NEW MEXICO LAW REVIEW

Volume 38
Issue 3 *Summer*

Summer 2008

Can I Buy Your Lawsuit - A Proposed Solution to the Unstated Problem in Gulf Insurance Co. v. Cottone

Neil R. Bell

CAN I BUY YOUR LAWSUIT? A PROPOSED SOLUTION TO THE UNSTATED PROBLEM IN *GULF INSURANCE CO. V. COTTONE*

NEIL R. BELL*

I. INTRODUCTION

New Mexico's system of pure comparative negligence harbors a disparity that can create an obstacle for parties who wish to settle their lawsuit. Parties have a right that can aid them in reaching a settlement when the defendant is jointly and severally liable that has no analog when the defendant is severally liable. Specifically, in a multiple tortfeasor scenario, a jointly and severally liable defendant can settle with a plaintiff for the whole of the plaintiff's damages and can then sue the defendant's fellow tortfeasors for contribution.[1] In that situation, as long as the plaintiff's claims against the other tortfeasors are "extinguished" by the settlement, the defendant can sue the other tortfeasors for their fair shares of the plaintiff's damages.[2] In essence, when the plaintiff is willing, a jointly and severally liable defendant has the right to buy the plaintiff's claims against the other tortfeasors for the price of the settlement.

A severally liable defendant, however, has no corresponding right to buy the plaintiff's claims. If a severally liable defendant settles for more than his expected share of the plaintiff's damages, the court will label him a mere "volunteer" and dismiss any attempted recovery from a fellow tortfeasor.[3] The result is a liability scheme that leaves a plaintiff and a severally liable defendant without a valuable bargaining tool when they reach an impasse in settlement negotiations.[4] This asymmetry in New Mexico's current liability scheme is arguably a "structural fault" that should be addressed because it can create obstacles for parties who wish to settle.[5]

Gulf Insurance Co. v. Cottone[6] illustrated this problem and presented a situation where the original plaintiff and defendant would have benefited from the creation of a right for the severally-liable defendant to buy the plaintiff's claims against the other tortfeasors. In *Cottone*, it appeared that the plaintiff wanted to conclude her

---

* The author would like to thank his wife, Kirsten, for her boundless patience throughout the course of this project, and Professor M.E. Occhialino for always making time to listen and to offer his valuable insight and encouragement.

1. *See* NMSA 1978, § 41-3-2(B) (1987) ("A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.").

2. *See id.* § 41-3-2(C) (1987) ("A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.").

3. *See* Gulf Ins. Co. v. Cottone, 2006-NMCA-150, ¶ 13, 148 P.3d 814, 819 (stating that the severally liable defendant's choice to settle the whole of the plaintiff's claims was "by definition—a voluntary act").

4. Reaching a settlement is even more difficult when the nature of the defendant's liability is unclear, i.e., whether his liability will be several or joint and several. *See infra* note 151 and accompanying text. In that situation, the defendant is unlikely to settle for more than his fair share of the plaintiff's damages because of the uncertainty about whether he will be able to seek contribution from the other tortfeasors after the settlement.

5. *See Cottone*, 2006-NMCA-150, ¶ 13, 148 P.3d at 819 (stating that it would take a "structural fault" in New Mexico's system of pure comparative negligence to justify the severally liable defendant's recovery of contribution).

6. 2006-NMCA-150, 148 P.3d 814.

case quickly, and that the defendant was willing to settle for the entirety of her damages and to pursue her claims against the other tortfeasors. However, there was no mechanism for doing so because the defendant was severally liable. This case note advocates that defendants should have the ability to settle the entirety of the plaintiff's claims and to sue the remaining tortfeasors for their fair share of the plaintiff's damages, irrespective of the nature of the settling defendant's liability.

This note presents two approaches that would allow a severally liable defendant to buy a plaintiff's claims against the other tortfeasors in a multiple tortfeasor scenario. New Mexico law could allow the plaintiff to contractually assign her causes of action against the other tortfeasors to the settling defendant, or alternatively, it could permit the settling defendant to subrogate to the plaintiff's claims against the other tortfeasors. Either approach would give the parties the freedom to do in a several liability situation what is already allowed by statute when the defendant is jointly and severally liable.

II. STATEMENT OF THE CASE

Rogelio Sarinana was driving a tanker truck filled with liquid carbon dioxide through an intersection in Roosevelt County when he collided with another vehicle.[7] Due to the collision, carbon dioxide began leaking from the truck and created a cloud around the accident scene that inhibited visibility "on an already foggy day."[8] A seven car pile-up ensued.[9] Michael Cottone (Cottone), the first motorist to confront the accident scene, drove into the cloud, collided with something, and stopped his vehicle in the middle of the road.[10] Elizabeth Rapp (Rapp) then drove into the cloud and collided with Cottone's car. Moments later, Rapp's rear window shattered when another vehicle collided with hers after being rear-ended as it approached the scene.[11] By the time the collision was over, an additional three vehicles joined the pile-up.[12] After her window broke, Rapp got out of her car, directly exposing herself to the liquid carbon dioxide and receiving severe burns.[13]

Though there were seven other drivers involved in the collision, Rapp sued only Richard Lobrado (Lobrado), the owner of the tanker truck that was involved in the accident.[14] Lobrado's insurer, Gulf Insurance Co. (Gulf), did not attempt to join any of the other drivers in Rapp's lawsuit but instead settled with Rapp for $1.7 million.[15] The settlement agreement released Gulf and Lobrado from all further liability[16] but did not release the other drivers.[17] Gulf then brought suit against the other six drivers in an effort to recoup some of its payment to Rapp under the theory

7. *Id.* ¶ 3, 148 P.3d at 816.
8. *Id.*
9. *Id.* ¶ 4, 148 P.3d at 816.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* ¶ 5, 148 P.3d at 817.
14. *Id.* ¶¶ 3, 5, 148 P.3d at 816, 817.
15. *Id.* ¶ 5, 148 P.3d at 817.
16. *Id.*
17. *See id.* ¶ 27, 148 P.3d at 822.

that it was subrogated to Rapp's claims against them.[18] The district court dismissed Gulf's claims against each of the other drivers with prejudice.[19]

Gulf appealed, arguing that it was entitled to seek damages from the other drivers based on its original theory that it was subrogated to Rapp's claims against them.[20] Gulf also argued in the alternative that it could either (1) seek contribution from the other drivers because Gulf was jointly and severally liable with them, or (2) sue the other drivers because Rapp had assigned her claims against them to Gulf when she entered into the settlement agreement.[21] The New Mexico Court of Appeals rejected each of Gulf's arguments and affirmed the district court's dismissal.[22]

Cottone revealed the difficulties experienced by a defendant caught in the web of New Mexico's system of comparative negligence. On the surface, *Cottone* was about a defendant that mistakenly assumed that it could pay the entirety of the plaintiff's damages and subrogate to her claims against the other tortfeasors.[23] However, the case also brought to light a problem created by the asymmetry of New Mexico's system of comparative negligence. If Lobrado were jointly and severally liable with the other drivers, Gulf would have had a statutory right to settle with Rapp for the whole of her damages and then seek proportional contribution from the other tortfeasors.[24] In other words, Gulf could have bought Rapp's claims against the other drivers for the amount of the settlement. The *Cottone* court, however, demonstrated to Gulf that a severally liable defendant has no corresponding right to buy a plaintiff's claims.[25]

It should be noted at the outset that Rapp and Gulf did not make it clear in their settlement agreement that they intended to settle the whole of Rapp's damages.[26] As a result, the *Cottone* court unquestionably reached the correct result by denying Gulf's recovery. However, if a similar situation arose in the future where the parties clearly stated their intent to settle the entirety of the plaintiff's damages, the *Cottone* opinion would stand as a barrier to the severally liable defendant's recovery from the other tortfeasors. This situation calls out for a solution.

III. BACKGROUND

To understand the *Cottone* court's holding and to better evaluate the alternative solutions posed below, this section will provide the legal context of the *Cottone* decision. Specifically, this section will summarize New Mexico's law of pure comparative negligence, assignment of personal injury claims, and subrogation.

---

18. *Id.* ¶ 5, 148 P.3d at 817.
19. *Id.*
20. *Id.* ¶ 6, 148 P.3d at 817.
21. *Id.*
22. *See id.* ¶ 31, 148 P.3d at 823.
23. *See id.* ¶ 5, 148 P.3d at 817.
24. *See infra* Part III.A.
25. *See Cottone*, 2006-NMCA-150, ¶ 13, 148 P.3d at 819; *see also infra* Part III.A.
26. *See Cottone*, 2006-NMCA-150, ¶ 27, 148 P.3d at 822.

A. *New Mexico's System of Pure Comparative Negligence*

With its decision in *Scott v. Rizzo*, the New Mexico Supreme Court abolished the doctrine of contributory negligence in favor of a system of pure comparative negligence.[27] On the heels of the *Scott* decision, the New Mexico Court of Appeals in *Bartlett v. N.M. Welding Supply, Inc.*,[28] used the rationale underlying the adoption of comparative negligence to abolish the doctrine of joint and several liability for concurrent tortfeasors.[29] Five years later, the New Mexico Legislature codified the *Bartlett* decision[30] with the passage of section 41-3A-1 of the New Mexico Statutes,[31] which abolished the doctrine of joint and several liability in all but four scenarios.[32] The result was the liability system that New Mexico has in place today[33] in which a defendant is presumptively liable only for the portion of the plaintiff's total damages that corresponds to that defendant's percentage of fault.[34]

When the Legislature codified *Bartlett*, it passed two additional provisions that are of particular importance to this case note because they affect the rights of a settling party based on the nature of that party's liability. First, section 41-3A-1(E) states that a party who is severally liable cannot seek contribution "from any other person," nor can he seek to reduce his liability based on the amount of payment made by a fellow tortfeasor to the plaintiff.[35] Under this statute, a severally-liable party who settles with the plaintiff is presumed to pay only his share of the

---

27. 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981) (adopting pure comparative negligence and holding that "[p]ure comparative negligence denies recovery for one's own fault; it permits recovery to the extent of another's fault; and it holds all parties fully responsible for their own respective acts to the degree that those acts have caused harm").

28. 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982).

29. *Id.* at 158, 646 P.2d at 585 (abolishing joint and several liability, holding "[f]airness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis").

30. *See* Andrew G. Schultz & M.E. Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History*, 18 N.M. L. REV. 483, 484 (1988).

31. NMSA 1978, § 41-3A-1 (1987).

32. *Id.* § 41-3A-1(C) (stating that 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").

33. Since the Legislature codified *Bartlett*, the courts have added two major exceptions to New Mexico's several liability scheme. The first occurred with the New Mexico Supreme Court's decision in *Saiz v. Belen School Dist.*, 113 N.M. 387, 827 P.2d 102 (1992). There, the court invoked the public policy exception to section 41-3A-1(C) to create the doctrine of "inherently dangerous activity." *See id.* at 395, 827 P.2d at 110. Under the doctrine, the employer of an independent contractor is jointly and severally liable if he hires the contractor to perform work that would create a "peculiar risk of harm" to others if the work were done without taking reasonable precautions and if those precautions were in fact not taken. *See id.*; *see also* 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, 37 (2003). The inherently dangerous activity doctrine is the only exception to several liability that the courts have created thus far using the public policy exception of the statute. *See* Occhialino, *supra*, at 37.

The second exception to several liability, termed successive tortfeasor liability, arose with the New Mexico Supreme Court's decision in *Lujan v. Healthsouth Rehabilitation Corp.*, 120 N.M. 422, 426, 902 P.2d 1025, 1029 (1995) (adopting successive tortfeasor liability in New Mexico). Under successive tortfeasor liability, an individual who causes a foreseeable enhanced injury that is causally distinct from the original injury is jointly and severally liable with the original tortfeasor for the enhanced injury. *See id.*

34. *See* NMSA 1978, § 41-3A-1(B) (1987) (defining several liability).

35. This provision codified the New Mexico Court of Appeals' ruling in *Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983). *See* Schultz & Occhialino, *supra* note 30, at 496.

plaintiff's damages.[36] Furthermore, the settlement does not affect the liability of any other tortfeasors who are severally liable to the plaintiff for the same injury.[37]

By contrast, section 41-3-2(C) states that a party who is jointly and severally liable may settle for more than his share of the plaintiff's damages and seek contribution from any other tortfeasor whose liability is "extinguished" by the settlement agreement.[38] Thus, a party who is jointly and severally liable has a statutory right to contribution so long as he secures from the plaintiff a release of liability for his fellow tortfeasors.[39]

B. The Law of Assignment of Personal Injury Claims in New Mexico

New Mexico courts define an assignment as "a transfer of property or some other right from one person (the assignor) to another (the assignee)."[40] Using an assignment, a creditor can assign to a third person a debt that the creditor is owed.[41] The debtor must then pay the assignee—not the original creditor—if the assignee gives notice to the debtor of the assignment.[42] If the debtor pays the original creditor after receiving such notice, it does so "at its peril, because the assignee may enforce its rights against the [debtor] directly."[43]

The practice of the assignment of choses in action[44] has long been a controversial one.[45] The early common law prohibited the assignment of legal claims altogether.[46] Over time, however, exceptions to the categorical prohibition were created in the commercial context, but the assignment of personal injury claims remained forbidden.[47]

Currently, there are three approaches relating to the assignment of personal injury claims.[48] Some jurisdictions continue to categorically prohibit such assignments while others place no restrictions on them.[49] There is a middle approach that distinguishes between the assignment of personal injury claims and the assignment

---

36. *See* NMSA 1978, § 41-3A-1(E).

37. *See id.*

38. *Id.* § 41-3-2(C).

39. *See id.*

40. Quality Chiropractic, P.C. v. Farmers Ins. Co. of Ariz., 2002-NMCA-080, ¶ 6, 51 P.3d 1172, 1175 (ellipsis omitted).

41. *Id.*

42. *Id.*

43. *Id.* This describes exactly what the plaintiff in *Quality Chiropractic* attempted to do. *See id.* ¶ 4, 51 P.3d at 1175.

44. A chose in action is "[a] proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort." BLACK'S LAW DICTIONARY 258 (8th ed. 2004).

45. *See Quality Chiropractic*, 2002-NMCA-080, ¶¶ 8–12, 51 P.3d at 1176–77.

46. *Id.* ¶ 8, 51 P.3d at 1176.

47. The primary reason for the continued prohibition against the assignment of personal injury claims was the potential for the "unscrupulous trafficking in litigation as a commodity," termed champerty and maintenance. *Id.* ¶ 10, 51 P.3d at 1176. The former is "the intermeddling of a stranger in the litigation of another, for profit" while the latter is "the financing of such intermeddling." *Id.* While these practices originally centered around land-based disputes, the names adhered to the practices of buying and financing legal claims. *See id.*

48. *Id.* ¶ 11, 51 P.3d at 1177.

49. *Id.*

of the proceeds from personal injury claims.[50] In those jurisdictions, the former is still prohibited; the latter is not.[51]

The law relating to the assignment of personal injury claims in New Mexico is unclear. Few cases have directly addressed the question of whether personal injury claims are assignable.[52] One line of cases, beginning with *Motto v. State Farm Mutual Automobile Insurance Co.*,[53] held that "in a personal injury case an injured person may assign his cause of action."[54] Despite this sweeping language, however, the reach of the *Motto* rule is arguably quite short. The *Motto* line of cases recognized the right of assignment solely in the context of an insured assigning his cause of action to his insurer through a subrogation clause.[55] Additionally, the *Motto* rule was premised on the existence of a statutory right to assign personal injury claims through a subrogation clause.[56] A further limitation is that the courts have inconsistently construed that statute as granting either a right of assignment or of reimbursement.[57] As a result, even the narrow right of assignment recognized in the *Motto* line of cases is of questionable validity.[58]

The case that has most thoroughly dealt with the assignability of personal injury claims is *Quality Chiropractic, PC v. Farmers Insurance Co. of Arizona.*[59] In that

---

50. *Id.*

51. The plaintiff in *Quality Chiropractic* argued for the third option, but the court rejected the argument. *See id* ¶¶ 13, 26, 51 P.3d at 1177, 1181.

52. A "trio of early New Mexico decisions" referenced the traditional common law rule that the assignment of personal injury claims is prohibited. *Id.* ¶ 8, 51 P.3d at 1176 (citing Young v. N.M. Broad. Co., 60 N.M. 475, 479, 292 P.2d 776, 779 (1956); Parker v. Beasley, 40 N.M. 68, 79, 54 P.2d 687, 693–94 (1936); Kandelin v. Lee Moor Contracting Co., 37 N.M. 479, 490, 24 P.2d 731, 737 (1933)). These cases, however, did not address the issue directly. *See Young*, 60 N.M. at 479, 292 P.2d at 779 ("Generally, a right of action for purely personal tort is not assignable before judgment, but the validity of the assignment is unimportant, as it did not purport to assign a cause of action."); *Parker*, 40 N.M. at 70, 54 P.2d at 689 ("The general rule now is that choses in action are assignable, the few exceptions are those for personal wrongs and contracts of a personal nature involving confidence, skill, and others of like nature."); *Kandelin*, 37 N.M. at 490, 24 P.2d at 737 ("As a general rule, a right of action for a tort purely personal, in the absence of statute, is not subject to assignment before judgment. Such are causes of action for injuries to the person.").

53. 81 N.M. 35, 462 P.2d 620 (1969).

54. Seaboard Fire & Marine Ins. Co. v. Kurth, 96 N.M. 631, 634 P.2d 1229, 1232 (Ct. App. 1980).

55. *See Motto*, 81 N.M. at 37, 462 P.2d at 622 (holding that, based on the validity of a section of the Workman's Compensation Act (WCA) which creates a statutory right of assignment of personal injury claims to an insurer through subrogation, non-WCA personal injury claims are also assignable to an insurer through subrogation); *see also* Jacobson v. State Farm Mut. Auto. Ins. Co., 83 N.M. 280, 282, 491 P.2d 168, 170 (1971) (citing *Motto* for the proposition that personal injury claims are assignable under New Mexico law with "respect to personal injury claims"); *Seaboard*, 96 N.M. at 634, 633 P.2d at 1232 (citing *Motto* for the proposition that "in a personal injury case an injured person may assign his cause of action").

56. *See* Worker's Compensation Act, NMSA 1978, § 52-5-17(B) (1990) (stating "the receipt of compensation from the employer *shall operate as an assignment to the employer or his insurer, guarantor or surety of any cause of action*...") (emphasis added).

57. *Compare* Liberty Mut. Ins. Co. v. Salgado, 2005-NMCA-144, ¶ 2, 125 P.3d 664, 666 (holding "[c]onsistently with our case law, we conclude Section 52-5-17 only provides a right to seek reimbursement..."), *with* Transamerica Ins. Co. v. Sydow, 107 N.M. 104, 105, 753 P.2d 350, 351 (1988) (construing the WCA as granting an assignment, holding "[w]hen the worker recovers the entire amount from the employer, he has assigned to his employer the right to further recover from third parties for the same injury").

58. *See* Quality Chiropractic, P.C. v. Farmers Ins. Co. of Ariz., 2002-NMCA-080, ¶ 15, 51 P.3d 1172, 1178 ("question[ing] the premise on which the [*Motto*] Court reached this conclusion [that personal injury claims are assignable]" because the WCA has been "consistently construed as...granting an employer a right of reimbursement, not an assignment" and therefore holding that the assignment of personal injury claims is prohibited by New Mexico common law).

59. *Id.*

case the plaintiff sought to enforce a contract that assigned to it the proceeds of a patient's personal injury claim in return for the promise of medical services to the patient.[60] Despite notice of the assignment, the defendant insurance company settled with the patient directly.[61] The plaintiff sued, claiming that the assignment was valid under New Mexico law and that the plaintiff, as the assignee, could "enforce its rights against the [debtor] directly."[62] The district court granted summary judgment for the defendant.[63]

On appeal, the plaintiff argued that New Mexico should at least allow for the assignment of the proceeds of personal injury claims.[64] After declining to recognize a distinction between the assignment of the proceeds of a personal injury claim and of the claim itself,[65] the unanimous Court of Appeals surveyed the development of the law of New Mexico in this area.[66] The court relied on "a trio of early New Mexico decisions" for the proposition that the assignment of personal injury claims is prohibited under New Mexico common law.[67] The court then had to decide whether to extend the "broad language" of the *Motto* line of cases—which hold that personal injury claims are assignable[68]—beyond the subrogation context of those decisions. The court chose not to do so and instead limited those cases to their facts.[69] The court held that the assignment of personal injury claims is prohibited

---

60. *Id.* ¶ 4, 51 P.3d at 1175.
61. *Id.* ¶ 3, 51 P.3d at 1175.
62. *Id.* ¶ 6, 51 P.3d at 1175.
63. *Id.* ¶ 4, 51 P.3d at 1175.
64. *Id.* ¶ 13, 51 P.3d at 1177.
65. *Id.* ¶ 12, 51 P.3d at 1177.
66. *See id.* ¶¶ 13–17, 51 P.3d at 1177–78.
67. *See supra* note 52.
68. *See supra* note 55.
69. *See Quality Chiropractic*, 2002-NMCA-080, ¶ 32, 51 P.3d at 1182. To achieve this result, the court first discounted *Motto*'s rationale stating "we must question the premise on which the [*Motto*] Court reached this conclusion [that personal injury claims are assignable]." *Id.* ¶ 15, 51 P.3d at 1178. According to the court, the provision of the Workmen's Compensation Act (WCA) upon which the *Motto* court based its assertion that New Mexico law allowed for the assignment of personal injury claims has been "consistently construed as...granting an employer a right of reimbursement, not an assignment." *Id.* Thus, the court implied that if *Motto*'s holding permitting the assignment of personal injury claims was based on the WCA, that holding was incorrect because the courts have construed the Act as a reimbursement statute despite the plain language of the act granting an assignment. *See supra* note 57.

Then, with the validity of *Motto*'s holding called into question, the *Quality Chiropractic* court focused its sights on the holding in *Seaboard*:

> [C]iting *Motto* for the proposition that personal injury claims are *assignable*, the *Seaboard Fire & Marine Insurance Co.* Court held that the worker could grant the employer an assignment in his personal injury claim...not recogniz[ing] that, had the *Motto* court been correct in asserting that the WCA created a right of assignment, the employer would not need an assignment from the worker.

Quality Chiropractic, 2002-NMCA-080, ¶ 16, 51 P.3d at 1178 (alteration in original).

With the clear rule of *Motto* and *Seaboard* thus marginalized, the court maintained that personal injury claims have always been prohibited by New Mexico common law. *See id.* ¶ 36, 51 P.3d at 1183. According to the court, notwithstanding the "broad language" in *Motto* and *Seaboard* "addressing the right of assignment in personal injury cases, those cases involved only the rights of subrogation, and we do not read them as addressing the enforceability of assignments." *Id.* ¶ 32, 51 P.3d at 1182. The court chose instead to "read those cases as creating an exception to the common law rule prohibiting the assignment of personal injury claims, not as abrogating the rule altogether." *Id.*

In sum, the *Quality Chiropractic* court held that personal injury claims have always been prohibited under New Mexico common law, and it "reject[ed] any distinction between an assignment of the proceeds of a claim and an

under New Mexico common law and declined to make a public policy exception for the assignment of future proceeds of personal injury claims.[70]

In support of its decision to limit *Motto*'s pro-assignment rule to the subrogation context, the Court of Appeals noted six distinctions between the practices of subrogation and the general assignment of personal injury claims.[71] According to the court, these differences support the right to subrogation and counsel against a departure from the traditional rule of anti-assignment.[72] *Quality Chiropractic* was the last word on the assignability of personal injury claims before the New Mexico Court of Appeals decided *Cottone*.

C. The Law of Subrogation in New Mexico

Subrogation is an equitable remedy with roots extending "to the English common law and to the Roman civil law."[73] The modern incarnation of subrogation, however, has remained largely unchanged for hundreds of years.[74] One commentator defines subrogation as "a legal fiction through which the subrogee, who is not a volunteer or wrongdoer, pays the debt or discharges the obligation of the subrogor and is substituted to all the rights and remedies of the subrogor."[75] For a subrogation claim to be valid, "[t]he debt or obligation is one that in good conscience and fairness should be paid by the tortfeasor."[76] When a person is subrogated to the rights of another, he or she "has no greater rights than the insured, for one cannot acquire by subrogation what another, whose rights he or she claims, did not have."[77] Traditionally, a right of subrogation arises "in one of three ways: 1) An agreement between the insurer and the insured[;] 2) A right created by statute[;or] 3) The judicial device of equity."[78]

While few New Mexico cases deal substantively with the nature of subrogation, the contours of the law itself are well established.[79] "In New Mexico, an insurer who pays the claim of its insured under an...insurance policy is deemed to be subrogated by operation of law to recovery of its payments against the person who caused the loss."[80] This is "[t]he most common instance of subrogation recognized by New Mexico law."[81] In such a situation, if the insured brings a lawsuit against

---

assignment of the claim itself." *Id.* ¶ 36, 51 P.3d at 1183. It saw no reason to abrogate the prohibition either in whole or in part. *See id.*

70. *Id.* ¶ 33, 51 P.3d at 1182.

71. *See infra* note 168.

72. *See Quality Chiropractic*, 2002-NMCA-080, ¶ 32, 51 P.3d at 1182.

73. M. L. Marasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I*, 10 VAL. U. L. REV. 45 (1975).

74. *See id.* at 49 (citing Simpson v. Thompson, 3 App. Cas. 279 (1877)).

75. 23 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D, § 141.1 (2003).

76. *Id.*

77. 16 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 222:5 (2005) (citation omitted).

78. *Id.* § 222:6.

79. The majority of New Mexico cases that decide issues related to subrogation are concerned with procedural matters. *See, e.g.*, Safeco Ins. Co. of Am. v. U.S. Fid. & Guar. Co., 101 N.M. 148, 150, 679 P.2d 816, 818 (1984) (holding that when a subrogated insurer is joined as a party to a jury trial, "the fact of the insurer's joinder is not to be disclosed to the jury").

80. *Id.* at 149, 679 P.2d at 817.

81. Gulf Ins. Co. v. Cottone, 2006-NMCA-150, ¶ 9, 148 P.3d 814, 818. The opinion also mentions that "[a] variant of insurer/insured subrogation is applied in the suretyship context." *Id.* That variant is unrelated to this article.

the tortfeasor, the insurer is deemed an indispensable party.[82] Alternatively, after paying out benefits to its insured, the insurer can bring suit in the name of its insured by "step[ping] into the shoes of the insured and collect[ing] what [the insured] has paid from the wrongdoer."[83] The right of subrogation arises because of "a pre-existing duty [of the insurer] to pay out benefits to its insured."[84]

New Mexico's rationale for allowing subrogation rests "upon the relationship of the parties and upon equitable principles, for the purpose of accomplishing the substantial ends of justice."[85] Specifically, the equitable remedy of subrogation "is for the benefit of one secondarily liable who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor."[86]

IV. RATIONALE

A. *Assignment of Personal Injury Claims*

The *Cottone* court rejected Gulf's argument that, through the release, Rapp had assigned to Gulf "all of her rights" including "an assignment of all her claims against Defendants."[87] First, because the release named only Gulf and Lobrado, the court held that Rapp retained her right to sue the other drivers.[88] Because Rapp had not released the other drivers from liability, she "did not assign claims against [them] and did not assign any rights whatsoever, including rights, if any, of subrogation or contribution."[89]

Additionally, the Court rejected Gulf's argument that it could sue the other drivers because the release met the requirements of NMSA 1978, section 41-3-2(C).[90] That statute would allow Gulf to sue the other drivers for contribution if Lobrado were jointly and severally liable.[91] However, because the Court held that Lobrado was only severally liable, the statute was inapplicable.[92]

Perhaps most importantly, the court held that even if the release had properly named the other drivers and had thus released them from liability, Rapp could not have assigned her claims to Gulf because doing so would be contrary to the holding

---

82. *See Safeco*, 101 N.M. at 149, 679 P.2d at 817.

83. Amica Mut. Ins. Co. v. Maloney, 120 N.M. 523, 527, 903 P.2d 834, 838 (1995).

84. *Cottone*, 2006-NMCA-150, ¶ 9, 148 P.3d at 818 (quoting Quality Chiropractic, P.C. v. Farmers Ins. Co. of Ariz., 2002-NMCA-080, ¶ 21, 51 P.3d 1172, 1179).

85. *Amica Mutual Ins. Co.*, 120 N.M. at 527, 903 P.2d at 838.

86. United States Fid. and Guar. Co. v. Raton Natural Gas Co., 86 N.M. 160, 162, 521 P.2d 122, 124 (1974) (quoting Fid. & Deposit Co. v. Atherton, 47 N.M. 443, 446, 144 P.2d 157, 160 (1943)).

87. *See Cottone*, 2006-NMCA-150, ¶ 26, 148 P.3d at 822.

88. *Id.* ¶ 27, 148 P.3d at 822 (citing *Hansen v. Ford Motor Co.*, 120 N.M. 203, 211, 900 P.2d 952, 960 (1995) (holding that "a general release raises a rebuttable presumption that only those persons specifically designated by name or by some other specific identifying terminology are discharged")).

89. *See id.*

90. NMSA 1978, § 41-3-2(C) (1987) (stating that "[a] joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement").

91. *See Cottone*, 2006-NMCA-150, ¶ 29, 148 P.3d at 822.

92. *See id.* (holding that Lobrado and the other drivers were concurrent and not successive tortfeasors, and therefore, joint and several liability does not apply).

in *Quality Chiropractic*.[93] According to the Court, that case serves as a complete bar to the assignment of personal injury claims.[94]

B. Subrogation

In rejecting Gulf's assertion that it was subrogated to Rapp's claims against the other drivers, the *Cottone* court focused on the lack of a pre-existing duty owed by Gulf to Rapp.[95] The court held that "Gulf offers a wholly new variant to New Mexico law: subrogation between the insurer of a tortfeasor and the tortfeasor's victim."[96] According to the court, one of the defining features of a relationship that supports subrogation is the insurer's "contractual obligation to compensate its insured for damages caused by third parties."[97] Because Gulf owed no such obligation to Rapp, subrogation was held inappropriate.[98]

The court also raised New Mexico's adoption of pure comparative fault as a barrier to Gulf's asserted right to subrogation.[99] In the court's view, Gulf's attempt to sue the other drivers amounted to an attempt to make an end-run around New Mexico's system of pure comparative negligence.[100] "Firmly entrenched as comparative negligence is, we would do well to require a compelling showing of equitable need—perhaps a demonstration of a structural fault in the system—to allow deviation from it."[101] Because Gulf alleged no such "structural fault," the court refused to "change the basic assumption of several liability in order to accommodate what would have to be considered—by definition—a voluntary act on Gulf's part."[102] Again, absent a pre-existing obligation to Rapp, the court refused to validate Gulf's attempt at subrogation.[103]

V. ANALYSIS

A. Assignment of Personal Injury Claims

While the *Cottone* court relied heavily on *Quality Chiropractic*'s anti-assignment rule in denying Gulf's assertion that Rapp had assigned to it her personal injury claims, the other two related issues addressed in that portion of the opinion also merit discussion.

Notably, the court used the absence of a release of the other drivers' liability to bar Gulf's claims, which suggests that the court failed to grasp the inherent differences between contribution and subrogation. If Gulf were jointly and severally liable, the court was correct that Gulf could sue the other drivers for contribution

93. *See id.* ¶ 28, 148 P.3d at 822.
94. *See supra* Part III.B.
95. *See Cottone*, 2006-NMCA-150, ¶ 10, 148 P.3d at 818.
96. *See id.*
97. *Id.*
98. *Id.* ¶ 11, 148 P.3d at 818.
99. *Id.* ¶ 12, 148 P.3d at 818–19.
100. *See id.* ¶ 13, 148 P.3d at 819.
101. *Id.*
102. *Id.*
103. *See id.*

only if Rapp had explicitly released them from liability.[104] However, the court failed to mention that the only way that Gulf's asserted right to subrogation could exist is if Rapp had not released the other drivers from liability and thus maintained a right to which Gulf could subrogate.[105] Subrogation operates on the assumption that the original plaintiff retained her causes of action.[106] Otherwise, there would be no claim for the insurer to "step into the shoes of its insured" and sue.[107] As a result, to the extent that the opinion relies on Rapp's continued right to sue the other drivers as a bar to Gulf's subrogation claim, the court is incorrect.

1. Effect of Quality Chiropractic

The *Cottone* court's reliance on *Quality Chiropractic*'s anti-assignment rule[108] posed the biggest obstacle to Gulf's assertion that Rapp had assigned to it her claims against the other drivers.[109] The most obvious question raised by the court's reliance on *Quality Chiropractic* is whether that case's rule is applicable to the facts of *Cottone*.[110]

In support of its decision to limit the "broad language" of the pro-assignment rule of the *Motto* line of cases to the subrogation context,[111] the *Quality Chiropractic* court focused on how the assignment of personal injury claims is distinguishable from subrogation to personal injury claims.[112] However, the court did so in the context of the facts of *Quality Chiropractic* where the plaintiff was "a creditor who sought a better guarantee of payment by demanding that the patient grant an

---

104. *See* NMSA 1978, § 41-3-2(C) (1987); Hanson v. Ford Motor Co., 120 N.M. 203, 211, 900 P.2d 952, 960 (1995).

105. *See supra* note 83 and accompanying text.

106. *See id.*

107. *Id.*

108. The court's reliance on *Quality Chiropractic* may be risky. *Quality Chiropractic*'s language questioning "the premise on which the [*Motto*] Court reached this conclusion [that personal injury claims are assignable]" and stating that the premise "appears incorrect" comes remarkably close to overruling *Motto*, a case decided by the New Mexico Supreme Court. 2002-NMCA-080, ¶ 15, 51 P.3d 1172, 1178. Recasting *Motto*'s declaration that New Mexico allows for the assignment of personal injury claims as a narrow exception to the traditional rule barring the practice amounts to a veiled departure from the constraints of stare decisis. *See* State *ex rel.* Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 20, 89 P.3d 47, 54 (holding that the New Mexico Court of Appeals is bound by stare decisis and therefore cannot decline to follow New Mexico Supreme Court precedent).

Interestingly, the New Mexico Supreme Court has not addressed this issue, despite the fact that the New Mexico Court of Appeals has cited the *Quality Chiropractic* opinion twice for the proposition that the assignment of personal injury claims is prohibited. *See* Espinosa v. United of Omaha Life Ins. Co, 2006-NMCA-075, ¶ 19, 137 P.3d 631, 637; Gulf Ins. Co. v. Cottone, 2006-NMCA-150, ¶ 28, 148 P.3d 814, 822. One wonders if this issue were actually addressed by the New Mexico Supreme Court whether it might choose to return to *Motto* and jettison the "antiquated doctrine of nonassignment of tortious actions." Lee v. State Farm Mut. Ins. Co., 129 Cal.Rptr. 271, 275 (Ct. App. 1976) (quoting John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1479 (1966)).

109. *See* Gulf Ins. Co. v. Cottone, 2006-NMCA-150, ¶ 28, 148 P.3d 814, 822.

110. *See Quality Chiropractic*, 2002-NMCA-080, ¶ 36, 51 P.3d at 1183.

111. *See supra* note 55.

112. *See Quality Chiropractic*, 2002-NMCA-080, ¶¶ 21–26, 51 P.3d at 1179–81 (holding that subrogation is permissible where assignment is not because subrogation (1) excludes "volunteers" and "strangers" to the litigation, (2) places the risk on the insurer that the subrogor "will be unable to obtain compensation from the tortfeasor," (3) "applies by necessity only to benefits paid directly for damages resulting from an injury-causing accident," (4) is subject to equitable doctrines that allow the court to "protect the rights of the insured," (5) does not increase the burden on the original tortfeasor, and (6) is subject to regulation through the Insurance Code).

assignment in any proceeds from his claim."[113] Because of these distinctions, the court declined to extend the *Motto* rule to the plaintiff.

Most of the cited differences between assignment and subrogation in *Quality Chiropractic* were not present in *Cottone*, where the plaintiff was an insurance company.[114] In fact, Gulf's asserted right to subrogation based on an assignment was closely analogous to the subrogation right that the *Quality Chiropractic* court repeatedly endorsed.[115] Thus, because Gulf was an insurer seeking to take over Rapp's claims against the other drivers and not a medical provider seeking "a better guarantee of payment,"[116] the rationale for *Quality Chiropractic*'s anti-assignment rule was inapplicable to the facts of *Cottone*.

B. Subrogation

1. Pre-existing Duty

The *Cottone* court's focus on the absence of a pre-existing duty as a bar to Gulf's subrogation claim is not without support in New Mexico case law.[117] However, *Cottone*'s lone citation for that premise is *Quality Chiropractic*.[118] That case focused on the distinction between assignment and subrogation when it articulated the pre-existing duty rule.[119] According to the *Quality Chiropractic* court, the pre-existing duty requirement makes subrogation to personal injury claims preferable to the assignment of personal injury claims because a pre-existing duty keeps "volunteers [from] choosing to become involved in litigation."[120] In contrast, an assignee "inserts itself into the litigation," and it does so only after the assignor has sustained an injury.[121] Thus, the rationale behind the pre-existing duty requirement is to limit the universe of possible subrogees to a particular claim by excluding "volunteers" or "strangers" to the litigation.[122]

While it is accurate to say in *Cottone* that Gulf did not owe a pre-existing duty to Rapp to settle with her for the entirety of her claims, to maintain that Gulf was a "volunteer" seems disingenuous.[123] In fact, out of the seven other drivers involved in the collision, Gulf's insured was the only party whom Rapp chose to sue.[124] Thus,

---

113. *Id.* ¶ 22, 51 P.3d at 1179.

114. *See id.* For example, one of the reasons the court allows subrogation but not assignments is that insurers are experienced with litigation, so their joinder in subrogation claims does not burden the defendant. *Id.* ¶ 25, 51 P.3d at 1180. "The joinder of physicians and other creditors," however, would "increase the burden on tortfeasors and their insurers in resolving such claims." *Id.* Given that Gulf is an insurer, this distinction is non-existent.

115. *See id.* ¶¶ 21–26, 51 P.3d at 1179–81.

116. *Id.* ¶ 22, 51 P.3d at 1179.

117. *See* Gulf Ins. Co. v. Cottone, 2006-NMCA-150, ¶ 9, 148 P.3d 814, 818 (citing *Quality Chiropractic*, 2002-NMCA-080, ¶ 21, 51 P.3d at 1179).

118. *See Quality Chiropractic*, 2002-NMCA-080, ¶ 21, 51 P.3d at 1179 (stating that subrogation requires a pre-existing duty while assignment does not).

119. *See id.*

120. *Id.* (also stating that "the doctrine of subrogation does not invite strangers to become unnecessarily involved in litigation").

121. *Id.*

122. *Id.*; *see also* HOLMES, *supra* note 75 and accompanying text.

123. *See* Gulf Ins. Co. v. Cottone, 2006-NMCA-150, ¶ 13, 148 P.3d 814, 819 (stating that Gulf's settling of the whole of Rapp's claims was "by definition—a voluntary act on Gulf's part").

124. *See id.* ¶ 5, 148 P.3d at 817.

Gulf was not a "stranger"[125] who "insert[ed] itself into the litigation."[126] On the contrary, Gulf was a party who Rapp dragged into the lawsuit. As a result, it is arguable that the pre-existing duty requirement should not be applied to deny Gulf's subrogation rights because doing so would not serve the rationale of the rule.[127]

Additionally, the *Cottone* court admitted that Gulf owed a "contractual duty...to act in good faith in providing coverage to its insured" from the moment its insured injured Rapp.[128] It is arguable that Rapp was an intended beneficiary of that duty.[129] For example, the New Mexico Supreme Court has held that under the Insurance Code,[130] an automobile liability insurer owes a duty to exercise "fair settlement practices" to a third party who is injured by its insured.[131] Gulf, therefore, owed a duty to Rapp to settle her claim against its insured in an "ethical" manner.[132] While Gulf did not owe this duty to Rapp before she was injured by Gulf's insured, it did owe an ethical duty to her before it settled her claim.[133] Thus, despite whether this is the precise type of "pre-existing duty"[134] that has traditionally supported subrogation, Gulf cannot be said to be a "stranger" or a "volunteer" to Rapp's causes of action.[135] Because Gulf is not the type of party that the pre-existing duty requirement was intended to exclude, the *Cottone* court's reliance on that requirement seems misplaced.[136]

2. New Mexico's System of Pure Comparative Negligence

The court's argument that Gulf attempted to make an end-run around New Mexico's comparative fault system by asserting that it was subrogated to Rapp's claims against the other drivers is also open to criticism.[137] The tried and true rationales behind New Mexico's adoption of pure comparative negligence are fairness to the parties and a belief that everyone should pay his fair share of the injured party's damages.[138] Under either several liability or joint and several liability, Gulf's attempt to settle the whole of Rapp's damages and to subrogate to

125. *Quality Chiropractic*, 2002-NMCA-080, ¶ 21, 51 P.3d at 1179.
126. *Id.*
127. *Id.*
128. *Cottone*, 2006-NMCA-150, ¶ 11, 148 P.3d at 818.
129. *See* Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 17, 89 P.3d 69, 74 (holding that an injured third party has a private right to sue a tortfeasor's automobile liability insurer for breach of the insurer's duty to exercise fair settlement practices).
130. *See, e.g.*, NMSA 1978, § 59A-16-20(e) (1997) ("[N]ot attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear" is "defined as [an] unfair and deceptive practice.").
131. *See Hovet*, 2004-NMSC-010, ¶ 18, 89 P.3d at 75.
132. *See id.* ¶ 17, 89 P.3d at 74.
133. *See id.* ¶ 18, 89 P.3d at 74–75.
134. *See* Gulf Ins. Co. v. Cottone, 2006-NMCA-150, ¶ 10, 148 P.3d 814, 818.
135. *See* Quality Chiropractic, P.C. v. Farmers Ins. Co. of Ariz., 2002-NMCA-080, ¶ 21, 51 P.3d 1172, 1179.
136. *See Cottone*, 2006-NMCA-150, ¶ 10, 148 P.3d at 818.
137. *See id.* ¶ 13, 148 P.3d at 819.
138. *See* Scott v. Rizzo, 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981) (adopting pure comparative negligence holding "[p]ure comparative negligence denies recovery for one's own fault; it permits recovery to the extent of another's fault; and it holds all parties fully responsible for their own respective acts to the degree that those acts have caused harm"); Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct. App. 1982) (abolishing joint and several liability holding "[f]airness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis").

her claims against the other drivers furthers these pivotal goals of pure comparative negligence.[139]

First, allowing Gulf to subrogate to Rapp's claims would further the goals of pure comparative negligence if Gulf were severally liable with the other drivers. Out of seven potential tortfeasors, Rapp chose to sue only Gulf's insured.[140] Therefore, if Gulf were barred from pursuing Rapp's claims against the other tortfeasors, they would escape all liability for their negligent conduct and thus fail to pay their fair share of Rapp's damages.[141] Because of Rapp's decision to sue only Gulf's insured, the goals of New Mexico's system of pure comparative negligence would be frustrated unless Gulf were allowed to subrogate to her claims against the other drivers.[142]

Alternatively, if Gulf were jointly and severally liable,[143] its attempt to settle with Rapp and to sue the other drivers for their fair share of her damages would also comport with the goals of pure comparative negligence. Indeed, doing so would be prescribed by statute.[144] The Uniform Contribution Among Joint Tortfeasors Act[145] allows a joint tortfeasor who settles for more than his *pro rata* share with an injured person to recover contribution from another tortfeasor as long as the non-settling tortfeasor's liability is extinguished in the settlement.[146] Thus, had Gulf's insured been jointly and severally liable, the Uniform Contribution Among Joint Tortfeasors Act would have effectively subrogated Gulf by law to Rapp's claims against the other drivers when it settled the whole of her damages.

3. Structural Fault

The court's assertion that Gulf's actions were an attempt to return to the days of joint and several liability raises a valid point.[147] Judge Bustamante's call for a "demonstration of a structural fault in the system"[148] to justify deviating from New Mexico's system of pure comparative negligence seems justified given the far-reaching impacts of New Mexico's adoption of comparative negligence.[149]

---

139. *See supra* note 138.

140. *See Cottone*, 2006-NMCA-150, ¶ 5, 148 P.3d at 817.

141. *See supra* note 138.

142. *See supra* note 138 and accompanying text.

143. Gulf argued in the alternative that it was jointly and severally liable with the other drivers under the doctrine of successive tortfeasor liability. *See Cottone*, 2006-NMCA-150, ¶ 19, 148 P.3d at 820 (citing Lujan v. Healthsouth Rehab. Corp. 120 N.M. 422, 426, 902 P.2d 1025, 1029 (1995) (adopting successive tortfeasor liability in New Mexico)).

144. *See infra* note 145–46 and accompanying text.

145. NMSA 1978, § 41-3-1 through § 41-3-8.

146. *See supra* Part III.A.

147. *See Cottone*, 2006-NMCA-150, ¶ 12, 148 P.3d at 818–19 (referring to the practice of a party paying for the entirety of a plaintiff's claim and then seeking contribution from the other tortfeasors).

148. *Id.* ¶ 13, 148 P.3d at 819.

149. The courts have used the adoption of comparative negligence as a justification for many subsequent changes in New Mexico law. *See, e.g.*, Torres v. El Paso Elec. Co., 1999-NMSC-029, ¶ 21, 987 P.2d 386, 395, *overruled on other grounds*, Herrera v. Quality Pontiac, 2003-NMSC-018, 73 P.3d 186 (holding that principles of comparative fault deny the defendant the right to assert the affirmative defense of independent intervening cause for the negligent actions of the plaintiff or of a third party).

According to the court, Gulf did not make a compelling argument to justify a departure from the norm of several liability.[150]

VI. IMPLICATIONS

The situation presented in *Cottone* perhaps illustrates a "structural fault" of the type called for by Judge Bustamante to justify departing from the default position of several liability. The asymmetry in the law of several liability and joint and several liability makes settling difficult for a plaintiff and a defendant who seek to settle the whole of the plaintiff's damages. The existence of contribution for jointly and severally liable defendants encourages and enables the parties to achieve this goal. However, if the defendant is severally liable, he is unlikely to agree to pay for the liability of all who are potentially liable because the ruling in *Cottone* demonstrates that he will be unable to sue the other tortfeasors for their fair share(s).

More complicated still is a situation where the nature of the defendant's liability is in question and thus the general rule of several liability may not apply under the specific facts of the case.[151] In such a scenario, the comparative negligence system creates an uncertainty that is problematic for both parties because neither the plaintiff nor the defendant knows whether joint and several liability will apply until a jury or a judge tells them so at the end of the lawsuit. The result is a system that potentially stalls or precludes settlement negotiations until after a judgment is rendered; this is problematic in a situation like *Cottone* because the defendant cannot be certain of whether he will retain the right to recoup some of his losses until it is too late. This situation calls for a solution.

A. Assignment of Personal Injury Claims

Admittedly, most courts view the phrase "assignment of personal injury claims" as something akin to a four-letter word.[152] At the heart of this antipathy to the practice is a wariness that the assignment device can be easily abused.[153] The *Quality Chiropractic* court addressed this issue specifically, stating that "if accident victims could use assignments as currency, they could issue assignments for any purpose and in any amount."[154] Without much effort, one can imagine a plaintiff using the assignment device to fracture his single claim into a host of smaller claims—each owned by a different party who is totally unrelated to the original cause of action.[155] Additionally, one can easily conceive of an individual who seeks an assignment in hopes of turning a profit. Perhaps the courts are wise to avoid the

150. *See Cottone*, 2006-NMCA-150, ¶ 13, 148 P.3d at 819. This issue will be addressed *infra* Part VII.

151. *See supra* notes 32–33.

152. Few states allow for the assignment of personal injury claims.

153. *See* Quality Chiropractic, P.C. v. Farmers Ins. Co. of Ariz., 2002-NMCA-080, ¶ 23, 51 P.3d 1172, 1179–80.

154. *Id.*

155. *See id.* The court cited *Lewis v. Kubena*, 800 So.2d 68, 72 (La. Ct. App. 2001) (affirming the lower court's refusal to allow an assignee to intervene in the plaintiff's personal injury lawsuit), as an example of the types of problems courts confront when they recognize the assignment of personal injury claims.

additional burdens on the judiciary and on the original tortfeasor that could arise from a wholesale recognition of the assignment of personal injury claims.[156]

However, a narrow common-law exception could limit the potential impact of a rule that allowed for the assignment of personal injury claims. Such an exception could be tailored by the courts to address the concerns raised above. First, the right of assignment could be limited to parties who were potentially liable for the plaintiff's injuries. Second, the law could impose a cap on the assignee's recovery so that it could not exceed the amount that he paid in consideration for the assignment. This type of exception to the anti-assignment rule would serve the needs of parties like Gulf and Rapp and would be narrow enough to guard against the dangers of a general acceptance of the assignments of personal injury claims.

Admittedly though, any such exception is susceptible to a "slippery slope" argument.[157] With the court's reluctance to allow for any assignment of personal injury claims,[158] it is wise to look for a non-assignment alternative.

B. Subrogation

To allow Gulf to subrogate to the claims of a third party like Rapp would not represent a significant departure from the law of subrogation in New Mexico.[159] Indeed, subrogation to Rapp's claims may be a better legal fit for this scenario than assignment.

In this context the doctrines of assignment and subrogation are different in name but virtually indistinguishable in effect.[160] Subrogation, however, poses an attractive alternative to assignment for several reasons. First, instead of being based in contract, subrogation arises out of equity.[161] Therefore, although subrogation frequently occurs in the context of an insurance contract, the insurer's right of subrogation is not triggered by the contract. Instead, the right "is founded upon the relationship of the parties and upon equitable principles, for the purpose of accomplishing the substantial ends of justice."[162] Thus, once an insurer pays its insured for "the debt of another," the court, acting in equity, "assign[s the insurer] the rights and remedies of the original creditor."[163]

Accordingly, New Mexico courts have noted that a benefit of subrogation's equitable roots is the court's ability to "apply equitable doctrines in subrogation

---

156. In addition to attempts to intervene, it is arguable that assignees could be made indispensable parties as in subrogation claims. *See* Quality Chiropractic, P.C. v. Farmers Ins. Co. of Ariz., 2002-NMCA-080, ¶ 25, 51 P.3d 1172, 1180.

157. *See id.* ¶ 23, 51 P.3d at 1180 (rejecting a narrow exception to the anti-assignment rule for medical services stating that there would be "no legitimate basis on which to make such a distinction").

158. *See id.*

159. *See supra* Part III.C.

160. *See* Kahrs v. Sanchez, 1998-NMCA-037, ¶ 25, 956 P.2d 132, 136-37(1998) (citing 73 AM. JUR. 2D *Subrogation* § 4 (1974)) (stating "that regardless of whether a transfer is technically called assignment or subrogation...its ultimate effect is the same: to pass the title to a cause of action from one person to another").

161. *See* U.S. Fid. and Guar. Co. v. Raton Natural Gas Co., 86 N.M. 160, 162, 521 P.2d 122, 124 (1974) ("A distinction is sometimes made between legal and conventional subrogation. Legal subrogation arises by operation of law; conventional subrogation arises by convention or contract of the parties. Whether legal or conventional, subrogation is an equitable remedy.") (internal quotation marks omitted).

162. *Id.* at 162, 521 P.2d at 124–25 (quoting 6A APPLEMAN, INSURANCE LAW AND PRACTICE, § 4054 at 142–44).

163. *Id.* at 162, 521 P.2d at 124.

cases to protect the rights of the insured."[164] Specifically, the court can reduce a subrogee's recovery through equitable apportionment[165] and can require that subrogated insurers pay a portion of attorney's fees.[166] Thus, if subrogation were expanded to cover a situation like that in *Cottone*, the court would be free to limit the insurer's recovery to a fair and just amount. As a result, any argument that expanding the right of subrogation, however slightly, would lead to greedy insurance companies seeking to take advantage of unsophisticated plaintiffs could easily be countered by the court's ability to exercise its equitable powers to limit recovery.

The second reason why subrogation may be preferable to assignment in this context is that subrogation to personal injury claims is already a common practice, while the assignment of personal injury claims remains forbidden.[167] In *Quality Chiropractic*, Judge Pickard gave a laundry list of reasons why subrogation to personal injury claims is permissible while the assignment of personal injury claims is not.[168] Insurers are allowed to subrogate to the claims of their insureds once they pay out benefits. Slightly expanding the universe of possible subrogees to include an insurer—acting on its duty to exercise "fair settlement practices"[169]—that pays benefits to a third party injured by its insured would not represent a significant change in the law or result in a dramatic increase in the number of subrogated claims before the courts. After all, it is difficult to imagine that an insurance company would often be eager to settle for *more* than its fair share of a plaintiff's injury on the off chance that it might be able to recoup some of its losses. One would think that an insurer would only take such a risk in the rare circumstances described in *Cottone*.

VII. CONCLUSION

Cottone stands for the proposition that a plaintiff and a defendant like Rapp and Gulf, who wish to settle for the whole of the plaintiff's damages, are left without a solution if the defendant is severally liable. In such a situation, the law's current inability to effectuate the parties' wishes, by providing an incentive to the defendant to settle the plaintiff's entire claim, illustrates a fundamental problem with New Mexico's system of pure comparative negligence.

Several compelling reasons support recovery for a party in Gulf's position, and there are at least two possible avenues the court could take to accomplish that end. While the wholesale assignment of personal injury claims is arguably not in the best

---

164. Quality Chiropractic, P.C. v. Farmers Ins. Co. of Ariz., 2002-NMCA-080, ¶ 24, 51 P.3d at 1180.

165. *See id.* (citing White v. Sutherland, 92 N.M. 187, 192, 585 P.2d 331, 336 (Ct. App. 1978) (holding that court could reduce insurer's award when insured settled for less than the full amount of her damages)).

166. *See id.* (citing Amica Mut. Ins. Co. v. Maloney, 120 N.M. 523, 528–29, 903 P.2d 834, 839–40 (1995)).

167. *See id.*

168. *See id.* ¶¶ 21–26, 51 P.3d at 1179–81 (holding that subrogation is permissible where assignment is not because subrogation (1) excludes "volunteers" and "strangers" to the litigation, (2) places the risk on the insurer that the subrogor "will be unable to obtain compensation from the tortfeasor," (3) "applies by necessity only to benefits paid directly for damages resulting from an injury-causing accident," (4) is subject to equitable doctrines that allow the court to "protect the rights of the insured," (5) does not increase the burden on the original tortfeasor, and (6) is subject to regulation through the Insurance Code.)

169. *See supra* note 129.

interests of the parties or the courts, a narrowly tailored exception to the anti-assignment rule provides a possible solution.[170] The equitable doctrine of subrogation, however, poses a more promising vehicle to effectuate the goals of parties like Gulf and Rapp because it would employ an already accepted remedy to address the problem.

The asymmetry between the law of several liability and joint and several liability would be eliminated if Gulf were allowed to compensate Rapp fully for her injuries and then "step into [her] shoes"[171] and sue the other tortfeasors. If nothing else, this arrangement would allow the inexperienced plaintiff the opportunity to cede the litigation process to the more able insurance company. Beyond that, though, Rapp would ostensibly be satisfied with her settlement, and Gulf would be allowed to recoup some of its losses while fulfilling the goals of the comparative negligence system by holding the other tortfeasors responsible for their fair share(s) of Rapp's damages.

170. *See supra* Part VI.A.

171. Amica Mut. Ins. Co. v. Maloney, 120 N.M. 523, 527, 903 P.2d 834, 838 (1995).