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# INDEMNIFYING PUBLIC EMPLOYEES AGAINST JUDGMENTS FOR PUNITIVE DAMAGES: THE NEW MEXICO TORT CLAIMS ACT IS UNCONSTITUTIONAL

Matthew Holt\*

## I. PROLOGUE

Veteran police officer Michael Garcia undertook to protect and serve.<sup>1</sup> Instead, he took advantage of his position as a police officer, and violated a young woman. D.G. was a 17-year-old high school student, going on a ride-along program with a police detective. Garcia and D.G. had been at the scene of a crime together, after which he said he was taking her back to the police station. Instead, he took her to a deserted area, and coerced her to perform a sexual act on him, and then digitally penetrated her.

D.G. filed suit against Garcia, who then demanded that the governmental entity that employed him provide him with a defense and indemnify him.<sup>2</sup> While D.G.'s claim for compensatory damages was significant, a huge portion of the claim concerned itself with the potential award of punitive damages. The New Mexico Tort Claims Act requires governmental entities to defend and indemnify an employee for claims arising out of acts or omissions occasioned in the "scope of his duty," including awards of punitive damages.<sup>3</sup> Fearful of a significant award of punitive damages, the governmental entity spent \$3,000,000 of taxpayers' money to settle the claim against Garcia.<sup>4</sup>

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1. According to the Los Angeles Police Department's website, in 1955, Beat Magazine held a contest to find a motto for the Los Angeles Police Department. Officer Joseph S. Dorobek suggested "to protect and serve" as the winning entry. The motto became the unofficial motto of the LAPD, growing in use until 1963, when the Los Angeles City Council passed an ordinance adopting it as the LAPD's official motto, and it was placed alongside the City Seal on the Department's patrol cars. *The Origins of the LAPD Motto*, LAPD, [http://www.lapdonline.org/history\\_of\\_the\\_lapd/content\\_basic\\_view/1128](http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128) (last visited Mar. 7, 2017) (reprinting the story from Beat Magazine's December 1963 issue). The motto is firmly embedded in New Mexico police culture to the point that, without reference to authority, the New Mexico Court of Appeals has noted that police officers have a duty to protect and serve, even when they are not on duty. See *Schultz v. Pojoaque Tribal Police Dep't*, 2014-NMCA-019, ¶ 21, 317 P.3d 866.

2. See Answer for Petitioner, ¶ 5, *Risk Mgmt. Div. v. McBrayer*, 2000-NMCA-104, 14 P.3d 43 (No. D-307-CV-971754).

3. N.M. STAT. ANN. § 41-4-4(B)-(C) (2001).

4. Yanan Wang, *Behind \$3M Settlement, the Story of a Police Intern's Dreams Shattered by Sexual Assault*, WASH. POST (March 24, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/03/24/behind-3m-settlement-the-story-of-a-police-interns-dreams-shattered-by-sexual-assault/>.

## II. INTRODUCTION

The New Mexico Tort Claims Act (TCA) was adopted both to limit the liability of the government, in order to protect the public treasury, and to provide for reasonable compensation to people who have been injured by wrongful acts of the government and its employees.<sup>5</sup> However, a particular area of the TCA neither decreases the government's liability nor provides for the payment of compensation to those injured by the government's wrongful acts. In fact, in this area, the TCA increases the government's liability.

The TCA provides that the government is obligated both to defend and indemnify employees who are subject to claims for compensatory and punitive damages, provided only that the claims arise out of the employees' conduct in the "scope of the duties" tasked to the employees.<sup>6</sup> More than 15 years ago, the New Mexico Court of Appeals held that conduct that is purely personal, indeed conduct that may be heinously felonious, conduct that does not in any way advance the interests of the government, can be within a public employee's "scope of duties" if the authorized duties assigned to the employee put him or her in the position so that they could commit the crime.

In such a case, the governmental entity has the duty both to defend and to indemnify the employee. While punitive damages are not available against a government employee for a common law tort, they are available for a constitutional tort – and the TCA requires that the governmental entity indemnify the employee for both compensatory and punitive damages.<sup>7</sup>

Because requiring the government to pay for punitive damages assessed against a public employee for purely personal conduct that falls with the "scope of duties" serves no public purpose, this Article argues that using taxpayer money to pay such an award violates the anti-donation clause of the New Mexico Constitution.

## III. A BRIEF OVERVIEW OF THE NEW MEXICO TORT CLAIMS ACT

### a. An Abbreviated History of Sovereign Immunity<sup>8</sup>

Sovereign immunity is the principle that the government itself cannot be sued without its consent.<sup>9</sup> Elements of flourished in England, thus becoming a core principal in English common law.<sup>10</sup>

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5. See N.M. STAT. ANN. § 41-4-2(A) (1976); Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. Rev. 249, 261–62 (1976).

6. § 41-4-4(B)–(C).

7. *Loya v. Gutierrez*, 2015-NMSC-017, ¶¶ 44–47, 350 P.2d 1155.

8. The history in this section is adapted from Jaime McAlister, *The New Mexico Tort Claims Act: The King Can Do "Little" Wrong*, 21 N.M. L. Rev. 441, 442–44 (1991).

9. *Dougherty v. Vidal*, 1933-NMSC-034, ¶ 6, 21 P.2d 90 (quoting *State ex. rel. Evans v. Field*, 1921-NMSC-082, ¶ 6, 201 P. 1059).

10. *Russell v. Men of Devon*, 100 Eng. Rep. 359, 362 (1788) (“[I]t is better that an individual should sustain an injury than that the public should suffer an inconvenience.”). The original source of the doctrine of sovereign immunity is unclear. Some claim that it finds its roots in ancient Roman law (See Edwin M Borchard, *Governmental Responsibility in Tort, IV*, 36 Yale L. J. 1, 3 (1926)), while other claim that

The doctrine of sovereign immunity came to the United States with the rest of English common law.<sup>11</sup> While the ancient precedents of sovereign immunity seem to stem from the idea that the kings of years bygone were anointed by God, and therefore it was impossible for a king to do anything wrong, later cases embraced sovereign immunity on the grounds that the king was the highest authority in the land, and to allow a court to exercise jurisdiction over him would usurp his authority.<sup>12</sup> That logic, of course, had no place in American jurisprudence, as the Constitution put the three branches of our government on somewhat even footing. Justice Holmes explained the American rationale for sovereign immunity: “A sovereign is exempt . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which that right depends.”<sup>13</sup>

While sovereign immunity was the unquestioned norm for years, courts eventually began to question the unblinking adherence to this ancient doctrine. Beginning in the 1960s, courts across the country began to reject the notion of sovereign immunity, finding that it had no place in modern society.<sup>14</sup>

The death knell for traditional sovereign immunity in New Mexico was sounded in 1975, in *Hicks v. State*,<sup>15</sup> when the New Mexico Supreme Court rejected the doctrine as “archaic” and stated that there were “no conditions or circumstances which could rationally support” the continuation of sovereign immunity.<sup>16</sup> The court ruled that the doctrine of sovereign immunity had been created by the courts, and could therefore be abolished by the courts.<sup>17</sup> Of course, the court could only abolish the immunities which the Judiciary had created, and it would be less than a year before judicial sovereign immunity would be replaced in New Mexico with a much more limited form of statutory immunity.

## b. The Adoption of the Tort Claims Act

The decision in *Hicks* was issued on September 26, 1975. The New Mexico legislature met the following January in regular session, and adopted the (TCA).<sup>18</sup> The TCA begins with a legislative declaration that the strict application of the

notion has been debunked (G. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 477 (1953)).

11. Early on, there seemed to be some debate as to whether American had embraced the doctrine of sovereign immunity. See *Langford v. United States*, 101 U.S. 341 (1879), which pointed out that the maxim that “the king could do no wrong” would not be embraced in America. But, over time, it became clear that the doctrine of sovereign immunity had firmly taken root in the United States. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

12. Verne Lawyer, *Birth and Death of Government of Immunity*, 15 CLEV. MARSHALL L. REV. 529 (1966).

13. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

14. See *Stone v. Ariz. Highway Comm’n*, 381 P.2d 107, 113 (Ariz. 1963); *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 463 (Cal. 1961); *Evans v. Board of Cty. Comm’r*, 482 P.2d 968, 972 (Colo. 1971); *Perkins v. State*, 251 N.E.2d 30, 35 (Ind. 1969); *Carroll v. Kittle*, 457 P.2d 21, 29 (Kan. 1969); *Haney v. City of Lexington*, 386 S.W.2d 738, 742 (Ky. 1964); *Spanel v. Mounds View School Dist. No. 621*, 118 N.W.2d 795 (Minn. 1962); *Holytz v. Milwaukee*, 115 N.W.2d 618, 623 (Wis. 1962).

15. *Hicks v. State*, 1975-NMSC-056, ¶ 13, 544 P.2d 1153.

16. *Id.* ¶ 8.

17. *Id.* ¶ 9.

18. See N.M. STAT. ANN. § 41-4-1 to 30 (1975, as amended through 2015).

doctrine of sovereign immunity can lead to unfair and inequitable results, but also recognizes that government should not have a duty to do everything that can be done to promote the public good.<sup>19</sup> The TCA states that governmental entities and public employees shall only be liable within the limitations set forth in the TCA.<sup>20</sup>

The TCA provides that governmental entities and public employees shall be immune from tort claims except as provided in the Act, which waives immunity for a wide variety of torts.<sup>21</sup> It creates procedural mechanisms that require claimants to give notice of potential claims against governmental entities,<sup>22</sup> provides for a shorter statute of limitations,<sup>23</sup> and sets a limit on the amount of damages that can be recovered.<sup>24</sup>

### c. A Review of the Relevant Portions of the Tort Claims Act

The TCA, of course, provides limited immunities only for tort claims brought in New Mexico. It does not immunize governmental entities or public employees for wrongs that are actionable under the laws of another jurisdiction.<sup>25</sup>

Under the TCA, a governmental entity must defend and indemnify a public employee against any claim alleging any tort or violation of the right, privileges or immunities secured by the constitution and laws of the United States or of New Mexico if the wrongful act was alleged to have been committed by the public employee “while acting within the scope of his duty.”<sup>26</sup> Importantly, the TCA requires the governmental entity to “pay any award for punitive or exemplary damages awarded against a public employee . . . if the public employee was acting within the scope of his duty.”<sup>27</sup> Under this provision, the State’s duty to defend and indemnify its employees, and its duty to pay for punitive or exemplary damages, are only triggered if the public employee’s acts occurred “within the scope of his duty.”

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19. N.M. STAT. ANN. § 41-4-2 (1976).

20. *Id.*

21. N.M. STAT. ANN. § 41-4-4(A) (2001).

22. N.M. STAT. ANN. § 41-4-16 (1977).

23. *See* N.M. STAT. ANN. § 41-4-15 (1977).

24. N.M. STAT. ANN. § 41-4-19 (2007).

25. *See* Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 490 (2003). A foreign jurisdiction, called upon to adjudicate a tort claim against the State of New Mexico, one of its political subdivisions, or one of its public employees, is not compelled to honor the immunities and protections created by the Tort Claims Act, but can extend those protections under the principle of comity, as long as extending those protections would not violate the foreign jurisdiction’s legitimate public policies. *See id.* at 497, 499; *cf.* Nevada v. Hall, 440 U.S. 410, 426–27 (1979). In the same vein, New Mexico courts will apply the immunity provisions of a foreign state’s law where appropriate. *See* Sam v. Estate of Sam, 2006-NMSC-022, ¶ 1, 134 P.3d 761.

26. N.M. STAT. ANN. § 41-4-4(D) (2001).

27. *Id.* § 41-4-4(C). The Tort Claims Act does not allow for an award of punitive damages against either the government or against a public employee, but the prohibition only applies to conventional tort claims. *See* N.M. STAT. ANN. § 41-4-19(D) (2007). Where a claim is brought against either the government or against one of its employees under the laws of a foreign jurisdiction, the statutory proscription against punitive damages has no application. § 41-4-4(C).

**IV. THE SOURCE OF THE PROBLEM:  
RISK MANAGEMENT DIVISION V. MCBRAYER<sup>28</sup>**

Jennifer McBrayer, a student at New Mexico State University, missed several assignments in her English class.<sup>29</sup> She wrote a note to her instructor, asking that she be allowed to make up the assignments.<sup>30</sup> Her instructor told McBrayer that she could go with him to his off-campus apartment and pick up her assignments and she agreed.<sup>31</sup>

McBrayer accompanied the instructor to his apartment and waited in the front doorway while he went to look for them inside.<sup>32</sup> He returned with the papers – and with a stun gun.<sup>33</sup> After a brief struggle, he forced McBrayer into his apartment, where he tortured and raped her.<sup>34</sup> She was finally able to escape, and her instructor was later arrested, charged, and tried on various felony charges.<sup>35</sup> He was ultimately convicted of kidnapping, criminal sexual penetration, attempted murder and criminal sexual contact, and was sentenced to fifty nine and one-half years in prison.<sup>36</sup>

McBrayer then sued her instructor, alleging that he committed the heinous attack on her “under color of state law.”<sup>37</sup> Her instructor—employed by a public university—claimed that the State had a duty to defend and to indemnify him.<sup>38</sup> The State Risk Management Division filed a petition for declaratory judgment, asking that the court determine “whether it had to defend or pay damages in McBrayer’s lawsuit.”<sup>39</sup> The trial court granted summary judgment in favor of Risk Management, and McBrayer appealed.<sup>40</sup>

The Court of Appeals noted that Risk Management had a duty to defend the instructor, and to pay any judgment or settlement against him, if he committed the acts “while acting within the scope of his duties.”<sup>41</sup> The court referred to this “as a kind of statutory insurance.”<sup>42</sup> The reference to statutory insurance is apt, and intriguing, and warrants a brief detour from the discussion of *McBrayer*.

28. Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 14 P.3d 43.

29. *Id.* ¶ 3.

30. *Id.*

31. *Id.*

32. *Id.* ¶ 4.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* ¶ 5.

38. See Petition for Declaratory Judgment and Supplemental Relief ¶ 7, Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 14 P.3d 43 (No. D-307-CV-971754); see also Answer of Defendant Eduardo Araiza to Petition for Declaratory Judgment and Supplemental Relief ¶ 5, Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 14 P.3d 43 (No. D-307-CV-971754).

39. *McBrayer*, 2000-NMCA-104, ¶ 5.

40. *Id.*

41. *Id.* ¶ 6.

42. *Id.*

*A brief detour to discuss insurance for Punitive Damages, and the New Mexico Supreme Court's Accompanying Misinterpretation of the Tort Claims Act*

Courts across the country are split as to whether insurance should be allowed to pay for punitive damages. Perhaps the most frequently cited case to support the argument that public policy prohibits insurance from paying an award of punitive damages is *Northwestern National Casualty Co. v. McNulty*, where the court reasoned thus:

Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties will be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.

The policy considerations in a state where, as in Florida and Virginia, punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.<sup>43</sup>

Other courts, however, allow insurance policies to cover punitive damages for a variety of reasons. Arguments for allowing insurance policies to cover punitive damages include: (1) allowing the insurer to pay punitive damages does not dilute the punitive effect of the award, because the insurer can then sue the insured for reimbursement of those damages;<sup>44</sup> (2) other punitive measures, such as criminal sanctions, are often available against the defendant, and these can act as a deterrent, rather than relying on punitive damages;<sup>45</sup> (3) the person insured against punitive damages would still feel the sting of the award because after an insurance company paid the award, the insured's premiums would soar;<sup>46</sup> (4) there is a fine line between negligence and gross negligence, and therefore insurance coverage for gross

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43. *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 440-41 (5th Cir. 1962).

44. *Baker v. Armstrong*, 1987-NMSC-101, ¶ 10, 744 P.2d 170.

45. *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, 7 (Tenn. 1964).

46. *Price v. Hartford Accident and Indem. Co.*, 502 P.2d 522, 524 (Ariz. 1972).

negligence—but not for intentional misconduct—should be allowed; and<sup>47</sup> (5) the public policy reasons against insuring for punitive damages are outweighed by the public policy in favor of enforcing insurance contracts that cover punitive damages.<sup>48</sup>

New Mexico allows insurance coverage for punitive damages.<sup>49</sup> In *Baker v. Armstrong*,<sup>50</sup> one of the first New Mexico cases to allow insurance coverage for punitive damages, the court, as part of its rationale, cited the Tort Claims Act as evidence that public policy allowed an insurer to pay an award of punitive damages: “Furthermore, under the tort claims act, a governmental entity is required to pay any punitive damages awarded against a public employee acting within the scope of his duty and not acting fraudulently or with actual intentional malice.”<sup>51</sup>

The *Baker* court, however, was mistaken in its understanding of the TCA. The language quoted above implies that the governmental entity need not pay punitive damages if the public employee was acting fraudulently or with malicious intent. When the TCA was first passed, it made no mention of indemnification for punitive damages, regardless of fraudulent or malicious intent.<sup>52</sup> Rather, the TCA provided that the government should generally indemnify a public employee for tort liability arising out of conduct that was occasioned in the scope of the employee’s duties, but expressly provided that the employee should be personally liable if the employee acted “maliciously, fraudulently, or without just cause.”<sup>53</sup>

Two years later, the TCA was amended. Rather than providing that an employee would be personally liable if he acted maliciously, fraudulently, or without just cause, the amended TCA provided that the government would pay the entire award, but could seek reimbursement for any payment from the employee if the liability resulted from conduct that was malicious, fraudulent, or without just cause.<sup>54</sup>

The TCA was again amended in 1982, to expressly provide that the governmental entity would pay any award of punitive damages against a public employee, though the governmental entity could seek reimburse of such payment (as well as the payment of defense costs and payment of compensatory damages) from an employee who acted maliciously, fraudulently, or without just cause.<sup>55</sup>

This was the state of the law in 1987, when *Baker v. Armstrong* was decided. The governmental entity’s obligation to pay punitive damages was dependent only on a finding that the public employee had acted in the scope of his duties. The governmental entity was not able to avoid paying such an award of punitive damages simply because the “public employee was acting fraudulent[ly] or with actual intentional malice.” Thus, in referencing the Tort Claims Act to determine whether insurance coverage could apply to punitive damages, the *Baker*

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47. See *Abbie Uriguen Oldsmobile Buick v. U. S. Fire Ins. Co.*, 511 P.2d 783, 787 (Idaho 1973); *Continental Ins. v. Hancock*, 507 S.W.2d 146, 151–52 (Ky. 1973).

48. See *Price v. Hartford Accident and Indem. Co.*, 502 P.2d 522, 524 (Ariz. 1972); *Greenwood Cemetery v. Travelers Indem. Co.*, 232 S.E.2d 910, 914 (Ga. 1976).

49. See *Baker v. Armstrong*, 1987-NMSC-101, ¶ 16, 744 P.2d 170.

50. 1987-NMSC-101, 744 P.2d 170.

51. *Id.* ¶ 8.

52. See 1976 N.M. Laws 159.

53. *Id.*

54. 1978 N.M. Laws 1028–29.

55. 1982 N.M. Laws 126.



court misinterpreted the TCA as allowing the government to avoid paying punitive damages when public employees acted fraudulently or with actual malice.

*Returning to McBrayer*

The issue before the New Mexico Court of Appeals in *McBrayer* was whether the New Mexico State instructor was acting within the scope of his duties when he tortured and raped McBrayer, pursuant to the TCA's definition of "scope of duties." The Court of Appeals noted that the legislature chose not to use the phrase "scope of employment," but instead to use the phrase "scope of duty."<sup>56</sup> The TCA provides a brief definition of the phrase:

Scope of duty means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance . . . .<sup>57</sup>

The Risk Management Division argued that the University had not "requested, required or authorized" the assault on Ms. McBrayer, and therefore the instructor was not acting in the scope of his duty to the University.<sup>58</sup> The Court of Appeals, however, noted that it could not just read the definition of scope of duty provided in the TCA, but was instead compelled to read the entire TCA together, in order to provide context.<sup>59</sup>

As noted above, the TCA requires the government to pay any judgment against an employee, including punitive damages, if the claim is based on conduct of a public employee acting in the scope of his duties.<sup>60</sup> The TCA also provides that if the award of damages is the result of the public employee's fraudulent or malicious conduct resulting in bodily injury, property damage, or death, then the governmental entity that paid the judgment may seek to recover the amount paid from the public employee.<sup>61</sup>

Based upon this language, the Court of Appeals reasoned that the TCA intended to require the government to pay a judgment when the public employee was acting within the scope of his duty, even when acting either fraudulently or with actual malice.<sup>62</sup> Therefore, the Court reasoned, the TCA anticipates that an employee can be acting in the scope of his duties even though he was acting fraudulently and/or with actual malice.<sup>63</sup>

The language of these indemnification sections does not exclude criminal conduct from an employee's scope of duty. For example, an employee whose intentional malice caused bodily injury may

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56. Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, ¶ 8, 14 P.3d 43.

57. N.M. STAT. ANN. § 41-4-3(G) (2015).

58. *McBrayer*, 2000-NMCA-104, ¶ 10.

59. *Id.* ¶ 11.

60. N.M. STAT. ANN. § 41-4-4(B)-(C) (2015).

61. N.M. STAT. ANN. § 41-4-4(E) (2015).

62. *McBrayer*, 2000-NMCA-104, ¶¶ 13, 22.

63. *Id.* ¶ 12. The Court also noted that the TCA provides coverage for punitive or exemplary damages in civil rights cases when the public employee acts in the scope of duty. Since punitive damages can only be awarded when the public employee's conduct was malicious, willful, reckless, wanton, fraudulent, or in bad faith, it must be that the TCA was intended to provide coverage for such conduct. *Id.* ¶¶ 13-14.

be guilty of battery . . . an employee whose intentional malice results in property damages may be guilty of a trespass . . . and, conceivably, an employee whose intentional malice results in a wrongful death may be guilty of murder.

The Court of Appeals ultimately reasoned that the legislature anticipated that a public employee might “abuse the duties actually requested, required or authorized . . . and thereby commit malicious, even criminal acts that were unauthorized, yet incidental to the performance of those duties.”<sup>64</sup>

The Court of Appeals then focused on the attack on McBrayer: [The assault came about] through [the instructor’s] duty as a university instructor to distribute homework assignments. Because it appears that [the instructor] used this authorized duty as a subterfuge to accomplish his assault, we find that a reasonable fact finder could determine that his actions were within the scope of his duties that NMSU requested, required or authorized him to perform. After all, the TCA defines “scope of duties” as “performing any duties [, not acts] that a public employee is requested, required or authorized to perform.” . . . It is the duty, not the tortious or criminal act, that triggers the state’s obligations under [the TCA].<sup>65</sup>

The decision in *McBrayer* discussed Risk Management’s potential obligation to pay any award or settlement of “damages,” without differentiating between the payment of compensatory and punitive damages.<sup>66</sup> But since the government has a duty to pay awards of both compensatory and punitive damages rendered against a public employee for conduct committed in the “scope of duty,” if Risk Management had a duty to pay an award of compensatory damages to McBrayer, it also had a duty to pay any award of punitive damages.

The Court of Appeals remanded the case to the district court for further proceedings, which would allow the finder of fact to determine if the instructor was acting within the scope of his duties.<sup>67</sup>

The New Mexico Supreme Court refused to grant a writ of certiorari in the *McBrayer* case.<sup>68</sup> Before the trial court had a chance determine if the instructor was acting within the scope of his duties, however, the case was settled.<sup>69</sup> The lawsuit against the instructor, and the declaratory judgment action filed the by Risk Management Division, were voluntarily dismissed.<sup>70</sup>

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64. *Id.* ¶ 17.

65. *Id.* ¶ 20.

66. *Id. passim.*

67. *Id.* ¶ 30.

68. Risk Mgmt. Div. v. McBrayer, 16 P.3d 442 (Table) (2000).

69. See Email to Judge Robles dated August 16, 2001, attached to Motion to Extend Deadlines, Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 14 P.3d 43 (No. D-307-CV-971754).

70. Order of Dismissal, Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 14 P.3d 43 (No. D-307-CV-971754); Order of Dismissal with Prejudice, Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 14 P.3d 43 (No. D-307-CV-971754).

The Court of Appeals' decision has been cited in more than a score of cases, in both state and federal court, and continues to be the law of the land. The net effect of *McBrayer* is that an employee may commit a criminal act for his own benefit, resulting not only in an award of compensatory damages to his victim, but an award of punitive damages, and the taxpayers of New Mexico will have to pay that award if the circumstances that allowed the criminal act found their origin in the employee's work for a governmental entity.

The Court of Appeals' decision in *McBrayer* was embraced by the New Mexico Supreme Court in *Celaya v. Hall*.<sup>71</sup> Hall, a volunteer chaplain with the Bernalillo County Sheriff's Department, ran over Celaya's foot in the parking lot of Wal-Mart. Hall was at Wal-Mart on a personal errand, driving an unmarked vehicle provided by the Sheriff's office.<sup>72</sup> He could not recall what he was doing immediately before going to Wal-Mart, but testified that he customarily drove the Department's vehicle only in connection with his official chaplain duties.<sup>73</sup>

Plaintiff filed suit almost three years after the incident. While there is a three-year statute of limitations for personal injuries,<sup>74</sup> the TCA has a two-year statute of limitations.<sup>75</sup> Therefore, if Hall was acting "in the scope of his duties," the claim would be barred by the TCA's two-year statute of limitations. The trial court found that Hall was acting in the scope of his duties, and therefore granted summary judgment in his favor.<sup>76</sup> The plaintiff appealed, and the Court of Appeals reversed the decision of the trial court.<sup>77</sup> The Supreme Court granted a writ of certiorari.<sup>78</sup>

In discussing whether Hall was acting in the scope of his duties, the Supreme Court relied on, and quoted from, the decision in *McBrayer*. For example, it quoted *McBrayer* for the proposition that, in adopting the phrase "scope of duties," the legislature "created and defined a unique standard to be applied to TCA claims based upon acts of public employees."<sup>79</sup> The *Celaya* court also drew on another decision by the Court of Appeals, the case of *Medina v. Fuller*.<sup>80</sup> The defendant in *Medina*, a deputy sheriff, was driving a departmental vehicle home from work when she stopped for a personal errand, and was involved in an accident. The deputy was on-call, and she was authorized to drive the departmental vehicle to and from work.<sup>81</sup> Reasoning that the deputy's continuous use of the vehicle was for the benefit of the sheriff's department, and that her use of the vehicle was "permitted, if not required" by her employer—a governmental entity—the Court of Appeals concluded that her use of the vehicle was "within the literal definition of [her] 'scope of duties.'"<sup>82</sup>

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71. 2004-NMSC-005, ¶ 22, 85 P.3d 239.

72. *Id.* ¶ 2.

73. *Id.* ¶¶ 3–4.

74. N.M. STAT. ANN. § 37-1-8 (2015).

75. N.M. STAT. ANN. § 41-4-15 (2015).

76. *Celaya*, 2004-NMSC-005, ¶ 6.

77. *Id.*

78. *Id.*

79. *Id.* ¶ 22 (quoting Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, ¶ 8, 14 P.3d 43).

80. *See id.* ¶¶ 22, 23, 26 (discussing *Medina v. Fuller*, 1999-NMCA-011, 971 P.2d 851).

81. *Medina*, 1990-NMCA-11, ¶¶ 5, 7.

82. *See id.* ¶¶ 11–12.

After discussing *McBrayer* and *Medina*, the Court in *Ceyala* reasoned that an employee is within the scope of his or her duties whenever there is “a connection between the public employee’s actions at the time of the incident and the duties the public employee was ‘requested, required or authorized’ to perform.”<sup>83</sup> The Court noted that while Hall was unable to remember exactly what he was doing before the incident, he testified that he drove the governmental vehicle only when he was performing his duties as the department’s chaplain.<sup>84</sup> In an affidavit submitted to the court, Hall testified that he “would occasionally stop in a store and run a personal errand on the way to or from a chaplain assignment,” but that he “never drove the vehicle exclusively for [his] own personal use.”<sup>85</sup> The Court reasoned that since Hall “never drove his Department vehicle exclusively for personal use, and because he was driving it at the time of the incident, then he must have been coming from a ‘chaplain assignment’ when he stopped off at Wal-Mart.”<sup>86</sup> Thus, the court reasoned, a jury could find that he was acting in the scope of his duties, and reversed the grant of summary judgment.

The decisions in *McBrayer*, *Medina* and *Ceyala* illustrate that a government employee can be in the “scope of his duties,” and thus can create vicarious liability for his government employer (and by extension, for the taxpayers which fund that governmental entity) not just when the employee is in the scope of employment,<sup>87</sup> but even when engaging in criminal acts<sup>88</sup> that are not for the benefit of the government entity.

## V. A GOVERNMENTAL ENTITY SHOULD NOT HAVE TO PAY PUNITIVE DAMAGES

### a. The Law Governing an Award of Punitive Damages

An award of punitive damages is for the “limited purpose of punishment and to deter others from the commission of like offenses.”<sup>89</sup> A culpable mental state is therefore required.<sup>90</sup> An award of punitive damages can be made only if the

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83. *Ceyala*, 2004-NMSC-005, ¶ 26 (quoting N.M. STAT. ANN. § 41–4–3(G) (2015)).

84. *Id.* ¶ 27.

85. *Id.*

86. *Id.*

87. The doctrine of *respondeat superior* imposes vicarious liability on an employer for the torts of its employees when they are committed in the “course and scope” of employment. *See* *Spurlock v. Townes*, 2016-NMSC-014, ¶¶ 12–13, 368 P.3d 1213. An act is in the “course and scope” of employment if (1) the act was fairly and naturally incidental to the employer’s business and (2) it was committed by the employee “with the view of furthering the employer’s interest.” N.M. CIV. U.J.I. 13-407. If the employee’s conduct arises from some external, independent and personal motive, it is not in the “course and scope” of employment. That means that – generally - an employee who intentionally injures another person is acting outside of the scope of their employment. *See* *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 29, 91 P.3d 58.

88. The RESTATEMENT (SECOND) OF AGENCY § 229 (AM. LAW. INST. 1958), outlines the criteria that a court should consider in determining whether an act is within the scope of employment. The last criterion asks that the court consider whether the act is “seriously criminal.”

89. N.M. CIV. U.J.I. 13-1827.

90. *See* *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 23, 85 P.3d 230.

defendant acted maliciously, willfully, recklessly, wantonly, fraudulently, or in bad faith.<sup>91</sup>

Since punitive damages are intended to punish—and not to compensate—commentators have recognized that “[t]he concept of punitive damages lies in the borderland that both bridges and separates criminal law and torts.”<sup>92</sup> Punitive damages may be appropriate in certain cases because the criminal law does not always adequately punish the wrongdoer.<sup>93</sup> “Therefore, punitive damages are necessary and useful to serve the dual purposes of the criminal law: the punishment and deterrence of unacceptable conduct.”<sup>94</sup>

Punitive damages do not compensate a victim of a crime that the public employee may have committed. The victim is compensated by an award of compensatory damages. The award of punitive damages is, instead, to punish and to deter. Therefore, in determining whether the government is benefitted by paying punitive damages, the focus therefore should not be on the victim.

#### **b. Requiring a Governmental Entity to Pay Punitive Damages Serves No Purpose**

Courts have clearly and unequivocally ruled that governments are not benefitted by paying punitive damages. These cases certainly did not arise in the context of claims for the indemnification of punitive damages, but in determining whether the government can be—and should be—held directly liable for punitive damages.

The seminal case on this issue is *Newport v. Fact Concerts, Inc.*,<sup>95</sup> where the United States Supreme Court discussed the fact that, historically, courts have always recognized that a governmental entity should not have to pay punitive damages, reasoning that requiring a government to pay punitive damages serves no purpose.<sup>96</sup> The *Newport* court reasoned that punitive damages awards against a government were against public policy, “because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised.”<sup>97</sup>

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91. N.M. CIV. U.J.I. 13-1827.

92. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982); accord, see Bradley D. Toney, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 WILLAMETTE L. REV. 635 (1994).

93. Nicholas K. Kile, *Constitutional Defenses Against Punitive Damages: Down but not out*, 65 IND. L.J. 141 (1989). Although recognizing that punitive damages serve the same purpose as the criminal law, courts have been quick to point out that punitive damages are not a criminal sanction, and therefore the Fifth Amendment’s prohibition on double jeopardy is not violated when someone is both sentenced to prison and held liable for punitive damages in a civil lawsuit. See *Hudson v. United States*, 522 U.S. 93, 103 (1997).

94. Kile, *supra* note 93, at 143.

95. 453 U.S. 247 (1981).

96. *Id.* at 267.

97. *Id.* at 263. While holding that the government could not be held directly liable for punitive damages, the Court acknowledged that some state statutes authorized the indemnification of punitive damages, though noting that a number of those statutes “specifically exclude indemnification for malicious or willful misconduct of the employees.” *Id.* at 269, n.30. A small handful of courts have, since that time, held that such indemnification does not conflict with the governmental body’s immunity granted by *Newport*. See, e.g., *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *overruled by* *Russ v.*

The New Mexico Supreme Court has echoed this sentiment repeatedly. In *Torrance County Mental Health Program v. New Mexico Health & Environment Department*,<sup>98</sup> the Supreme Court considered whether punitive damages could be recovered from the State for a bad-faith breach of contract.<sup>99</sup> The Court noted that while the TCA precluded an award of punitive damages for tort claims, a comparable statute concerning contract claims was silent as to punitive damages. The Court balanced competing interests: 1) deterring the abuse of governmental power and promoting accountability of governmental offices, and 2) protecting public revenues and the injustice of punishing innocent taxpayers rather than the officials at fault.<sup>100</sup> The court found that the balance was to be struck by not awarding punitive damages against the government. The court specifically noted that such an award served only as a windfall to the plaintiff.

### c. Punitive Damages Cannot Be Awarded Against a Governmental Entity

The New Mexico Legislature seems to agree that punitive damages should not be paid by the taxpayers. The TCA expressly provides that punitive damages may not be awarded against the State or against any of its political subdivisions, for any tort for which immunity has been waived.<sup>101</sup>

In addition, the United States Supreme Court has held that punitive damages cannot be awarded against a governmental entity, under 42 U.S.C. § 1983.<sup>102</sup> The Supreme Court's rationale for not awarding punitive damages against a government is that punitive damages are not intended to compensate, but to punish the tortfeasor and to deter others from similar conduct.<sup>103</sup> Since punitive damages are—as the name

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Watts, 414 F.3d 783 (7th Cir. 2005); *Cornwell v. City of Riverside*, 896 F.2d 398 (9th Cir. 1984); *Haile v. Village of Sag Harbor*, 639 F. Supp. 718 (E.D.N.Y. 1986).

98. 1992-NMSC-026, 830 P.2d 145.

99. *Id.* ¶¶ 1, 10.

100. *Id.* ¶¶ 27–28 (noting that “[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers” (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981))).

101. N.M. STAT. ANN. § 41-4-19(D) (2007).

102. *Newport*, 453 U.S. at 271.

103. Certainly, one could argue that a governmental entity would be less likely to commit a violation of someone's rights if the entity could be exposed to punitive damages. But the issue here is not the commission of a tort by a governmental entity, but by one of its employees. Even if the conduct could be directly attributed to the governmental employer (but certainly not in the case of the police department that employed Garcia), there can be no real claim that the government acted with malice. The United States Supreme Court considered the question whether an award of punitive damages against a government might have a deterrent effect, and concluded it was “far from clear” that it would. Instead, the court suggested that corrective action, such as the discharge of the public officials who were involved and the public excoriation of those who were elected, would follow. *Id.* at 269. As the Court noted, “The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.” *Id.* at 269 (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)). The Court also noted a more effective means of deterrence – an award of punitive damages against the offending official. *Id.* at 269–70. The Court said that awarding punitive damages against the offending official provides sufficient protection against the prospect that an official will commit recurrent violations, and that the threat of such an award against the individual is more effective as a deterrent than the threat of punitive damages against the governmental employer. *Id.* If anything, the TCA, by requiring

implies, punitive—such an award against a government serves only to punish taxpayers.

**VI. USING TAXPAYER MONEY TO PAY PUNITIVE DAMAGES  
AWARDED AS A RESULT OF WHOLLY PERSONAL CONDUCT  
VIOLATES THE ANTI-DONATION CLAUSE OF THE NEW MEXICO  
CONSTITUTION**

**a. The New Mexico Constitution Prohibits Expenditure of Taxpayers’  
Monies for Private Purposes.**

The New Mexico Constitution prohibits the use of taxpayers’ monies for private purposes,<sup>104</sup> except in certain, narrowly defined, circumstances which are inapplicable here.<sup>105</sup> The “anti-donation clause” of the New Mexico Constitution provides:

Neither the state, nor any county, school district, or municipality . . . shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation. . . .<sup>106</sup>

There are a number of reported cases involving the interpretation of this constitutional provision and many opinions from the Attorney General on this provision. The cases and Attorney General opinions are in accord that the government may not use taxpayers’ money for anything unless the government receives fair value in return.<sup>107</sup>

An early application of the anti-donation clause can be found in *State ex. rel. Mechem v. Hannah*.<sup>108</sup> The State had been facing a severe drought, resulting in a very limited, and very expensive, supply of hay for cattle. The federal government interceded, and offered a program that would help pay for hay, provided that New Mexico would also contribute financially. The state legislature passed an appropriations bill, authorizing a contribution to the program that would have provided hay—or, at least, money for hay—to New Mexico ranchers. The Governor, relying on an opinion from the Attorney General, refused to allow the money to be provided,<sup>109</sup> and a lawsuit ensued.

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that the government pay the award of punitive damages in the first instance, removes the immediate threat of assessing punitive damages against the governmental employee.

104. N.M. CONST. art. IX, § 14.

105. *Id.* (explaining that public monies may be used to provide care for the sick and indigent, to provide scholarships for veterans at post-secondary institutions, to create new job opportunities by buying land, buildings or infrastructure to support new or expanding businesses under certain circumstances, or to pay for land for affordable housing).

106. *Id.*

107. *See* Indemnification Under the Educational Retirement Act, N.M. Att’y Gen. Op. No. 10-05, 2010 WL 5113294 (Dec. 2010); Public Funding in Defense of Alleged Misconduct in Public Schools, N.M. Att’y Gen. Op. No. 07-03, 2007 WL 2143020 (July 2007); Insurance for Criminal Defense Expenses, N.M. Att’y Gen. Op. No. 85-23, 1985 WL 190691 (Sept 1985).

108. 1957-NMSC-065, 314 P.2d 714.

109. *Id.* ¶ 1.

The case reached the New Mexico Supreme Court, and the Court reasoned that the program to provide hay by the federal government, aided by the State of New Mexico, “was a wonderful thing for the livestock industry, and no doubt was the cause of larger numbers of livestock staying on their range in New Mexico for future production of their kind, thus benefitting the economy of the state. . . .”<sup>110</sup> Nonetheless, the Court concluded that the act authorizing such a payment violated the anti-donation clause.<sup>111</sup>

Absent an exception that allows the government to donate money, such as to the indigent,<sup>112</sup> the New Mexico Constitution prohibits the government from paying money for the benefit of others, unless it also receives a corresponding benefit.

**b. Paying Punitive Damages for a Public Employee’s Purely Personal Conduct Violates the Anti-Donation Clause**

The requirement that the government pay punitive damages, at least when an employee’s conduct leading to the award of punitive damages was purely personal, violates the anti-donation clause. When the government pays punitive damages, the government employee who committed a tortious act benefits by being discharged from his or her obligation to pay damages. The plaintiff who was awarded damages also benefits, because he or she receives compensation greater than the amount necessary for any injuries. However, the government does not receive a corresponding benefit, which is required under the anti-donation clause.

There are no reported decisions from a New Mexico court that consider this issue.<sup>113</sup> An analogous issue, however, was raised in the United States District Court

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110. *Id.* ¶ 39.

111. *Id.* ¶ 40.

112. The anti-donation clause does not impose an absolute ban on using taxpayers’ money without receiving a benefit in return. It contains a number of exceptions, which specifically allow the use of government funds for specific purposes. For example, Article IX, § 14 (A), allows for government monies to be used to help the poor and the ill: “Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.” There are, however, no exceptions that would allow the government to use taxpayer money to pay an award of punitive damages assessed against a public employee.

113. This is a uniquely New Mexico problem. Since many states have constitutional provisions similar to New Mexico’s anti-donation clause, so it would seem that this issue would have arisen elsewhere. But it has not. The reason it has not arisen elsewhere may be due to the fact that the provisions in the New Mexico Tort Claims Act, which purport to require indemnification for punitive damages, are unique. Other states generally require that governmental employers indemnify their employees for compensatory damages, but not punitive damages, or provide for the indemnification of punitive damages only under circumstances where the governmental employee was truly acting in the best interests of the government. For example, the law in Colorado provides that a public entity shall pay for all judgments or settlements of claims against public employees, where the claim arose out of injuries sustained from an act or omission of the public employee during the performance of his duties and in the scope of his employment, “except where such act or omission is willful or wanton. . . .” COLO. REV. STAT. ANN. § 24-10-110 (West 2016). The law in Idaho imposes on the public entity a duty to defend and indemnify its employees, but allows the entity to “refuse a defense or disavow and refuse to pay any judgment for its employee if it is determined that the act . . . included malice or criminal intent.” IDAHO CODE § 6-903(3) (2016). The law in Kansas provides that the governmental entity may refuse to provide a defense if the “employee acted or failed to act because of actual fraud or actual malice.” KAN. STAT. ANN. § 75-6108(c)(2) (West 2016).



for the District of Northern Alabama. *Carr v. City of Florence* dealt with a resolution adopted by the City of Florence, which agreed to pay, on behalf of its employees, all sums which the employees became legally obligated to pay because of “negligent and wrongful acts caused by an occurrence arising out of and in the line and scope of their legal duties. . . .”<sup>114</sup> Several Florence police officers engaged in a nighttime chase and warrantless search.<sup>115</sup> Twelve plaintiffs filed suit against a number of officers and governmental entities.<sup>116</sup> The trial court entered summary judgment on the issue of liability against Officer Harvey, who had angrily slapped one of the plaintiffs during an interrogation.<sup>117</sup> The rest of the case went to trial.<sup>118</sup>

During the course of trial, the court granted a directed verdict in favor of many of the defendants.<sup>119</sup> With the exception of Officer Harvey, the jury found in favor of the defendants who had not obtained a directed verdict.<sup>120</sup> As to Officer Harvey, the jury awarded \$100 to the plaintiff he had slapped, but no punitive damages.<sup>121</sup>

The plaintiff who was slapped filed a motion for *additur*, arguing that he should have been awarded greater damages.<sup>122</sup> He specifically complained that the court erred in excluding from evidence the ordinance adopted by the City of Florence, apparently believing that if the jury had been aware of the ordinance which required the City of Florence to pay any judgment, rather than the individual officer, it would have been more likely to award punitive damages.<sup>123</sup>

The ordinance required the City of Florence to pay any award stemming from the “negligent and wrongful” acts of its officers.<sup>124</sup> The trial court kept it out of evidence for a variety of reasons, most notably for its conclusion that the ordinance did not require the City of Florence to pay an award of punitive damages.<sup>125</sup> The trial court noted that the constitution of Alabama placed limits on what the government could voluntarily agree to pay.<sup>126</sup> Quoting a provision similar to the New Mexico anti-donation clause, the court noted that the legislature could not “grant public money or a thing of value in aide of, or to any individual. . . .”<sup>127</sup> The court went on to note that the City’s resolution had to be read to allow for payment of its employees

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The law in Washington provides that the governmental employer has a duty to defend and indemnify only while the employee was acting in good faith. WASH. REV. CODE ANN. §§ 4.92.060, 4.92.070 (West 2016). And the law in Vermont imposes upon the government a duty to defend and indemnify except where the judgment results from gross negligence or willful misconduct. VT. STAT. ANN. tit. 12, § 5606 (2016).

114. 729 F. Supp. 783, 786 (N.D. Ala. 1990).

115. *Id.* at 784.

116. *Id.* at 785.

117. *Id.* at 785, 786.

118. *Id.* at 785.

119. *Id.*

120. *Id.* at 785.

121. *Id.*

122. *Id.*

123. *Id.* at 786 (explaining that plaintiff sought to introduce the ordinance after the defense lawyer introduced evidence showing that the police officer lacked the money to pay punitive damages).

124. *Id.* (quoting the Florence City Council Resolution adopted April 15, 1986).

125. *Id.* at 788–89.

126. *Id.* at 788 (quoting ALA. CONST. art. IV, § 94).

127. *Id.*

liabilities only if the conduct was both negligent and wrongful, because otherwise it would require the city to pay for liability arising solely from wrongful conduct. Any other reading, the court reasoned, would be unconstitutional.

Citing an amendment to Alabama's version of the anti-donation clause, which allows the government to spend money when the expenditure is deemed "in the proper corporate interest," the court noted that while there might be a proper corporate purpose in defending a public employee accused of wrongdoing, "[t]here is a marked difference between providing the cost of *defense* and paying a *punitive judgment*. Any casualty insurance company would readily recognize this distinction."<sup>128</sup>

Although the decision in *Carr* seems to be the only case that directly addresses the issue, an analogous issue has been the subject of frequent litigation. A number of cases have dealt with the question of whether a government can properly pay for the legal expenses incurred by a public employee in defending themselves against criminal charges.<sup>129</sup> Courts have consistently held that if the conduct resulting in criminal charges arose out of their public employment, the government can reimburse the employees for their legal expenses only if they are found not guilty, and they have acted in good faith.<sup>130</sup> Otherwise, the courts agree, no public purpose would be served by reimbursing them for their legal expenses, and paying those expenses would be an unconstitutional payment.<sup>131</sup>

*Wright v. The City of Danville*<sup>132</sup> is typical of this line of cases. A group of people filed suit against the City and its commissioners, alleging a violation of the Voting Rights Act of 1965.<sup>133</sup> A proposed settlement agreement was reached when the commissioners agreed to a change in the form of government from a mayor-commissioners system to a mayor-aldermen system, with aldermen elected from seven two-member districts. The agreement contained provisions, insisted on by the existing commissioners, that the existing commissioners would be appointed as administrators of the various departments that corresponded with their then-current duties as commissioners. They were guaranteed new employment in these

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128. *Id.* at 789 (emphasis in original).

129. *See, e.g.,* *Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. Dist. Ct. App. 1983); *Ellison v. Reid*, 397 So. 2d 352 (Fla. Dist. Ct. App. 1981); *Wright v. City of Danville*, 675 N.E.2d 110 (Ill. 1996); *Snowden v. Anne Arundel Cty.*, 456 A.2d 380 (Md. 1983); *Bowens v. City of Pontiac*, 419 N.W.2d 24 (Mich. Ct. App. 1988), *overruled on other grounds by* *Warda v. City Council of Flushing*, 696 N.W. 2d 671 (Mich. 2005); *Sonnenberg v. Farmington Twp.*, 197 N.W.2d 853 (Mich. Ct. App. 1972); *Kroschel v. City of Afton*, 512 N.W.2d 351 (Minn. Ct. App. 1994); *Beckett v. Bd. of Supervisors*, 363 S.E.2d 918 (Va. 1988).

130. *See, e.g.,* *Lomelo*, 423 So. 2d at 977 (holding that costs of defending public official for misconduct charges served public purpose only because official was acquitted of charges); *Reid*, 397 So. 2d at 354; *Snowden*, 456 A.2d at 385 (holding that indemnity ordinance served public purpose primarily because it limited reimbursement to only those public officials who had successfully defended themselves against criminal charges); *Bowens*, 419 N.W.2d at 26; *Sonnenberg*, 197 N.W.2d at 854; *Kroschel*, 512 N.W.2d at 356-57; *Beckett*, 363 S.E.2d at 921.

131. *See, e.g.,* *Lomelo*, 423 So. 2d at 977; *Reid*, 397 So. 2d at 354; *Snowden*, 456 A.2d at 385; *Bowens*, 419 N.W.2d at 26; *Sonnenberg*, 197 N.W.2d at 854; *Kroschel*, 512 N.W.2d at 356; *Beckett*, 363 S.E.2d at 921.

132. 675 N.E.2d 110 (Ill. 1996).

133. *See* 42 U.S.C. §1973b (current version at 52 U.S.C. § 10303 (2014)).

administrative positions for three years, at salaries the commissioners would set themselves.<sup>134</sup>

The State's Attorney felt that the proposed settlement agreement was a conflict of interest. He issued subpoenas, requiring the commissioners to appear before a grand jury.<sup>135</sup> A federal court issued an injunction, prohibiting the grand jury from going forward, and approved the settlement agreement. The commissioners then adopted a new ordinance, in keeping with the settlement agreement.<sup>136</sup> In addition to the agreed-upon terms, the new ordinance provided that the City would pay for any legal fees that the commissioners incurred in the event that criminal charges were brought against them, provided only that any commissioner seeking indemnity had no reasonable cause to believe his conduct was unlawful and that the act or omission leading to the charges was within the scope of the office or employment.<sup>137</sup>

After the ordinance was passed, the injunction issued by the federal court was dissolved. The State's Attorney convened the grand jury, and the commissioners testified that they would receive personal benefit from the settlement agreement and ordinance, and that they never would have agreed to the settlement without the provisions allowing them to effectively retain their positions. The grand jury then indicted the members of the commission, charging them with official misconduct and conflict of interest.

The federal district court again issued an injunction, reasoning that it had resolved the issues of the commissioner's criminal liability when it approved the settlement. The federal court of appeals, however, reversed, finding that the district court had only determined that the City had the power to enter into the agreement, and did not have the power to determine that the negotiation process was valid.

The commissioners subsequently stood trial on the criminal charges. During the trial, they admitted that they had no right to require that they retain their jobs as a condition of settling the voting rights litigation, and that they were not entitled to retention. All of the commissioners were found guilty of official misconduct. The convictions were reversed by the Illinois Court of Appeals, and then reinstated by the Illinois Supreme Court.<sup>138</sup>

The commissioners incurred legal expenses of over \$320,000. They filed suit against the City, seeking reimbursement of their legal expenses. The trial court summarily found that the commissioners were not entitled to reimbursement, and the case was appealed. The Illinois Court of Appeals reversed, finding that there were material issues of fact that should be addressed by the trial court.<sup>139</sup> The Illinois Supreme Court then granted the City's petition to appeal to the state's highest court.

The Illinois Constitution has a clause (similar to the anti-donation clause found in New Mexico's constitution) which provides that public funds may be expended only for a public purpose.<sup>140</sup> The Illinois Supreme Court noted that a state

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134. *Wright*, 675 N.E.2d at 113.

135. *Id.*

136. *Id.*

137. *Id.* at 114 (quoting Danville, Ill. Ordinance no. 7237 (effective Mar. 10, 1987)).

138. *Id.* at 113–14.

139. *Id.* at 114.

140. ILL. CONST. art. VIII, § 1.

statute provided that local governments could indemnify their employees for compensatory damage awards and for costs in civil actions, but that they could not indemnify against an award of punitive damages.<sup>141</sup> It also noted that defraying the costs of purely private litigation has “always been outside the bounds of a proper public purpose.”<sup>142</sup> Finally, it noted that while a legislative body has broad discretion in determining what constitutes a public purpose, that discretion is not unlimited, and the courts should intervene when public property is devoted to a private purpose.<sup>143</sup>

The court also reviewed cases involving the same issue: whether public money could be used to pay for the attorneys’ fees incurred by public employees whilst defending themselves from criminal charges. The court summarized the cases succinctly and accurately:

[I]t is generally held . . . that a valid public purpose exists only when the authority of the municipality is limited to the reimbursement of legal expenses incurred in a successful defense.<sup>144</sup>

After reviewing the case law concerning the use of public monies to pay for attorneys’ fee incurred by public employee, the court concluded that the City would obtain no benefit from paying for the attorneys’ fees:

Further, the purpose of indemnification, so as not to inhibit capable individuals from seeking public office, has no relevance in the context of the criminal conduct involved in this case. No official of public government should be encouraged to engage in criminal acts by the assurance that he will be able to pass defense costs on to the taxpayers of the community he was elected to serve.<sup>145</sup>

*Wright v. City of Danville* is not an aberration, but instead reflects the mainstream of reported decisions: Using taxpayers’ money to pay for attorneys’ fees incurred by public employees who are then convicted of a crime serves no public purpose, and therefore it is unconstitutional.

The parallel between cases involving punitive damages against a public employee for purely personal conduct and cases involving attorneys’ fees incurred in the unsuccessful defense against criminal charges is patent. In both cases, the public employee is subject to liability because of personal conduct that is markedly different from the type of act he was authorized to perform, or that was performed purely in his own self-interest.

The courts of New Mexico have never had the occasion to address this question. But the issue has repeatedly arisen, as is evidenced by several requests to the New Mexico Attorney General, asking for advice on the topic. And in their formal opinions, our Attorneys General have followed the mainstream of cases, concluding that paying for a public employee’s legal fees associated with criminal

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141. 745 ILL. COMP. STAT. § 10/9-102 (2002).

142. *Wright*, 675 N.E.2d at 115 (citing *City of Chicago v. Williams*, 55 N.E. 123 (Ill. 1899)).

143. *See id.* at 115–16.

144. *Id.* at 116 (emphasis omitted).

145. *Id.* at 117.

charges would violate the anti-donation clause unless the employee is acquitted, and was acting in good faith.<sup>146</sup>

*1983-1986 Opinion of the Attorney General 425*

In 1985, the Attorney General was asked to opine as to whether the State could pay for attorney's fees incurred by public employees in connection with criminal charges brought against them.<sup>147</sup> The Attorney General noted that there was no statutory authority for the government to pay such fees, but noted that a number of other states had statutes allowing for the payment of criminal defense fees, subject to a number of conditions.<sup>148</sup> The opinion also noted that in some jurisdictions, courts had allowed the payment of such fees even in the absence of statutory authority, again subject to some conditions.<sup>149</sup> Finally, the opinion noted that some courts had held that the government could not voluntarily pay such fees.<sup>150</sup>

The Attorney General framed the question as one involving the effect of the anti-donation clause. The opinion discussed *Montgomery v. Collins*<sup>151</sup>, a decision by the Alabama Supreme Court. The question in that case was whether the government could pay the attorney's fees incurred by three police officers.<sup>152</sup> The three officers had testified before a grand jury, resulting in an indictment.<sup>153</sup> An order was entered enjoining the City of Montgomery (who had employed the police officers) from spending municipal funds in the defense of the criminal charges against the police officer. .<sup>154</sup> The Alabama Supreme Court held that because of the conclusive effect of conviction might have in subsequent civil litigation, the government had an interest in providing the employees with a defense in the criminal case, and paying the fees would not violate Alabama's anti-gratuity clause.<sup>155</sup>

The Attorney General's opinion also states that, given the absence of statutory authority in New Mexico for the payment of such fees, it was the Attorney General's opinion that paying the fees would not violate the anti-donation clause if:

1. The criminal charges arose from the discharge of an official duty in which the government had an interest;
2. The employee had acted in good faith when the alleged criminal conduct occurred;
3. The agency seeking to indemnify the employee had the express or implied power to do so;
4. The employee is exonerated of the criminal charges; and

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146. The opinions of the Attorney General do not have the force of law in New Mexico. The opinions are, however, entitled to "great weight." *United States v. Reese*, 2014-NMSC-013, ¶ 36, 326 P.3d 454 (quoting *Hanagan v. Bd. of Cty. Comm'rs*, 1958-NMSC-053, ¶ 9, 325 P.2d 282).

147. *See Insurance for Criminal Defense Expenses*, N.M. Att'y Gen. Op. No. 85-23, 1985 WL 190691, at \*1 (Sept. 1985).

148. *See id.*

149. *See id.* at \*2.

150. *See id.*

151. *See id.* (discussing *City of Montgomery v. Collins*, 355 So. 2d 1111 (Ala. 1978)).

152. *See City of Montgomery*, 355 So. 2d at 1112–13.

153. *See id.* at 1112.

154. *See id.* at 1112–14.

155. *See id.* at 1114–15.

5. The decision to pay the fees was made by an impartial official or official body which performed a thorough investigation to determine the existence of the first four factors.<sup>156</sup>

*Opinion of the Attorney General 07-03*

A similar question was presented to the Attorney General in 2007. Specifically, the Attorney General was asked to opine as to whether public funds could be used to pay for legal fees incurred by public employees in legal actions filed against them.<sup>157</sup> The Attorney General referred to the 1985 Opinion Letter, and noted that there were no significant changes in the law since that time.<sup>158</sup> The 2007 opinion repeated the five criteria quoted above, and noted that while the 1985 opinion dealt with fees associated with criminal charges, similar criteria should be used in civil proceedings.<sup>159</sup> The Attorney General emphasized the importance that the employee acted in good faith and was exonerated:

The requirements that the allegations arise from conduct within the public employee's official capacity or scope of employment and that the employee be exonerated ensure that public funds are not improperly used to provide a defense in personal proceedings.<sup>160</sup>

That the employee was exonerated seems to be important; it not only appears in the list of criteria, but was specifically referred as a requirement for the expenditure of public funds.<sup>161</sup> For example, the Attorney General cited as support for his position the opinion of the Attorney General of New York in a similar case, specifically quoting that opinion's statement that "[a] municipality's 'payment of legal fees when an employee is found guilty would constitute an unconstitutional gift of public funds because an employee acting criminally is not acting within the scope of his public employment.'"<sup>162</sup>

*Opinion of the Attorney General 10-05*

Bruce Malott, the former chairman of the Education Retirement Board for the State of New Mexico, was named as a defendant in four separate lawsuits.<sup>163</sup> He was the target of an investigation instituted by the Securities and Exchange Commission, and he was being investigated by a federal grand jury.<sup>164</sup> Risk Management assigned counsel to represent him in the two lawsuits, and the

156. See Insurance for Criminal Defense Expenses, N.M. Att'y Gen. Op. No. 85-23, 1985 WL 190691, at \*3 (Sept. 1985).

157. Public Funding in Defense of Alleged Misconduct in Public Schools, N.M. Att'y Gen. Op. No. 07-03, 2007 WL 2143020, at \*1 (July 2007).

158. See *id.* at \*2.

159. See *id.*

160. *Id.* at \*6.

161. See *id.*

162. *Id.* (quoting Town's Authority to Reimburse Legal Fees, N.Y. Informal Att'y Gen. Op. No. 2003-16, 2003 WL 22669327, at \*2 (Nov. 2003)).

163. See Indemnification Under the Education Retirement Act, N.M. Att'y Gen. Op. No. 10-05, 2010 WL 5113294, at \*1 (Dec. 2010).

164. See *id.*

Educational Retirement Board offered to provide him with counsel, at its expense, to defend him in the lawsuits, but Malott chose to hire counsel of his choice.<sup>165</sup> He then demanded that the State reimburse him for his legal expenses.<sup>166</sup>

The Attorney General opined that while the State had a duty to provide Malott an attorney in the two civil lawsuits, it had done so.<sup>167</sup> It had no duty to pay for Malott's private counsel. Malott argued that the attorneys provided by the State were insufficient, because they would not protect his "individual, personal interests."<sup>168</sup> The Attorney General, however, noted that the State could not provide a defense in a proceeding implicating Malott's personal, individual interest without violating the anti-donation clause.<sup>169</sup>

The State did not offer an attorney to represent Malott in connection with the grand jury investigation.<sup>170</sup> In response to Malott's claim that he was entitled to be indemnified for expenses associated with the criminal investigation, the Attorney General again reviewed the 1985 opinion, reciting the five criteria noted above.<sup>171</sup> The Attorney General focused on the fourth criterion, the requirement that the employee be exonerated of the criminal charge before the State could reimburse the employee for his legal expense:

As applied to the ERB, the fourth criterion — the employee's exoneration — is most critical. As discussed in this Office's previous opinions, the exoneration requirement ensures that public funds are not improperly used to defend a public employee or officer who is convicted of a crime. Criminal acts, by definition, are not within the scope of an officer's public duties or employment.<sup>172</sup>

In support of this position, the Attorney General cited to *Wright v. City of Danville*,<sup>173</sup> the decision by the Illinois Supreme Court discussed at the outset of this section. And in *Wright*, the court noted that:

[H]olding public officials personally liable for the expenses incurred in unsuccessfully defending charges of their criminal misconduct in office tends to protect the public and to secure honest and faithful service by such servants. Indeed, allowing expenditure of public funds for such use would encourage a disregard of duty and place a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law.<sup>174</sup>

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165. See *id.* at \*1–2. Although Malott hired his own counsel, the Risk Management Division had assigned, or made counsel available, to Malott in at least some of the cases.

166. See *id.* at \*2.

167. See *id.* at \*2–3.

168. *Id.* at \*11.

169. *Id.* at \*11–12.

170. *Id.* at \*3.

171. See *id.* at \*6.

172. *Id.* (citation omitted).

173. See *id.* (citing *Wright v. City of Danville*, 675 N.E.2d 110, 118 (Ill. 1996)).

174. See *Wright*, 675 N.E.2d at 117.

As noted by the court in *Bowling v. Brown*, “to reimburse [convicted public officials] for their legal expenses would not encourage the ‘faithful and courageous discharge of duty on the part of public officials.’ On the contrary, it would encourage the reverse.”<sup>175</sup> No court should give any incentive to an individual “drawn to these corrupt practices” by promising indemnification.<sup>176</sup>

## VII. CONCLUSION

While it certainly makes sense to provide for the defense and indemnification of public employees who are liable for compensatory damages for liability occasioned by their good faith efforts to discharge their duties, the Tort Claims Act goes too far when it requires the government to indemnify its employees for punitive damages stemming from their wholly personal and malicious objectives. Not only is such indemnification bad policy, it also violates the anti-donation clause of the New Mexico Constitution. While a litigant will, at some point, bring this issue to the New Mexico Supreme Court, it is likely that governments will use taxpayers’ money to settle claims to avoid the potential exposure to punitive damages in the meantime.

The New Mexico Legislature should avoid this needless and illegal expenditure of money, and save everyone involved the costs of litigating the issue, by simply amending the TCA to comport with the New Mexico Constitution.

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175. *Bowling v. Brown*, 469 A.2d 896, 901 (Md. Ct. Spec. App. 1984) (quoting *Snowden v. Anne Arundel Cty.*, 456 A.2d 380, 384 (Md. 1983)).

176. *Wright*, 675 N.E.2d at 117.