Multiple Tortfeasors Defined by the Injury:
Successive Tortfeasor Liability after Payne v. Hall

Megan P. Duffy
MULTIPLE TORTFEASORS DEFINED BY THE INJURY:
SUCCESSIVE TORTFEASOR LIABILITY AFTER
PAYNE V. HALL
MEGAN P. DUFFY*

I. INTRODUCTION

Multiple tortfeasor liability has been the bane of New Mexico tort law for years, largely because the New Mexico Legislature and New Mexico courts have failed to articulate a clear method on how to approach and resolve successive tortfeasor issues. The primary confusion lies in how to apportion liability among multiple tortfeasors, how and to what extent comparative fault may be presented at trial, and how to properly instruct the jury on these complex issues.

In the past three decades, New Mexico courts have encountered only a handful of opportunities in which to navigate this murky territory. Payne v. Hall (Payne I) is the most recent decision on multi-tortfeasor issues and it attempts to clarify the longstanding confusion surrounding these cases. In order to understand the significance of the court’s decision in Payne II, this Note begins by exploring the complex historical development of successive tortfeasor law in New Mexico. After looking at the facts of Payne II in Part III, Part IV turns to the framework set forth by the New Mexico Supreme Court for analyzing multiple tortfeasor fact-patterns. Subsequently, Part V examines the practical effect of Payne II on multiple tortfeasor issues by illustrating how Payne II applies in a variety of tort scenarios; this section scrutinizes how the different theories of liability affect plaintiffs in proving their case, and how defendants may use comparative negligence to offset their liability. This section concludes by exploring how fault can be apportioned differently based on suggestions presented by Martinez v. First National Bank of Santa Fe and Judge Alarid’s special concurrence to the New Mexico Court of Appeals’ decision in Payne I.

* Class of 2008, University of New Mexico School of Law. I would like to extend my gratitude to Professor M.E. Occhialino for all of his time and thoughtful help in preparing this Note; his knowledge on the subject is impresssive and inspiring. Additionally, I would like to thank my editors: Margot Sigal, for her patience, guidance, and encouragement; Barry Berenberg, for his attention to detail; Richard Hatch, for his frank advice; and Deana Bennett, for everything.

1. See generally Payne v. Hall (Payne II), 2006-NMSC-029, ¶ 10, 137 P.3d 599, 603 (citing M.E. Occhialino, Bartlett Revisited: New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability—Part One, 33 N.M. L. REV. 1 (2003) (discussing the history of joint and several liability in New Mexico)).
3. 2006-NMSC-029, 137 P.3d 599.
4. Id.
5. See infra Part II.
6. See infra Part III.
7. See infra Part IV.
Finally, this Note concludes by assessing how *Payne II* may affect practitioners.\(^{10}\) The direct effect arises from the proposal and adoption of new uniform jury instructions that are specifically tailored to successive tortfeasor cases.\(^{11}\) However, *Payne II* is arguably more valuable as an example of the difficulties a plaintiff may experience through various choices in approaching a successive tortfeasor action and illustrates indirectly that practitioners should argue both concurrent and successive theories of liability, alternatively, when trying multiple tortfeasor cases.\(^{12}\) Through an awareness of the opportunities and pitfalls presented in multi-tortfeasor fact patterns, practitioners may successfully litigate these complex cases and avoid a myriad of stumbling blocks along the way.

II. HISTORICAL BACKGROUND

Before analyzing the rationale and implications set forth in *Payne II*,\(^{13}\) it is useful to understand the terminology of multiple tortfeasor cases. As a practical matter, when one person injures another, the party causing the injury is called a tortfeasor. When an injury is caused by two or more tortfeasors, these situations are generally referred to as multiple tortfeasor scenarios.

There are two types of multiple tortfeasor scenarios, which are classified by the number of injuries caused to a third party.\(^{14}\) The more common situation involves concurrent tortfeasors, where two or more persons combine to cause a single, indivisible injury to a third party.\(^{15}\) A classic concurrent tort is illustrated by the example of a chain reaction car accident. In this scenario, two or more cars collide with the plaintiff's car and cause an injury (or injuries) to the plaintiff that cannot be identified with the individual drivers and impacts.\(^{16}\) Because the plaintiff's injuries cannot be readily divided and attributed to specific drivers, the plaintiff's condition is viewed as a single, overall injury caused by the combined acts of multiple tortfeasors.\(^{17}\)

Conversely, the less common multi-tortfeasor pattern involves successive tortfeasors who cause two or more separate, divisible injuries: a first injury caused by a first tortfeasor, followed by a distinct second injury caused by a second tortfeasor.\(^{18}\) In referring to successive tortfeasor scenarios, the parties are defined as the "original" tortfeasor, who causes the first or original injury, and the "successive" tortfeasor, who causes another separate or enhanced injury that is distinct and

---

10. See infra Part VI.
11. See infra Part VI.B.
12. See infra Part VI.
14. See id. ¶ 11–12, 137 P.3d at 603–04.
18. The resulting injury could also be a distinct enhancement of the first injury. See *Payne II*, 2006-NMSC-029, ¶ 12, 137 P.3d at 604. Successive tortfeasors are two or more parties whose actions may occur at different times and cause different injuries to the same plaintiff. See *Lujan*, 120 N.M. at 425, 902 P.2d at 1028.
Adoption of Several Liability in New Mexico: insurer risk on the plaintiff. A common successive tortfeasor example occurs when the plaintiff is injured in a car accident caused by the original tortfeasor; the plaintiff is then taken to the hospital where she suffers a second injury as the result of negligent medical treatment.

New Mexico courts use concurrent and successive tortfeasor classifications to determine the type and extent of liability imposed on each tortfeasor. Historically, concurrent tortfeasors were subject to joint and several liability, where any one of the individual tortfeasors may be held liable for the entire harm, regardless of his individual amount of fault. While joint and several liability was widely disfavored by defendants, the New Mexico Supreme Court justified its use by stating that, "under traditional principles of causation, if the plaintiff could not prove what portion of a single injury each of two concurrent tortfeasors had caused, that plaintiff could not recover damages from either wrongdoer. However, "rather than permit wrongdoers to escape without liability, American jurisdictions, including New Mexico, adopted the rule that each concurrent tortfeasor is jointly and severally liable for the entire harm." Accordingly, "this solution assures recovery for the plaintiff even in the absence of proof allocating the injury between

divisible from the original injury. These classifications were traditionally distinguished by the temporal relationship between the acts and by the divisibility of the resulting injury or injuries. A common successive tortfeasor example occurs when the plaintiff is injured in a car accident caused by the original tortfeasor; the plaintiff is then taken to the hospital where she suffers a second injury as the result of negligent medical treatment.

New Mexico courts use concurrent and successive tortfeasor classifications to determine the type and extent of liability imposed on each tortfeasor. Historically, concurrent tortfeasors were subject to joint and several liability, where any one of the individual tortfeasors may be held liable for the entire harm, regardless of his individual amount of fault. While joint and several liability was widely disfavored by defendants, the New Mexico Supreme Court justified its use by stating that, "under traditional principles of causation, if the plaintiff could not prove what portion of a single injury each of two concurrent tortfeasors had caused, that plaintiff could not recover damages from either wrongdoer." However, "rather than permit wrongdoers to escape without liability, American jurisdictions, including New Mexico, adopted the rule that each concurrent tortfeasor is jointly and severally liable for the entire harm." Accordingly, "this solution assures recovery for the plaintiff even in the absence of proof allocating the injury between

---

20. See Payne II, 2006-NMSC-029, ¶ 15, 137 P.3d at 604 (citing Occhialino, supra note 1, at 21). For a discussion of the New Mexico Supreme Court’s rejection of a temporal analysis in favor of a focus on the divisibility of the injury or injuries, see infra Part IV.A.
22. See, e.g., Lujan, 120 N.M. 422, 902 P.2d 1025.
25. Comment a of the Restatement (Second) of Torts further states:
   One whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result. Nor are the damages against him diminished. This is true when both are simultaneously negligent, and also when the act of one either occurs or takes harmful effect after that of the other. It is immaterial that as between the two, one of them was primarily at fault for causing the harm or that the other, upon payment of damages, would be entitled to indemnity against him. It is also immaterial that the conduct of the other was seriously wrongful while the conduct of the other was merely negligent or, indeed, blameless.

26. See infra notes 52–58 and accompanying text. Generally, joint and several liability required a single defendant to pay more damages that he or she was individually responsible for. See infra notes 52–58 and accompanying text. In addition, "Joint and several liability imposes the risk that one or more tortfeasors liable for the plaintiff’s damages is insolvent on the remaining solvent defendants, while several liability imposes this insolvency risk on the plaintiff." RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 10 cmt. a.
28. Id.
its two negligent causes. After the plaintiff is awarded a judgment against one defendant, the burden then shifts to the liable defendant to pursue the remaining tortfeasors for indemnification or contribution.

Whereas concurrent tortfeasors were subject to joint and several liability, the "analysis shifts when successive tortfeasors cause separate divisible injuries." The Restatement (Second) of Torts states, "If two or more persons, acting independently, tortiously cause distinct harms,...each is subject to liability only for the portion of the total harm that he has himself caused." Thus, under the Restatement, when injuries are divisible, successive tortfeasors are subject to several liability, where each tortfeasor is only liable to the extent of his individual fault. Unlike concurrent tortfeasors, no single tortfeasor in a successive tort scenario would be wholly responsible for all of the damages. Therefore, several liability requires the plaintiff to bring suit against each tortfeasor that may be liable for her damages in order to achieve a full recovery.

29. Schultz & Occhialino, supra note 24, at 494 ("Rather than rule against the plaintiff for failure to establish causation, the law instead chose to impose joint and several liability on the tortfeasors who caused the indivisible injury.").

30. There is still some ambiguity regarding the time frame for indemnification and contribution in New Mexico under Rule 1-014(A) NMRA. New Mexico courts have not determined whether the defendant's right to indemnification and contribution begins after a judgment has been entered against the defendant (or when the defendant actually pays for the plaintiff's injury), or whether indemnification and contribution are controlled by the underlying statute of limitations for the original tort. See Payne II, 2006-NMSC-029, ¶ 7 n.2, 137 P.3d at 602 n.2.

31. Indemnity is defined as
[a] duty to make good any loss, damage, or liability, incurred by another. (2) The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty (3) Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common law duty.
BLACK'S LAW DICTIONARY, supra note 15, at 784.

32. Contribution is defined as
[the right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others when that one person discharges the debt for the benefit of all; the right to demand that another who is jointly responsible for a third party's injury supply part of what is required to compensate the third party.
Id. at 352-53.


34. RESTATEMENT (SECOND) OF TORTS § 881 (1979) (emphasis added). Comment a continues:
This Section is an application of § 433A, where the distinction is made between harm that is single and indivisible and hence is not to be apportioned among the various causes that contribute to it, and harms that are distinct or that afford a reasonable basis for division, in which case the apportionment of damages is made. This Section is concerned only with harms that are distinct or divisible. When the tortious conduct of two or more persons has contributed to harm of this type, the liability is apportioned among them and each is held liable only for the proportion of the total harm for which he is himself responsible. For harms that are incapable of apportionment, see § 875.
Id. cmt. a.

35. Several liability is defined as "[I]liability that is separate and distinct from another's liability, so that the plaintiff may bring a separate action against one defendant without joining the other liable parties." BLACK'S LAW DICTIONARY, supra note 15, at 933.

36. See supra note 34 and accompanying text. This general statement must allow for the fact that the original tortfeasor may be held liable for the entire harm under a proximate cause analysis. See Payne v. Hall (Payne I), 2004-NMCA-113, ¶¶ 36-37, 98 P.3d 1030, 1041 (Alarid, J., specially concurring).

37. See infra Part VI.A.
This framework presents an overview of multiple tortfeasor law, and these patterns were firmly entrenched in New Mexico courts until 1981. The following section will explore how the abrupt change from contributory negligence to comparative negligence in 1981 inspired the courts to explore and change their approach to multi-tortfeasor liability. Eventually, this evolution led to a complete reversal of the traditional apportionment patterns in New Mexico.

A. The Adoption of Comparative Negligence and Several Liability in New Mexico

Before 1981, New Mexico courts applied joint and several liability to concurrent tortfeasors and several liability to successive tortfeasors. In addition, the courts employed the doctrine of contributory negligence in tort actions, which prevented a plaintiff from recovering monetary damages if the plaintiff's own negligence, however slight, contributed to her injury. However, in the 1981 case of Scott v. Rizzo, the New Mexico Supreme Court abolished the doctrine of contributory negligence and adopted comparative negligence in its place. This change prompted New Mexico courts to reevaluate multi-tortfeasor liability, eventually leading to a complete reversal of the apportionment theories.

After Scott, the new comparative negligence approach allowed a plaintiff to recover damages even if she contributed to her own injury. Instead of a wholesale rejection of the plaintiff's claim, the total damage award is merely reduced based on the plaintiff's own percentage of fault in causing the injury. The New Mexico Court of Appeals explained that comparative negligence seeks to accomplish "the apportionment of fault between or among negligent parties...and apportionment of the total damages resulting from such loss or injury in proportion to the fault of each party." The following year, in Bartlett v. New Mexico Welding Supply, Inc., the New Mexico Court of Appeals began to apply comparative negligence to suits involving multiple tortfeasors. In Bartlett, the plaintiff was injured in a three-vehicle accident. The identity of one of the drivers was wholly unknown and the plaintiff

38. See infra Part II.A.
39. See infra Part II.C.
40. See supra notes 24–37 and accompanying text.
41. See Scott v. Rizzo, 96 N.M. 682, 684, 634 P.2d 1234, 1236 (1981). Under contributory negligence, a defendant has a complete defense if he can establish that the plaintiff negligently contributed to her own injury. See id.
42. Id.
43. See id.; see also Occhialino, supra note 1, at 4.
44. See Scott, 96 N.M. at 684 n.1, 634 P.2d at 1236 n.1; Occhialino, supra note 1, at 4.
45. See BLACK'S LAW DICTIONARY, supra note 15, at 300.
47. Id.
48. In Bartlett, the New Mexico Court of Appeals was asked to consider whether it was appropriate for the factfinder to determine the percentage of fault for an unknown concurrent tortfeasor and ultimately whether it was appropriate to apply joint and several liability to a single, concurrent tortfeasor in a pure comparative negligence system. See id. at 153–54, 646 P.2d at 580–81.
49. Id. at 153, 646 P.2d at 580. Three vehicles were driving in a single-file line, with the plaintiff driving the middle car, when the lead car pulled off of and back on to the road very quickly. Id. The plaintiff slammed on her brakes and the car behind her rear-ended her. Id.
brought suit solely against the other, known driver. There was no question that the defendant and the unknown driver were concurrent tortfeasors; instead, the court was asked to decide whether it was appropriate, under the new comparative negligence system, to apply joint and several liability to the known driver, thereby making one concurrent tortfeasor liable for the entire injury.

At trial, the jury determined that the plaintiff’s damages totaled $100,000, and that the defendant’s negligence contributed to thirty percent of those damages. If the court of appeals chose to impose joint and several liability, the practical effect would be that a defendant who was only thirty percent responsible for causing the plaintiffs’ injuries would be forced to pay one hundred percent of her damages. Instead, the court believed that it was no longer consistent to place full liability on a single defendant when multiple parties combined to cause the injury. The court stated that the jury is capable of apportioning comparative fault between a plaintiff and a defendant in a traditional negligence action and, therefore, the jury is also capable of apportioning fault among several defendants in a concurrent tort action. This finding led the court of appeals to abolish joint and several liability for concurrent tortfeasors.

By adopting comparative fault (and several liability) for concurrent tortfeasors, the Bartlett decision had two primary effects on concurrent tort actions. First, Bartlett effectively held that no single defendant will be liable for the entirety of the plaintiff’s damages when multiple parties cause an indivisible injury to a plaintiff. Instead, each concurrent tortfeasor is severally responsible for his individual

50. Id. The driver of the lead car was unknown, and the plaintiff brought suit only against the driver of the car that rear-ended her. Id.

51. See id. at 154, 646 P.2d at 581. In other words, the drivers caused a single, indivisible injury to the plaintiff. See supra notes 15-17 and accompanying text.

52. Bartlett, 98 N.M. at 154, 646 P.2d at 581. Until the decision in Bartlett, New Mexico courts regularly applied joint and several liability to a single concurrent tortfeasor. See supra notes 24-37 and accompanying text. Thus, the court in Bartlett revisited and examined longstanding tort principles in New Mexico.

53. Bartlett, 98 N.M. at 153, 646 P.2d at 580. The jury also determined that the unknown driver caused seventy percent of the plaintiffs’ damages. Id. The plaintiff moved the court for judgment against the defendant for the full $100,000 under a theory of joint and several liability. Id. Instead of granting the motion, the trial court ordered a new trial. Id. The defendant then filed an interlocutory appeal. See id.

54. Id. at 154, 646 P.2d at 581.


56. See Bartlett, 98 N.M. at 158, 646 P.2d at 585; see also Lujan, 120 N.M. 422, 902 P.2d 1025.

57. Bartlett, 98 N.M. at 158, 646 P.2d at 585.

58. See id. Instead, each defendant will only be responsible for the individual percentage of harm that he or she specifically caused. Id. Using this analysis, the court of appeals ordered that the defendant in Bartlett was only responsible for thirty percent of the plaintiff’s total damages, or $30,000 of the $100,000 total. Id. at 159, 646 P.2d at 586. Additionally, one year after Bartlett, the court of appeals decided Duran v. General Motors Corp., 101 N.M. 742, 688 P.2d 779 (Ct. App. 1983). Duran, like Bartlett, involved a lawsuit following a car accident, but the cases turned on different theories of liability: the plaintiffs in Bartlett sued the defendant driver under a theory of negligence, whereas the plaintiffs in Duran sued the auto manufacturer under a theory of strict products liability. Duran, 101 N.M. 742, 688 P.2d 779. The court of appeals held that the concurrent tortfeasor concept was not applicable because crashworthiness liability was based only on enhanced or additional injuries. Id. at 750, 688 P.2d at 787. Duran illustrates that New Mexico courts have begun to adopt a distinction based on divisible injuries, rather than a temporal relationship between the injuries. Id.
percentage of fault. Therefore, the plaintiff must now join all of the tortfeasors that contributed to her injury if she wishes to receive a full recovery.

The second, indirect effect of the *Bartlett* decision is that concurrent tortfeasor defendants may present evidence of comparative negligence at trial. Comparative negligence allows the defendant to introduce evidence to show that the fault of others contributed to the plaintiff’s injury. If the defendant is successful, he will reduce or eliminate his percentage of liability by attributing fault to other negligent tortfeasors, thereby reducing his responsibility for damages. Consequently, comparative fault creates a higher burden for the plaintiff by requiring the plaintiff to identify and join all liable defendants to achieve a full recovery; failing full joinder, the defendant will point to the fault of others to reduce his own liability and the plaintiff risks an incomplete recovery.

**B. Statutory Adoption of Several Liability in New Mexico**

The New Mexico Legislature incorporated the principles of *Bartlett* into the Several Liability Act of 1986. The Act established several liability as the general rule in tort actions, whereby each tortfeasor is only liable to the extent of his individual fault. While the Several Liability Act did not overtly address the distinction between concurrent and successive tortfeasors, the New Mexico Legislature did attempt to clarify an approach to multiple tortfeasor scenarios. Akin to the comparative fault principles in *Bartlett*, section (B) of the Several Liability Act states that, when multiple defendants contribute to a *single injury* (i.e., concurrent tortfeasors), each defendant is only liable for damages in an amount equal to that defendant’s individual percentage of fault in contributing to the injury.
Conversely, section (D) of the Several Liability Act appears to address successive tortfeasors by stating: 67

Where a plaintiff sustains damage as the result of fault of more than one person which can be causally apportioned on the basis that distinct harms were caused to the plaintiff, the fault of each of the persons proximately causing one harm shall not be compared to the fault of persons proximately causing other distinct harms. Each person is severally liable only for the distinct harm which that person proximately caused. 68

Accordingly, section (D) indicates that the legislature intended for several liability to apply in successive tortfeasor actions as well. 69

In addition to establishing several liability as the default proposition in multiple tortfeasor cases, the legislature followed Bartlett and expressly abolished joint and several liability. 70 Despite this general prohibition, the Several Liability Act carved out four narrow exceptions where joint and several liability would still apply: 71 (1) intentional wrongs, (2) vicarious liability, (3) strict products liability, and (4) public policy. 72 However, subsequent case law in New Mexico has established another specific exception where joint and several liability survives: successive tortfeasor actions. 73

Following the Several Liability Act, New Mexico courts have struggled with when and how to apply joint and several liability in multiple tortfeasor cases. 74 While both the courts and the legislature have expressed an intent to circumscribe the use of joint and several liability, successive tortfeasor actions have broadened its potential scope and application, and the following section will address this progression. 75

67. NMSA 1978, § 41-3A-1(D). Whereas Bartlett dealt with concurrent tortfeasors who had combined to cause a single injury, section (D) references causally distinct harms, indicating that it applies to successive tortfeasor scenarios. Id.
68. Id. (emphasis added).
69. In addition, section (D) also expressly proscribes the use of comparative fault. See id. For a more complete discussion of the Several Liability Act, see generally Schultz & Occhialino, supra note 24 (discussing the legislative adoption of several liability in New Mexico).
70. See NMSA 1978, § 41-3A-1(A).
71. See id. § 41-3A-1(C).
72. Id. Section (C) reads:
The doctrine imposing joint and several liability shall apply:
(1) to any person or persons who acted with the intention of inflicting injury or damage;
(2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
(3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
(4) to situations not covered by any of the foregoing and having a sound basis in public policy.

Id. For a more complete discussion of the exceptions to several liability after the Act, see generally Occhialino, supra note 1.
74. See infra Part II.C.
75. See infra Part II.C; see also infra notes 283-285 and accompanying text.
C. Successive Tortfeasor Law After the Several Liability Act

New Mexico courts have not relied on the Several Liability Act for guidance in successive tortfeasor cases, choosing instead to carve a path in common law. One year after the Several Liability Act took effect, the court of appeals attempted to apply comparative fault (and several liability) to successive tortfeasors in Martinez v. First National Bank of Santa Fe. Whereas prior cases had addressed concurrent tortfeasor actions involving a single injury, Martinez presented a classic successive tortfeasor scenario when two tortfeasors caused separate and distinct injuries to the plaintiff. Perhaps because the original tortfeasor was a family member, the plaintiffs brought suit solely against the successive tortfeasor.

In Martinez, the court of appeals considered how to “apportion fault between the tortfeasor who has created the plaintiff's injury and a subsequent tortfeasor who has aggravated the original injury.” The court suggested that fault should be apportioned between the original and the successive tortfeasor to the extent that their negligence was a proximate cause of each injury. Under this approach, the original tortfeasor would be fully liable for the original injury; however, for the second injury, the jury could compare the negligence of the original tortfeasor to that of the successive tortfeasor and apportion liability between them. The resulting implication is that comparative fault and several liability apply to the second or enhanced injury in successive tortfeasor actions.

Eight years later, the New Mexico Supreme Court addressed successive tortfeasor liability in Lujan v. Healthsouth Rehabilitation Corp. In Lujan, the court...
reexamined and ultimately rejected the apportionment suggestions presented in *Martinez*.

Rather than employ several liability for the second injury, the court held that either the original or the successive tortfeasor would be fully liable for the second or enhanced injury, contingent only on whomever the plaintiff chooses to pursue.

The supreme court first explored the liability attached to the original tortfeasor and concluded that an original tortfeasor, if sued alone, is jointly and severally liable for the entire harm. Using a proximate cause analysis, the court held that the original tortfeasor will be fully liable for both the original and the enhanced injuries as long as the "negligence of a [successive tortfeasor]...does not break the sequence of events." The court further explained that, "premised upon the concept that the original tort is a proximate cause of the [second tort], courts have held the original tortfeasor liable both for the original injury and for the harm caused by [the successive tortfeasor's negligence]." Accordingly, the court determined that the original tortfeasor would be jointly and severally liable for the *entire* harm based on an analysis that examines both proximate cause and divisibility of the resultant injuries.

The court then turned to the successive tortfeasor and stated that, because the harm is divisible into separate injuries, a successive tortfeasor "who negligently aggravates the plaintiff's initial injuries is not jointly and severally liable for the *additional* harm." Therefore, even though both the original and the successive tortfeasor were each a proximate cause of the second injury, the successive tortfeasor could be jointly and severally liable for that injury; as a practical matter, this meant that the plaintiff may choose to pursue

---

86. *Lujan*, 120 N.M. at 423, 902 P.2d at 1026.
87. Id. at 424, 902 P.2d at 1027.
89. Id.
90. Id. at 426, 902 P.2d at 1029 (quoting Thompson v. Anderman, 59 N.M. 400, 412, 285 P.2d 507, 514 (1955)). The court noted that, "[w]hen a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm." Id. (citing Ash v. Mortensen, 150 P.2d 876, 877 (1944)). This tends to indicate that injuries resulting from subsequent medical treatment are always foreseeable, and proximate causation is therefore established automatically. See id.
91. Id. The court was careful to note, however, that "[e]ven though the original tortfeasor may be held liable for both the original and the enhanced injury, the imposition of entire liability is only temporary. The original tortfeasor...can shift through indemnification the responsibility for an enhanced injury." Id. at 427, 902 P.2d at 1030.
92. Id. The court was silent, however, on whether the original tortfeasor may still be jointly and severally liable for the entire harm in the absence of proximate causation. Id.
93. Both the original tortfeasor and the successive tortfeasor are proximate causes of the second injury. Id.
the successive tortfeasor alone for the full extent of the second injury.\(^\text{94}\) This holding effectively rejected the New Mexico Court of Appeals' rationale in \textit{Martinez} by stating that principles of comparative negligence do not apply to the second injury in successive tortfeasor actions.\(^\text{95}\)

Six years later, the New Mexico Supreme Court affirmed and further clarified its holding in \textit{Lujan} when it decided \textit{Lewis v. Samson}.\(^\text{96}\) Like \textit{Lujan}, \textit{Lewis} was a successive tortfeasor case where the plaintiff brought suit against the successive tortfeasor alone.\(^\text{97}\) \textit{Lewis}, however, limited the application of \textit{Lujan} to a narrow class of cases where an original tortfeasor causes an initial injury, followed by a distinct enhancement of that injury resulting from subsequent, negligent medical treatment.\(^\text{98}\)

The supreme court began its analysis in \textit{Lewis} by affirming the apportionment principles set forth in \textit{Lujan}.\(^\text{99}\) Beginning with the original tortfeasor, the court reiterated \textit{Lujan}'s proximate cause analysis by stating that the original tortfeasor, if sued alone, "is jointly and severally liable for the entire harm to the plaintiff, including the original injury and any foreseeable enhancement of the injury."\(^\text{100}\) Turning to the successive tortfeasor, the court echoed \textit{Lujan} and stated that the successive tortfeasor, if sued alone, is fully liable for the second or enhanced injury.\(^\text{101}\) In either scenario, however, the court stated that the plaintiff is required to prove the existence of a separate or enhanced injury as well as the degree of enhancement in order for joint and several liability to apply.\(^\text{102}\) Failing proof of a distinct second injury, the court stated that the original tortfeasor remains liable for the entire harm.\(^\text{103}\)

\(^{94}\) \textit{Id.} at 427, 902 P.2d at 1030; \textit{see also} \textit{Lewis v. Samson}, 2001-NMSC-035, \S 31, 35 P.3d 972, 984.

\(^{95}\) \textit{Lujan}, 120 N.M. at 425, 902 P.2d at 1028; \textit{see also} \textit{Lewis}, 2001-NMSC-035, \S 31, 35 P.3d at 984; Pofahl, \textit{supra} note 82, at 697.

\(^{96}\) 2001-NMSC-035, 35 P.3d 972. The year before \textit{Lewis} was decided, the \textit{Restatement (Third) of Torts} also addressed the issue of concurrent and successive tortfeasors. \textit{See} \textit{RESTATEMENT (THIRD) OF TORTS: APORTIONMENT OF LIABILITY} \S 26 (2000). Like \textit{Lujan} and \textit{Lewis}, the \textit{Restatement (Third) of Torts} also determined liability for each tortfeasor based on the presence, or lack, of causally divisible injuries. \textit{Id.} \S 26.

\(^{97}\) \textit{See} \textit{Lujan}, 120 N.M. 422, 902 P.2d 1025; \textit{Lewis}, 2001-NMSC-035, 35 P.3d 972. In \textit{Lewis}, the plaintiff was the personal representative for a victim who had been stabbed repeatedly before receiving treatment at an emergency room. \textit{Lewis}, 2001-NMSC-035, \S 3, 35 P.3d at 975. The doctors did what they could but waited for an expert surgeon to arrive before beginning an advanced procedure. \textit{Id.} The victim died following surgery. \textit{See id.} At trial, the plaintiff argued that the decedent would have lived but for the doctors' negligent treatment; in return, the doctors argued that the stab wounds caused by the original tortfeasor were responsible for the decedent's death and that their treatment did nothing to enhance or aggravate the victim's already fatal injuries. \textit{Id.} \S 36, 35 P.3d at 986. The jury found by special verdict that the defendant doctors were not negligent. \textit{Id.} \S 31 n.2, 35 P.3d at 984 n.2.

\(^{98}\) \textit{Lewis}, 2001-NMSC-035, \S 34, 35 P.3d at 985.

\(^{99}\) \textit{Id.} \S\S 31-36, 35 P.3d at 984-86.

\(^{100}\) \textit{Id.} \S 33, 35 P.3d at 985 (emphasis added). It is noteworthy, however, that the \textit{Lewis} court was unwillingly to automatically apply joint and several liability as a matter of law; rather, the application of joint and several liability was contingent upon proximate causation where the causal chain remained unbroken between the first and the second injuries. \textit{Id.} \S 33 n.4, 35 P.3d at 985 n.4. Where the injuries caused by the successive tortfeasor's negligence "are so remote from the original injury as to be unforeseeable," the court indicated that it would be improper to impose joint and several liability on the original tortfeasor as a matter of law; instead, the original tortfeasor's liability would be limited to the original injury alone. \textit{Id.}

\(^{101}\) \textit{Id.} \S 36, 35 P.3d at 986.

\(^{102}\) \textit{Id.}

\(^{103}\) \textit{Id.} \S 34, 35 P.3d at 985-86. This statement is counterintuitive because if the injury is indivisible, then the tortfeasors should be considered concurrent and the original tortfeasor, instead of being liable for the entire injury, should be allowed to argue comparative fault to offset some of the liability onto the successive tortfeasor. \textit{Id.} \S 37, 35 P.3d at 986.
After summarizing and clarifying the Lujan holding, the court turned to the more problematic issue of when and how comparative fault may be introduced at trial. The court began by stating that, in a successive tortfeasor case, "a jury does not compare the negligence of the tortfeasors for the [second] injury, but the plaintiff must still prove that the [successive tortfeasor's] negligence proximately caused an enhancement of the initial harm suffered at the hands of the original tortfeasor." Once the plaintiff has established two separate injuries, the defendant may not then compare his fault with the other tortfeasor to reduce his liability for the second injury. However, when the injury is not clearly divisible, a successive tortfeasor defendant may argue, as an affirmative defense, that the original tortfeasor was the proximate cause of the entire harm or, stated differently, the successive tortfeasor did not cause any appreciable second injury. Without a distinct second injury, the successive tortfeasor removes his liability entirely and the original tortfeasor remains fully liable for the entire harm.

Lujan and Lewis represent the working rules for successive tortfeasor actions at the time Payne v. Hall was decided. Following Lewis and Lujan, it was unclear whether the original tortfeasor would always be jointly and severally liable for the second injury and whether these cases limited joint and several liability to situations where the second injury was caused by medical negligence. Further, there was continued ambiguity as to when and how comparative fault may be presented at trial, particularly where the injury is not clearly divisible. Finally, there was no guidance on how to apportion fault when the plaintiff brings suit against both the original and successive tortfeasor in the same action. These questions remained unanswered at the time Payne v. Hall was decided in 2006.

III. STATEMENT OF THE CASE

Payne v. Hall was the first case to reach the New Mexico Supreme Court where the plaintiff brought suit solely against the original tortfeasor. The plaintiff's injuries, however, were not clearly divisible and the court struggled with how to

104. Id. §§ 35–37, 35 P.3d at 986.
106. Id.
107. Id. § 37, 35 P.3d at 986 ("[A] physician accused of subsequent medical negligence may rebut the plaintiff's evidence of causation through evidence of the initial tortfeasor's responsibility for the entire harm."). A successful argument would aim to establish that the successive tortfeasor may have been negligent, but his negligence did not cause any appreciably distinct injury. Id. § 33, 35 P.3d at 985. In Lewis, the defendant doctor argued that stab wounds caused by the original tortfeasor were the sole cause of the victim's death. Id. § 36, 35 P.3d at 986.
108. Id. Although the court held that a defendant may introduce evidence of the other tortfeasor's fault in causing the entirety of the injury, Lewis held that the trial court erred by instructing the jury on comparative fault for two reasons. Id. ¶ 41, 35 P.3d at 987–88. First, the court believed that a comparative fault instruction impermissibly shifted the burden of proof for the enhanced injury from the plaintiff to the defendant. Id. Second, assuming that the plaintiff had met her burden to prove an enhanced injury and the degree of enhancement, the court believed that a comparative fault instruction was improper because the defendants would have been liable for the entirety of the enhanced injury and any apportionment of fault by the jury would have been improper. Id. ¶ 41, 35 P.3d at 988. Regardless of these errors, the court held that the improper instruction did not prejudice the plaintiff and reinstated a judgment in favor of the defendants. Id. ¶¶ 44–45, 35 P.3d at 988–89.
109. See supra note 98 and accompanying text.
apportion fault. Writing for a unanimous court, Chief Justice Bosson examined the plaintiff's burden to prove causally divisible injuries and when the court may appropriately assign negligence for the injuries as a matter of law. After outlining a clear framework for apportionment, the court suggested a variety of ways to approach successive tortfeasor actions and methods to improve trial procedure.

A. Facts of the Case

*Payne v. Hall* originated from complications during an elective abortion performed on Kimberly J. Payne that resulted in the loss of her uterus and right kidney. Ms. Payne was four months pregnant when she chose to have an abortion. Because New Mexico hospitals refuse to admit patients directly for elective abortions, it was necessary for Ms. Payne to go to a clinic for the procedure. Her physician referred her to the Boyd Clinic (Clinic), where she first met with Dr. Hall.

The Clinic used a two-day procedure, known as a dilation and extraction, due to the advanced stage of Ms. Payne's pregnancy. Ms. Payne experienced some initial pain and discomfort on the first day of the procedure but elected to continue. On the second day, she returned to the Clinic to complete the abortion but she had difficulty tolerating the pain of the procedure. Dr. Hall ultimately determined that he could not complete the abortion at the Clinic, and because the procedure was too far along to stop, Dr. Hall decided to transfer Ms. Payne to the University of New Mexico Hospital (Hospital) to complete the procedure.

111. See infra Part IV.B.
112. See infra Part IV.C-D.
114. Id. Ms. Payne was in her second trimester of pregnancy. Id.; see also Payne v. Hall (*Payne I*), 2004-NMCA-113, ¶ 2, 98 P.3d 1030, 1033.
116. *Payne I*, 2004-NMCA-113, ¶ 1, 98 P.3d at 1033. Dr. Hall was the named defendant in this case.
117. *Payne II*, 2006-NMSC-029, ¶ 3, 137 P.3d at 602. In a dilation and extraction (D&E), the cervix is dilated on the first day and the fetus is removed on the second. *Id.* After Ms. Payne completed the background procedures, including a medical history, Dr. Hall began the dilation portion of the procedure. *Payne I*, 2004-NMCA-113, ¶ 2, 98 P.3d at 1033.
119. *Id.* Before beginning the extraction, Dr. Hall tried unsuccessfully to start an IV in Ms. Payne's arms to help with pain relief. *Id.* ¶ 3, 98 P.3d at 1033. There was a question at trial of whether Ms. Payne was a past or present IV drug user and whether Dr. Hall's inability to start an IV was directly caused by her prior drug use. *Id.* After determining that an IV was not possible, the Clinic staff attempted to call in an anesthesiologist. *Id.* When they could not locate one, Dr. Hall presented Ms. Payne with two options: First, Dr. Hall could perform the procedure at the Clinic using an intramuscular anesthesia, which may increase the risk of bleeding without IV access and would require transferring Ms. Payne to a hospital if she had excessive bleeding or was unable to tolerate the pain. *Id.* Alternatively, Dr. Hall stated that he could immediately transfer Ms. Payne to a hospital where another doctor would perform the entire procedure. *Id.* Ms. Payne elected to stay at the Clinic to undergo the remaining procedure. *Id.*
120. *Id.* ¶ 4, 98 P.3d at 1033. Ms. Payne "had a hard time staying still, was in a significant amount of distress, began experiencing a lot of pain, and was screaming and moving her legs and body off the table." *Id.* ¶ 4, 98 P.3d at 1033. After initially agreeing to continue the procedure, Ms. Payne asked Dr. Hall to stop the procedure several times. *Id.* ¶ 4-5, 98 P.3d at 1033-34.
While at the Hospital, Dr. Maybach, a second-year resident, continued the procedure under the supervision of Dr. Jamison. As Dr. Maybach attempted to remove the fetus, she caused extensive damage, including the mistaken removal of Ms. Payne’s right ureter and, later, the accidental extraction of her right ovary. During surgery, the doctors found that Ms. Payne’s uterus was perforated beyond repair and they were forced to perform a hysterectomy; later, after they discovered the missing ureter, they were also forced to remove her right kidney.

B. Procedural Posture

Following the surgery, Ms. Payne filed suit against Dr. Hall and the Boyd Clinic under the theory of successive tortfeasor liability and sought to hold the Clinic jointly and severally liable for the entirety of her injuries at both the Clinic and the Hospital. At trial, Ms. Payne argued that her uterus was perforated at the Clinic, which then necessitated her transfer to the Hospital. She contended that the Clinic, in causing that original injury, was also responsible for the additional harm that occurred later at the Hospital. In response, the Clinic denied any negligence and averred that “it caused no separate injury to [Ms. Payne], but that all injuries resulted at the Hospital.”

At trial, and at Ms. Payne’s request, the court instructed the jury that Ms. Payne had the burden of proving that the Clinic’s negligence was the proximate cause of her injuries. The court then gave the jury a special verdict form that separated negligence from proximate cause.

The jury returned a verdict that found the Clinic negligent but also found that the Clinic’s negligence was not a proximate cause of

---

122. Id. ¶ 6, 137 P.3d at 602.
123. Id. The ureter is the tube that connects the kidney to the bladder. Id.
124. Payne I, 2004-NMCA-113, ¶ 8, 98 P.3d at 1034. When the doctors saw the plaintiff’s ovary among the extracted tissue, they stopped the abortion and began emergency abdominal surgery. Id. ¶¶ 8-9, 98 P.3d at 1034.
125. Id. ¶ 9, 98 P.3d at 1034-35.
126. Id. ¶ 10, 98 P.3d at 1035. Initially, the defendants filed a third-party complaint seeking indemnity from the Hospital. Id. However, the third-party complaint was dismissed for failure to comply with the two-year limitations period under the Tort Claims Act, NMSA 1978, § 41-4-15(A) (1977). See Payne II, 2006-NMSC-029, ¶ 17, 137 P.3d at 602 n.2.
128. Id. ¶ 10, 98 P.3d at 1035; see also supra note 89 and accompanying text. If the Clinic were found liable as the original tortfeasor, joint and several liability would apply and the Clinic would be responsible for all damages caused in the course of the abortion. Payne II, 2006-NMSC-029, ¶ 7, 137 P.3d at 602.
129. Payne II, 2006-NMSC-029, ¶ 17, 137 P.3d at 605. While Dr. Hall wrote in his operative report that he “strongly suspected possible perforation,” he testified at trial that he did not believe that he had caused a perforation while Ms. Payne was at the Clinic. Payne I, 2004-NMCA-113, ¶¶ 6-7, 98 P.3d at 1034. Dr. Hall presented evidence that Ms. Payne had stable vital signs when she arrived at the Hospital and that there was no obvious evidence of a perforation. Id. ¶ 7, 98 P.3d at 1034. Dr. Jamison also testified at trial and stated that she would not have allowed Dr. Maybach to perform the procedure if she had suspected that Dr. Hall had perforated the uterus. Id. ¶ 8, 98 P.3d at 1034.
130. Payne II, 2006-NMSC-029, ¶ 9, 137 P.3d at 603. The jury also received a separate instruction that “[w]hen a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by subsequent medical treatment, if any.” Id. ¶ 8, 137 P.3d at 603.
131. Id. ¶ 9, 137 P.3d at 603. The proximate cause instruction was removed from the New Mexico Uniform Jury Instructions after the original trial. Id.
Ms. Payne's injuries. Without causation, the Clinic could not be held liable for Ms. Payne's injuries and her claim became a nullity. 

After the verdict was issued, Ms. Payne requested a new trial and a Judgment Notwithstanding the Verdict (JNOV), asking the court to find, as a matter of law, that the Clinic was the proximate cause of her subsequent injuries at the Hospital. Ms. Payne argued, in light of Lewis, that "an original tortfeasor's negligence is, as a matter of law, the sole proximate cause" of both the original and the enhanced injuries. The trial court denied her motions, and she appealed the ruling.

When the case first reached the New Mexico Court of Appeals, the court initially certified the successive tortfeasor issues to the New Mexico Supreme Court. At that time, the New Mexico Supreme Court was addressing successive tortfeasor issues in Lewis v. Samson. The supreme court granted but later quashed certiorari after issuing a final decision in Lewis. The court of appeals then asked the parties to brief their positions in light of the Lewis decision.

On appeal, Ms. Payne renewed her argument that the Clinic was fully liable for the entirety of her injuries as a matter of law. In a split decision written by Judge Castillo, the court of appeals rejected this argument and upheld both the jury's verdict and the district court's decision to deny her motion for a JNOV. The court found that Ms. Payne had not proved that the Clinic caused any original injury and, therefore, had not met her burden of proof at trial.

Ms. Payne then argued that the trial court erred in allowing the Clinic to argue comparative fault at trial (i.e., that the Hospital was the singular cause of all of Ms. Payne's injuries). The court affirmed that "the argument that another tortfeasor was wholly responsible [for all of the injuries] represents a basic proximate cause defense." Accordingly, the court concluded that an original tortfeasor is entitled to argue, as an affirmative defense, that it did not cause any original injury and that the successive tortfeasor is the sole proximate cause of the entire harm. As a result, the court believed that the jury instructions, which included comparative fault

132. Id. § 10, 137 P.3d at 603. Although the jury was not asked to decide this issue, it is possible they believed that the Clinic was not responsible for any injuries that occurred at the Hospital.
133. Id. § 46, 137 P.3d at 610.
134. A Judgment Notwithstanding the Verdict is defined as "[a] judgment entered for one party even though a jury verdict has been rendered for the opposing party." BLACK'S LAW DICTIONARY, supra note 15, at 860.
137. Payne II, 2006-NMSC-029, § 10, 137 P.3d at 603.
140. Id.
141. Id.
144. Id. § 13, 98 P.3d at 1035-36. At trial, the Clinic successfully argued that the Hospital was the sole proximate cause of Ms. Payne's injuries and that any and all injuries to Ms. Payne occurred at the Hospital. Id.
145. Id. § 29, 98 P.3d at 1039. The court held that an original tortfeasor "may argue that any negligence that may have occurred is not necessarily the proximate cause of the injuries suffered by [the] Plaintiff." Id. § 22, 98 P.3d at 1038.
146. Id. § 29, 98 P.3d at 1039.
language, did not cause any additional confusion and were therefore not in error.\textsuperscript{147} Ms. Payne appealed again, and the New Mexico Supreme Court granted certiorari on June 13, 2005.\textsuperscript{148}

IV. RATIONALE

The New Mexico Supreme Court granted certiorari to “clarify the evolving state of the law regarding successive tortfeasor liability, particularly as it relates to the requirement that the victim prove a distinct injury caused by the negligence of the original tortfeasor, separate and apart from those injuries later caused by the successive tortfeasor.”\textsuperscript{149} Although the supreme court rarely hears successive tortfeasor cases, those disputes that had reached the supreme court were increasingly problematic.\textsuperscript{150} Payne \textsuperscript{11} presented the supreme court with the opportunity to clarify a system that was not, according to Judge Alarid, “‘capable of being understood and applied by courts and juries in a reasonably efficient manner.’”\textsuperscript{151} Moreover, Payne \textsuperscript{11} allowed the court to apply the theoretical implications in Lujan and Lewis to an original tortfeasor for the first time.\textsuperscript{152}

A. Successive Tortfeasors and the Requirement of a Causally Distinct Injury

The court began its analysis by differentiating between the liability for concurrent and successive tortfeasors.\textsuperscript{153} The court noted that, even though several liability is the general rule in New Mexico, there are narrow exceptions that still allow for joint and several liability.\textsuperscript{154} Although these exceptions are listed in section 41-3A-1(C) of the New Mexico statutes, the supreme court chose instead to focus on the common law development of joint and several liability following the Act.\textsuperscript{155}

\textsuperscript{147} Id. ¶ 30, 98 P.3d at 1040. Judge Alarid wrote a special concurrence to the court of appeals decision because he believed that it was an error to focus on divisible injuries and suggested that the court should simply focus on causation. Id. ¶¶ 35–37, 98 P.3d at 1041 (Alarid, J., specially concurring). Under this approach, the plaintiff would not be required to show an enhanced injury and the degree of enhancement; rather, the plaintiff need only show that the original tortfeasor was negligent and that during the causal chain of events the plaintiff was injured. Id. ¶ 37, 98 P.3d at 1041. Accordingly, Judge Alarid stated that an original injury is relevant rather than determinative because “it is the reason the plaintiff goes to the hospital.” Id. Judge Alarid still believed that an original tortfeasor could be jointly and severally liable for the entire harm, even without causally divisible injuries, as long as the original tortfeasor’s negligence caused the plaintiff’s exposure to malpractice. Id. However, the reciprocal effect is that the original tortfeasor is not automatically jointly and severally liable for the second injury. Id.


\textsuperscript{149} Payne v. Hall (Payne II), 2006-NMSC-029, ¶ 2, 137 P.3d 599, 602.

\textsuperscript{150} See supra Part II.C.


\textsuperscript{152} See generally Payne II, 2006-NMSC-029, 137 P.3d 599 (discussing the application of joint and several liability to an original tortfeasor and the requisite burden of proof).

\textsuperscript{153} Id. ¶ 11–12, 137 P.3d at 603. The court stated that concurrent tortfeasors are subject to several liability when they cause a single, indivisible injury. Id. ¶ 11, 137 P.3d at 603. Under the general rule of several liability, the court affirmed that “each tortfeasor is severally responsible for its own percentage of comparative fault for that injury.” Id.

\textsuperscript{154} See id. ¶ 11–13, 137 P.3d at 604. The New Mexico Supreme Court stated that, “[u]nder the theory of joint and several liability, each tortfeasor is liable for the entire injury, regardless of proportional fault, leaving it to the defendants to sort out among themselves individual responsibility based on theories of proportional indemnification or contribution.” Id. ¶ 11, 137 P.3d at 604.

\textsuperscript{155} See id. ¶¶ 12–13, 137 P.3d at 604.
Affirming *Lujan*, the court stated that “the successive tortfeasor doctrine imposes joint and several liability on the original tortfeasor for the full extent of both injuries.” Conversely, “[t]he successive tortfeasor is only responsible for the second injury or for the distinct enhancement of the first injury.”

Despite the court’s affirmation that successive tortfeasor actions may present an additional area where joint and several liability survives, the court stated its intent to limit joint and several liability to “‘a narrow class of cases,’ in which a plaintiff can show more than one distinct injury.” In looking at the divisibility of the injury, the court was careful to state that tortfeasors were not successive merely because of their linear or temporal relationship. Rather, the court held that the proper distinction between concurrent and successive tortfeasors was based on an original injury and a subsequent or enhanced second injury. Thus, the court firmly established that the injury, or rather, the presence of two distinct injuries, is the determinative factor in whether tortfeasors are concurrent or successive.

In the absence of distinctly divisible injuries, the court held that the tortfeasors are deemed concurrent and are subject to several liability.

**B. Standard of Proof**

After analyzing the framework for apportionment in successive tortfeasor actions, the supreme court then addressed the requisite standard of proof. The court stated that generally, where a plaintiff seeks to obtain joint and several liability against an original tortfeasor, the plaintiff not only bears the burden to prove the presence of divisible injuries, but must also prove negligence and causation. The court then
evaluated the facts on appeal in light of these three elements to determine whether Ms. Payne had met her burden of proof.\textsuperscript{165}

Based on the jury’s conclusions, the court surmised that Ms. Payne “met part of her burden by proving negligence, but failed to show the Clinic’s negligence caused any distinct original injury”\textsuperscript{166} such as a perforated uterus, internal bleeding, or pain and suffering.\textsuperscript{167} Ms. Payne contended that a finding of negligence was sufficient to impose causation as a matter of law.\textsuperscript{168} However, the court rejected this argument and held that “causation for the second injury is determined as a matter of law, but if, and only if, the plaintiff satisfactorily demonstrates that the original tortfeasor negligently caused a distinct, original injury requiring medical treatment.”\textsuperscript{169} It was disputed at trial whether the Clinic had caused any original injury, and the court determined that the jury could have reasonably concluded that the Clinic’s negligence did not result in a distinct original injury.\textsuperscript{170} Failing this proof, the court declined to impose causation as a matter of law.\textsuperscript{171}

Ms. Payne’s second argument suggested that successive tortfeasor liability should be based on a mere causal connection between the negligence and the injury, rather than requiring proof of two causally distinct injuries.\textsuperscript{172} As an affirmative matter, the court recognized that there are many situations where a defendant’s negligence, without causing a distinct original injury, may cause a person to seek medical care.\textsuperscript{173} The court agreed that, in such situations, the defendant’s negligence is arguably a contributing factor to any resulting injury caused by medical negligence.\textsuperscript{174} However, the court rejected the plaintiff’s proposition that causation was sufficient to impose liability in the absence of distinct injuries and reaffirmed that successive tortfeasor liability applies “only when an original injury causes subsequent medical treatment, because it is that separate injury which makes subsequent medical treatment foreseeable as a matter of law.”\textsuperscript{175} The court concluded its analysis by stating that “[w]ithout a separate original injury, there is but one injury caused by the combined negligence of two tortfeasors. This would be

---

apply. \textit{Id.} \textsuperscript{\textsuperscript{165}} \textsuperscript{14}, 137 P.3d at 604 (alteration in original) (emphasis omitted) (quoting Lujan v. Healthsouth Rehab. Corp., 120 N.M. 422, 426, 902 P.2d 1025, 1028 (1995)). However, the court stated that “[m]erely alleging a causal connection between two alleged tortfeasors who cause a single, indivisible injury does not meet this requirement.” \textit{Id.} \textsuperscript{\textsuperscript{166}} 29, 137 P.3d at 607. This language illustrates the court’s focus on the injury as the determinative factor in whether liability will be joint and several or merely several. \textit{Id.} 165. \textit{Id.} 166. \textit{Id.}

167. \textit{Id.} 16, 137 P.3d at 605. The court stated that “[w]hen the claim is brought against the original tortfeasor, it is up to the plaintiff to prove, and the jury to decide, whether the plaintiff suffered a distinct original injury caused by the original tortfeasor’s negligence.” \textit{Id.} 19, 137 P.3d at 605.

168. \textit{Id.} 18, 137 P.3d at 605.

169. \textit{Id.} 19, 137 P.3d at 605. The court further stated that “[i]f the original tortfeasor causes a distinct original injury requiring medical treatment, then it is also the cause, as a matter of law, for the successive injury.” \textit{Id.} 33 n.4, 137 P.3d at 608 n.4.

170. \textit{Id.} 25, 137 P.3d at 606.

171. See \textit{id.}

172. \textit{Id.} 26–27, 137 P.3d at 606–07. The New Mexico Supreme Court’s argument here addresses Judge Alarid’s special concurrence in the court of appeal’s decision. See \textit{supra} note 147.

173. \textit{Payne II}, 2006-NMSC-029, \textsuperscript{\textsuperscript{174}} 28, 137 P.3d at 607.

174. \textit{Id.}

175. \textit{Id.}
a classic comparative negligence case arising from concurrent tortfeasors who together produce one, indivisible injury.”

C. Uniform Jury Instructions and Comparative Fault

Although the plaintiff had not met her burden of proof, the court felt compelled to assess whether the jury instructions given at trial allowed the jury to decide the essential issues of the case. The court believed that the jury was never asked the determinative question of whether the Clinic’s negligence caused a separate original injury, causally distinct from those occurring at the Hospital. Instead, “the jury was asked about the causation of injuries considered as a whole,” and whether the Clinic’s negligence “was a proximate cause of the injuries and damages [sustained by the plaintiff].”

The court found a fatal problem with this definition of proximate cause because it failed to “differentiate between the original injury and the successive injury.” The court stated, “Based on the given instructions, the jury could well have concluded that it had to determine whether the Clinic’s negligence caused all the injuries, both those occurring at the Clinic and those occurring at the Hospital.” As a result, the court questioned the jury’s conclusions because it was unclear whether the jury had addressed the “pivotal and determinative issue of the case.”

The court also considered whether the trial court properly permitted the Clinic to introduce, and the jury to hear, evidence that Ms. Payne’s injuries were solely caused by the Hospital. Ms. Payne contended that it was an error to allow the Clinic to argue comparative fault in a successive tortfeasor action. The court disagreed, stating, “Under the law of this state, the alleged original tortfeasor may argue that another tortfeasor caused the original injury; in other words, that the original tortfeasor’s negligence did not cause an original distinct injury. Such an argument is not comparative fault but a basic proximate cause defense.”

Under this approach, when the divisibility of the plaintiff’s injury is in dispute, the court will allow the original tortfeasor to argue that he did not cause any appreciable first injury. The court was careful to distinguish, however, that when divisible injuries are clearly present, comparative fault should not be argued because the original tortfeasor, if liable for an initial injury, is also liable as a matter of law for the second injury. Therefore, the original tortfeasor may not introduce

---

176. Id.
177. See id. ¶ 31, 137 P.3d at 607–08.
178. Id. ¶ 35, 137 P.3d at 609.
179. Id. ¶ 33, 137 P.3d at 609 (emphasis added). Note that this was, in part, the fault of the plaintiff, who selected the specific instructions presented to the jury, along with the special verdict form. Id.
180. Id.
181. Id.
182. Id. ¶ 35, 137 P.3d at 608–09.
183. Id. ¶ 36, 137 P.3d at 609.
184. Id. ¶ 33 n.4, 137 P.3d at 608 n.4.
185. Id.
186. Id. (emphasis added).
187. See id.
188. Id. Essentially, this holding reaffirms that joint and several liability will attach to the original tortfeasor upon a determination that divisible injuries are present. Id.
evidence of the successive tortfeasor’s negligence in an attempt to reduce his liability for the second injury.189 The court further indicated that the current Uniform Jury Instructions do not adequately or accurately relate to successive tortfeasor situations and suggested that future modifications were necessary to address causally divisible injuries.190

D. Guidance for Future Successive Tortfeasor Actions

Perhaps anticipating difficulty in working through future multi-tortfeasor scenarios after untangling the issues in Payne, the court provided guidance on how successive tortfeasor actions should proceed at trial to avoid confusion and error.191 The supreme court first stated that if there is no dispute as to causally distinct injuries, a trial court should determine, as a matter of law, that the successive tortfeasor theory applies.192 The court believed that an early determination on the type of liability (and the theory of apportionment) is beneficial because the parties will know whether they are permitted to argue comparative fault at trial.193 However, if divisibility is unclear, the supreme court suggested that the trial court should refrain from making a determination in place of the jury.194 The court predicted that these situations will result in heightened complexity at trial, particularly in asking the jury to determine the appropriate theory of liability.195 In an effort to quell this difficulty, the court presented a model for trial procedure when divisibility cannot be determined as a matter of law.196

The court began by stating that the jury should be asked a series of questions at the close of evidence through the use of factual interrogatories, which will ultimately determine the appropriate theory of liability.197 The interrogatories will first inquire into the defendant’s negligence and then ask the jury to determine “whether the evidence demonstrated causally distinct injuries.”198 The jury’s answer to the question of divisibility would then determine whether the jury will proceed under successive tortfeasor liability or comparative fault.199

189. Id.
190. For an excellent discussion of the proposed Uniform Jury Instruction modifications, see Ransom, supra note 19, at 92–97.
192. Id. ¶ 42, 137 P.3d at 610. The New Mexico Supreme Court indicated that the trial court may also determine that the successive tortfeasor theory applies as a matter of law when the plaintiff brings suit only against the successive tortfeasor. Id.
193. See id. ¶ 41, 137 P.3d at 609 (when “the original tortfeasor causes a distinct original injury requiring medical treatment, then [the original tortfeasor] is also the cause, as a matter of law, for the successive injury”); see, e.g., id. ¶ 33 n.4, 137 P.3d at 608; supra note 91 and accompanying text. The original tortfeasor is not allowed to compare his negligence with that of the successive tortfeasor to reduce his own liability. See supra note 105 and accompanying text.
194. Id. ¶¶ 42–43, 137 P.3d at 610.
195. Id. ¶ 43, 137 P.3d at 610.
196. Id. ¶¶ 44–47, 137 P.3d at 610.
197. Id. ¶ 44, 137 P.3d at 610. The court stated that alternate jury instructions will be available to address the separate concurrent and successive theories and that the jury will proceed under the appropriate instruction after answering a series of interrogatories. See id.
198. Id. ¶ 45, 137 P.3d at 610.
199. Id. If the jury finds that causally distinct injuries are present, the court believed that the next instruction should ask the jury whether the original tortfeasor’s negligence caused a distinct original injury. Id. ¶ 46, 137 P.3d at 610. If the answer is no, the claim against the original tortfeasor is a nullity. Id. If yes, the original tortfeasor
The court next examined the more complex situation where the plaintiff asserts both concurrent and successive liability. The court stated that counsel for the parties should separate the claims under the appropriate theory of liability and present them individually to the jury under the proper theory. The supreme court felt that it was an error to group concurrent and successive tortfeasor claims together as the trial court did in Payne. After concluding its analysis, the court remanded Payne for a new trial.

V. ANALYSIS

After the introduction of several liability in New Mexico, Payne v. Hall was the first successive tortfeasor case to reach the New Mexico Supreme Court where the original tortfeasor was sued for the entire injury under a theory of joint and several liability. The Payne II holding firmly established an additional exception where joint and several liability survives following the Several Liability Act of 1986. In addition, Payne II directly addressed the most challenging questions in successive tortfeasor cases: how to apportion the second injury (i.e., who should pay for it, how much, and why), when a defendant may argue the comparative fault of the other tortfeasor, and how broadly joint and several liability may be applied in the future. The New Mexico Supreme Court took the opportunity in Payne II to explore the viability and workability of the varying approaches to these questions using suggestions presented in Bartlett, Lujan, and Lewis.

This analysis begins by examining the Payne II approach to see how it applies and affects multiple tortfeasor scenarios. These examples will illustrate that, in the interest of a full recovery, plaintiffs now have less discretion to pursue only one theory of liability when divisible injuries are unclear. In addition, while defendants are generally not permitted to argue comparative fault, the examples will illustrate how defendants may successfully use proximate causation as an affirmative defense. This analysis then addresses how the New Mexico Supreme Court could have reached a simpler, and arguably fairer, result in Payne II by using the methods suggested by Judge Alarid and Martinez v. First National Bank of Santa Fe.

would be jointly and severally liable for the full extent of both injuries. Id. ¶ 48, 137 P.3d at 610. However, the court noted that, where the plaintiff brings a claim against a successive tortfeasor, the jury should be asked to determine the degree of enhancement caused by the successive tortfeasor’s negligence. Id. ¶ 50, 137 P.3d at 610.11

200. Id. ¶ 48, 137 P.3d at 611.
201. Id. ¶ 49, 137 P.3d at 611.
202. Id. ¶ 50, 137 P.3d at 611.
203. Id. ¶ 51, 137 P.3d at 611.
204. See id.; supra note 110 and accompanying text.
205. Payne II, 2006-NMSC-029, ¶ 13, 137 P.3d at 604; see also supra notes 70–73 and accompanying text.
206. See supra notes 154–156 and accompanying text.
207. See infra Part V.A–B.
208. See infra Part V.A.
209. See infra Part V.A.
210. See infra Part V.A.
211. See infra Part V.B.
A. Joint and Several Liability for Causally Distinct Injuries: The Payne Approach

Prior to Payne II, the New Mexico Supreme Court had only decided cases against the successive tortfeasor and, therefore, had only been able to theorize about the potential liability for the original tortfeasor. Where both Lujan and Lewis suggested that the original tortfeasor may be jointly and severally liable for the entire harm, Payne II presented an opportunity to explore and apply that thesis for the first time.

Payne II stated that several liability is the general rule in multiple tortfeasor scenarios. In addition, the New Mexico Supreme Court firmly established that the injury, or the divisibility of the injuries, is the controlling factor in differentiating between concurrent and successive tortfeasors and will therefore determine whether several liability applies. Generally, when the injury is indivisible, the tortfeasors are deemed concurrent and each tortfeasor is severally responsible for his individual percentage of comparative fault in causing the injury. However, when the injuries are divisible and causally distinct, the tortfeasors are deemed successive and present an exception to the general rule of several liability. The original tortfeasor, if sued alone, is jointly and severally liable for the entire harm, whereas the successive tortfeasor, if sued alone, is fully liable for the second injury.

The examples below will illustrate how the different theories of liability apply in multiple tortfeasor scenarios, first by looking at suits where the plaintiff (P) sues only the original tortfeasor (D1) and then at suits where the plaintiff sues only the successive tortfeasor (D2). These examples will illustrate how the Payne II approach affects the plaintiff, and how and when a defendant may argue comparative negligence.

1. Plaintiff Sues Only the Original Tortfeasor (P v. D1)

Imagine a classic successive tortfeasor example like Lujan, where P and D1 are involved in a car accident; P suffers Injury 1 and requires medical care. P is taken to the hospital, where D2, a doctor, negligently treats P and causes Injury 2. In light of Payne II, if P sues only D1, then D1 may be fully liable for both Injury 1 and

---

212. See supra Part II.C.
213. See supra note 100 and accompanying text.
214. See supra note 154 and accompanying text.
215. The court in Payne II adopted the approach previously outlined in Lujan and Lewis without question. See supra notes 160–162 and accompanying text.
217. See supra notes 154–158 and accompanying text.
218. Gulf Ins. Co., 2006-NMCA-150, ¶ 20, 148 P.3d at 820 (citing Payne II, 2006-NMSC-029, ¶ 14, 137 P.3d at 604). More precisely, the original tortfeasor is fully liable for the first injury and is jointly and severally liable for the second injury. See supra note 91 and accompanying text.
219. See supra Part IV.A.
221. See supra note 85 and accompanying text. For purposes of this example, the time frame between the injuries is immaterial; the relevant focus is that there are two separate and distinct injuries.
Injury 2. 222  P must prove that Injury 1 and Injury 2 are separate and that the harm caused by each injury is distinctly measurable. 223  If P can establish that D, caused Injury 1 and that a separate Injury 2 occurred later in the same causal sequence, then the trial court must find that D, caused Injury 2 as a matter of law. 224  This rationale assumes causation: because D, caused the first injury, D, is also responsible for the sequence of events that led P to be injured by D,2. 225  D, is therefore wholly and solely liable for both injuries.

This framework will not consider the extent of D,’s role in causing Injury 2 and will therefore prohibit D, from arguing comparative fault at trial. 226  Specifically, D, may not present evidence of D,’s negligence in causing Injury 2 to try to reduce his own liability for Injury 2. 227  However, D, may argue that he did not cause any original injury, and that any and all of P’s injuries were caused solely by D, 228  Payne II held that this was a permissible proximate cause defense because D,’s negligence alone, without an original injury, does not qualify for successive tortfeasor liability. 229  Accordingly, D, will be permitted to present evidence that he was not the proximate cause of any of P’s injuries; stated differently, D, may present evidence that D,’s negligence caused all of P’s injuries. 230  If D, successfully shows that he did not cause an original injury, D, will escape joint and several liability. 231

However, New Mexico courts have indicated that where D, did not cause a distinct original injury, D, and D, may be treated as concurrent tortfeasors who together produce one indivisible injury. 232  The courts would then apply comparative fault to D, and D, and D, would remain severally liable for his percentage of negligence in contributing to P’s injury. 233  This illustrates that D, may reduce his liability by arguing that he did not cause an original injury, but it may not allow him to escape liability completely. 234

When tortfeasors are deemed concurrent because the injury is indivisible, D, will be allowed to argue comparative fault and present evidence that D,’s negligence

---

222. See supra notes 154–158 and accompanying text (D, will be fully liable for Injury 1 and jointly and severally liable for Injury 2).
223. This comports with the Lewis test. See supra note 102 and accompanying text.
224. See supra note 169 and accompanying text. If it is clear from the outset that there are causally divisible injuries, the holding of Payne II indicates that the trial court should also determine that the case involves successive tortfeasors as a matter of law. See infra Part VI.B.
225. See supra notes 188–189 and accompanying text.
226. See supra notes 188–189 and accompanying text.
227. See supra note 186 and accompanying text. D, is allowed to raise this argument without joining D, as a party, i.e., the “empty chair approach.” See Occhialino, supra note 60, at 63–64. This was the argument successfully employed by the defendants in Payne II. See supra note 186 and accompanying text.
228. See supra note 186 and accompanying text.
229. See supra note 176 and accompanying text.
230. See Payne v. Hall (Payne II), 2006-NMSC-029, ¶ 28, 137 P.3d 599, 607 (“There are many scenarios in which a defendant’s negligence does not cause a separate injury, but may lead the victim to seek medical care, and in that case the defendant’s negligence would be a contributing factor to the injury resulting from subsequent medical treatment.”); supra note 176 and accompanying text.
231. See supra note 176 and accompanying text.
232. See supra note 176 and accompanying text.
233. This also illustrates how injuries may be considered “concurrent” although the negligence occurs at wholly separate times. See, e.g., Payne II, 2006-NMSC-029, 137 P.3d 599.
contributed to the injury in an effort to reduce his own liability. As in Bartlett, the jury will be asked to determine the total of P’s damages resulting from the injury and then to apportion percentages of fault between and among each defendant for their individual roles in causing the total damage. For example, the jury may determine that P’s total damage amounts to $100,000. Then, the jury may determine that D1 was twenty-five percent at fault for causing P’s injury, and D2 was seventy-five percent at fault. Accordingly, if P has only sued D1, then P will only recover a total of $25,000 from D1. This illustrates that when tortfeasors are concurrent, the plaintiff must sue each tortfeasor that contributed to the injury if she wishes to recover one hundred percent of her damages.

2. Plaintiff Sues Only the Successive Tortfeasor (P v. D2)

In a classic successive tortfeasor scenario, the original tortfeasor (D1) and the successive tortfeasor (D2) cause two separate injuries to the plaintiff. Assume now that the plaintiff (P) has brought suit only against D2, as in Martinez, Lujan, and Lewis. According to this line of jurisprudence, P must prove that Injury 1 and Injury 2 are causally divisible and must also prove the amount of additional and separate harm caused by Injury 2. If P is successful, D2 is fully liable for Injury 2.

Lewis held that D2 may not argue comparative negligence at trial, i.e., D2 may not attempt to reduce her own liability by presenting evidence to show that D1’s negligence contributed to Injury 2. However, Lewis illustrated that D2 may argue that she did not cause any appreciable enhancement to Injury 1 or, stated differently, that D2 did not cause any Injury 2 because all of P’s damages occurred from Injury 1. If P is unable to establish that D2 caused a distinct and measurable Injury 2, Lewis indicated that D2 will not be liable for any damages. Accordingly, D2 will remain fully liable for the entire harm and P will not recover unless P joins or separately pursues D1.

Compare the outcome above to a situation where P sues D1 instead of D2. Where D1 was negligent but caused no distinct original injury (i.e., D1 caused the entire injury), D2 will still be treated as a concurrent tortfeasor with D1 and will remain liable for a percentage of the injury. However, where D2 was negligent but did not

---

235. See supra notes 38–60 and accompanying text.
236. See supra note 53 and accompanying text.
237. See supra note 53 and accompanying text. This also illustrates that the Bartlett holding, by adopting several liability for concurrent tortfeasors, effectively reversed traditional tort principles for the apportionment of damages. See supra Part II.A (explaining how the adoption of comparative negligence led to the conclusion that concurrent tortfeasors should not be jointly and severally liable for the entire harm). Prior to Bartlett, using the above example where D1 was only twenty-five percent liable for causing P’s injury, D1 would have to pay one hundred percent of P’s damages. Super Part II.A. After Bartlett, D1 will only pay damages in an amount equal to his own percentage of negligence in contributing to P’s injury. See supra notes 55–59 and accompanying text.
238. See Occhialino, supra note 60, at 38–39.
239. See supra Part I.C.
240. See supra notes 92–95 and accompanying text.
241. See supra note 105 and accompanying text.
242. See supra note 107 and accompanying text.
243. See supra notes 107–108, 176 and accompanying text; Lewis v. Samson, 2001-NMSC-035, ¶ 34, 35 P.3d 972, 985–86 (stating that if the “injured party...is unable to establish the degree of enhancement, then the initial tortfeasor (D1) remains responsible for the entire harm”).
244. This is analogous to the facts of Payne. See supra note 162 and accompanying text.
cause an appreciable second injury (i.e., $D_1$ caused the entire injury), $D_2$ is not given the same concurrent tortfeasor treatment as $D_1$. Instead, $D_2$ has established a complete defense and removed all liability for damages.\textsuperscript{245} The explanation for this inequitable treatment is temporal: $D_1$'s negligence was a direct cause of $P$’s exposure to $D_2$’s subsequent negligence, whereas this causal relationship does not operate in reverse.

These examples provide an overview of various multiple tortfeasor fact-patterns in light of Payne II. The plaintiff’s options for recovery vary considerably depending on which defendant(s) she joins and which theory of apportionment she chooses to pursue. This analysis will now examine an alternative to the approach adopted in Payne II.

B. The Concurrent Second Injury (CSI) Approach

When the New Mexico Supreme Court affirmed that the injury was the determinative factor in sorting through multi-tortfeasor liability, it effectively rejected a more traditional rule that focused on causation.\textsuperscript{246} To date, New Mexico courts have not provided a rationale that explains why the distinction between concurrent and successive tortfeasors (and the resulting examination of divisible injuries) is relevant or useful in working through multi-tortfeasor fact patterns.\textsuperscript{247} The intrinsic problem with the Payne II approach is that it is often unclear whether the injuries are divisible. As a result, multi-tortfeasor cases become increasingly complex by requiring the parties to conform to one of two alternative apportionment options when the facts may not easily lend themselves to either.\textsuperscript{248}

An alternative to the Payne II approach exists in a traditional causation model.\textsuperscript{249} By focusing on causation rather than apportionment and divisibility, courts can assign liability easily and fairly to the extent of each tortfeasor’s fault. The New Mexico Court of Appeals explored this fault-based approach in Martinez v. First National Bank of Santa Fe,\textsuperscript{250} as did Judge Alarid in his special concurrence to the Payne I decision,\textsuperscript{251} and these suggestions form the basis of the Concurrent Second Injury (CSI) approach.\textsuperscript{252}

The CSI approach differs from the Payne II approach in two material ways. Foremost, the CSI approach does not require a sharp distinction between concurrent

\textsuperscript{245} This is analogous to the facts of Lewis. See supra notes 107–108 and accompanying text.
\textsuperscript{246} See supra notes 160–161 and accompanying text.
\textsuperscript{248} See generally Payne v. Hall (Payne II), 2006-NMSC-029, 137 P.3d 599.
\textsuperscript{249} See supra note 147 and accompanying text.
\textsuperscript{250} 107 N.M. 268, 270, 755 P.2d 606, 608 (Ct. App. 1987). The CSI approach derives its name from the comparative negligence approach suggested in Martinez. Id.
\textsuperscript{251} See supra notes 81–83, 147 and accompanying text.
\textsuperscript{252} The CSI approach has two primary benefits. First, multi-tortfeasor actions are simplified because the parties are not required to conform to one of two rigid apportionment patterns. Cf. supra Part II.C. Consequently, the jury is not subjected to complex and confusing legal theory on liability, and the parties are free instead to focus on proving and rebutting causation and damages. Liability will be borne out through the evidence and fault allocated fairly to its source. The second benefit is conferred upon the defendant—fair apportionment of damages. Cf. supra notes 26, 52–58 and accompanying text. Yet, the CSI approach is not without its drawbacks. Contrary to the New Mexico Supreme Court’s express desire in Lujan, the CSI approach shifts the risk of insolvency to the plaintiff. Cf. supra notes 26–28 and accompanying text.
and successive tortfeasor liability. Rather than adhering to two competing and confusing theories of apportionment, Judge Alarid suggested that multi-tortfeasor actions could be decided using a singular theory that looks only at negligence and proximate causation to determine liability. The analysis is simple: Where the original tortfeasor’s negligence causes the plaintiff to seek care from the successive tortfeasor, “the wrongful conduct of the original tortfeasor continues to operate as a proximate cause” of any injury caused by the successive tortfeasor, unless “an unforeseeable, superseding cause...cuts off the initial wrongdoer’s liability.” Notably, however, this analysis applies regardless of the presence of a distinct original injury; the original tortfeasor’s negligence results in a completed tort as soon as the plaintiff suffers an injury, regardless of when the injury occurs in the causal sequence or how many separate injuries eventually manifest, and therefore, it is not necessary to focus on the divisibility of the injury or injuries because the original tortfeasor’s liability is rooted in causation as a whole, rather than causation of an original injury.

To apportion liability, the CSI approach borrows from the logic in Martinez and would apply comparative fault and several liability in all instances where the original and the successive tortfeasors’ negligence combines to cause an injury, which represents the second divergence from the Payne II approach. The Martinez court appeared to recognize that, in successive tortfeasor actions, the second injury is in essence a concurrent tort. This concept is illustrated by a classic successive tortfeasor example where the original tortfeasor (D,) causes Injury 1; D,’s negligence then causally leads the plaintiff (P) to seek medical care from the successive tortfeasor (D), where D,’s negligence causes Injury 2. Taken alone, Injury 2 is a separate, yet indivisible injury caused by the negligence of both D, and D, i.e., Injury 2 is a concurrent tort. New Mexico courts have long recognized that concurrent tortfeasors are subject to several liability for causing an indivisible injury to the plaintiff. Accordingly, Martinez rightly suggested that D, and D, should be severally liable for Injury 2. The CSI approach adopts this logic and applies several liability to any injury caused by the combined negligence of D, and D,.

To illustrate the benefit of this approach, envision a case where the original tortfeasor (D,) negligently causes a collision with the plaintiff (P). P then goes to the emergency room for evaluation, where she is negligently treated by the successive tortfeasor (D,). D,’s negligence caused P to seek additional medical treatment from D, whose negligence caused a second injury. See supra note 85 and accompanying text. D, is liable because his negligence was the proximate cause of P seeing D, when she did. See Payne I, 2004-NMCA-113, ¶ 37, 98 P.3d at 1041 (Alarid, J., specially concurring); supra note 85 and accompanying text.

255. See id. ¶ 37, 98 P.3d at 1041. Under this approach, the distinction between the original and the successive tortfeasor is relevant for sorting through the temporal sequence of events but is not required for the purpose of apportioning fault. Id. ¶¶ 35–37, 98 P.3d at 1041.
256. Id.
257. Cf. supra notes 81–84 and accompanying text.
258. Cf. supra notes 81–84 and accompanying text.
259. Similar to Lujan, D,’s negligence caused P to seek additional medical treatment from D, whose negligence caused a second injury. See supra note 85 and accompanying text. D, is liable because his negligence was the proximate cause of P seeing D, when she did. See Payne I, 2004-NMCA-113, ¶ 37, 98 P.3d at 1041 (Alarid, J., specially concurring); supra note 85 and accompanying text.
260. See supra Part II.A.
tortfeasor ($D_2$) and suffers an injury. In this scenario, the \textit{Payne II} approach will treat $P$'s injury at the hospital differently depending upon whether $D_1$ caused a distinct original injury during the collision. If an original injury is present, then $D_1$ is jointly and severally liable for the harm that occurred at the hospital; if there was no discernable original injury, $D_1$ and $D_2$ will be treated as concurrent tortfeasors and each will be severally liable for the injury at the hospital. Accordingly, under the \textit{Payne II} approach, $P$'s theory of recovery is contingent upon the presence of a distinct original injury.

Understandably, the "contingent-negligence" dichotomy created by \textit{Lujan} and \textit{Lewis} is responsible for the confusion in successive tortfeasor actions. Yet, this confusion is easily remedied through a blanket application of several liability and comparative fault. Under the CSI approach, $D_1$'s liability is not contingent upon a completed tort prior to $P$'s interaction with $D_2$, nor does it require the presence of distinctly divisible injuries; rather, the CSI approach will hold $D_1$ and $D_2$ severally liable for the injury at the hospital as long as $D_1$'s negligence was a proximate cause of that injury. To establish proximate causation, $P$ must simply show that $D_1$'s negligence caused $P$ to seek further medical care from $D_2$, and that $P$ was injured during the course of that treatment. If $P$ establishes causation, then the jury will compare $D_1$'s negligence to $D_2$'s negligence and apportion fault accordingly.

Although the CSI approach presents an attractive alternative, \textit{Payne II} is rooted in twenty-five years of well-reasoned jurisprudence and represents New Mexico's unique approach to multi-tortfeasor liability. A wise practitioner will seek to understand the court's apportionment patterns in an effort to successfully navigate within them throughout multi-tortfeasor litigation. The following section will address how practitioners may choose and apply the lessons from \textit{Payne II} in their litigation strategy.

**VI. IMPLICATIONS**

This section addresses how practitioners may and should approach multi-tortfeasor cases throughout the various stages of litigation in light of \textit{Payne II}. The first section will evaluate how a practitioner may choose and apply the appropriate theory of apportionment. The following section will examine how to present the

\begin{footnotes}
261. This example was loosely borrowed from Judge Alarid's special concurrence. See \textit{Payne I}, 2004-NMCA-113, ¶ 39, 98 P.3d at 1041 (Alarid, J., specially concurring).
262. See supra Part V.A.
263. See supra Part V.A.
264. See supra Part V.A.
265. See supra Part V.A.
268. A secondary consequence of the CSI approach is that the defendant, whether the original or the successive tortfeasor, should always be permitted to introduce evidence of comparative fault if the negligence of others contributed to the plaintiff's injuries. See, e.g., supra note 83 and accompanying text. Applying comparative fault, each Defendant's potential liability for Injury 2 may range from zero to one hundred percent. While $D_1$ may still be held fully responsible for Injury 2 under this approach, it will occur only as a result of a jury's deliberation and not as a matter of law. Cf. supra note 169 and accompanying text. Further, $P$ may need to sue both $D_1$ and $D_2$ to fully recover for Injury 2, indicating that successive tortfeasor actions should always include all liable tortfeasors as defendants. See infra Part VI.A.
\end{footnotes}
applicable theory at trial and will conclude with an evaluation of the newly adopted jury instructions.

A. Pre-Trial Practice

There are two primary considerations before any multiple tortfeasor action reaches trial: which theory of liability to pursue and how to frame the injury to comport with the chosen theory. The foremost consideration, from the plaintiff's perspective, is which theory of liability to pursue, as that theory will ultimately determine the extent of the damages to which she is entitled. There are three options available: The plaintiff may argue concurrent tortfeasor liability, successive tortfeasor liability, or both in the alternative. While there are a multitude of factors to consider when choosing the appropriate theory, the primary consideration should always be whether the plaintiff's injury is clearly divisible. When divisibility is unclear, Payne II illustrates that there are certain risks in choosing only one theory of apportionment and, therefore, a wise practitioner should always argue both.

In successive tort actions, plaintiffs will generally achieve the best result by joining all liable tortfeasors. Failing full joinder, however, a plaintiff is always guaranteed an incomplete recovery by choosing to pursue the successive tortfeasor alone because she will only be compensated for the second injury. Understanding that, a plaintiff may instead pursue the original tortfeasor alone in an effort to hold the original tortfeasor jointly and severally liable for the entire harm. In this instance, the plaintiff is required to prove that she suffered two causally distinct injuries resulting from the original tortfeasor's negligence. A successful argument allows the plaintiff to achieve a full recovery from a single defendant and is particularly beneficial where the plaintiff faces difficulty in joining the successive tortfeasor(s). However, the inherent and real danger in pursuing the original tortfeasor alone is that, failing proof of separate injuries, a plaintiff will recover nothing at all. Therefore, when divisibility of the injury is unclear, successive

269. A concurrent tortfeasor theory will subject the defendant(s) to several liability. See supra notes 55–59 and accompanying text.

270. See supra notes 156–157 and accompanying text. The successive tortfeasor theory will subject the original tortfeasor to full liability for the first injury and joint and several liability for the second injury. Alternatively, this apportionment theory will subject the successive tortfeasor to joint and several liability for the second injury.

271. In addition to divisibility, practitioners should also consider the feasibility of joining all liable defendants. Joinder, however, may present other problems ranging from statutes of limitation/repose to immunity to insolvency. See supra note 126 and accompanying text. While these difficulties will impact the parties' pre-trial planning, divisibility of the injury still represents the primary consideration in which theory of apportionment is appropriate.

272. See supra notes 92, 157 and accompanying text.

273. See supra note 158 and accompanying text.

274. See supra note 167 and accompanying text.

275. This difficulty is exemplified by Payne, where the Hospital could not be joined as a defendant because the two-year statute of repose had run, and by Bartlett, where the second tortfeasor was wholly unknown. See supra notes 50, 126 and accompanying text.

276. See supra Part IV.B. The Payne litigation shows that while successive tortfeasor liability may allow a plaintiff to achieve a full recovery from the original tortfeasor, it is often a more difficult case to prove. For a discussion on how modified jury instructions may cure this defect in successive tortfeasor liability, see infra Part VI.B.
tortfeasor liability carries a higher burden and a higher risk for the plaintiff by requiring the plaintiff to make an all-or-nothing case for recovery.

Alternatively, concurrent tortfeasor liability allows the plaintiff to choose one or any number of defendants and allows more flexibility in crafting the case. The benefits of this option are best exemplified by the outcome in Payne II; if Ms. Payne had pursued the Clinic under a concurrent tortfeasor theory, she may have obtained a partial recovery from the Clinic even in the absence of a distinct original injury. In this example, a partial recovery is preferable to the failed recovery that ensued when Ms. Payne was unable to establish divisible injuries in her successive tortfeasor claim. Yet, several liability may complicate the plaintiff’s pre-litigation planning by requiring the plaintiff to identify and join all liable tortfeasors in order to obtain a full recovery. The risk of an incomplete recovery is exemplified by Bartlett, where one of the concurrent tortfeasors was wholly unknown, thereby preventing the plaintiff from ever achieving a full recovery. Therefore, in light of the risks and benefits posed by both theories, Payne II illustrates that, when divisibility of the injury is unclear, the risks of a failed or partial recovery may effectively be lessened by pursuing both theories in the alternative.

After selecting the appropriate theory of liability, the second pre-trial consideration is how to frame the plaintiff’s injury to comport with the chosen theory. Generally, this tactic is only necessary where a plaintiff has elected to pursue successive tortfeasor liability, which requires the plaintiff to plead and prove the presence of two causally divisible injuries. Because the determinative issue is the injury, the plaintiff’s ability to achieve a full recovery from the original tortfeasor using joint and several liability will hinge on how she frames the injuries.

Significantly, when the court explored divisibility in Payne II, it may have opened the door to a broader application of joint and several liability by stating that, “[d]epending on the specific facts and circumstances of a given case, [pain and suffering] might constitute the distinct original injury necessary under successive tortfeasor liability, as long as we can decide it was foreseeable as a matter of law that medical treatment would be sought.” Accordingly, a plaintiff may use “pain and suffering” to obtain joint and several liability against an original tortfeasor. Yet, because “pain and suffering” is a broad and ambiguous injury that may be alleged in the absence of an original physical injury, this language seems counter to the court’s stated desire to restrict joint and several liability to a narrow class of

277. For purposes of this section, the author uses “several liability” and “concurrent tortfeasor liability” interchangeably.
278. See supra Part V.A.1.
279. See supra Part V.A.1.
280. See Ochialino, supra note 60, at 38–39 (“The task of identifying and suing other tortfeasors fell upon the targeted defendant who might seek contribution or indemnity from them if held liable for all the plaintiff’s injuries.”).
281. See supra Part II.A.
282. See supra Part II.A.
284. Id. For example, if Ms. Payne had successfully established that she experienced pain and suffering at the Clinic, then the Clinic may have been jointly and severally liable for the entire harm. See supra note 158.
cases. It seems likely that the courts will need to revisit and clarify this suggestion in the future.

B. Trial and Jury Instructions

Trial procedure has been a contentious source of dispute in multi-tortfeasor cases, particularly in relation to the plaintiff's burden of proof and the defendant's desire to argue comparative fault when the divisibility of the plaintiff's injury is unclear. To reduce the possibility of error, *Payne II* suggested a model of trial procedure designed to minimize prejudice to the parties and confusion for the jury. The success of this model is contingent on accurate jury instructions, which are discussed in more detail at the conclusion of this section.

In any multi-tortfeasor action, there is a general consensus that when the divisibility of the injury is not in dispute, the court should determine the appropriate theory of liability as a matter of law prior to the start of trial. The parties may accomplish this by stipulation or by submitting a motion for partial summary judgment on the issue of divisibility. After "the trial court make[s] such a determination one way or the other (concurrent tortfeasor liability versus successive tortfeasor liability)," evidence of comparative fault may be permitted or limited and the jury will receive a singular instruction in accord with the proper theory of apportionment.

The result is not as tidy, however, when divisibility is unclear at the time of trial; divisibility remains a question of fact reserved for the jury and the resulting trial necessarily becomes more complex. However, the complexity of successive tortfeasor actions can be mitigated through precautions taken during trial, in addition to specialized jury instructions tailored to multi-tortfeasor cases.

The New Mexico Supreme Court in *Payne II* suggested an approach that allows the parties to present evidence on causation, liability, and divisibility at trial without adhering to a particular theory. Under this approach, the parties are prevented from arguing comparative fault in an effort to avoid tainting the jury. At the close of evidence, the jury will determine the applicable theory of apportionment through

---

285. See supra note 158 and accompanying text.
286. See supra Part IVA-B.
287. See supra Part IV.C-D.
288. See supra notes 192–193 and accompanying text. The court stated that if the trial court could determine before hearing the evidence that the case involved successive tortfeasor liability, then the parties should be informed not to argue comparative fault. See *Payne II*, 2006-NMSC-029, ¶ 40, 137 P.3d at 609.
289. Note that in successive tortfeasor actions, the plaintiff may also wish to file a companion motion in limine to restrict evidence of comparative fault.
291. *Id.* ¶ 41, 137 P.3d at 609–10.
292. *Id.* ¶ 42, 137 P.3d at 610. In the absence of this determination, the jury must decide whether two distinct injuries occurred and then proceed under the appropriate theory.
293. *Id.* ¶ 42, 48, 137 P.3d at 610–11. If there is a question of whether two causally distinct injuries are present, then the appropriate theory is also unclear until the close of evidence, thereby delaying a determination of whether the case involves several liability and comparative fault for concurrent tortfeasors or joint and several liability for successive tortfeasors. *Id.*
294. See supra note 147.
295. See *Payne II*, 2006-NMSC-029, ¶ 43–47, 137 P.3d at 610.
296. See *id.* ¶ 40, 137 P.3d at 609; supra Part IV.D.
the use of factual interrogatories, which ask questions regarding negligence, causation, and the presence of a distinct original injury. Based on the jury's conclusion regarding divisibility, it will proceed under either the concurrent or the successive theory of liability. Despite the clarity afforded by this approach, a problem may arise where a defendant is deprived of its rightful opportunity to present evidence of comparative fault in the event that the action is deemed concurrent, and it is unclear whether this may constitute reversible error.

Following the suggestions in Payne II, the Uniform Jury Instructions Committee for Civil Cases proposed a set of jury instructions that specifically addressed multiple tortfeasor fact patterns and those instructions were adopted by the New Mexico Supreme Court in January 2008. Prior to the adoption of these uniform instructions, the court and counsel were forced to craft an ad hoc set of jury instructions for multiple tortfeasor cases based on causation, liability, and damages. The newly adopted instructions address all of these elements as they specifically apply to each of four successive tortfeasor scenarios.

The three initial instructions, 13-1802B, 13-1802C, and 13-1802D, are designed for successive tort actions where the plaintiff's injuries are clearly divisible and are not in dispute. These individualized instructions eliminate confusion regarding the type of liability attached to each party and eliminate unnecessary considerations for the jury. For example, the jury is not asked about the divisibility of the injuries or the plaintiff's burden of proving distinct injuries because these instructions are specifically limited to cases where divisibility was determined prior to trial.

The first proposed instruction, 13-1802B, is written for situations where the plaintiff sues only the original tortfeasor. This instruction comports with the holding in Payne II and states that the first tortfeasor is jointly and severally liable for both the first and any subsequent injuries. It is noteworthy, however, that this

---

298. See supra note 197 and accompanying text.
299. Cf. Yardman v. San Juan Downs, Inc., 120 N.M. 751, 756-57, 906 P.2d 742, 747-48 (Ct. App. 1995) (holding that the trial court's refusal to instruct the jury on comparative fault was reversible error where such an instruction was supported by substantial evidence).
301. See New Jury Instructions, supra note 300, at 21-22. The parties may have stipulated or the court may have decided as a matter of law that two causally distinct injuries are present.
302. See id. 13-1802B, which is entitled “Suit against original tortfeasor; divisibility of injuries not in dispute; medical treatment,” reads:

In this case, if you find that [ ] (one or more original tortfeasor(s)) [was] [were] negligent and caused injury to the plaintiff, [he] [she] [it] [they] [is] [are] also responsible for any harm caused by medical care that the plaintiff's injury reasonably required, even if the medical care was negligently performed.

Id.
303. See supra note 157 and accompanying text.
instruction, as written, is limited to situations where the second injury is caused by medical negligence.³⁰⁴

The next instruction, 13-1802C, addresses suits solely against the successive tortfeasor.³⁰⁵ Borrowing from the holdings in Payne II, Lewis, and Lujan, the proposed instruction asks the jury to consider the plaintiff’s original and successive injuries separately to determine damages. However, 13-1802C clearly instructs that the successive tortfeasor is only liable for the second injury.³⁰⁶

Finally, 13-1802D was written for situations where the plaintiff brings suit against both the original and the successive tortfeasor in the same action and divisible injuries are clearly present.³⁰⁷ This instruction walks the jury through a series of questions regarding negligence and damages to determine separate amounts for the original and the successive injuries. Although 13-1802D instructs the jury to consider the original tortfeasor’s negligence separately from that of the successive tortfeasor, a problem arises when the jury is asked to “compare the negligence of each person whose [negligence] [fault] contributed to the second injury.”³⁰⁸ As written, this instruction may invite the jury to compare the original tortfeasor’s negligence to that of the successive tortfeasor for the second injury, in clear contradiction of Lujan.³⁰⁹ Despite this anomalous language, the sample verdict form reveals the committee’s true intent: the jury is to compare the negligence of the plaintiff to that of the defendant and determine comparative fault.³¹⁰ Accordingly, the particular difficulty with this instruction may be eliminated through a statement that the original tortfeasor’s negligence is not to be considered when apportioning the second injury.³¹¹

The fourth and final instruction, 13-1802E, applies when divisibility of the injury is unclear, regardless of which tortfeasor or combination thereof the plaintiff chooses to pursue.³¹² This instruction largely adopts suggestions from Payne II specifically by using sample verdict forms that take the jury through a series of questions to determine the applicable theory of liability.³¹³ The instruction first asks

---

304. See New Jury Instructions, supra note 300. This instruction aligns with and supports the Lewis intent to limit joint and several liability to these very situations. See supra note 158 and accompanying text.

305. See New Jury Instructions, supra note 300, at 21. 13-1802C, which is entitled “Successive tortfeasor only defendant; no question for jury on divisibility of injuries,” reads:

In this case, the plaintiff says and has the burden of proving by the greater weight of the evidence that __________(the successive tortfeasor(s)) caused injuries that were separate and distinct from, or that caused a measurable worsening of, injuries the plaintiff received from __________(the original injury). In determining what damages, if any, were caused by __________(the successive tortfeasor(s)), you should award the plaintiff compensation only for [the separate injury caused by __________(the successive tortfeasor(s))] [the measurable worsening of the plaintiff’s condition caused by __________(the successive tortfeasor(s))] [harm that would have been avoided had __________(the successive tortfeasor) [not been negligent][acted within the standard of care]], but not for damages from __________(the first or original injury).

Id.

306. Id.

307. See id. at 22.

308. See id.

309. See supra note 95 and accompanying text.

310. New Jury Instructions, supra note 300, at 23.

311. See id.

312. See id. at 22-23.

313. See id.; supra Part IV.D.
whether at least one original tortfeasor and one successive tortfeasor were negligent.\textsuperscript{314} The Committee reasoned that \textit{“[u]nless the jury finds at least one [concurrent] and at least one [successive tortfeasor] to be liable, it is unnecessary to present the question of divisibility to the jury because the defendants liable will be concurrent tortfeasors, as regards to either the original or successive injuries.”}\textsuperscript{315}

After determining liability, the jury will then decide whether the injuries are divisible. Based on the jury’s conclusion, it will proceed under either the concurrent or the successive theory. Interestingly, where a plaintiff seeks joint and several liability under the successive tortfeasor theory, the instruction allows the jury to default to concurrent tortfeasor liability if the plaintiff fails to prove divisible injuries.\textsuperscript{316} Accordingly, the plaintiff benefits from the option of proceeding under either theory depending on whether she meets her burden to prove divisibility.

Where the injuries are divisible and the successive tort theory applies, the jury will follow a series of questions tailored from the \textit{Payne II} opinion that divide and apportion liability between the original and successive tortfeasor.\textsuperscript{317} If the injuries are indivisible, then the jury will proceed under the concurrent tort theory and is instructed to “compare the negligence of all parties you find to be responsible for the injuries and the defendant will be responsible for its proportionate share of the plaintiff’s damages.”\textsuperscript{318} While this instruction is straightforward, it appears to disregard the \textit{Lewis} dichotomy that removes liability for the successive tortfeasor in the absence of a clear second injury.\textsuperscript{319} Accordingly, this instruction may need additional interpretation by the court at trial, particularly where the successive tortfeasor has asserted a proximate cause defense.

\textbf{VII. CONCLUSION}

While \textit{Payne v. Hall} did not present any fundamental change in New Mexico law, it did present an opportunity to examine and clarify a complex and confusing area of jurisprudence. \textit{Payne II} adopted the principles set forth in \textit{Lujan} and \textit{Lewis} and provided a working example of how to analyze successive tortfeasor fact-patterns. However, while \textit{Payne II} has set forth definitive rules of law for multi-tortfeasor scenarios, there are still practical questions that linger. Comparative fault, for example, remains a particularly contentious issue and will likely continue to reappear in future multi-tortfeasor actions.

\textit{Payne II} is perhaps most valuable as an example of the difficulties a plaintiff may experience by choosing to pursue a singular theory of apportionment and how a plaintiff’s recovery may hinge on how she frames the injury. Yet, the most enlightening aspect of \textit{Payne II} was the realization that the prior uniform jury instructions were inadequate to assist practitioners, the court, and the jury in working through these complex issues. The suggestions found within the \textit{Payne II} opinion have led to the proposal and adoption of new Uniform Jury Instructions to

\textsuperscript{314} See \textit{New Jury Instructions}, supra note 300, at 19–20.
\textsuperscript{315} See \textit{Proposed Revisions}, supra note 300, at 20 (emphasis added).
\textsuperscript{316} See \textit{New Jury Instructions}, supra note 300, at 23.
\textsuperscript{317} See \textit{id.} at 19–20.
\textsuperscript{318} See \textit{id.} at 22.
\textsuperscript{319} See \textit{id.}; \textit{supra} Part V.A.
better equip attorneys and the jury in presenting and understanding the complexities of successive tortfeasor liability. These instructions may provide the clarity that the court has been aspiring to achieve since it began this evolution over twenty-five years ago.