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THE LAW OF MEDICAL MALPRACTICE IN NEW MEXICO

JERRALD J. ROEHL†

> If the surgeon has made a deep incision in [the body of] a [free] man with a lancet of bronze and causes the man's death or has opened the caruncle in [the eye of] a man and so destroys the man's eye, they shall cut off his forehand.
>
> *The Code of Hammurabi*[1]

Although the law's attitude toward the medical profession has mellowed considerably since that enactment of 4,000 years ago,[2] medicine and law still have difficulty in attaining mutual understanding and trust.[3] One major obstacle is medical malpractice,[4] or the law of medical professional responsibility.[5] Very few medical malpractice cases are reported for New Mexico courts prior to the 1960's,[6] but in

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1. 2 Driver & Miles, The Babylonian Laws §218, at 81 (1955).

2. The first medical malpractice case was reported in England in 1374. The first reported American case was Cross v. Guthrey, 2 Root 90 (Conn. 1794). *See* Stetler, *History of Reported Medical Professional Liability Cases*, 30 Temp. L.Q. 366 (1957); Sandor, *The History of Professional Liability Suits in the United States*, 163 J.A.M.A. 459 (1957).

3. *See* 1 D. Louisell & H. Williams, Medical Malpractice ¶1.03 (1970) [hereinafter cited as Louisell & Williams].

4. The term "medical malpractice" has caused some difficulty. It has been defined as "[a]ny professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct." Black, Law Dictionary 1111 (4th ed. 1951). The term as used herein means nothing more than professional negligence by physicians.

5. The barrier to a better relationship between the medical and legal professions due to medical malpractice cases has been summarized in a comprehensive book on medical malpractice as follows:

> It is natural and perhaps inevitable, although unfortunate, that the physician sued for malpractice will see his true adversary not as the plaintiff but as the plaintiff's attorney. An attitude of antipathy between any physician witness and a cross examining lawyer is also understandable. . . . It is true that for a superficial explanation [of the antagonism between the legal and medical professions] one perhaps need look no further than to the increasing frequency of malpractice suits and the fact that almost inevitably they are prosecuted by lawyers. From this many physicians seem to conclude that lawyers are the cause of the malpractice predicament.

1 Louisell & Williams, *supra* note 3, ¶1.03 at 5.

6. Only one case reported for New Mexico courts during the first sixty years of this century directly concerns medical malpractice. Los Alamos Medical Center, Inc. v. Coe, 58 N.M. 686, 275 P.2d 175 (1954). Three other opinions during this time period only remotely concern medical malpractice. Munroe v. Wall, 66 N.M. 15, 340 P.2d 1069 (1959) (osteopaths cannot be placed on equal footing with physicians who are graduates of approved medical schools); Johnson v. Armstrong & Armstrong, 41 N.M. 206, 66 P.2d 992 (1937) (third person not obligated to pay physician for patient's treatment where third person requested physician to treat patient); Territory v. Lotspeich, 14 N.M. 412, 94 P. 1025 (1908) (unlawful practice of medicine).

the last decade the number of published malpractice cases has increased dramatically.[7] As a result, the law of medical malpractice in New Mexico has virtually developed in the last few years.[8] The more recent cases demonstrate that this development must still continue; further exposition is needed, particularly in the areas of standards of care, expert testimony, the doctrine of *res ipsa loquitur*, informed consent and the statute of limitations.

STANDARDS OF CARE

Unlike the Code of Hammurabi which imposed the strict liability of an insurer on the physicians of that day, the modern law of medical malpractice does not require that the physician be an insurer "of a cure, or even of beneficial results, unless he has bound himself by special contract to effect a cure."[9] Moreover, a bad result, no matter how bad, is insufficient to establish the unskillfulness or negligence of a physician.[10] The New Mexico Supreme Court has stated:

> The fact that a poor result is achieved or that an unintended incident transpired, unless exceptional circumstances are present, does not establish liability without a showing that the result or incident occurred because of the physician's failure to meet the standard of care either by his acts, neglect, or inattention.[11]

The standard of care which is required of a physician in a medical malpractice case is based on his specialized knowledge or skill.[12] This standard has been generally defined as follows:

> A physician is not required to exercise the highest degree of skill and diligence possible, in the treatment of an injury, unless he has

See also Polhemus v. American Medical Ass'n, 145 F.2d 357 (10th Cir. 1944) (New Mexico statute not allowing naturopathic healer the benefit of "Grandfather Clause" available to other branches of healing art upheld).

7. Ten medical malpractice cases have been reported by the New Mexico Supreme Court in the last ten years. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971); Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296 (1970); Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964); Stake v. Woman's Div. of Christian Serv., 73 N.M. 303, 387 P.2d 871 (1963); Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963); Burks v. Baumgartner, 72 N.M. 123, 381 P.2d 57 (1963); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962); Kilkenny v. Kenny, 68 N.M. 266, 361 P.2d 149 (1961).

8. *See* Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964); Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

9. Henley v. Mason, 154 Va. 381, 383, 153 S.E. 653 (1930). *See also* Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964).

10. Buchanan v. Downing, 74 N.M. 423, 426, 394 P.2d 269, 272 (1964); Cervantes v. Forbis, 73 N.M. 445, 448, 389 P.2d 210, 213 (1964).

11. Cervantes v. Forbis, 73 N.M. 445, 448, 389 P.2d 210, 213 (1964).

12. Prosser, Law of Torts 124-35 (2d ed. 1955); Restatement of Torts §290, comment e at 779 (1934); McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549 (1959).

> agreed by special contract to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the average of the members of the profession in good standing, in similar localities and in the same general line of practice. . . .[13]

Thus, a physician's standard of care has been summarized traditionally as the diligence ordinarily exercised by other physicians of the same skill in the same general community.[14] This will be referred to as the community standard of care. The reasoning behind the limitation to the same general community is that courts have believed that significant differences exist between the facilities, opportunities for research and the extent of medical knowledge of those physicians practicing in large metropolitan areas and those practicing in rural areas.[15] The current uniformity in standards of medical schools and licensing boards has diminished the significance of the community limitation.[16] Yet there is still a need for courts to recognize that "due care in a lumber camp might be gross negligence at Johns Hopkins."[17]

Although most jurisdictions in the country have followed the community standard of care,[18] recent cases indicate that the community standard is being abandoned in some states and is being replaced with a measure requiring the physician to meet a national standard of care.[19] That standard would allow for a determination based on recognized medical practices outside of the community. In addition to other advantages,[20] this approach might enable the courts to judge physicians accused of malpractice on the basis of published guidelines approved by a board of prominent doctors practicing the same

13. United Dentists, Inc. v. Bryan, 158 Va. 880, 884-85, 164 S.E. 554, 555 (1932). *See* Williams v. Vandenhoven, 82 N.M. 352, 353, 482 P.2d 55, 56 (1971) (approving N.M. Uniform Jury Instruction 8.1).

14. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971); Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964).

15. Shepherd, *The Law of Medical Malpractice in Virginia*, 21 Wash. & Lee L. Rev. 212, 221 (1964).

16. *Id.*

17. Fox v. Mason, 139 Va. 667, 671, 124 S.E. 405, 406 (1924).

18. Shartel & Plant, The Law of Medical Practice 116-17 (1959) [hereinafter cited as Shartel & Plant].

19. Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968); Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970); Douglas v. Bussaberger, 73 Wash. 2d 476, 438 P.2d 829 (1968); Stone v. Sisters of Charity of House of Province, 2 Wash. App. 607, 469 P.2d 229 (1970). *See also* Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965); Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967).

20. Adoption of a national standard of care would abrogate the locale rule, allowing doctors to testify who are not from the same community. Notes 43-47 and accompanying text *infra*. A national standard would also perhaps enable medical treatises to be substituted for expert testimony. Text accompanying notes 58-59 *infra*.

specialty.[21] The application of these guidelines in medical malpractice cases has been advocated by a number of respected physicians.[22] A prominent physician and medico-legal expert[23] has suggested that the national standard of care would permit a court to decide physicians' negligence by accepted medical procedures as set forth in recognized medical school textbooks and medical treatises.[24]

Although New Mexico has consistently adhered to the community standard[25] one case suggests this allegiance may not be exclusive. In *Los Alamos Medical Center, Inc. v. Coe*,[26] the New Mexico Supreme Court upheld a verdict for plaintiff although the trial court had admitted testimony by an expert witness who practiced more than 800 miles from the community. The case arose when the Los Alamos Medical Center filed suit against a patient's husband for judgment on an account. The patient and her husband filed a counterclaim against the medical center and her physician for malpractice, claiming that the physician was negligent in prescribing morphine to the patient and allowing her to take the drug at home over a long period of time. The patient alleged that because the physician failed to supervise the administration of the drug which she took frequently and in large doses, she became addicted to morphine. The physician alleged contributory negligence, contending that he had warned the patient and her husband of the dangers associated with morphine, and that if they allowed the drug to be administered frequently knowing of these dangers, they were contributorily negligent. The physician also contended through the testimony of specialists in drug addiction that the quantity of drugs administered to the patient could not result in addiction, and that the withdrawal of a true addict could not be

21. Address by Dr. Charles Frankel, M.D., Medico-Legal Seminar Course, Washington and Lee University School of Law, Lexington, Va., March 17, 1971 (hereinafter cited as Address). For Dr. Frankel's qualifications, *see infra* note 23.

22. The American Board of Orthopedic Surgeons is currently writing a set of guidelines for orthopedic surgeons which will purportedly set forth a national standard of care for this surgical group. There has been no indication by the courts or legislatures as to its adoption as a national standard of care for legal purposes. Address, *supra* note 21.

23. Dr. Charles Frankel, LL.B., University of Virginia, M.D., Rush Medical School, University of Chicago; staff physician, University of Virginia Hospital; professor of orthopedic surgery, University of Virginia Medical School; certified by the American Board of Orthopedic Surgery. Dr. Frankel was instrumental in the abrogation of the expert testimony "locale rule" in Georgia. *See* Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965).

24. Address, *supra* note 21.

25. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971); Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964); Burks v. Baumgartner, 72 N.M. 123, 381 P.2d 57 (1963); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962); Binns v. Schoenbrum, 81 N.M. 489, 468 P.2d 890 (Ct. App. 1970). *But see* Los Alamos Medical Center v. Coe, 58 N.M. 686, 275 P.2d 175 (1954).

26. 58 N.M. 686, 275 P.2d 175 (1954).

accomplished in the short time taken by the patient. In rebuttal, the patient offered testimony of an Albuquerque physician and a Los Angeles surgeon that the patient was addicted. The accused physician objected that the two doctors testifying against him were not experts in drug addiction, and had admitted to their lack of expertise during their testimony. However, the court held their testimony admissible, even though the two doctors were not from the same general community as the accused physician and were totally unfamiliar with that community's standards of care. The court stated:

> The mere fact that [the Los Angeles surgeon] may have had no particular experience in the immediate vicinity of Los Alamos in the use of morphine, does not render his testimony inadmissible. *The standard of care and skill required of physicians in administering morphine is unquestionably the same.* . . . [W]hile not claiming to be an expert on the subject of narcotics, [he] has observed many addicts and actually treated several cases. . . . We think they were competent to testify, though they may not be highly qualified to testify on the subject.[27] [Emphasis added.]

It has been suggested that the standard of care and skill required of physicians is unquestionably the same in many operating procedures, diagnoses and various other medical treatments.[28] Thus, it might be successfully argued from *Coe* that, in New Mexico, the question of a physician's negligence in common medical matters may be determined by testimony of doctors from throughout the country who are knowledgeable in the particular field. If the supreme court accepted this argument, the standard of care in medical malpractice cases in New Mexico would be judged in the light of evidence presented by physicians from outside the defendant physician's community.[29] However, subsequent cases demonstrate a reluctance to extend *Coe*.[30] This reluctance may exist only because the courts have not confronted a common medical matter,[31] similar to that in *Coe*, which would enable such an extension.[32]

27. 58 N.M. at 692, 275 P.2d at 179.

28. Address, *supra* note 21.

29. The rule against expert testimony by physician outside of the general community, referred to as the locale rule, has a definite interrelationship with the community standard of care. *See* text accompanying notes 37-39 *infra*.

30. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971); Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

31. The *Coe* opinion emphasized the testimony by the Albuquerque physician and Los Angeles surgeon to the effect that "it was a simple matter to detect whether a patient is addicted to the use of narcotics." The fact that detection of narcotic addiction was a common medical matter undoubtedly influenced the court in allowing the testimony. 58 N.M. at 692, 275 P.2d at 179.

32. *See* cases cited note 31 *supra*.

EXPERT TESTIMONY

A basic requirement in any medical malpractice case is that expert testimony be given by physicians.[33] New Mexico has consistently followed this rule.[34] It is often difficult to comply with this requirement since most doctors are reluctant to expound on the inadequacy of a colleague's method of treatment or practice.[35] The necessity for the testimony of other physicians has created grave frustrations for plaintiff's attorneys, and has been the greatest source of criticism of malpractice law.[36]

The need for expert testimony is complicated by the community standard of care.[37] Physicans are even more reluctant to testify against a doctor of the same community, especially where that community has a small population.[38] The requirement of doctors testifying from the same community or locale has been referred to as the locale rule.[39]

The difficulty inherent in obtaining expert testimony in accordance with the locale rule and the community standard of care would be lessened by adopting a national standard of care.[40] Under a national standard of care, doctors from throughout the country could testify.[41] Attorneys would not have to confront a doctor's aversion to testifying against a fellow physician from the same community.

There is evidence that the locale rule has already deteriorated to some extent in New Mexico. *Los Alamos Medical Center, Inc. v. Coe*[42] shows that compliance with the locale rule is not always required. In

33. Shartel & Plant, *supra* note 18 at 130.

34. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971); Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964).

35. Address, *supra* note 21. *See e.g.*, Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (1959); Bernstein v. Alameda–Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 283 P.2d 862 (1956); Butts v. Watts, 290 S.W.2d 777 (Ky. 1956); Johnston v. Winston, 68 Neb. 425, 94 N.W. 607 (1903); Steiginga v. Thron, 30 N.J. Super. Ct. 423, 105 A.2d 10 (1954). The reluctance or refusal of physicians to testify against each other has been characterized as the conspiracy of silence. *See e.g.*, Note, *Overcoming the "Conspiracy of Silence": Statutory and Common Law Innovations*, 45 Minn. L. Rev. 1019 (1961).

36. *See e.g.*, Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 Vill. L. Rev. 250 (1956); *contra*, Stetler, *Medical-Legal Relations–The Brighter Side*, 2 Vill. L. Rev. 497 (1957); Comment, 17 U. Miami L. Rev. 182 (1962).

37. *See* cases cited notes 39–40 *supra*.

38. *Address*, note 21 *supra*.

39. *See e.g.*, comment, *Locality Doctrine and the Standard of Care of a Physician*, 8 Washburn L.J. 339 (1969); Comment, *Locality Rule in Medical Malpractice Suits*, 5 Cal. W. L. Rev. 124 (1968).

40. *See* Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965); Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968); Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970); Douglas v. Bussaberger, 73 Wash. 2d 476, 438 P.2d 829 (1968); Stone v. Sisters of Charity of House of Province, 2 Wash. App. 607, 469 P.2d 229 (1970); Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967).

41. *Id.*

42. 58 N.M. 686, 275 P.2d 175 (1954).

Coe the New Mexico Supreme Court ruled that the expert testimony of a Los Angeles surgeon was admissible over objection that the testimony violated the locale rule.[43]

Although *Coe* is noteworthy as an exception to the locale rule, it has lost some of its significance because of the refusal of the courts to apply it.[44] In *Cervantes v. Forbis,*[45] the New Mexico Supreme Court emphasized the necessity of expert testimony showing failure to meet a community standard of care. The patient, suing two physicians for negligent treatment of a broken right femur, could not obtain expert testimony by any doctor in the community. The court held that the lack of expert testimony on negligence and proximate cause entitled the physicians to summary judgment.[46] It is notable, however, that the court also observed:

> While we are not called upon to determine if in a proper case a prima facie case might not be made without the necessity of producing an expert, we are satisfied that this is not such a case.[47]

It is therefore conceivable that a partial abrogation of the expert testimony rule could be established where special circumstances not requiring an expert were present.[48] Such circumstances have apparently not yet been presented to a New Mexico court, but an otherwise frustrated plaintiff should not ignore this possibility.[49]

Should a national standard of care be adopted in New Mexico or the locale rule be abandoned, a step further would allow use of medical treatises and pamphlets as substitutes for expert testimony.[50]

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43. Text accompanying note 27 *supra.*

44. *See* Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971); Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964).

45. 73 N.M. 445, 389 P.2d 210 (1964).

46. 389 P.2d at 213.

47. *Id.*

48. The special circumstances not requiring expert testimony to which the court referred would normally involve circumstantial evidence so that the doctrine of *res ipsa loquitur* could be successfully utilized.

49. Plaintiffs have unsuccessfully contended through unique arguments that the circumstances present in their cases were such as to not require expert testimony. *See e.g.,* Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964).

50. A few states have enacted statutes which enable courts to use medical treatises or other medical literature as a substitute for expert testimony. Nevada has adopted such a statute, and the pertinent section reads as follows:

> A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, osteopathic physicians or surgeons, chiropractors, chiropodists, naturopathic physicians, hospitals and sanitaria, as evidence tending to prove the fact or as opinion evidence.

Medical treatises, pamphlets or drug manufacturers' instructions cannot now be used to substitute for expert testimony.[51] In *Crouch v. Most*[52] an action was brought against a physician for negligent treatment of a snake bite. The plaintiff attempted to introduce an instruction sheet prepared by the manufacturer of the snake bite kit which the defendant physician used in treating the plaintiff. The plaintiff intended to show that the doctor had been negligent in not complying with the directions in the instruction sheet. The trial court ruled that the instruction sheet was inadmissible and the New Mexico Supreme Court affirmed. The court noted, however, that the information contained in the instruction sheet had nevertheless been placed in the record through the testimony of the plaintiff's expert witness, and that the trial court's ruling was therefore immaterial because any error was harmless.[53]

In addition to the invalidation of the locale rule through adoption of a national standard and the use of medical treatises, two other suggestions for solving the problem of expert testimony have been made. These involve plans for obtaining impartial medical testimony and for insuring the availability of an expert when the plaintiff has a meritorious case. The impartial medical testimony plan has received substantial support as a result of its application in other types of personal injury cases, especially in New York.[54] It has been considered in New Mexico.[55] This plan is based on the appointment of a doctor who becomes the court's witness. The parties, however, are not bound by the doctor's findings. The proposal has not yet been applied in malpractice litigation. It may be difficult to do so because necessary medical cooperation may be lacking.

The second suggestion foresees the establishment of a Medical Malpractice Screening Panel which would provide experts for meritorious cases. This proposal has been adopted in a few states,[56]

Nev. Rev. Stat. §51.040 (1967). *See also* Mass Rev. Stat. Ann. §79C (1969); R.I. Acts & Resolves ch. 230 at 1108 (1969).

51. *See* Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967).

52. *Id.*

53. 78 N.M. at 408, 432 P.2d at 251–52.

54. *See* Peck, *A Successful New Plan: Impartial Medical Testimony*, 42 A.B.A.J. 31 (1959); *Impartial Medical Testimony*, 27 Ins. Counsel J. 184 (1960); Comment, *Impartial Medical Testimony Plans*, 55 Nw. U. L. Rev. 1019 (1961).

55. Interview with Joseph E. Roehl, senior partner, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, N.M., former member of Medico-Legal Screening Panel for State Bar of New Mexico, May, 1971.

56. This proposal has been adopted in Arizona, New Jersey, New Mexico and Virginia. Letter from Mr. Howard Hassard, senior partner, Hassard, Bonnington, Rogers & Huber, San Francisco, Cal., Apr. 24, 1971. Mr. Hassard is urging the State of California to adopt such a plan. *See also* Virginia Bar News 12–13, May 1961.

including New Mexico. The New Mexico panel is the subject of a student note following in this issue.[57]

Logic would dictate that the locale rule could also be waived by a defendant physician who wanted the expert testimony of a doctor from outside of the community in his own behalf. Since the locale rule protects the physician from testimony by other doctors unfamiliar with the practice and procedures in his community, the defendant physician should have the power to waive it. The waiver has been considered by the Committee on Uniform Jury Instructions of the New Mexico Supreme Court and there is some probability that it will be incorporated in the Uniform Jury Instructions.[58]

A fourth solution to the expert testimony problem advocates the submission of medical malpractice claims to an arbitration panel.[59] Under such a plan the board of arbitrators, composed of lawyers and doctors, would determine the merit of the claim and encourage the parties to settle without filing suit.[60] The determination of the arbitration panel would not be binding but could be utilized to keep unnecessary cases out of crowded court dockets.[61]

As these plans are better understood and receive more publicity,[62] it is likely that more states will want to put them into use.[63]

RES IPSA LOQUITUR

The application of the doctrine of *res ipsa loquitur* to the law of medical malpractice has been controversial.[64] Despite this, courts in many jurisdictions have been requested to apply the doctrine to

57. Note, 3 N.M.L. Rev. 311 (1973).

58. Interview with Joseph E. Roehl, *supra* note 55, Chairman of the New Mexico Supreme Court Committee on Uniform Jury Instructions and author of New Mexico Uniform Jury Instructions.

59. J. F. Lillard, III, *Arbitration of Medical Malpractice Claims*, 26 Arb. J. 193 (1971).

60. *Id.*

61. *Id.*

62. The State Bar of New Mexico received the American Bar Association's 1971 Award of Merit in the state and local bar association competition for the establishment and success of the Medico-Legal Screening Panel. 10 N.M. St. Bar Bull. 165 (August 5, 1971).

63. Many states have shown a substantial interest in promulgating a plan for screening medical malpractice cases similar to the New Mexico Plan, particularly since the Award of Merit was received. Interview with Irwin S. Moise, Chairman, Medico-Legal Screening Panel for State Bar of New Mexico, former Chief Justice of New Mexico Supreme Court and presently senior partner of the Albuquerque firm of Sutin, Thayer & Browne, May, 1972.

64. *See generally* Bulman, *Res Ipsa Loquitur—Where Does it Apply?*, 1961 Ins. L.J. 20; D. Louisell & H. Williams, Medical Malpractice ¶1406-1408 (1970). Application of the doctrine in medical malpractice cases has been met with extensive criticism. *See* Adamson, *Medical Malpractice: Misuse of Res Ipsa Loquitur*, 46 Minn. L. Rev. 1043 (1962); Morris, *"Res Ipsa Loquitur"—Liability Without Fault*, 163 J.A.M.A. 1055 (1957); Rossen, *Defense Against Res Ipsa in Medical Malpractice*, 13 Clev.-Mar. L. Rev. 128 (1968); Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 Harv. L. Rev. 633 (1950); Comment, *RIL v. The Expert Witness in Medical Malpractice*, 21 Wash. & Lee L. Rev. 292 (1964).

medical malpractice for some time.[65] The New Mexico Supreme Court confronted the issue only recently in *Buchanan v. Downing.*[66]

In *Buchanan* the plaintiff, after suffering from diarrhea and nausea for three days, received an injection of sparine from the defendant physician. The plaintiff immediately reacted, his skin reddening at the place of the injection. The reddening turned into an open, festering sore which subsequently required a skin graft. The plaintiff, in suing the physician and the manufacturer of the drug, relied on the doctrine of *res ipsa loquitur.* The trial court granted summary judgment in favor of both defendants. The decision was affirmed on appeal, the supreme court holding that the doctrine did not apply because plaintiff has not established its minimum prerequisites. The court enumerated them as follows:

> It is generally said that for the res ipsa loquitur doctrine to apply these elements must exist: (1) That the accident be of the kind which ordinarily does not occur in the absence of someone's negligence; (2) that it must be caused by an agency or instrumentality within exclusive control and management of the defendant.[67]

Although the plaintiff satisfied the second prerequisite by showing that the instrument was in the exclusive control of the defendant, his failure to satisfy the first prerequisite caused the court to rule:

> It is the absence of any showing that, without the defendant's negligence, the unnatural reaction by the plaintiff would not have occurred, which takes the case outside the res ipsa loquitur rule.[68]

Although the plaintiff failed, it is interesting to note how he attempted to show that the accident would not have occurred unless someone was negligent. The plaintiff contended that the statement by the defendant's expert witness that the plaintiff's injury was "not a natural reaction to such an injection"[69] amounted to a sufficient showing that the accident would not have happened but for someone's negligence and that, therefore, the defendant was required by the doctrine to meet the burden of proof.[70] The court, however,

65. *See e.g.*, Hunter v. Borroughs, 123 Va. 113, 96 S.E. 360 (1918).
66. 74 N.M. 423, 394 P.2 269 (1964), commented on in 6 Natural Resources J. 334 (1966).
67. 394 P.2d at 271.
68. *Id.*
69. *Id.*
70. The plaintiff's contention that he had met the requirements of *res ipsa loquitur*, causing the burden of proof to shift to the defendant, and the court's restatement of this without correction is misleading. In the view of eminent legal scholars, the burden of proof never shifts, even in a valid res ipsa case only the production burden shifts. *See* 9 Wigmore, Evidence §§2486–89 (3d ed. 1940); Thayer, Preliminary Treatise on Evidence 355–85 (1898); Laughlin, *The location of the Burden of Persuasion*, 18 U. Pitt. L. Rev. 3, 4–5, 12, 24–26 (1956). *See also* Dietze v. King, 184 F. Supp. 944, 946–47 (E.D. Va. 1960).

pointed out that the defendant's expert also testified that the reaction could have been due to many factors, including the nature of the medicine, the allergies of the patient, or the manner in which the injection was given. The court reasoned that the plaintiff had thus failed to prove the accident would not have occurred but for someone's negligence and ruled that the doctrine was inapplicable.

Plaintiff's attorneys rely on the doctrine of *res ipsa loquitur* because, if the plaintiff can satisfy both prerequisites, the burden of producing evidence[71] shifts to the defendant.[72] It may also permit the plaintiff to establish his cause of action without expert witnesses.[73] Finally, application of the doctrine virtually assures the plaintiff of reaching the jury.[74]

Because of these advantages, plaintiff's attorneys have urged courts to apply the doctrine to malpractice litigation. Their efforts have been quite successful in some jurisdictions. For instance, in California the doctrine was held applicable in two cases[75] with facts similar to *Buchanan*. The California courts in both cases said that it was a matter of common knowledge that injections do not cause injury unless unskillfully given or unless the serum is defective. The *Buchanan* decision expressly considered and rejected the California approach. The court felt that it would place too great a burden on doctors in New Mexico.[76]

The *Buchanan* decision accords with the majority rule.[77] Other courts have avoided the application of *res ipsa loquitur* to medical malpractice cases because it would impose strict liability on doctors, making them liable for not effecting a cure in some instances.[78] This view was summarized by Mr. Chief Justice Taft, then a Circuit Judge, in a leading case as follows:

> If the maxim "res ipsa loquitur" were applicable to a case like this, and a failure to cure were held to be evidence, however

71. The burden of producing evidence along with the burden of persuasion have traditionally been characterized as elements of the burden of proof. Like the general burden of proof, the burden of persuasion never shifts but the burden of producing evidence may shift. Laughlin, *The Location of the Burden of Persuasion*, 18 U. Pitt. L. Rev. 3, 4–5, 24–26 (1956).

72. *See* Hamilton v. Southern Ry. Co., 162 F.2d 884 (4th Cir. 1947); Dietze v. King, 184 F. Supp. 944, 946–47 (E.D. Va. 1960). *But see* Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964).

73. Henley v. Mason, 154 Va. 381, 153 S.E. 653 (1930). *See also* Cervantes v. Forbis, 73 N.M. 445, 448-49, 389 P.2d 210, 213.

74. *See* Dietze v. King, 184 F. Supp. 944, 947 (E.D. Va. 1960).

75. Wolfsmith v. Marsh, 51 Cal. 2d 832, 337 P.2d (1959); Bauer v. Otis, 33 Cal. App. 2d 439, 284 P.2d 113 (1955).

76. 394 P.2d at 272.

77. *Id.* at 272-73.

78. Ewing v. Goode, 78 F. 442 (6th Cir. 1897); Henley v. Mason, 154 Va. 381, 153 S.E. 653 (1930).

> slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly "all the ills that flesh is heir to."[79]

In view of such consequences, it is very probable that the New Mexico courts will adhere to *Buchanan* in holding the doctrine of *res ipsa loquitur* inapplicable in most medical malpractice cases. Nevertheless, it should be noted that in *Cervantes v. Forbis*,[80] the supreme court left the question unsettled:

> While we are not called upon to determine if in a proper case a prima facie case might not be made without the necessity of producing an expert, we are satisfied that this is not such a case.[81]

INFORMED CONSENT

Like questions involving the application of *res ipsa loquitur* to medical malpractice law, the development of the rule of informed consent is of recent origin in New Mexico.[82] This rule requires the physician to disclose all risks inherent in a contemplated treatment. Unless such disclosure is made to the patient, the doctor may be liable for any resulting injury.[83] Liability may exist even though the patient has expressly consented to the treatment because a patient must be informed of the dangers of the treatment before he can effectively consent to it.[84] A physician may not treat a patient without consent unless special circumstances, such as an emergency, are present.[85] The physician must disclose all reasonable risks involved in the treatment or chance liability for assault and battery[86] or negligence.[87] In the past decade, over twenty jurisdictions, including New Mexico, have evolved standards for cases concerning informed consent.[88]

In *Woods v. Brumlop*[89] the New Mexico Supreme Court directly confronted the issue of informed consent. In that case the plaintiff was referred by her physician to Dr. Brumlop for psychiatric treatment.

79. 78 F. 442, at 443.

80. 73 N.M. 445, 389 P.2d 210 (1964).

81. 73 N.M. at 449, 389 P.2d at 213.

82. The New Mexico Supreme Court directly confronted the rule of informed consent for the first time in 1962. *See* Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

83. 1 Louisell & Williams, *supra* note 3, at ¶22.01.

84. Natanson v. Klein, 187 Kan. 186, 354 P.2d 670 (1960).

85. Woods v. Brumlop, 71 N.M. 221, 228, 377 P.2d 520, 525 (1962); 1 Louisell & Williams, *supra* note 3, at ¶22.01.

86. *See e.g.*, Scott v. Wilson, 296 S.W.2d 532, 535 (Tex. Civ. App. 1965), *aff'd*, 412 S.W.2d 299 (Tex. 1967).

87. *See e.g.*, Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965).

88. *See* discussion and cases gathered in 2 Louisell & Williams, *supra* note 3, at ¶¶ 22.01-2209.

89. 71 N.M. 221, 377 P.2d 520 (1962).

Dr. Brumlop subsequently advised the plaintiff to undergo electroshock but refused to give the treatments herself, suggesting that the plaintiff enter the New Mexico Mental Hospital. The electroshock treatments were thus administered to the plaintiff in the State Hospital. The plaintiff claimed tht she received a compression fracture of her spine and a loss of hearing as a result.

The plaintiff alleged that although Dr. Brumlop did not administer the treatments, she was liable because she did not inform the plaintiff of the risks inherent in electroshock, and because she told the plaintiff that no harmful results could occur, knowing that this was untrue. The plaintiff also contended that the doctor's failure to inform her deprived her of any basis upon which to predicate her consent.

A jury found in favor of the plaintiff and defendant appealed. The supreme court reversed and remanded for a new trial, holding that the plaintiff's testimony that the electroshock treatments destroyed most of her hearing was inadmissible because she was a lay witness. The testimony raised a fact question whether the physician falsely advised the patient that no danger could result from the treatment.

On the issue of informed consent, the court said:

> The physician has the duty to make a full and frank disclosure to the patient of all pertinent facts relative to his illness and the treatment prescribed or recommended therefor.
>
> . . . .
>
> . . . The real basis for the rule requiring disclosure is to give the patient a basis upon which to exercise judgment as to whether he will consent to the treatment. Without the disclosure by the doctor it is said that the patient is not informed and that, therefore, any consent obtained is ineffectual.[90]

With the rule of informed consent thus established in New Mexico, attorneys would be well-advised to consider its application in pending medical malpractice cases.

STATUTE OF LIMITATIONS

The application of the statute of limitations to medical malpractice actions has received extensive treatment in the courts[91] and in legal publications.[92] The problem normally arises when a foreign object has been left in the body of a patient and is not discovered until after the

90. 71 N.M. at 227, 377 P.2d at 524.

91. *See* Annot., 80 A.L.R.2d 368 (1961).

92. Lillich, *The Malpractice Statute of Limitations in New York's New Civil Practice Law and Rules*, 14 Syracuse L. Rev. 42 (1962); Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 Wash. U.L.Q. 413; Note, 64 W. Va. L. Rev. 412 (1961); Note, 27 Albany L. Rev. 312 (1963); Note, 37 St. John's L. Rev. 385 (1963); Comment, 3 Natural Resources J. 540 (1964).

statute of limitations has run. According to many courts,[93] the patient's claim against the surgeon is barred.

Statutes of limitations are intended to prevent fraudulent and stale claims with their attending difficulty of securing witnesses and evidence.[94] However, most of these considerations are not present in a typical foreign objects case. These cases do not involve a plaintiff delaying pursuit of his rights. On the contrary, the facts of a typical case establish that the cause of action was unknown and unknowable to the plaintiff until after the statute had run.[95] Moreover, the lapse of time does not entail the danger of a false or frivolous claim, nor the danger of a speculative or uncertain claim since fraud is negated by the existence of the object itself.[96]

Because of the hardships which a statute of limitations can work on a plaintiff in such a case,[97] many states have adopted the discovery rule, which[98] tolls the statute until the patient discovers, or should have discovered by reasonable diligence, the cause of action.[99] Thus, under this rule the statute begins to run when the patient finds the object in his body rather than when it was left there by the physician.

In *Roybal v. White*[100] the New Mexico Supreme Court ruled that the discovery rule was not applicable to a foreign objects case because of the state legislature's failure to indicate otherwise. The plaintiff filed suit in February 1962 for injuries sustained in an operation performed in January 1952 when the physician allegedly left a sponge in the plaintiff's abdominal cavity. The sponge was removed in July 1961.

The suit was dismissed by the trial court on the ground that it was barred by the statute of limitations.[101] On appeal the ruling was affirmed by the supreme court, which held that the legislature's failure to include the discovery exception in the tort action limitation was binding on the court. The court reasoned that the legislature could have provided otherwise, as it had done with other exceptions.[102]

A plaintiff can attempt to circumvent the statute of limitations by

93. 1 Louisell & Williams, *supra* note 3, ¶13.06, at 370.
94. *See* 53 C.J.S. Limitations of Actions §1 (1948).
95. *See* Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).
96. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).
97. *See e.g.*, Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963).
98. 1 Louisell & Williams, *supra* note 3, ¶13.06, at 372.
99. *See e.g.*, Stafford v. Shultz, 42 Cal. 2d 767, 270 P.2d 1 (1954); Costa v. Regents of Univ. of Calif., 116 Cal. App. 2d 445, 254 P.2d 85 (1952).
100. 72 N.M. 285, 383 P.2d 250 (1963).
101. 72 N.M. at 226, 383 P.2d at 251.
102. 72 N.M. at 227, 383, P.2d at 252.

alleging and proving fraudulent concealment as provided in N.M. Stat. Ann. §23-1-7 (1953). Fraudulent concealment will toll the statute.[103] The plaintiff, however, must allege concealment in his complaint or he may be barred from doing so later.[104] To effectively demonstrate fraudulent concealment in a foreign objects case, the plaintiff must show that the physician committed some overt act tantamount to fraud which concealed the problem from the plaintiff.[105] Although the doctrine has never been raised in a reported foreign objects case in New Mexico,[106] it has been successfully asserted in such cases in other jurisdictions.[107]

Even though the doctrine of fraudulent concealment may be invoked in some foreign objects cases to mitigate the hardships of *Roybal*[108] and the statute of limitations, it is extremely doubtful that the doctrine would apply in all such cases.[109] To fully ameliorate the hardships arising from cases such as *Roybal*, a longer statute of limitations should be enacted[110] or the principle of discovery should be made applicable by statute[111] or judicial decision.[112] A longer statute of limitations would not make claims more speculative or uncertain, for leaving a foreign object in the patient's body is clearly negligent.[113] Perhaps the greater lapse of time would make it harder for the patient to link the negligence to the defendant physician. From the physician's point of view, a longer statute of limitation would make him more susceptible to the difficulties of lost evidence

103. 72 N.M. at 287, 383 P.2d at 252.

104. In *Roybal* the court emphasized the rule to the effect that since fradulent concealment was not alleged in the complaint, it could not be urged on appeal. *Id.*

105. Shartell & Plant, *supra* note 18, at 173.

106. The applicability of fraudulent concealment in such cases was brought to the supreme court's attention in *Roybal*, where the plaintiff sought to raise fraudulent concealment on appeal but the court held that his failure to allege it in the complaint barred him from raising it on appeal. 72 N.M. at 287, 383, P.2d at 252. The doctrine of fraudulent concealment was recently raised at the trial court level in State District Court for Bernalillo County in *Mantz* v. *Follingstad*, Cause No. A-42908. Interview with Robert D. Taichert, partner with Albuquerque firm of Rodey, Dickason, Sloan, Akin & Robb, May, 1972. The defense verdict was upheld on appeal. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

107. 1 Louisell & Williams, *supra* note 3, ¶13.11 at 379-82.

108. 72 N.M. at 287, 383 P.2d at 252. *See* text accompanying note 114 *infra*.

109. *See e.g.*, Draws v. Levin, 332 Mich. 447, 52 N.W.2d 180 (1952); Gray v. Wright, 142 W. Va. 490, 96 S.E.2d 671 (1957).

110. No state legislature has enacted a longer period of limitations for foreign objects cases. *But see* note 17 Vand. L. Rev. 1577 (1964).

111. Missouri has incorporated the principle of discovery into their statute of limitations for medical malpractice by stating that the cause of action must be brought within two years from the time that the wrong and damage resulting therefrom "is capable of ascertainment." Mo. Rev. Stat. §§516.100, 516.140 (1949). *See also* Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943).

112. For jurisdictions which have adopted the principle of discovery through adjudication, *see* cases cited notes 105 and 107 *supra*.

113. *See* Annot., 65 A.L.R. 1023, 1030 (1930).

and unavailable witnesses. Although application of the discovery rule would also present these problems it may be the best solution because the time lapse could be minimized by the requirement of reasonable diligence in discovery. Balancing the equities, the injustice of denying innocently ignorant malpractice victims judicial relief should override the policy of repose and security from stale claims.

CONCLUSION

While the subject matter and cases discussed in this article indicate that New Mexico is not as liberal as some jurisdictions in the law of medical malpractice, relaxing current requirements in the areas treated herein might saddle the profession with burdens it could not endure. For instance, if a national standard of care were adopted in New Mexico, it would eventually mean use of published guidelines or medical treatises instead of expert testimony. Courts would then determine a physician's negligence by deciding whether the physician met requirements set forth in the treatise. This manner of determination would closely resemble the "slot machine" theory of analytical jurisprudence.[114] This method would not allow for much flexibility in borderline cases,[115] would undermine the importance of the jury,[116] and would remove the human element from medical malpractice cases.[117] If the doctrine of *res ipsa loquitur* were extended to cover more medical malpractice cases, this also would place a heavy burden on physicians because the doctrine shifts the burden of

114. The "slot-machine" theory, more recently referred to as the "computer" theory, presupposes that a system of law can be so perfectly codified as to include every possible legal situation or controversy and the appropriate solution. With such a system, the jury would not be needed since the perfect code would theoretically handle every conceivable case. The code would be applied once the facts were ascertained and it would automatically render a decision just as money is inserted in a slot machine, a lever pulled and winning oranges or losing plums are shown, or like the computer, facts are fed into the computer and an answer is flashed or delivered to a slot.

John Austin, the founder of the analytical school of jurisprudence, has been criticized for his theory of law which in part advocates the adoption of a "slot-machine" theory of law based on a perfect code. 1 S. Simpson & J. Stone, Law and Society 656-57 (1948), quoting 1 Blackstone, Commentaries 69-72 (1st ed. 1765). *See also* 1 J. Stone, Lawyers and Lawyers' Reasoning 257, 287-88, 330 (1950); J. Stone, The Province and Function of the Law 70-73, 149-206 (1946). *Cf.* 1 R. Pound, Jurisprudence 71-81 (1959); 2 R. Pound Jurisprudence 148-49 (1959).

115. Medical malpractice cases can involve very close questions of negligence and therefore require a large degree of flexibility to avoid inequitable results.

116. The New Mexico Supreme Court has determined that expert testimony does not invade the province of the jury since the jurors can accept or reject such testimony at their own discretion after the expert has been subjected to both direct and cross examination. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55, 57 (1971). However, allowing the court to determine a doctor's negligence on the basis of a medical treatise would remove the decisional power from the jury and there would be no opportunity of cross examination.

117. The importance of the human element through the jury system has been emphasized extensively. *See e.g.*, Lombard, *Trial by Jury and Speedy Justice*, 28 Wash. & Lee L. Rev. 309, 311 (1971).

producing evidence to the physician.[118] If the requirements of informed consent were made so stringent that the physician were to be charged with informing a patient of every conceivable risk, no matter how remote, patients might be dissuaded from undergoing necessary treatments.[119] If the statute of limitations were lengthened to cover every possible hardship resulting from a foreign objects case, the time lapse from the initial negligence would be so great that most evidence would be lost and many witnesses dead.[120]

There are alternatives available other than a national standard of care,[121] stringent requirements of informed consent,[122] or a longer statute of limitations.[123] If law and medicine are to achieve an equitable interrelationship, some of these alternatives will have to be adopted. However, courts should be cautious not to overreact to the present inequities. The best current approach appears to be the screening panel system for expert tesimony,[124] which enables the legal and medical professions to attain necessary levels of cooperation. More solutions such as this must be devised if lawyers and doctors are to achieve mutual understanding and trust. Both professions should work toward that goal, being mindful that the fault lies not in the stars but in ourselves.[125]

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118. Renfro v. J. D. Coggins Co., 71 N.M. 310, 378 P.2d 130 (1963); Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N.M. 43, 278 P.2d 575 (1955).

119. 1 Louisell & Williams, *supra* note 3, at ¶22.02.

120. *See* note 17 Vand. L. Rev. 1577 (1964).

121. A regional standard of care has been suggested to allow for the differences in the practice of medicine in certain regions yet doctors from outside the community could still testify. *See* Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).

122. It has been suggested that a physician should be able to understate the possibilities of a bad result where the statistical risk is low and the patient is emotionally unstable or unduly apprehensive and still fulfill the requirements of informed consent. Louisell & Williams, *supra* note 3, at ¶22.02. *See also* Starnes v. Taylor, 272 N.C. 386, 158 S.E.2d 341 (1968); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

123. *See* text accompanying note 128 *supra*.

124. *See* note 3 N.M.L. Rev. 311 (1973).

125. The last portion of this statement is a paraphrasal of a famous Shakespearean line: "The fault, dear Brutus, is not in our stars, But in ourselves, ..." Shakespeare, Julius Caesar, act I, scene ii, line 134 (1598-1600).