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Tort Law - The Doctrine of Independent Intervening Cause Does Not Apply in Cases of Multiple Acts of Negligence - Torres v. El Paso Electric Company

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I. INTRODUCTION

In Torres v. El Paso Electric Company,1 the New Mexico Supreme Court abolished the doctrine of independent intervening cause for multiple acts of negligence, including where a defendant and a plaintiff are both negligent.2 An independent intervening cause is "a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen."3 The Torres court concluded that the independent intervening cause instruction would "unduly emphasize" a defendant's attempts to shift fault and was "sufficiently repetitive" of that for proximate cause that any "potential for jury confusion and misdirection outweigh[ed] its usefulness."4 As a result, the Torres court held that in cases involving multiple acts of negligence, trial courts should not give the independent intervening cause instruction or include a reference to it in the proximate cause instruction.5 The decision is the most recent in a series of New Mexico cases that have reexamined prior procedural and substantive doctrines in light of the switch from contributory to comparative negligence and from joint and several liability to several liability.

This note describes the Torres case in part II, describes the legal background for the case in part III, examines the court's reasoning in eliminating independent intervening cause in part IV, analyzes the court's ruling in the context of current tort law in part V, and discusses Torres' implications with respect to future rulings on the effect of comparative negligence on other tort doctrines in New Mexico in part VI.

II. STATEMENT OF THE CASE

Francisco Torres, an employee of Aldershot of New Mexico, Inc., was assisting in the installation of a greenhouse roof when he touched a high voltage conductor on an adjacent power pole with a long metal rod handed to him by a coworker.6 Torres was standing at the edge of the roof when he came in contact with the power line. As a result of the electrical shock, he fell to the ground outside the greenhouse and suffered serious injuries.

Francisco Torres and his wife Sonia filed a personal injury action in state district court alleging negligence by El Paso Electric Company. Torres alleged that the pole, which El Paso Electric had installed, was bent and that at the time of installation it was leaned toward the greenhouse to offset the weight of the electrical conductor attached to the pole. After the company installed the pole, it shifted several feet

2. See id. at 737-38, 987 P.2d at 394-95.
5. See id.
6. Unless otherwise noted, all facts in this section are from Torres, 127 N.M. at 732-34, 987 P.2d at 389-91.
towards the greenhouse, twisted and cracked, and the cross-arm of the pole tilted down toward the greenhouse.

In his complaint, Torres alleged that although several individuals had warned El Paso Electric about the condition of the pole, and the line’s proximity to the greenhouse, the company took no action to alleviate the problem. El Paso Electric claimed that the negligence of Torres, Aldershot, and Aldershot’s contractors superseded any negligence by the company and constituted independent intervening causes, which relieved it of liability.

At trial, the court instructed the jury on the affirmative defense of independent intervening causes, over Torres’ objections. The jury returned a special verdict finding El Paso Electric Company negligent, but finding that the company’s negligence had not proximately caused Torres’s injuries. On appeal, the court of appeals recognized a potential conflict between the defense of independent intervening cause and New Mexico’s adoption of comparative negligence. Therefore, it certified the case to the New Mexico Supreme Court and asked it to decide “the continuing viability of the independent intervening cause [jury] instructions and, if viable, the circumstances in which they should be given . . . .”

The New Mexico Supreme Court accepted the certification.

### III. BACKGROUND

#### A. Independent Intervening Cause

The concept of independent intervening cause has been an integral part of the doctrine of proximate cause, and has traditionally been included in the definition of proximate cause. In *Thompson v. Anderman*, the court stated “[t]he proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.” As a result, intervening cause has been discussed in the
context of proximate cause. For example, in *Reif v. Morrison*, the defendant placed poisoned feed on a neighbor’s land. The neighbor subsequently rented the land for pasture, and the cattle put on the land were killed by eating the poisoned feed. In his defense, the defendant relied on the renting of the land and placement of cattle on it as an intervening cause absolving him of negligence. The court held that the defendant could reasonably have anticipated the placement of cattle on the land, therefore, it was not an intervening cause. Thus, as explained by the court in *Thompson*, “[t]he concurrent or succeeding negligence of a third person which does not break the sequence of events is not [an independent intervening cause], and constitutes no defense for the original wrongdoer . . . .”

New Mexico cases that have considered independent intervening cause illustrate the key elements of the doctrine: (1) generally a subsequent negligence, breaking the chain of events, and (3) creating an unforeseen result. In *Latimer v. City of Clovis*, where a boy drowned in the city’s swimming pool, the court found that whether the mother’s or playmates’ actions just prior to the drowning constituted independent intervening causes to the city’s lack of maintenance of the pool area was a factual issue for the jury. In another case, the court found that a grain processor’s mixing of grain treated for planting that was toxic with feed supplies was foreseeable, and thus not an independent intervening cause relieving the manufacturer of its duty to warn.

New Mexico courts have also considered independent intervening cause instructions in cases involving successive automobile accidents. However, the
New Mexico Court of Appeals has noted that the definitions of proximate cause and independent intervening cause are "difficult to understand and apply in second accident cases." The court agreed with the First Circuit that the jury needs to determine whether the potentially bizarre unfolding of events between the culpable act and the injury, though impossible to predict, are sufficiently close to hold the initial wrongdoer liable. Even in a single accident case, the court of appeals had earlier suggested that submission of the independent intervening cause instruction could be misleading and confusing to the jury.

In many cases, the defense of intervening cause was a contention made along with the contention that the plaintiff was contributorily negligent. In Thompson v. Anderman, the defendant contended that a minor plaintiff who ran across a street without looking after being discharged from a bus at a particular location was an independent intervening cause and contributorily negligent. The court found that the bus driver's act of discharging the plaintiff from the bus was the proximate cause of the injuries the plaintiff sustained when he ran into a truck in traffic. In another case, regarding a sign turned sideways at the intersection where a collision occurred, the defendant asserted that the plaintiff's action constituted both contributory negligence and an independent intervening cause. The court of appeals found the independent intervening cause instruction should not have been submitted to the jury because the defendant did not look in the direction of the sign and therefore presented no evidence that any act broke the natural sequence of events causing the accident. In Little v. Price, the defendant alleged that the plaintiff's construction of a dam on the defendant's land constituted contributory negligence and an independent intervening cause to the defendant's negligent maintenance of the dam. Finally, a plaintiff's suicide while under custodial care has been considered under both independent intervening cause and contributory negligence.

Kelly v. Montoya, 81 N.M. 591, 595, 470 P.2d 563, 567 (Ct. App. 1970) (holding that it was a matter for the jury to determine whether the second accident was an independent intervening cause where the driver hit a car stopped because of the first accident); see also Archuleta v. Johnston, 83 N.M. 380, 381-82, 492 P.2d 997, 998-99 (Ct. App. 1971) (holding that where the plaintiff had an unobstructed view of slow-traveling vehicles, there was evidence to support the theory that the plaintiff's failure to avoid a collision was an independent intervening cause). Independent intervening cause has also been a consideration in successive injury cases. See Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 27, 636 P.2d 291, 298 (Ct. App. 1980); Perea v. Gorby, 94 N.M. 330-32, 492 P.2d 997, 998-99 (Ct. App. 1971).

Under contributory negligence, where the plaintiff's injury is brought about by not just the defendant's negligence but also by the plaintiff's negligence, the defendant is relieved completely of liability according to the common law. See Joseph Goldberg, Judicial Adoption of Comparative Fault in New Mexico: The Time is at Hand, 10 N.M. L. Rev. 3 (1979).
theories in New Mexico. The dual contentions in these cases suggest a possible overlap of the role of independent intervening cause with that of contributory negligence. Because either defense, if proven, resulted in defeat for a plaintiff, it was not necessary to distinguish them. Subsequent to these cases, New Mexico replaced contributory negligence with comparative negligence. The result was that if comparative negligence were applicable, a plaintiff would still recover a reduced amount, but if the negligence was an independent intervening cause, the plaintiff recovered nothing. This, in turn, required a reexamination of the relationship of independent intervening cause with comparative negligence in cases where the plaintiff's conduct constituted negligence. The advent of comparative negligence and several liability required reexamination of many of our tort doctrines, to test their compatibility with comparative negligence and several liability.

B. Comparative Negligence and Several Liability

Although New Mexico historically embraced the common-law doctrine of contributory negligence, it recognized that it was an "all-or-nothing" doctrine that could result in substantial injustices by barring a plaintiff from recovering anything. Because of the harshness of the doctrine, New Mexico took steps to alleviate its harshness through judicial adoption of ameliorative common-law doctrines and statutory doctrines. For instance, the legislature enacted a statute that stated that the failure of a blind pedestrian to carry a cane or use a guide dog would not constitute nor be evidence of contributory negligence. The harshness associated with employee contributory negligence was lessened when the state passed the Worker's Compensation Act and the New Mexico Disease Disablement Law. These laws disallowed any defense that an employee assumed risk or did not exercise ordinary care in actions where the employee was injured in the line of duty or sustained occupational disease.

Finally, in 1981, the New Mexico Supreme Court, adopting an opinion by the court of appeals, eliminated contributory negligence, replacing it with comparative negligence. The court adopted the pure form of comparative negligence where the jury apportions fault, regardless of degree, between the plaintiff and defendant.

34. See City of Belen v. Harrell, 93 N.M. 601, 604, 603 P.2d 711, 714 (1979) (finding that the trial court erred in refusing to instruct the jury on whether plaintiff decedent's actions constituted an independent intervening cause or contributory negligence).


37. See id. at 686, 634 P.2d at 1238.

38. See N.M. STAT. ANN. § 28-7-4 (1996).


40. See id. § 52-3-7.

41. See id. §§ 52-1-8, 52-3-7; see also id. § 63-3-23 (1999) (disallowing the application of contributory negligence where a railroad employee is injured through a reported defect). The New Mexico legislature also alleviated the harshness of common law joint and several liability. For instance, the Uniform Contribution Among Tortfeasors Act gave joint tortfeasors the right to contribution from other tortfeasors. See id. § 41-3-1 to -8 (1996).


43. See id. at 689-90, 634 P.2d at 1241-42. The pure form of comparative negligence apportions liability in direct proportion to fault in all cases. See Li v. Yellow Cab Co. of California, 532 P.2d 1226, 1242 (Cal. 1975)
Because of the balance created by comparative negligence, the court held that "rules designed to ameliorate the harshness of the contributory negligence rule are no longer needed." In addition, the court stated that "negligence . . . and other liability concepts based on or related to negligence of either plaintiff, defendant, or both, are subject to the comparative negligence rule."

Shortly after the adoption of comparative negligence, the New Mexico Court of Appeals also abolished joint and several liability for concurrent tortfeasors and adopted several liability in its place. In *Bartlett v. New Mexico Welding Supply, Inc.*, the New Mexico Court of Appeals held that in multi-tortfeasor cases a concurrent tortfeasor was no longer liable for the entire damage resulting from his negligence. The court reasoned that the potential grounds for retaining joint and several liability could not be justified. First, it determined that the concept of one indivisible wrong is obsolete and is not to be applied in comparative negligence cases. The court was unwilling to say that causation could not be apportioned along with fault. Second, the court concluded that plaintiffs should not be favored by bearing no risk of non-recovery against an insolvent defendant in multi-tortfeasor cases and stated that "[f]airness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis." The court also held that it is proper for the jury to consider all tortfeasors, including non-parties, in apportioning fault.

After *Bartlett*, the New Mexico Legislature codified several liability for joint tortfeasors whose conduct proximately caused a plaintiff's injury.

The adoption of comparative negligence and abolition of joint and several liability in New Mexico has compelled reconsideration of associated tort doctrines. The result is that some have been abolished, some have been retained, and some have been modified. Others have not yet undergone reconsideration, but eventually will be similarly evaluated. The treatment is generally based on the extent to which

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(adopting the pure form of comparative negligence for the State of California). A second basic form of comparative negligence, of which there are several variants, applies apportionment based on fault up to the point at which the plaintiff's negligence is equal to or greater than that of the defendant—when that point is reached, plaintiff is barred from recovery. See id. A third, infrequently used form called "slight/gross" allows a plaintiff to recover damages diminished in accordance with his fault if his fault is slight and the defendant's is gross. See Goldberg, supra note 28, at 10-11.

44. *Scott*, 96 N.M. at 687, 634 P.2d at 1239.
45. *Id.*
47. *Id.*
48. See id. at 159, 646 P.2d at 586.
49. See id. at 158, 646 P.2d at 585.
50. See id.
51. *Id.*
52. *See id.* at 159, 646 P.2d at 586. Following *Bartlett*, the New Mexico Court of Appeals held that the Uniform Contribution Among Tortfeasors Act no longer held any force in New Mexico with respect to contribution among concurrent tortfeasors. See *Wilson v. Galt*, 100 N.M. 227, 231, 668 P.2d 1104, 1108 (Ct. App. 1983).
53. See N.M. STAT. ANN. § 41-3A-1 (1996). The statute became effective in 1987 and specified exceptions where joint and several liability continued to apply. See *Id.* The exceptions are: (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. See *Id.*
the doctrine is related to contributory negligence. Indeed, the *Scott v. Rizzo* court anticipated that adaptations of various existing rules would have to be made on a case-by-case basis and left most of the adaptations to the courts, stating that it had "great faith in the ability of our state's trial judges to sort out any problems that may arise." Thus, in the wake of adopting pure comparative negligence and several liability, New Mexico courts addressed a number of doctrines, both substantive and procedural. The *Scott* court addressed two of them—last clear chance and the distinction between ordinary and gross negligence in the contributory negligence context. As a result, key doctrines have been abolished, including the two abolished in *Scott*, and some have been modified or retained.

**C. Abolished Doctrines**

1. Last clear chance

The last clear chance doctrine allows a negligent plaintiff to recover if the defendant knew or should have known of the plaintiff's peril and had a clear chance, by the exercise of ordinary care, to avoid the injury. The doctrine was developed as a means of neutralizing the harsh consequences resulting from a contributory negligence defense. In order to apply the doctrine, the defendant needs to have time for appreciation, thought, and time to act effectively to avoid the accident causing injury to the plaintiff. When it abolished contributory negligence in New Mexico, the supreme court explicitly abolished the last clear chance doctrine because such "rules designed to ameliorate the harshness of contributory negligence [were] no longer needed."

2. Gross negligence as a bar to the defense of contributory negligence

A defendant's gross negligence historically barred the defense of contributory negligence in New Mexico. In *Gray v. Esslinger*, the court explained that the use

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55. *Scott*, 96 N.M. at 688, 634 P.2d at 1240.
56. See *id* at 687, 634 P.2d at 1239.
58. *See* *id*.
60. *Scott*, 96 N.M. at 687, 634 P.2d at 1239.
61. Most courts have determined that gross negligence falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 34, at 212 (5th ed. 1984) [hereinafter KEETON ET AL.].
62. See *Gray* v. *Esslinger*, 46 N.M. 421, 429-30, 130 P.2d 24, 29 (1942). New Mexico has historically recognized the right to recover punitive damages in cases of tort where the plaintiff can show gross negligence, malice, or circumstances of aggravation. See *id* at 428, 130 P.2d at 28 (citations omitted). Later, the New Mexico Supreme Court rejected gross negligence as a basis for punitive damages in a contract action. See *Paiz* v. *State Farm Fire & Cas. Co.*, 118 N.M. 203, 211, 880 P.2d 300, 308 (1994). However, in *Clay* v. *Ferreillas*, Inc., 118 N.M. 266, 269, 881 P.2d 11, 14 (1994), a negligence action, the court stated that to be liable for punitive damages, the wrongdoer must "have some culpable mental state" and his conduct must "rise to a willful, wanton, malicious, reckless, oppressive, or fraudulent level ... " *Id*. Notably, *Clay* did not specify whether gross negligence was sufficient, but New Mexico's jury instructions retained grossly negligent conduct as a basis for punitive damages until July 1, 1998. See *Torres* v. *El Paso Electric Co.*, 127 N.M. 729, 740, 987 P.2d 386, 397 (1999). The *Torres* court declined to reach the question for *Torres* ' claim, which was filed while the jury instruction included gross
of the doctrine did not impose comparative negligence, but was "merely a circumstance to be considered along with all other evidence in determining whether the act complained of is of such character as to . . . the denial of the defense of contributory negligence." Upon adoption of comparative negligence, however, the New Mexico Supreme Court abolished the use of gross negligence to bar the defense of contributory negligence because, like the doctrine of last clear chance, it was no longer needed.

3. Open and obvious danger

The doctrine of open and obvious danger imposes a duty on a property owner/occupant to use ordinary care to protect a business visitor from known or obvious dangers only if: (1) the owner/occupant knows or has reason to know of a dangerous condition on his premises involving unreasonable risk to a visitor and (2) the owner/occupant should reasonably anticipate that the visitor will not discover or realize the danger or that harm will result even though the visitor knows or has reason to know of the danger. Under the rule, there is no duty of care if the condition is open and obvious and there is no reason to believe it constitutes a danger because it is reasonable to believe the visitor will discover the danger and thus it is not an unreasonable risk. Thus, the doctrine essentially eliminates a defendant’s duty of care when a plaintiff’s injury was caused by the plaintiff’s negligent failure to observe an obvious danger.

The doctrine of open and obvious danger was abolished in Klopp v. Wackenhut Corporation, which held that in a place of public accommodation, an occupier of the premises owes a duty to safeguard each business visitor whom the occupier reasonably may foresee could be injured by a danger avoidable through reasonable precautions available to the occupier of the premises. In discussing the holding, the court stated that “[i]f we were to accept that no duty is owed to invitees foreseeably injured . . . through contributory negligence, we would vitiate the ameliorating effect of comparative fault.” The court elaborated, stating “some degree of negligence on the part of all persons is foreseeable, just like the inquisitive propensities of children, and thus, should be taken into account by the occupant in the exercise of ordinary care.”

negligence, because the concept of recklessness resolved the issue. See id.

63. 46 N.M. 421, 130 P.2d 24 (1942).
64. Id. at 430, 130 P.2d at 29.
67. See id. at 155, 824 P.2d at 295.
69. See id. at 157, 824 P.2d at 297. Klopp also abrogated the reasonably-careful-invitee test of Davis v. Gabriel. See id. at 157, 824 P.2d at 297; Stetz v. Skaggs Drug Ctrs., Inc., 114 N.M. 465, 467, 840 P.2d 612, 614 (Ct. App. 1992); Davis v. Gabriel, 111 N.M. 289, 291, 804 P.2d 1108, 1110 (Ct. App. 1990). The Klopp court commented that simply making a danger open and obvious to those exercising ordinary care does not make the risk reasonable or relieve the owner/occupier of liability and overruled cases that appeared to have held the duty to avoid unreasonable risk of injury to others is satisfied by an adequate warning. See Klopp, 113 N.M. at 157, 824 P.2d at 297.
70. Klopp, 113 N.M. at 157, 824 P.2d at 297.
71. Id.
4. Sudden emergency

The sudden emergency doctrine provides a defense for a person who, confronted with a sudden or unexpected event calling for immediate action, does not have the opportunity to weigh the safety of alternate courses of action. In such a situation, the person "cannot be expected to act with the same accuracy of judgment as [a person] who has had time to reflect on the situation." The sudden emergency doctrine was devised to ameliorate the sometimes harsh results of contributory negligence that would affect the plaintiff, but over the years it has become available to a defendant also. In *Dunleavy v. Miller* New Mexico eliminated the doctrine because use of the doctrine was "merely an application of the standard of ordinary care." The *Dunleavy* court stated that the sudden emergency instruction "merely directs the jury's attention to one of the circumstances . . . to be considered in evaluating the reasonableness of the actor's behavior." Furthermore, the court stated that the instruction on sudden emergency "unduly emphasize[d] the 'under the circumstances' portion of the standard [of care], thereby potentially confusing the jury . . . ."

Because a bar to recovery for negligence is incompatible with apportionment of fault and because the sudden emergency doctrine evolved to apply to defendants' negligence as well as plaintiffs' contributory negligence, the sudden emergency doctrine is not necessarily incompatible with comparative negligence. In this respect, it is more like the unavoidable accident rule, which offered the defense that an accident was unavoidable to a defendant before New Mexico abolished the defense prior to adopting comparative negligence. In abolishing the doctrine, the New Mexico Supreme Court reasoned that the ordinary instructions on negligence and proximate cause were sufficient to describe the plaintiff's burden of proof and an additional instruction "is not only unnecessary but is confusing . . . [and] may mislead the jury . . . ."

5. Complicity

The doctrine of complicity bars recovery under a dramshop act to anyone who "actively contributes to, procures, participates in, or encourages the intoxication of the inebriated driver." This applies to a plaintiff's voluntary intoxication if the plaintiff is a passenger in the car driven by the inebriated driver involved in an

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73. *Id.*
74. *See id.*
76. *Id.* at 357, 862 P.2d at 1216.
77. *Id.*
78. *Id.* at 357, 359, 862 P.2d at 1216, 1218.
80. *See id.*
accident that injures or kills the plaintiff.\textsuperscript{83} Implicit in the doctrine is that a tavernkeeper is liable for injuries arising from actions of the inebriated driver. Historically, though, the common law did not make a tavernkeeper liable for injuries resulting from the sale of intoxicating liquor to an inebriated customer.\textsuperscript{84} In New Mexico, the duty of a tavernkeeper to a third party for injuries that might result from the customer's conduct was established in \textit{Lopez v. Maez}.\textsuperscript{85} In \textit{Lopez}, the court held that

a person may be subject to liability if he or she breaches his or her duty by violating a statute or regulation that prohibits the selling or serving of alcoholic liquor to an intoxicated person; the breach of which is found to be the proximate cause of injuries to a third party.\textsuperscript{86}

At the time of \textit{Lopez}, there was a New Mexico law that forbade serving alcoholic beverages to any person who was obviously intoxicated,\textsuperscript{87} but complicity could be used as a defense. However, in \textit{Baxter v. Noce},\textsuperscript{88} New Mexico did away with the defense of complicity, applying comparative negligence instead.\textsuperscript{89} In disposing of complicity, the \textit{Baxter} court stated that "[c]omplicity, while superficially dissimilar, is only a hybrid form of contributory negligence and is identical to it in application."\textsuperscript{90}

6. Sole proximate cause

Under the sole proximate cause doctrine, a plaintiff in a comparative negligence action is barred from recovery for loss or injury caused by the negligence of another only if the plaintiff's negligence and/or that of someone other than the defendant is the sole legal cause of the damage.\textsuperscript{91} Alleging that the plaintiff's negligence is the sole proximate cause of the occurrence causing damages is a widely used defense in the pure comparative negligence jurisdictions.\textsuperscript{92} In \textit{Armstrong v. Industrial Electric and Equipment Service},\textsuperscript{93} however, the New Mexico Court of Appeals found that the defense of sole proximate cause was not necessary under comparative negligence when it determined that there was no error in omitting from the

\begin{itemize}
\item \textsuperscript{83} See \textit{id}.
\item \textsuperscript{84} See \textit{Lopez v. Maez}, 98 N.M. 625, 629, 651 P.2d 1269, 1273 (1982).
\item \textsuperscript{85} 98 N.M. 625, 651 P.2d 1269 (1982).
\item \textsuperscript{86} \textit{id}. at 632, 651 P.2d at 1276. The \textit{Lopez} court discussed whether the actions of the inebriated customer were intervening causes sufficient to release the provider of the alcohol from liability and determined that the consequences of serving liquor to an intoxicated person whom the server knows or could have known is driving a car is reasonably foreseeable. \textit{See id}.
\item \textsuperscript{88} 107 N.M. 48, 752 P.2d 240 (1988).
\item \textsuperscript{89} \textit{id}. at 51, 752 P.2d at 243.
\item \textsuperscript{90} \textit{id}.
\item \textsuperscript{92} \textit{id}. at 276, 639 P.2d at 85.
\item \textsuperscript{93} 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981).
\end{itemize}
proximate cause instruction the language that a cause need not be the only cause. The defense is not necessary because under the doctrine of comparative negligence, even with the omission, the fact finder can still find either the negligence of the plaintiff or the defendant as a sole proximate cause of a plaintiff’s injuries.

D. Retained or Modified Doctrines

1. Strict liability

In the products liability context, an injured user or consumer may recover against a supplier or manufacturer without having to prove negligence. The doctrine evolved as a matter of public policy, placing liability on the party primarily responsible for the condition giving rise to the injury, that is, the manufacturer. New Mexico recognized that the policy concern was on the nature of the defect, not how a consumer obtained the product, and adopted strict liability for both sellers and lessors of a defective product in 1972.

Conventional contributory negligence was inapplicable as a defense in strict liability cases, but a plaintiff’s assumption of risk was a defense. After adopting comparative negligence, New Mexico recognized conventional negligence as a partial defense in strict liability actions. New Mexico has also retained assumption of risk, but as a partial defense to strict liability. In addition, New Mexico has retained joint and several liability for persons strictly liable for the manufacture and sale of a defective product, but their liability is only for that portion of the total liability attributed to them. It follows, then, that comparative...
negligence could be applicable to determine their portion of the total liability.\textsuperscript{104} Thus, under its comparative negligence regime, New Mexico has adopted defenses to strict liability that are modified from those applicable under contributory negligence and it has modified its joint and several liability for strict liability cases.

2. Assumption of risk

Assumption of risk by a plaintiff may be express or implied. Express assumption of risk means that the plaintiff, in advance, has expressly consented to relieve the defendant of a legal duty that he owes to the plaintiff.\textsuperscript{105} Unless a court holds that the agreement is invalid for policy reasons or finds that the risk is disproportionate to the plaintiff’s reason for assuming the risk, assumption of the risk will prevent a cause of action.\textsuperscript{106}

Assumption of risk may also be implied from the plaintiff’s conduct under the circumstances.\textsuperscript{107} In its “primary” sense, implied assumption of risk corresponds to a defendant’s lack of duty or absence of breach of duty, i.e., nonnegligence of a defendant.\textsuperscript{108} In its “secondary” sense, it is an affirmative defense to an established breach of duty.\textsuperscript{109} After New Mexico adopted comparative negligence, the court of appeals addressed and retained the primary sense of assumption of risk in \textit{Yount v. Johnson}.\textsuperscript{110} The court stated that “primary assumption of risk remains with our jurisprudence as a shorthand for a judicial declaration of no duty of ordinary care, or breach of that duty, depending on the circumstances of a particular relationship between the parties.”\textsuperscript{111} The court noted that secondary assumption of risk had earlier been merged with contributory negligence and now was addressed through comparative negligence.\textsuperscript{112} Thus, although assumption of risk as a total defense to liability is not retained, assumption of risk as a form of negligence is retained in New Mexico for establishing duty.
3. Third party intentional torts

Third party intentional torts describe a situation where a party was negligent but another tortfeasor’s conduct was intentional. While the liability of the intentional tortfeasor is governed by the New Mexico statute imposing joint and several liability, the liability of the concurrent negligent tortfeasor is not. The New Mexico Court of Appeals declined to apply comparative negligence to a concurrent tortfeasor in Medina v. Graham’s Cowboys, Inc., where a bar owner hired a doorman with a propensity to engage in fights, and the doorman subsequently assaulted a patron. Despite the notions of fairness relied on in Scott and Bartlett suggesting that comparative fault should apply, the court reasoned that because the tort was a reasonably foreseeable result of the negligent hiring, the owner was vicariously liable for the total injury and comparative fault did not apply.

In contrast to Medina, the New Mexico Supreme Court did apply comparative negligence in a similar situation in Reichert v. Atler, where a bar patron was injured when another patron assaulted him. The court found that the bar owner’s negligent failure to protect patrons from foreseeable harm may be compared to the conduct of the third party in determining liability. However, the Reichert court emphasized that the holding did not hinge on the third party conduct being intentional; the court was simply applying the reasoning in Bartlett that each individual tortfeasor should be held responsible only for his percentage of the harm. The reasoning in the two cases suggests that the principles of comparative fault should apply to a concurrent tortfeasor unless the tortfeasor’s conduct is covered by one of New Mexico’s exceptions to several liability.

4. Mitigation of damages, avoidable consequences

Under the doctrine of avoidable consequences, a party is not entitled to damages for harm that he could have avoided by the use of reasonable effort after the negligent action of the tortfeasor. Avoidable consequences, also known as mitigation of damages, is applicable to both negligence and to intentional torts.
In *Ledbetter v. Webb*, the plaintiff misrepresented the condition of a machine, but the defendants failed to heed warning signs that showed that the machine was malfunctioning and in need of repairs. The New Mexico Supreme Court concluded the trial court erred when it determined that damages assessed against the defendants were for comparative negligence rather than for failure to mitigate damages.

Justice Stowers, in an opinion concurring on the issue, pointed out that because the injured party cannot recover damages caused by that party’s negligence, the conclusion was proper and stated that “[m]itigation of damages raises questions of causation, not of comparative fault.” Thus, it would appear that New Mexico views the doctrines of mitigation of damages and comparative negligence as compatible because their roles do not overlap.

5. Minor plaintiff

New Mexico courts usually determine a minor’s negligence based on a “child’s standard of care,” which asks whether the child “exercised that degree of care ordinarily exercised by children of like age, capacity, discretion, knowledge and experience under the same or similar circumstances.” A minor’s breach of duty of care could be asserted by a plaintiff as negligence or used by a defendant as a defense. According to *Scott*, questions concerning the minor plaintiff should not be affected by the comparative negligence doctrine. Indeed, comparative negligence merely eliminates the negligence of a child as a complete bar or defense to the child’s action for personal injuries, just as it does for the negligence of an adult. Thus, whether or not a child can be guilty of negligence addresses a kind of “competence,” is not related to the policies underlying the comparative principles of *Scott*, and has not changed with the adoption of comparative negligence.

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125. See id. at 603, 711 P.2d at 880.
126. The New Mexico Supreme Court did not disturb the trial court’s finding that the defendants suffered consequential damages as a result of the plaintiffs’ misrepresentations. See id. The trial court did, however, find that some of the business losses were caused by the defendants’ failure to exercise due care subsequent to the plaintiffs’ tortious acts of misrepresentation. See id. at 605, 711 P.2d at 882 (Stowers, J., concurring in part, dissenting in part).
127. See id. at 603, 711 P.2d at 880. The court did not reach the question of whether New Mexico’s comparative negligence system governs the assessment of damages in actions for fraudulent misrepresentation or other intentional torts. See id. at 605, 711 P.2d at 882 (Stowers, J., concurring in part, dissenting in part).
128. Id. (Stowers, J., concurring in part, dissenting in part).
130. See, e.g., Lerma, 117 N.M. at 784-85, 877 P.2d at 1087-88.
132. See Honeycutt, 796 P.2d at 554.
133. See, e.g., Lerma, 117 N.M. at 785, 877 P.2d at 1088.
6. Rescue

Under the rescue doctrine, courts have held that efforts to protect the personal safety of another do not supersede the liability for the original negligence that endangered it.\(^{134}\) Traditionally, the rescue doctrine provided a defense to a contributorily negligent rescuer/plaintiff\(^{135}\) and that a negligent defendant “may not have foreseen the coming of a deliverer. . . . [but] is accountable as if he had” for a plaintiff’s injury in an emergency.\(^{136}\) Under comparative negligence, the New Mexico Supreme Court has concluded that the rescue doctrine is only needed to establish and identify the duty owed the rescuer, and as such “remains vital under New Mexico’s comparative negligence regime.”\(^{137}\) Thus, in New Mexico, the doctrine is used to establish duty, and it is not needed to insulate the plaintiff/rescuer under comparative negligence.\(^{138}\)

7. Independent intervening cause

Prior to Torres, the New Mexico Supreme Court looked at the issue of independent intervening cause in the context of comparative negligence in Richardson v. Carnegie.\(^{139}\) The court only mentioned comparative negligence in a discussion of whether an independent intervening cause existed, however.\(^{140}\) The court did not determine whether the independent intervening cause doctrine is consistent with New Mexico’s system of pure comparative fault until Torres.\(^{141}\)

E. Summary

Over the years since it eliminated contributory negligence and joint and several liability for concurrent tortfeasors, New Mexico has eliminated, modified, or retained various tort doctrines using several criteria. The key criteria the court has used are whether (1) the doctrine served to avoid the harshness of contributory negligence and thus is no longer necessary; (2) abolition will assure fairness to defendants; and (3) abolition will avoid overemphasis to or confusion of the jury. Because their role in ameliorating the harshness of contributory negligence is no longer needed under a comparative negligence regime, the last clear chance doctrine, the distinction between ordinary and gross negligence in the contributory negligence context, open and obvious danger, and complicity have been abolished.\(^{142}\) For the same reason, New Mexico does not require a separate instruction for sole proximate cause.\(^{143}\) Joint and several liability generally has been abolished where abolition assures fairness to defendants and does not conflict with

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\(^{134}\) See Keeton et al., supra note 61, § 44, at 307.


\(^{137}\) Govich, 112 N.M. at 232, 814 P.2d at 100.

\(^{138}\) See id.

\(^{139}\) 107 N.M. 688, 763 P.2d 1153 (1988).

\(^{139}\) See id. at 701, 763 P.2d at 1166.


duty and causation (as it did in Medina). The sudden emergency and unavoidable accident doctrines historically related to more than one aspect of negligence or liability, with the result that they tended to overemphasize the circumstances and had the potential for confusing the jury. Because of the risk of confusion, the New Mexico Supreme Court abolished them.

Where a doctrine is important in determining duty or breach of duty, it has been retained. New Mexico has retained primary assumption of risk and the rescue doctrine because they remain important in determining duty.

It has retained a standard of care for a minor plaintiff that is different from an adult’s for the purpose of determining a minor’s breach of duty. Because the interests behind the doctrine are addressed by comparative negligence, assumption of risk is no longer used for contributory negligence in New Mexico. Similarly, the rescue doctrine is no longer used as a defense to a plaintiff’s contributory negligence.

IV. RATIONALE

The Torres court concluded that the use of Uniform Jury Instruction 13-306 for independent intervening cause in addition to Uniform Jury Instruction 13-305 for proximate cause unduly emphasized a defendant’s attempt to escape liability by asserting an absence of proximate cause. The court also determined that the use of both instructions was repetitive and likely to lead to jury confusion and misdirection. Uniform Jury Instruction 13-305 includes the statement that “[a] proximate cause of an injury is that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred.” Uniform Jury Instruction 13-306 defines a portion of Uniform Jury Instruction 13-305: “An independent intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.”

146. See Dunleavy, 116 N.M. at 357, 862 P.2d at 1218; Alexander, 84 N.M. at 719, 507 P.2d at 780.
150. See Govich, 112 N.M. at 232, 814 P.2d at 100.
152. N.M. U.J.L. Crv. 13-305.
153. See Torres, 127 N.M. at 736-37, 987 P.2d at 393-94 (citing State ex rel. State Highway Comm’n v. Atchison, Topeka & Santa Fe Ry., 76 N.M. 587, 590, 417 P.2d 68, 70 (1966) (“Instructions that are repetitious or unduly emphasis should not be given.”)).
154. See id. at 737, 987 P.2d at 394 (citing Dunleavy v. Miller, 116 N.M. 353, 359, 862 P.2d 1212, 1218 (1993) (“It is not necessary for the judge to charge the jury a second time that the law requires it to consider the circumstances . . . .”); Alexander v. Delgado, 84 N.M. 717, 719, 507 P.2d 778, 780 (1973) (“The defendant is not entitled to have [the] defense [of not proximately causing the injury] overemphasized.”)).
In determining the usefulness of the independent intervening cause doctrine under New Mexico’s comparative negligence scheme, the <i>Torres</i> court expressly limited its analysis to negligent acts or omissions by a third party or the plaintiff that are causes in fact of the plaintiff’s injury. In its analysis, the court noted that although the doctrine of independent intervening cause did not originate in response to the harshness of contributory negligence and potential unfairness of joint and several liability, it has served to relieve both plaintiffs and defendants of responsibility. The court pointed out that the doctrine has been used to relieve a defendant of complete liability under joint and several liability when a third party’s negligence is grossly disproportionate to that of the defendant and to immunize a negligent plaintiff from being barred from recovery. The court viewed such an “expansive application of the doctrine” as inconsistent with New Mexico’s system of pure comparative fault.

The court was concerned that when the defendant attempts to shift fault to a plaintiff, the overlap in the proximate cause and independent intervening cause instructions “creates an unacceptable risk that the jury will inadvertently apply the common law rule of contributory negligence . . . .” Because of the risk of prejudice that would result from the inadvertent application of contributory negligence, the court directed that the jury not be instructed on independent intervening cause for a plaintiff’s alleged comparative negligence and held that the doctrine does not apply to a plaintiff’s negligence.

In the case of a defendant attempting to shift fault to a tortfeasor other than the plaintiff, the <i>Torres</i> court thought that the extra jury instruction on independent intervening cause “would unduly emphasize the conduct of one tortfeasor over another and would potentially conflict with the jury’s duty to apportion fault.” On that basis, the court stated that the doctrine of independent intervening cause should be carefully applied so as not to conflict with New Mexico’s use of several liability, but went on to state that application of the doctrine to the intervening negligence of third parties does not necessarily conflict with several liability. The court recognized that “[t]here are many cases in which the unforeseeable negligence

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157. <i>See</i> <i>Torres</i>, 127 N.M. at 736, 987 P.2d at 393 n.2. The court further stated that their analysis did not extend to intentional torts or criminal acts or forces of nature. <i>See id.</i>

158. <i>See id.</i> at 735, 987 P.2d at 392.

159. <i>See id.</i> at 736, 987 P.2d at 393 (citing <i>Holden v. Balko</i>, 949 F.Supp. 704, 708-09 (S.D. Ind. 1996)).

160. <i>See id.</i> at 735, 987 P.2d at 392 (citing <i>Terry Christlieb, Note, Why Superseding Cause Analysis Should be Abandoned</i>, 72 Tex. L. Rev. 161, 165-66 (1993)).

161. <i>See id.</i> at 736, 987 P.2d at 393.

162. <i>Id.</i>

163. <i>See id.</i> at 737, 987 P.2d at 394. For support, the court cited <i>Brooks v. Logan</i>, 903 P.2d 73, 80-81 (Idaho 1995), which stated that for plaintiff’s acts, comparative negligence was a more appropriate question than intervening, superseding cause, and <i>Von Der Heide v. Commonwealth Department of Transportation</i>, 718 A.2d 286, 289 (Pa. 1998), which stated that an instruction on superseding cause based on a plaintiff’s negligence was more properly considered under comparative negligence principles. <i>See id.</i>

164. <i>Id.</i> at 737, 987 P.2d at 394.


166. <i>See id.</i>
of a third party can reasonably be said to break the chain of causation . . . "167 Recognizing that the doctrine of independent intervening cause could be appropriate in circumstances where one actor is too far removed for society to hold him responsible, the court concluded that "some of the principles underlying the doctrine . . . remain important in our current tort system."168

Despite the importance of some of the principles underlying independent intervening cause,169 the court eliminated the separate instruction on the doctrine to "simplify[,] the complex task of the jury[,]"170 believing that the proximate cause instruction would be adequate.171 The court explained that New Mexico cases show a trend toward simplifying causation issues to the jury172 and that "independent intervening cause adds a complex layer of analysis to the jury’s determination of proximate cause."173 The court concluded that the independent intervening cause instruction was "sufficiently repetitive of the instruction on proximate cause and the task of apportioning fault that any potential for jury confusion and misdirection outweighs its usefulness."174 The court then instructed trial courts not to give Uniform Jury Instruction 13-306 and not to include a reference to independent intervening cause in Uniform Jury Instruction 13-305, stating "the instruction on proximate cause will adequately ensure a proper verdict."175 Thus, the Torres court eliminated the doctrine of independent intervening cause as a concept separate from that of proximate cause in negligence contexts.176

V. ANALYSIS

The Torres decision was a logical progression in New Mexico’s comparative negligence jurisprudence. In its analysis, the court used the criteria that New Mexico courts have applied to test the validity of tort doctrines in the wake of the adoption of comparative negligence and several liability: the importance of avoiding any application of contributory negligence, unfairness to either plaintiff or defendant, and jury confusion.177 The court’s analysis was true to the thrust of

167. Id. The court cited Straley v. Kimberly, 687 N.E.2d 360, 365 (Ind. Ct. App. 1997), as an example. In Straley, the court concluded that where a gas explosion occurred more than one hour after the defendants had called the gas company and the gas company had assumed control of the site, the defendants were not the proximate cause of the plaintiff’s injuries as a matter of law. The Straley court noted that where the negligent actor was so removed from the resulting injury that society cannot hold him responsible, precedent applying comparative fault was not applicable. See Straley, 687 N.E.2d at 366 n.4.

168. Torres, 127 N.M. at 737, 987 P.2d at 394. Arguably, under comparative negligence, there is no justification for the doctrine. See Hercules, Inc. v. Stevens Shipping Co., 765 F.2d 1069, 1075 (11th Cir. 1985) (determining that under the proportional fault system, no justification exists for applying the doctrine of intervening negligence unless it can be said that one party’s negligence did not in any way contribute to the loss).

169. See Torres, 127 N.M. at 737, 987 P.2d at 394.

170. Id.

171. See id. at 738, 987 P.2d at 395.


174. Id.

175. Id.

176. See id.

177. Because the Torres court eliminated the doctrine of independent intervening cause for multiple acts of negligence without specifying that the acts be concurrent, the holding may potentially apply to subsequent tortfeasor situations that involve joint and several liability of original tortfeasors. See Lujan v. Healthsouth
comparative negligence to apportion fault between or among parties whose negligence proximately causes loss or injury and to apportion damages in proportion to the parties’ fault. In addition, the analysis followed the trend in New Mexico to simplify the task of the jury.

The court’s analysis of independent intervening cause was composed of two primary steps. First, the court examined whether retaining the independent intervening cause doctrine would in effect apply contributory negligence and result in unfairness to a plaintiff. Second, the court evaluated whether extra jury instructions would overemphasize a defendant’s attempts to shift fault, confusing the jury and conflicting with its duty to apportion fault.

Like other cases that have examined the continuing validity of pre-existing tort doctrines under comparative negligence in New Mexico, Torres examined the extent to which the doctrine of independent intervening cause served to ameliorate the harshness of contributory negligence, because any doctrine that did so was no longer necessary. The court observed that the independent intervening cause doctrine reflects traditional notions of proximate causation and the need to limit liability, and that it did not originate in response to contributory negligence. Thus, the doctrine’s relationship to comparative negligence is unlike the clear incompatibility of comparative negligence with the now-abolished doctrines of last clear chance and gross negligence as a bar to a contributory negligence defense, open and obvious danger, and complicity, which were developed because of the harsh effects of contributory negligence.

However, as the court pointed out, the independent intervening cause doctrine is analogous to the abolished doctrine of sudden emergency. Although sudden emergency was designed to ameliorate the harshness of contributory negligence and independent intervening cause was not, they both evolved to be applicable to the actions of defendants as well as plaintiffs. In addition, each doctrine was addressed in more than one instruction.

The crux of the Torres court’s concern was that the independent intervening cause concept is sufficiently addressed in the proximate cause instruction language: A proximate cause of an injury is that which in a natural and continuous

Rehabilitation Corp., 120 N.M. 422, 426-27, 902 P.2d 1025, 1029-30 (1995); see also N.M. STAT. ANN. § 41-3A-1 (1996). However, the role of independent intervening cause in such a situation or in other joint and several liability situations that remain in New Mexico, which may involve intentional torts rather than negligence, is beyond the scope of this note. See id. § 41-3A-1. Indeed, the Torres court did not extend its analysis to intentional tortious or criminal acts. See Torres, 127 N.M. at 736, 987 P.2d at 393 n.2.

179. See Torres, 127 N.M. at 736-37, 987 P.2d at 393-94.
180. See id.
181. See id. at 736, 987 P.2d at 393.
182. See id. at 735, 987 P.2d at 392.
183. See Scott, 96 N.M. at 687, 634 P.2d at 1239.
186. See Torres, 127 N.M. at 735, 987 P.2d at 392.
188. See Torres, 127 N.M. at 735, 987 P.2d at 393.
189. See id. at 736, 987 P.2d at 393; Dunleavy, 116 N.M. at 358, 862 P.2d at 1217.
190. See Torres, 127 N.M. at 736, 987 P.2d at 393; Dunleavy, 116 N.M. at 359, 862 P.2d at 1218.
sequence... produces the injury...” and “need not be the... the last nor nearest
cause.” The court believed that reiterating the concept in the separate instruction
on independent intervening cause and the independent intervening cause portion of
the proximate cause instruction would result in the jury inadvertently applying
contributory negligence. The court also believed that the additional instruction
could affect the jury’s ability to apportion fault among tortfeasors.

Similarly, the court in Dunleavy concluded that the sudden emergency instruction
duplicated another instruction and resulted in overemphasis to the jury when it
abolished the doctrine of sudden emergency. The concept of sudden emergency
is implicitly addressed in the standard of ordinary care stated in Uniform .Jury
Instruction 13-1603 with the language “the conduct in question must be
considered in the light of all the surrounding circumstances.” The Dunleavy court
viewed the overemphasis that resulted from having a separate sudden emergency
instruction as having a tendency to imply a different standard for a sudden
emergency and to be potentially confusing to the jury.

Both courts eliminated the repetitive instructions and potential confusion when
they eliminated the doctrines. Furthermore, because the instructions could be
tendered by either the plaintiff or defendant, any unfairness to a plaintiff or
defendant that could result was also avoided. However, the concern of unfairness
to either plaintiff or defendant is more characteristic of the Torres court than the
Dunleavy court, which focused on avoiding the implication of a different standard
of care.

The Torres decision eliminated independent intervening cause for multiple acts
of negligence, but provided very little description of acts that might be within the
holding. For instance, although the court limited the holding to negligent acts or
omissions by a third party or the plaintiff that are causes in fact of the plaintiff’s

191. N.M. U.J.I. Civ. 13-305 (omitting the phrase “[unbroken by an independent intervening cause]” as the
Torres court directed).
192. See Torres, 127 N.M. at 736, 987 P.2d at 393.
193. See id. at 737, 987 P.2d at 394.
194. See Dunleavy, 116 N.M. at 359, 862 P.2d at 1218.
195. See id.
197. See Dunleavy, 116 N.M. at 359, 862 P.2d at 1218.
198. See Torres, 127 N.M. at 738, 987 P.2d at 395; Dunleavy, 116 N.M. at 359, 862 P.2d at 1218.
199. See Torres, 127 N.M. at 736-38, 987 P.2d at 393-95; Dunleavy, 116 N.M. at 358, 862 P.2d at 1217.
200. See Torres, 127 N.M. at 398 P.2d at 393-95.
201. See Dunleavy, 116 N.M. at 359, 862 P.2d at 1218.
202. See Torres, 127 N.M. at 738, 987 P.2d at 395. The New Mexico Supreme Court concluded that
independent intervening cause was not applicable to either Torres’ negligence or the alleged negligence of
Aldershot and its contractors. See id. at 738, 987 P.2d at 395. The doctrine did not apply to Torres because it
“uniformly does not apply to a plaintiff’s negligence.” Id. The doctrine did not apply to Aldershot and its
contractors because El Paso Electric Company did not introduce “evidence of any cause that prevented the natural
and probable result of its own negligence.” Id. The court determined that some negligence on the part of all persons
was foreseeable as part of the electric company’s duty to exercise reasonable care in the installation and
maintenance of the power pole, and the negligence of Aldershot and its contractors was within the scope of the risk
created by the company. See id. at 739, 987 P.2d at 396. Because it interjected a false issue into the trial, the court
found reversible error with the giving of the independent intervening cause instruction, vacated the judgment in
favor of El Paso Electric Company on the negligence claim, and remanded the case. See id. at 732, 741, 987 P.2d
at 389, 398.
VI. IMPLICATIONS

The Torres analysis presented an approach that courts may use to address the continuing validity of other tort doctrines after the adoption of comparative negligence and several liability. These doctrines are as follows:

A. Attractive nuisance

The attractive nuisance doctrine imposes liability, under certain conditions, on a possessor of land having an artificial condition that causes physical harm to trespassing children. New Mexico has adopted the attractive nuisance doctrine, which has evolved as an exception to the general rule that a landowner is not liable to trespassers. However, when the New Mexico Supreme Court replaced the Restatement (First) of Torts on attractive nuisance with the Restatement (Second) of Torts in 1998, it did not discuss comparative negligence in its opinion.

In applying the criteria used in the Torres decision, a court would first ask whether the doctrine at issue served to avoid the harshness of contributory negligence. The attractive nuisance doctrine essentially allowed a child to recover when he failed to discover or realize the risk associated with the danger, but a child's contributory negligence was a separate consideration. Thus, under comparative negligence, a minor plaintiff’s negligence would also be a separate con-

203. See id. at 736, 987 P.2d at 393 n.2.
204. The court states that the doctrine of independent intervening cause would not apply in the Torres case because Torres, Aldershot and its contractors, and El Paso Electric were concurrent tortfeasors. See id. at 739, 987 P.2d at 396 n.4 (citing N.M. U.J.I. Civ. 13-306 comm. cmt.). The court’s statement is inconsistent with New Mexico precedent. See discussion supra part III.
205. See id. at 736, 987 P.2d at 393 n.2.
206. See RESTATEMENT, supra note 122, § 339. The conditions for liability are: (1) the possessor knows or has reason to know that children are likely to trespass, (2) the possessor knows or has reason to know and realizes or should realize the condition involves an unreasonable risk of death or serious bodily harm to trespassing children, (3) the children do not discover or realize the risk, (4) the utility of maintaining the condition and burden of eliminating the danger are slight compared to the risk, and (5) the possessor fails to exercise reasonable care to eliminate the danger or protect the children. See id.
208. See id. at 63, 957 P.2d at 48. In an earlier case, the New Mexico Court of Appeals found that a school board had a duty of ordinary care to a nonstudent child regarding a condition on an easement on school grounds and left the comparative negligence question to the fact finder. See Schleft v. Bd. of Educ. of Los Alamos Pub. Sch., 109 N.M. 271, 278, 784 P.2d 1014, 1021 ( Ct. App. 1989). The court did not reach the question of whether the doctrine of attractive nuisance applied because of its disposition in the case. See id. at 274, 784 P.2d at 1017. In other jurisdictions, whether attractive nuisance applies has been held to be a separate issue from a minor plaintiff’s comparative negligence. See Mathis v. Massachusetts Elec. Co., 565 N.E.2d 1180, 1184 (Mass. 1991). Recall that the Klopp court, which abolished the open and obvious danger doctrine, included the inquisitive propensities of children when it stated that the foreseeable negligence of all persons should be taken into account by the owner/occupant. See Klopp v. Wackenhut Corp., 113 N.M. 153, 157, 824 P.2d 293, 297 (1992). The statement is consistent with the attractive nuisance doctrine.
209. See Saul v. Roman Catholic Church of Archdiocese of Santa Fe, 75 N.M. 160, 164, 402 P.2d 48, 51 (1965) (concluding the jury was properly instructed on the law of attractive nuisance and contributory negligence where a ten-year-old boy trespassed and was injured); see also text accompanying note 131.
sideration. Moreover, the attractive nuisance doctrine is universally recognized as establishing a duty of care. Because of its role in determining duty, the doctrine is much like the rescue doctrine, which the New Mexico Supreme Court has retained under comparative negligence.

The second question under the Torres analysis is whether extra jury instructions associated with the doctrine would overemphasize a defendant’s attempts to shift fault, confusing the jury and conflicting with its duty to apportion fault. An attractive nuisance instruction would not be an extra instruction when submitted in lieu of another duty instruction relating to trespass and artificial conditions on the premises. The New Mexico attractive nuisance instruction instructs the jury to consider, among other things, whether “[t]he child because of [his] [her] youth does not discover the condition or realize the risk . . . .” in determining whether the defendant has a duty of care to the child. In addition to the attractive nuisance instruction, the instruction on the standard of care for a minor would be given. The two instructions describe two separate ways a defendant can be relieved of liability. The first is that no duty of care to the child existed and the second is that the child breached his duty of care by not meeting the standard of conduct for minors. Thus, the instructions are not duplicative. Finally, the attractive nuisance instruction does not overlap with the comparative negligence instructions, which address the apportionment of damages given a finding of negligence, that is, a breach of duty. Thus, there is no potential for overemphasis to the jury and the Torres analysis indicates that, like the rescue doctrine, the attractive nuisance doctrine would be retained for the purpose of determining duty.

B. Res Ipsa Loquitur

The doctrine of res ipsa loquitur allows the fact finder to infer a defendant’s negligence based on circumstantial evidence. Application of the doctrine is typically conditioned on the event (1) being of a kind that ordinarily does not occur in the absence of someone’s negligence, (2) being caused by an agency or instrumentality within the exclusive control of the defendant, and (3) not being due to any voluntary action or contribution on the part of the plaintiff. New Mexico has traditionally considered the first two elements as comprising res ipsa loquitur, the third being subsumed under contributory negligence. New Mexico has not ruled on the applicability of the doctrine of res ipsa loquitur in the context of a plaintiff’s comparative negligence.

210. See N.M. U.J.I. CIV. 13-1312; Schlett, 109 N.M. at 274, 784 P.2d at 1017.
211. See N.M. U.J.I. CIV. 13-1312.
212. See id. 13-1305.
213. See id. 13-1312 (bracketed words in original).
214. See id. 13-1605; supra part III.
215. See id. 13-2218 to 13-2220.
216. See RESTATEMENT, supra note 122, § 328D; N.M. U.J.I. CIV. 13-1623, 13-1420.
217. See KEETON ET AL., supra note 61, § 39, at 244. In New Mexico, the requirement of “exclusive control” has been changed to “management and control.” See Trujeque v. Serv. Merchandise Co., 117 N.M. 388, 393, 872 P.2d 361, 366 (1994); N.M. U.J.I. CIV. 13-1623 cmt.
A Torres analysis would first determine that the res ipsa loquitur doctrine, by its very nature, facilitates a plaintiff’s recovery by allowing him to use circumstantial evidence to meet his burden of proof. Because it facilitates, rather than prohibits, a plaintiff’s recovery, the doctrine is almost the antithesis of contributory negligence. Even so, comparative negligence does not serve an evidentiary function as does circumstantial evidence; thus, the doctrines do not have the same purpose and the res ipsa loquitur doctrine may apply under comparative negligence.

Despite the intrinsic ameliorative nature of the res ipsa loquitur doctrine, the requirement that the defendant must be in control of the cause of harm for res ipsa loquitur to apply has overtones of contributory negligence because the control requirement implies that the plaintiff must not be responsible. However, New Mexico’s requirement is that the defendant “manage and control” rather than “exclusively control” the harm-causing instrumentality or occurrence. As such, the requirement allows for some negligence by either a plaintiff or another defendant. Indeed, in Tipton v. Texaco, Inc., where the New Mexico Supreme Court addressed procedural aspects of the adoption of comparative negligence, the court stated that “[t]he mere existence of concurrent negligence does not preclude a particular finding of negligence of one or more tortfeasors through reliance on the res ipsa loquitur doctrine.” In discussing the existence of concurrent negligence, the Tipton court specifically pointed out that a plaintiff’s negligence would not bar his recovery under res ipsa loquitur and to bar a plaintiff’s recovery would be in “direct contravention of the concept of comparative negligence.” Thus, under Torres, New Mexico’s res ipsa loquitur requirements would need no change with regard to a plaintiff’s negligence to be compatible with comparative negligence.

Torres’ second criteria, which analyzes the impact of extra jury instructions related to the doctrine, favors retaining the doctrine. In order to infer negligence of

221. See Tipton v. Texaco, Inc., 103 N.M. 697, 696-97, 712 P.2d 1351,1358-59 (1985) (holding that the adoption of comparative negligence justified liberal third-party pleading). The court determined that the res ipsa loquitur instruction should not have been given because the doctrine was not the plaintiff’s only recourse. See id. at 698, 712 P.2d at 1360.
222. Id. at 697, 712 P.2d at 1359.
223. See id. at 697, 712 P.2d at 1359.
224. Id. at 697, 712 P.2d at 1359 (citing Montgomery Elevator Co. v. Gordon, 619 P.2d 66, 70 (Colo. 1980)).
the person or entity in control of the occurrence causing injury or damage, the *res ipsa loquitur* instruction requires that (1) the injury or damage be proximately caused by the occurrence, and (2) the occurrence be of a kind that does not ordinarily occur in the absence of negligence. The instruction simply provides a framework for inferring negligence. A comparative negligence instruction, which would be given in addition to the *res ipsa loquitur* instruction, would address the apportionment of damages given a finding of negligence under *res ipsa loquitur*. Thus, there would be no redundancy in giving the *res ipsa loquitur* instruction.

Under *Torres*, then, the future existence of *res ipsa loquitur* in New Mexico’s comparative negligence scheme hinges on whether the control requirement implies that the plaintiff must not be negligent. New Mexico’s modified requirement and the dicta in *Tipton* strongly indicate that the court would ensure that a plaintiff’s negligence would not bar recovery and find *res ipsa loquitur* compatible with both comparative negligence and several liability.

C. Momentary forgetfulness or distracting circumstances

The distracting circumstances doctrine excuses “a plaintiff’s inattentiveness to obvious dangers.” Similarly, the doctrine of momentary forgetfulness excuses “a plaintiff’s negligence when he momentarily forgot known dangers to which he had voluntarily exposed himself.” Courts have applied the doctrines most often to lessen the harsh effects of contributory negligence, but also have applied them to a defendant’s negligence.

A *Torres* analysis suggests that these doctrines have characteristics similar to those of the sudden emergency doctrine and like that doctrine, New Mexico would not endorse their use under comparative negligence. Because the doctrines have been used primarily to avoid contributory negligence, like the now-abolished sudden emergency doctrine, *Torres* suggests that they are not needed under comparative negligence. *Torres* also suggests that separate instructions on these doctrines would overemphasize a defendant’s attempts to shift fault and would confuse the jury. The overemphasis would arise because “distracting circumstances” and “momentary forgetfulness” would be addressed in the instruction on whether ordinary care has been used, which considers the conduct in question “in the light of all the surrounding circumstances.” The New Mexico Supreme Court eliminated the sudden emergency doctrine for precisely the same reason.

These doctrines have not been adopted in New Mexico, and the analysis could be used to constrain their judicial adoption. New Mexico has upheld submission of

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226. *See Strong v. Shaw*, 96 N.M. 281, 283, 629 P.2d 784, 786 (Ct. App. 1980) (stating that *res ipsa loquitur* “is a rule of evidence . . . . Its sole function is to supply inferences from which negligent conduct can be found”).
228. Harfield v. Tate, 598 N.W.2d 840, 842-43 (N.D. 1999).
229. *Id.*
230. *See id.* at 843 n.1.
231. However, in North Dakota, both doctrines have been retained. *See id.* at 843.
the comparative negligence instruction in cases that involve a plaintiff's distraction or forgetfulness where there was no separate instruction on the distraction or forgetfulness. The Torres analysis suggests that New Mexico courts will not be recognizing the distracting circumstances and momentary forgetfulness doctrines in the future.

In summary, the Torres analysis implies that in the future, New Mexico may retain the attractive nuisance doctrine and the res ipso loquitur doctrine, and refrain from adopting the momentary forgetfulness or distracting circumstances doctrines. Torres suggests that New Mexico would likely find no need to modify the res ipso loquitur doctrine to ensure that a plaintiff's negligence would not bar recovery, consistent with Torres and New Mexico's development of tort law since abolishing contributory negligence.

VII. CONCLUSION

The Torres decision eliminated independent intervening cause for multiple acts of negligence, expressly limiting its holding to negligent acts or omissions by a third party or the plaintiff that are causes in fact of the plaintiff's injury. The court did not extend its analysis to intentional tortious or criminal acts or forces of nature, so the doctrine of independent intervening cause remains in our jurisprudence for such situations. The applicability of Torres to concurrent versus subsequent tortfeasor situations remains to be seen.

The Torres decision was a logical progression in New Mexico's jurisprudence under comparative negligence and may prove useful in predicting a change in existing doctrine or a judicial constraint in adopting doctrine in the future.

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234. See Lamkin v. Garcia, 106 N.M. 60, 62, 738 P.2d 932, 935 (Ct. App. 1987). A plaintiff's distraction or forgetfulness might be related to whether he observes an open and obvious danger, which is not a defense in New Mexico. See Klopp v. Wackenhut Corp., 113 N.M. 153, 157, 824 P.2d 293, 297 (1992). The requirement that an invitee exercise reasonable care in such a situation has been abrogated as well. See cases cited supra note 69 and accompanying text.
236. See id. at 736, 987 P.2d at 393 n.2.
237. See id.