities.[90]
- The court of appeals found the two-year statute of limitations for Tort Claims Act suits in section 41-4-15 supersedes the three-year limit set in section 37-1-24 for suits against cities, towns, or villages.[91]
- The supreme court held, in *Cole v. City of Las Cruces*,[92] that the city

83. N.M. Stat. Ann. §41-4-16 (Repl. Pamp. 1982).
84. 100 N.M. at 331, 670 P.2d at 584.
85. *Id.* at 331-32, 670 P.2d at 584-85.
86. *Id.* at 332, 670 P.2d at 585.
87. *Id.*
88. N.M. Stat. Ann. §41-4-16(C) (Repl. Pamp. 1982).
89. State v. Garcia, ___ N.M. ___, 690 P.2d 1019 (1984).
90. McMurry v. City of Farmington, 97 N.M. 728, 643 P.2d 292 (Ct. App. 1982). The plaintiff alleged that the fire department created an unreasonably dangerous condition by setting controlled fires so firemen could practice putting them out and that she was injured by inhaling metals released by the fires. *Id.* at 729-30, 643 P.2d at 293-94.
91. Cozart v. Town of Bernalillo, 99 N.M. 737, 738, 663 P.2d 713, 714 (Ct. App. 1983).
92. 99 N.M. 302, 657 P.2d 629 (1983).

was subject to suit as "a governmental entity" for an injury stemming from its operation of a natural gas pipeline outside the city limits.[93] The court also held that the private corporation which apparently owned the pipeline system the city operated was not an "instrumentality" of the city, so it was not covered by the Tort Claims Act.[94] Finally, the court rejected the argument that the act could not cover activities outside the city's authority.[95]

VI. MEDICAL MALPRACTICE

Several major cases during the survey period concerned the interaction of the general statutes of limitations and the provisions of New Mexico's Medical Malpractice Act.[96] The complaint in *Armijo v. Tandysh*[97] alleged the deceased died September 13, 1977 as a result of malpractice committed in May 1977. The plaintiff filed the complaint in August 1980.[98] The court of appeals had to determine if the complaint was timely. If the Wrongful Death Act[99] applied, the complaint could be filed any time within three years of the date of death,[100] and the complaint could stand. But the court found the specific inclusion of wrongful death as a claim covered by the Medical Malpractice Act[101] meant the suit had to be filed within "three years after the date that the act of malpractice occurred,"[102] the specific and only statute of limitation contained in the Medical Malpractice Act.

The legislature enacted the Malpractice Act after New Mexico's courts already had ruled the statute of limitation in a malpractice case starts to run at the time of the act causing injury.[103] The act limits the liability of certain types of health care providers who elect to participate in the state's patient compensation fund.[104] The *Armijo* plaintiff argued the act's statute of limitation found in section 41-5-13—three years from the act of malpractice, rather than three years from the occurrence of injury—applied

93. *Id.* at 303, 657 P.2d at 630.
94. *Id.* at 305, 657 P.2d at 632.
95. *Id.*
96. N.M. Stat. Ann. §§ 41-5-1 to -28 (Repl. Pamp. 1982).
97. 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (1982).
98. 98 N.M. at 184, 646 P.2d at 1248.
99. N.M. Stat. Ann. §§ 41-2-1 to -4 (Repl. Pamp. 1982).
100. *Id.* § 41-2-2.
101. *Id.* §§ 41-5-1 to -28.
102. 98 N.M. at 183, 646 P.2d at 1247; *see* N.M. Stat. Ann. § 41-5-13 (Repl. Pamp. 1982).
103. *See* Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963). For a history of the Medical Malpractice Act, see Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M.L. Rev. 5 (1976-77).
104. N.M. Stat. Ann. § 41-5-6 (Repl. Pamp. 1982).

only to health care providers who "qualified" by participating in the compensation fund.[105]

The court rejected that assertion. Because the limitation period in effect when the act was passed was the same as the period contained in the act, it could not be considered a "benefit" of the new law. Moreover, section 41-5-13 itself does not distinguish between qualified and non-qualified providers, so the same limitations period would apply to all health care providers and there was no classification that could violate the equal protection requirement.[106]

In *Ealy v. Sheppeck,*[107] the plaintiff recognized the statute of limitations had run before the suit was filed, but argued the defendant's fraudulent concealment, continuing tortious conduct, and false misrepresentation tolled the statute. It was the plaintiff's burden to establish a material fact about tolling that would defeat the defendant's motion for summary judgment, and in *Ealy,* the plaintiff failed to meet the burden before the trial court or on appeal.[108] The case is significant for the court's apparent recognition that tolling of the limitations period in section 41-5-13 might occur in some cases.

In *Saiz v. Barham,*[109] the alleged malpractice occurred July 3, 1979, and the application for review by the Medical Legal Review Commission was filed on July 2, 1982 pursuant to sections 41-5-14(A) and 41-5-15. The commission's decision was reached November 20, 1982; it was mailed on November 22. The plaintiff's attorney received a copy through certified mail on December 2, 1982. The attorney received another copy addressed to the plaintiff in care of the attorney on the same day. The plaintiff then filed suit on December 30, 1982. The defendant moved to dismiss on the ground that the statute of limitations had expired.[110]

In its decision the court determined that the filing was timely. The Medical Malpractice Act provides that the statute of limitations is tolled upon the presentation of a claim to the commission; the statute of limitations does not start to run again until thirty days after the commission's decision is entered in the commission's files and a copy of the decision is served on the claimant and his attorney by certified mail.[111] The limitations period would have expired July 5, 1982 (July 3 was a Saturday), so when the application was filed July 2, 1982, three days of the limitation period remained. The thirty-day grace period following the commission's

105. 98 N.M. at 184, 646 P.2d at 1248.

106. *Id.*

107. 100 N.M. 250, 669 P.2d 259 (Ct. App.), *cert. quashed,* 100 N.M. 259, 669 P.2d 735 (1983).

108. *Id.* at 250-51, 669 P.2d at 259-60.

109. 100 N.M. 596, 673 P.2d 1329 (Ct. App.), *cert. denied,* 100 N.M. 689, 675 P.2d 421 (1983).

110. *Id.* at 597, 673 P.2d at 1330.

111. *See* N.M. Stat. Ann. § 41-5-22 (Repl. Pamp. 1982).

decision would have expired December 22, 1982, but since service was made by mail, the plaintiff received an additional three days by analogy to Rule 6(e) of the Rules of Civil Procedure of the District Courts. Because December 25, 1982 was a holiday (and a Saturday), the expiration of the thirty-day tolling period that automatically followed the commission's decision expired December 27, 1982. The plaintiff still had three days left in which to file left over from the original three-year limitation period, so the filing on December 30, 1982 was timely.[112]

VII. MISCELLANEOUS

The following decisions do not fall into any special category; they are included because they deal with issues that will probably recur.

- In *Wilson v. Galt,*[113] the court of appeals ruled New Mexico does not recognize a cause of action for the loss of a child's society.
- *Kabella v. Bouschelle*[114] held there is no cause of action in negligence for injuries of a participant in a contact sport caused by another participant, although the court recognized claims for reckless or willful conduct.
- *Miera v. Waltmeyer*[115] involved a malicious prosecution case. The court of appeals held that the conviction of the plaintiff of battery in municipal court created a rebuttable presumption that the defendant police officer had probable cause for the arrest, even though the conviction was reversed after a de novo trial in district court.
- According to *Livingston v. Begay,*[116] a hotel operator cannot be held strictly liable for defects in the fixtures, furnishings, or design of his rooms.

112. *Id.* at 599-600, 673 P.2d at 1332-33. The court also held that, as there was no doubt that the copies of the decision were actually received, service under N.M. Stat. Ann. § 41-5-22 (Repl. Pamp. 1982) was complete upon the mailing of the decision on November 22, 1982. 100 N.M. at 599, 673 P.2d at 1332. In addition, the court determined that service by certified mail on the plaintiff at the office of his attorney met the requirement of the statute. *Id.*

113. 100 N.M. 227, 668 P.2d 1104 (Ct. App.), *cert. quashed,* 100 N.M. 192, 668 P.2d 308 (1983).

114. 100 N.M. 461, 672 P.2d 290 (Ct. App. 1983).

115. 97 N.M. 588, 642 P.2d 191 (Ct. App.), *cert. quashed,* 98 N.M. 52, 644 P.2d 1040 (1982).

116. 98 N.M. 712, 652 P.2d 734 (1982).