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# Torts

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## INTRODUCTION

The most significant tort developments of this Survey year have been the appellate decisions which have adopted modern tort trends. With the *Claymore* decision, New Mexico became a comparative fault jurisdiction. New Mexico courts also recognized two new theories of tort liability during the survey period. The first is a right of recovery for wrongful death of a viable fetus. The second is a right of recovery for interference with prospective contractual relations. Though this review attempts to touch upon most of the developments which may be of practical interest, its emphasis is upon the treatment by New Mexico courts of these modern doctrines. Among these major developments, less attention has been devoted to the decision which adopted the comparative negligence rule for New Mexico than to the others because that decision has already been the focus of a great deal of discussion.

## I. MAJOR DEVELOPMENTS IN NEW MEXICO CASE LAW

### *A. Adoption of Comparative Negligence Rule*

The most significant decision of this survey year was that of the New Mexico Court of Appeals in *Claymore v. City of Albuquerque.*[1] In that case, the court abolished the doctrine of contributory negligence, and replaced it with the doctrine of comparative fault. Thus New Mexico became the thirty-sixth American jurisdiction to embrace the comparative fault system.[2]

In *Claymore,* two plaintiffs separately sued the city, and each moved to strike the city's defense of contributory negligence. The Bernalillo County District Court denied the motions, but stayed the

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1. 20 N.M. St. B. Bull. 75 (Ct. App., Jan. 15, 1981). For a more complete discussion of *Claymore* and the issues in its wake, *see* Note, *Judicial Adoption of Comparative Negligence in New Mexico,* 11 N.M. L. Rev. 487 (1981).

2. The other comparative fault jurisdictions are noted in the Court of Appeals' decision. 20 N.M. St. B. Bull. 75, 81-82 n. 4. Subsequent to *Claymore,* Illinois became the thirty-seventh jurisdiction to adopt the comparative negligence rule. *Alvis v. Ribar,* 85 Ill.2d 1, 421 N.E.2d 886 (1981). Of the jurisdictions which have embraced comparative negligence, 30 have done so within the last 12 years. *Id.* at _____, 421 N.E.2d at 892.

proceedings pending an interlocutory appeal to the New Mexico Supreme Court. The supreme court consolidated the cases and transferred them to the court of appeals. In its transfer order the supreme court instructed the court of appeals "to decide the issue 'notwithstanding prior decisions.' "[3]

The court of appeals, first, with a clean slate before it, rejected the contention of defendants and friends of the court that any adoption of comparative negligence should be by the legislature and not the courts.[4] The court, in abandoning contributory negligence, relied upon "the undeniable inequity and injustice" of the contributory negligence rule. That rule bars a plaintiff from any recovery[5] if he has contributed, however slightly, to his own injury. The court further relied on "the almost universal trend toward comparative negligence—comparative fault principles . . . the more humane, the more fundamentally just system of apportioning liability in accordance with respective fault."[6]

The court of appeals concluded that the "pure form" of comparative fault is best suited to New Mexico law. Under the "pure form," the plaintiff's percentage of contributory fault reduces his recovery of total damages in an amount equal to his degree of fault. The plaintiff is also exposed to liability to the defendant for injuries suffered in an amount equal to plaintiff's degree of fault.[7] For example, in an accident where plaintiff was 70% at fault for his injury, he could recover only 30% of his full loss from the defendant. If defendant had also been injured or incurred damage, defendant could recover for 70% of that damage, an amount equal to plaintiff's degree of fault.[8]

The choice between available versions of comparative negligence is only the first step in adapting the new doctrine to practical purposes. Clearly those common law doctrines which were created to ameliorate the harshness of contributory negligence have become obsolete. The court of appeals in *Claymore* thus properly announced the demise of the "last clear chance" rule and the distinction be-

3. 20 N.M. St. B. Bull. at 77.

4. 20 N.M. St. B. Bull. at 76–77. *See* note 1, *supra.*

5. 20 N.M. St. B. Bull. at 80.

6. *Id.*

7. 20 N.M. St. B. Bull. at 80. Contrast the "pure form" of comparative negligence with the so-called "modified" system, which allows a plaintiff to recover only if the plaintiff's percentage of negligence is less than that of defendant. Thus, a 49% negligent plaintiff could recover 51% of his total damages from a single defendant, whereas a 51% negligent plaintiff could recover nothing. The inequity of the modified system is compounded when multiple defendants are involved. *See* 20 N.M. St. B. Bull. at 80–81; Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

8. *See* W. Schwartz, Comparative Negligence, 1970.

tween ordinary and gross negligence in New Mexico.[9] Changes to be made in other areas are less clear.

The relationship between comparative fault claims and strict liability claims, for example, has yet to be clarified. Previously, the plaintiff's contributory negligence was *not* a defense to a strict liability action.[10] The *Claymore* court suggested that *comparative* negligence principles may apply to a strict liability case. If that is so, a jury will have to compare relative degrees of fault where fault had not previously been the basis of defendant's liability.[11]

Another issue left open by the *Claymore* decision is that of the effect of the new comparative negligence doctrine on multiple tortfeasors.[12] The court did not address other ambiguities in application of the "pure form" in complex cases. The court of appeals in *Claymore* declared its confidence in the ability of New Mexico trial courts to resolve these difficulties as they arise.[13]

The *Claymore* court also declared that the principles of comparative negligence should be applied retroactively. Comparative negligence thus became applicable to the trial of the *Claymore* cases, to all cases filed after the date of the decision, to cases awaiting trial, and to all cases pending appeal in which the issue was preserved.[14]

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9. 20 N.M. St. B. Bull. at 78. *Claymore* should also inspire the alteration of New Mexico law on other ameliorating doctrines, for example, the dead man rule in wrongful death actions. In Strickland v. Roosevelt County R.E.C., 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980), decedent was electrocuted on defendant's farm. The trial court directed a verdict for defendants on the ground of decedent's contributory negligence, based on the uncontradicted testimony of a farmer concerning decedent's failure to heed warnings. The court of appeals reversed in a lengthy opinion, but was unable to agree on the status in New Mexico of the rule that a trial court may not direct a verdict where decedent is the only person who can contradict a witness on a material issue. *See also,* Silva v. City of Albuquerque, 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980), a contributory negligence/summary judgment situation of the sort which will be much more difficult to resolve after Claymore.

10. Rudisaile v. Hawk Aviation, Inc., 92 N.M. 575, 592 P.2d 175 (1979).

11. 20 N.M. St. B. Bull. at 79. The court of appeals more or less assumes that "comparative negligence" would comfortably become "comparative causation" in strict liability cases, and points the curious observer to (not altogether satisfactory) resolutions of the dilemma in other jurisdictions. The court does not itself consider the vitality of the policies which predicate strict liability.

12. *See* note 7, *supra.*

13. 20 N.M. St. B. Bull. at 79.

14. 20 N.M. St. B. Bull. at 81. A typical case which is altered in mid-stream by *Claymore* is Sweenhart v. Co-Con, Inc. & Mt. States Constructors, 95 N.M. 773, 626 P.2d 310 (1981) *cert. denied,* 95 N.M. 669, 625 P.2d 1186 (1981), *cert. pending.* In that wrongful death action, decedent was killed when his car left the road on a curve in a construction zone. The defendants' evidence showed that the speed of decedent's vehicle was in excess of the construction speed limit and that the decedent had enough alcohol in his blood to impair his driving ability. The trial court granted defendant's motion for summary judgment on the ground of decedent's contributory negligence. The court of appeals reversed based on two circumstances. First, defendant had failed to introduce evidence on the issue of causation. Second, there was evidence which suggested that defendant's minimal markings would not have informed dece-

The New Mexico Supreme Court adopted the opinion of the court of appeals in toto,[15] without addition or clarification. The opinion of the court of appeals in *Claymore,* therefore, remains the sole source of guidance regarding the meaning and impact of the new doctrine.

### *B. Recovery for Wrongful Death of Viable Fetus*

During the survey year, the New Mexico courts leaped dramatically, if not altogether consciously, into the controversy surrounding the law of the unborn. In *Salazar v. St. Vincent Hospital,*[16] the court of appeals construed the state wrongful death statute to provide a right of recovery for the wrongful death of a viable fetus.

The plaintiff, as personal representative of the estate of the fetus, brought an action against the hospital and its doctors. She asserted that there had been negligent malpractice in attending to her vaginal bleeding, which allegedly caused the wrongful death of her thirty-week old fetus. The plaintiff claimed in her second amended complaint that the "fetus was aged more than thirty weeks of gestation, was a viable fetus, and was alive at the time" of the alleged negligence and malpractice.[17] The court framed the question before it, therefore, as "whether [the word] 'person,' as used in the statute, included a viable fetus."[18] Plaintiff appealed the trial court's dismissal of the wrongful death claims.

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dent he was in a construction zone. These circumstances raised a genuine issue of material fact as to the proximate cause of the accident. *Claymore* was decided, and *Sweenhart* was remanded, to be tried under the newly-adopted comparative negligence principles. 95 N.M. at 773, 626 P.2d at 313. *Sweenhart* is a case where a defendant's chances of avoiding liability altogether were unexpectedly and drastically reduced by the intervening *Claymore* decision.

15. 20 N.M. St. B. Bull. at 79.

16. 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980), *cert. quashed,* Sept. 30, 1980. *See also,* St. Vincent Hospital v. Salazar, 95 N.M. 147, 619 P.2d 823 (1980), a subsequent opinion in which the supreme court affirmed a decision of the court of appeals. The court of appeals held that the privilege established by the Medical Malpractice Act, N.M. Stat. Ann. §§41-5-1 to 41-5-28 (1978), does not preclude a plaintiff from deposing a panelist on the Medical Malpractice Commission in order to reconstruct the testimony of a named defendant who was later unable to recall the events in question. Salazar v. St. Vincent Hospital, 96 N.M. 409, 631 P.2d 315 (Ct. App. 1980). The supreme court held, however, that the court of appeals had improvidently reached the issue of the meaning of "health care provider" within the meaning of the Act because the holding on that issue was merely advisory. 95 N.M. 147, 150, 619 P.2d 823, 825.

17. 95 N.M. at 151, 619 P.2d at 827.

18. *Id.* at 152, 619 P.2d at 828. The statute states:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, *although such death shall have been caused under such circumstances as amount in law to a felony,* and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death

On appeal, the court looked to the intent of the legislature which enacted the original New Mexico wrongful death statute[19] and concluded that the legislature would not have considered a fetus to be protected at common law. An earlier statute, however, imposed criminal penalties for the wrongful killing of a "quick" fetus.[20] The court reasoned that the legislature would have known of this statutory protection of the fetus. The court decided that, because the killing of a fetus was a criminal offense in 1882, and further, that civil liability existed in 1882 for the commission of a criminal offense, the legislature that enacted the wrongful death statute meant to provide a remedy for the wrongful death of a fetus.[21] The court held that a viable fetus is a "person" within the meaning of the statute.

New Mexico thus became the twenty-sixth jurisdiction to recognize a right of recovery for the wrongful death of a fetus.[22] The court of appeals endorsed the modern trend, but did not articulate a clear or consistent body of law regarding the unborn. Crucial questions remain unanswered.

The challenge to the New Mexico Court of Appeals in *Salazar* can only be appreciated in light of the reasoning of the United States Supreme Court in *Roe v. Wade*.[23] In that famous opinion, the Court held that a woman's choice to have an abortion is constitutionally

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had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

N.M. Stat. Ann. §41-2-1 (1978) (emphasis in opinion, 95 N.M. 150, 151-152, 619 P.2d 826, 827-28).

19. 95 N.M. at 153, 619 P.2d at 829. The court wisely declined to rest its interpretation on the status of a fetus at common law, as there is confusion on that question. *Id.* at 152, 619 P.2d at 828. The court similarly declined to give "a contemporary meaning to the words of [the] statute," on the grounds that such an approach "would make a mockery of legislative intent." *Id.* at 152-153, 619 P.2d at 828-829.

20. Laws 1853-54, Act 28, Chapter III. The relevant sections stated:

> Sec. 10. The wilful killing of an unborn infant child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed murder in the third degree.
>
> Sec. 11. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, and shall have been advised by a physician to be necessary for such purpose, shall, in case the death of such child or such mother be thereby produced, be deemed guilty of murder in the third degree.

21. 95 N.M. at 154, 619 P.2d at 830.

22. The others are South Carolina, West Virginia, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, Rhode Island, Utah, Washington, Wisconsin, Tennessee, and the District of Columbia. *See* cases and statutes noted at Kader, *infra* n. 26, 644-645 n. 25. Thirteen jurisdictions have denied recovery. *Id.*

23. 410 U.S. 113 (1973).

protected, at least in the first and second trimesters of pregnancy. The state's interest in protecting potential life increases over time, however, and becomes substantial enough to override the woman's decision to have an abortion at approximately the time that the fetus becomes "viable," or capable of living outside the mother's womb. Thus, the state may restrict severely the availability of abortions in the third trimester of pregnancy, or, at about the time that experts told the court the average fetus would be capable of life outside the womb.[24]

*Roe v. Wade* casts a long shadow over the development of tort recoveries for fetal death. Though seldom discussed by state courts in tort cases,[25] *Roe* inevitably poses the question of how it can be said that a fetus *is* a person for state tort purposes[26] if a fetus is *not* a person within the meaning of the fourteenth amendment.[27] The *Salazar* court failed to grapple with the problems raised by *Roe,* and left difficult questions unanswered.

First is the broad question of the method of statutory interpretation used in *Salazar.* The court of appeals based its reasoning on the nineteenth century criminal statute which was, among other things, a *prohibition on abortion.*[28] As the court recognized,[29] that statute may have been impliedly repealed by a 1919 statute regulating abortions in New Mexico.[30] Further, even if not repealed, the criminal prohibition on abortions before the time of viability would have been rendered unconstitutional by *Roe v. Wade.* The *Salazar* construction of the present wrongful death statute, therefore, depends upon a defunct statute which the legislature could not now enact. The use of a repealed or unconstitutional statute to discern current legislative intent seems questionable, especially with regard to such a

24. *Id.* at 163. The Court states that "in the light of present medical knowledge," viability occurs approximately at the end of the second trimester of pregnancy, or at the end of 24-28 weeks. *Id.*

25. The New Mexico Court of Appeals in *Salazar* mentions Roe v. Wade only three times in passing, always in reference to the United States Supreme Court's treatment of the history of the law of the unborn. 95 N.M. 150, 152, 153, 619 P.2d 826, 828, 829 (Ct. App. 1980).

26. Three states have denied recovery on the ground that a fetus is not a person, citing Roe v. Wade. Justus v. Atchison, 19 Cal. 3d 564, 571, 565 P.2d 122, 126, 139 Cal. Rptr. 97, 101 (1977); Hamby v. McDaniel, 559 S.W.2d 774, 777 (Tenn. 1977); State ex rel. Hardin v. Sanders, 538 S.W.2d 336, 338 (Mo. en banc 1976). For an excellent discussion of all of the implications of Roe v. Wade in this context, *see* Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade,* 45 Mo. L. Rev. 639 (1980).

27. 410 U.S. 113, at 158.

28. *See* Section 11 of the statute quoted in note 20, *supra.*

29. 95 N.M. 150, 153, 619 P.2d 826, 829.

30. N.M. Laws Ch. 4, § 2 (1919).

contemporary issue.[31] The court avoided the real question by this method of statutory construction. The New Mexico court should squarely face the question of the legal status of an unborn fetus. *Salazar,* although indirectly, answers this question as to a viable fetus, by holding that there can be wrongful death recovery.

The specific question left open by the *Salazar* decision is whether there can be recovery for the wrongful death of a *nonviable* fetus. The court, in limiting its reasoning to viable fetuses, may be indicating its concurrence with those jurisdictions which expressly preclude recovery for the death of a nonviable fetus.[32] The rationale of the court of appeals would not necessarily extend to recovery for death occurring any time after conception, because the old statute on which the court relies provides criminal penalties only for the killing of a "quick child."[33] The viability/nonviability distinction, however, may be meaningless in light of two circumstances. First, medical science is constantly increasing the fetus' chance to live outside the womb, so that the 24–28 week rule of thumb for viability established by the Supreme Court in 1973 may become 18–20 weeks in ten years. Second, the United States Supreme Court has held that viability must be determined on a case-by-case basis,[34] so that it is most inconvenient as a legal standard.

The more important aspect of the question of the rights of the nonviable fetus is whether viability is a relevant criterion at all. The purpose of the wrongful death statute is to compensate the living. That is, recoveries for wrongful death of the unborn are predicated upon the notion that the loss to the plaintiff is not dependent upon a live birth. As the Washington Supreme Court put it, "Clearly, a parent's bereavement does not depend upon whether or not the child

31. A court may rely on an earlier repealed statute in construing a contemporary statute on the same subject. See 73 Am. Jur. 2d *Statutes* § 192 (1974) and cases cited therein. It is an unanswered question, however, whether a court may rely on an earlier repealed statute in a situation where the statutes are not addressed to the same specific issue or where the earlier statute, if currently in effect, would be unconstitutuional.

32. *See e.g.,* Panagopoulous v. Martin, 295 F. Supp. 220, 226 (S.D. W. Va. 1969); Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975); Chrisafogeorgis v. Brandenberg, 55 Ill.2d 368, 304 N.E.2d 88 (1973); Gorke v. LeClerc, 23 Conn. Sup. 256, 181 A.2d 448 (Super. Ct. 1962).

33. *See* Section 11 of statute quoted in note 20, *supra.* However, "quickening" and "viability" cannot be equated, since the former term refers to any movement within the womb, an event which occurs before the fetus would be capable of living outside the womb. This is an inconsistency the New Mexico courts may have to resolve in the future.

34. *See* Colautti v. Franklin, 439 U.S. 379 (1979) (a generalization as to viability may not constitutionally be incorporated into a state abortion law.)

survives to full term."[35] The question then arises, as to why the wrongful death statute should be applied differently depending on whether a 24- or a 22-week old fetus is involved. According to the Rhode Island Supreme Court:

> If one proffers allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve the same purpose, is a veritable *non sequitor.*[36]

The abortion controversy makes the law of the unborn a most difficult area. The New Mexico Court of Appeals did not squarely face the relation of abortion to the wrongful death of a fetus in *Salazar.* Nonetheless, the court implicated abortion by relying on an outdated abortion statute and by referring to the viability/nonviability distinction which predicated the United States Supreme Court's landmark abortion decision. When the question arises, and it surely will, of recovery in New Mexico for the wrongful death of a nonviable fetus, the courts will be forced to consider the "personhood" of that fetus.

*Roe v. Wade* seems to, upon cursory inspection, provide a convenient basis for denying tort recovery for the death of a nonviable fetus.[37] The better reasoned approach, however, should recognize that "personhood" for purposes of the wrongful death statute and for purposes of the fourteenth amendment are two distinct things, especially in light of the interests involved. The wrongful death statute really protects the loss of survivors. That loss would be no less for a nonviable fetus than for a viable one. Thus, the state always has an interest in protecting the fetus from wrongful interference. The 1973 abortion decision protects a woman's right to privacy. That right guarantees her decision to terminate a pregnancy, *at*

35. Moen v. Hanson, 85 Wash. 2d 597, 598, 537 P.2d 266, 267 (Wash. en banc 1975) (recovery for death of viable fetus; issue on nonviability not presented).

36. Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976) (plurality opinion).

37. *See e.g.,* Toth v. Goree, 65 Mich. App. 296, 303-04, 237 N.W. 2d 297, 301 (1975):

> If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at the same state. There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.

*least up until the time* of viability, when the state's interest in protecting potential life grows to outweigh the woman's interest.[38] The interests implicated in abortion are therefore functions of time; *those implicated in wrongful death are not.*[39]

### C. *Interference with Prospective Contractual Regulations*

Protection in tort for interference with business relationships has been called " '[o]ne of the most fluid and rapidly growing tort theories,' comparable to products liability, and promising to become the predominant remedy for a multitude of business wrongs."[40] During the survey year the New Mexico Court of Appeals paved the way to extend protection against business wrongs in this jurisdiction. In *M & M Rental Tools, Inc. v. Milchem, Inc.*,[41] the court of appeals, while upholding the dismissal of a case imperfectly brought on a theory of interference with prospective contractual relations, went out of its way to recognize this cause of action. Previously, protection had been available only for tortious interference with an existing contractual relation.[42]

In *M & M Rental Tools,* a competitor of plaintiff's in the rental of centrifugal pumps called plaintiff's offices in order to locate an available pump for a customer. Plaintiff's employee, who answered the phone, did not understand the inquiry. He handed the phone to Meyers, who was a former employee of plaintiff who happened to be on the premises. Meyers attempted to locate a pump on plaintiff's premises. Then another former employee of plaintiff's who also happened to be on the premises, Briggs, learned who was calling. Briggs said to Meyers, "Let me talk to him." Briggs was working for defendant, another competitor of plaintiff. While Meyers was attempting to find a pump in plaintiff's stock, Briggs and the caller agreed that the caller would get the pump from defendant. Plaintiff

38. 410 U.S. 113 at 154.

39. Indeed, one commentator has argued that awards for wrongful prenatal death actually vindicate a woman's right to privacy in the pregnancy context. If she has a constitutional right to determine the outcome of her pregnancy, the right should encompass the *continuation* of the pregnancy free from the interference of the state or others. Kader, note 26, *supra,* at 664.

40. Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 205, 582 P.2d 1365, 1368 (1978) quoting Estes, *Expanding Horizons in the Law of Torts—Tortious Interference,* 23 Drake L. Rev. 341, 363 (1974). Though the area of business torts has burgeoned only in recent years, such claims have an ancient lineage. *See* Dobbs, *Tortious Interference with Contractual Relationships,* 34 Ark. L. Rev. 335, 338-42 (1980) (hereinafter "Dobbs").

41. 94 N.M. 449, 612 P.2d 241 (Ct. App. 1980).

42. Shriners Hosp. for Crippled Children v. Kirby Cattle Co., 89 N.M. 169, 548 P.2d 449 (1976); Williams v. Ashcraft, 72 N.M. 120, 381 P.2d 55 (1963); Wolf v. Perry, 65 N.M. 457, 339 P.2d 679 (1959); Acme Cigarette Services, Inc. v. Gallegos, 91 N.M. 577, 577 P.2d 885 (Ct. App. 1978); Bynum v. Bynum, 87 N.M. 195, 531 P.2d 618 (Ct. App. 1975).

sued, claiming that the defendant, through Briggs, tortiously interfered with the rental agreement which would otherwise have been struck with plaintiff. The trial court granted defendant's motion for dismissal at the close of plaintiff's case-in-chief.[43]

The court of appeals affirmed the decision of the trial court on the ground that plaintiff had not made his case. The court expressly adopted the cause of action, however, and discussed at length the elements of the new tort. The court also adopted the description of the tort stated in *Restatement of Torts (Second),*[44] which makes liability depend on the impropriety of the defendant's interference. In order to recover, a plaintiff such as that in *M & M Rental Tools* would have to demonstrate that the defendants had "either an improper motive (solely to harm plaintiff), or an improper means."[45] Plaintiff in *M & M Rental* failed to prove improper motive because Briggs' motive was not solely to harm plaintiff: "Briggs wanted to rent a pump, and did so."[46] Nor did plaintiff demonstrate improper means, because the parties wre competitors: " '[I]n the absence of prohibition by statute, illegitimate means, or some other unlawful element,' a defendant may seek to increase his business without incurring liability."[47]

The court compared the current *Restatement* view which it adopted to that expressed in the first *Restatement of Torts.* The first *Restatement* described both interference with existing contract and interference with a prospective contract in terms of interference "without a privilege to do so."[48] Some courts have interpreted the

43. 94 N.M. at 451, 612 P.2d at 243.

44. Intentional Interference with Prospective Contractual Relation.

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Restatement of Torts 2d § 766B (1979).

45. 94 N.M. at 454, 612 P.2d at 246.

46. *Id.* The court's indication that the defendant's *sole* motive must be to harm the plaintiff flatly contradicts the *Restatement* section which the court purports to adopt. According to the *Restatement,* "[t]he desire to interfere with the other's contractual relations need not, however, be the sole motive. If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances." Restatement of Torts 2d § 767, Comment d (1979). At least one court has expressly embraced a "dominant motive" theory. Alyeska Pipeline Serv. Co. V. Aurora Air Serv. Inc., 604 P.2d 1090 (Alaska 1979). *See* Dobbs, *supra* note 40, at 349-50.

47. *Id.* quoting Prosser, *Law of Torts* § 130 (4th ed. 1971).

48. Restatement of Torts § 766 (1939).

older definition to mean that, upon a showing by plaintiff of intentional interference and resulting damage, the burden shifts to defendant to demonstrate privilege as an affirmative defense.[49] The authors of the second *Restatement* declined to state whether the new definition would have the effect of obligating a plaintiff to prove the impropriety of the interference in the prima facie case.[50] A number of courts, however, have apparently taken the position that the plaintiff must now prove impropriety.[51] New Mexico has joined these jurisdictions. The court of appeals stated that the plaintiff in an interference with business relationships case has the burden of proving that the defendant's interference was improper.[52]

The court of appeals' decision did not, however, clarify the relationship between impropriety and privilege. The court stated that, until the plaintiff demonstrates impropriety, no issue of privilege arises. When impropriety has been shown, the defendant has the burden of proving any privilege relied on. The evidence of impropriety presented by plaintiff will then bear on the applicability of the privilege.[53]

It would seem that such an allocation of burden somewhat wasteful, because the proof of impropriety should itself be a negation of privilege. That is, a defendant may be privileged, if he is a competitor. If he interferes with another's business in order to improve his own, however, the asserted privilege will not apply when the interference was wrongfully motivated or accomplished.[54] Impropriety will not in all cases be coextensive with lack of privilege.

Of course, the uncertainty inherent in the impropriety standard may ultimately be responsible for the imbroglio with regard to

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49. *See e.g.*, Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318, 9 A.L.R.2d 223 (1948).

50. Restatement of Torts 2d, Introductory Note to Chapter 37 and §767, Comment K (1979).

51. Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365 (1978); Alvord and Swift v. Stewart M. Muller Const. Co., 46 N.Y.2d 276, 385 N.E.2d 1238 (1978) (no discussion of the point; Breitel, J., seems to have put the burden on the plaintiff); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978); Lake Gateway Motor Inn Inc. v. Matt's Sunshine Gift Shops, Inc. 361 So.2d 769 (Fla. Dist. Ct. App. 1978) (no discussion on point, court appears to put the burden on the plaintiff).

52. 94 N.M. at 455, 612 P.2d at 247.

53. *Id.*

54. As one commentator has pointed out, the definition from the second *Restatement* may amount to "punishment for mental states," that is, imposing liability where the conduct is itself privileged or even socially desirable, but the actor's intentions are not sufficiently pure. Dobbs, note 40, *supra,* at 347. Some cases may impose liability where there is no "wrong" which is otherwise cognizable by the common law, such as threat, violence, abuse of confidence, undue influence, or misuse of economic power. *Id.* at 343. The *Restatement* takes the view that "[a] motive to injure another or to vent one's ill will on him serves no socially useful purpose." Restatement of Torts 2d §767, Comment d (1979).

burden of proof. It is difficult to know which motive or means will be deemed to be improper.

The indefinite contours of the standard of liability lead necessarily, perhaps, to disagreements about whether any given conduct or motive constitutes impropriety. In *M & M Rentals,* Judge Sutin dissented on the ground that the conduct complained of should be considered wrongful. Judge Sutin would have New Mexico follow those jurisdictions[55] which have relied upon "standards of business morality and care," "the rules of the game," or "contemporary business standards" in determining impropriety.[56] "The laws of competition in business are harsh enough at best. . . . To sanction this conduct leads to 'outrage and indignity,' violence, insult and affront. M & M should not be required to post signs that state 'Former Employees Engaged In Competitive Business—Stay Off This Property.' "[57]

## II. OTHER NOTABLE DEVELOPMENTS

### *A. Products Liability: Adequacy of Warnings of Toxic Drugs*

In *Richards v. The Upjohn Co.,*[58] the New Mexico Court of Appeals addressed the circumstances which will give rise to liability of a drug manufacturer for failure to give adequate warning of a drug's toxic propensities. The court held that the manufacturer was liable where his warning went no farther than a changed entry in the *Physicians' Desk Reference.*

The drug neomycin sulfate was known to be toxic to the nerve controlling hearing, and could cause deafness. The manufacturer published a warning to that effect in the 1971 *Physicians' Desk Reference* (PDR) and in the package inserts of the drug. The 1971

55. 94 N.M. at 456-57, 612 P.2d at 248-49.

56. *Id.* at 457, 612 P.2d at 249.

57. *Id.* at 457-58, 612 P.2d at 249-50. The disagreement on the New Mexico Court of Appeals is a classic example of what one commentator has identified as the continuing clash in American private law opinions between the ideals of individualism and altruism. Kennedy, *Form and Substance in Private Law Adjudication,* 89 Harv. L. Rev. 1685 (1976). The essence of individualism, according to Kennedy, is "the making of a sharp distinction between one's interests and those of others, combined with a belief that a preference in conduct for one's own interests is legitimate. . . ." *Id.* at 1713. "The form of conduct associated with individualism is self reliance. . . . It means accepting that [others] will neither share their gains nor one's own losses." *Id.* Thus, the court of appeals in an individualist mode may excuse the conduct complained of, and be very much within the mainstream of American legal rhetoric. *See id.* at 1718-1719. Judge Sutin, on the other hand, might be said to have been bothered by "the moral problem presented by the law's failure to interfere with unsavory instances of individualism." *Id.* at 1716. The more protective standards which Judge Sutin endorses tend toward an altruistic ideal, according to which "one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful." *Id.* at 1717.

58. 95 N.M. 675, 625 P.2d. 1192 (Ct. App. 1980), *cert. denied,* May 22, 1980.

PDR stated elsewhere in the volume that the drug could be used for irrigating wounds. After 1971, the manufacturer withdrew its recommendation for any uses of the drug other than intramuscular ones. The 1972 and 1973 PDR's indicated that the drug was for intramuscular use only. The drug had been on the market and used topically for many years prior to 1971.

In 1973, doctors at an Albuquerque hospital operated upon a gunshot wound in plaintiff's leg. Following surgery, the wound was irrigated with a solution containing neomycin sulfate. Subsequent to the irrigation, plaintiff suffered permanent loss of hearing in both ears.[59]

The hospital and the doctors settled the negligence claims against them. The plaintiff had also sued the drug manufacturer on theories of breach of warranty, negligent misrepresentation, and strict products liability. The trial court granted the manufacturer's summary judgment motion, and plaintiff appealed.

The court of appeals reversed, holding that the plaintiff had introduced evidence to create genuine issues of material fact regarding whether the drug caused the deafness, whether the manufacturer's warnings about the drug were adequate, and whether the doctor's decision to use the drug as an irrigating solution was a foreseeable risk rather than an independent intervening cause which would relieve the manufacturer of liability.

The court of appeals' decision in *Richards* comports with general tort law and New Mexico precedent. In a strict products liability case, causation may be established by circumstantial evidence.[60] In *Richards,* it was undisputed that the drug could cause deafness. Additionally, plaintiff presented evidence of the rapid rate of absorption of solutions applied to irrigated wounds, and of the excellence of his hearing prior to the 1973 treatment. This circumstantial evidence was held to be enough to raise the issue of actual cause.[61]

The court held that the plaintiff had presented evidence of inadequate warning. In doing so, the court relied on its own standards concerning the adequacy of warnings about dangerous drugs promulgated in *First National Bank in Albuquerque v. Nor-Am Agricultural Products, Inc.*[62] Of the five standards established in *Nor-*

59. 95 N.M. at 677-81, 625 P.2d at 1194-95. The drug in question in *Richards,* like many other ethical drugs, would fall under the *Restatement* definition of "Unavoidably Unsafe Products." Restatement of Torts 2d § 402A, comment K (1965).

60. *Id.* at 681, 625 P.2d at 1195.

61. *Id.*

62. 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975).

*Am,*[63] the most significant for the *Richards* case was the last, the adequacy of the means to convey the warnings. The 1972 and 1973 PDR's and the package inserts excluded the recommendation of topical use of the drug. The court decided that the fact that the drug had been on the market for over ten years before the recommendation was withdrawn presented a question of fact for the jury as to the effectiveness of the manufacturer's communication to the physicians of the danger of topical use.[64]

The issue of adequacy of warning is closely related to the issue of the doctor's responsibility to keep abreast of changes in information about a drug. The court rejected the argument that the doctor's unawareness of the danger was as a matter of law an independent intervening cause of the injury. The court stated that the issue was the foreseeability of the doctor's actions. In *Richards* the doctor testified that it is not standard medical practice to reread the PDR every time a drug is administered, especially when the drug has been on the market for some time. Thus the doctor's failure to be aware of the dangers from using the drug for irrigation may have been foreseeable by the manufacturer, and therefore not an independent intervening cause which would relieve the manufacturer of liability.[65]

The *Richards* case did not answer the difficult question of how the manufacturer could have given adequate warning. This situation presents the manufacturer with the difficult problem of how to impart needed information to physicians. The *Richards* court did not indicate what means of warning would be adequate. In *Richards* itself, the only change in the PDR information and in the package insert over the course of a decade was a deletion of the recommendation of the drug for topical use and irrigation. This was clearly not adequate warning. However, the doctor's testimony that a physician would not likely reread that information anyway, indicates that even an affirmative warning regarding topical use and irrigation would be inadequate. The only guidance on this question that the *Richards*

63. 1. The warning must adequately indicate the scope of the danger.
2. The warning must reasonably communicate the extent or seriousness of the harm that could result from misuse of the drug.
3. The physical aspects of the warning must be adequate to alert a reasonably prudent person to the danger.
4. A simple directive warning may be inadequate when it fails to indicate the consequences that might follow from failure to follow it.
5. The means to convey the warning must be adequate.
88 N.M. at 83-84, 537 P.2d at 691-92.

64. 95 N.M. at 682, 625 P.2d at 1196.

65. *Id.* at 682, 683, 625 P.2d at 1196-97.

court supplied must be inferred from precedent. In one case relied upon by the court, it was suggested that "[w]here the doctor is innundated with the literature and product cards of the various drug manufacturers," the most effective means of communication regarding changes in information about a drug would be oral communication by "detail men," manufacturers' representatives who visit doctors at regular intervals.[66] This method may be the surest way, after *Richards,* for the manufacturer to avoid strict tort liability.

### *B. Construction of the Tort Claims Act*

In the Survey year, New Mexico courts again devoted a great deal of attention to the 1970 Tort Claims Act.[67] The major decisions[68] involved the constitutionality of the statute and the scope of its categories which allow for the imposition of liability on official entities.

#### 1. Constitutionality

The New Mexico Tort Claims Act provides sovereign and govern-

66. Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (D.S.D. 1967), *aff'd* Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969).

67. N.M. Stat. Ann. §§41-4-1 to -25 (1978).

68. There were other Survey year decisions which are not addressed in this article. In Miera v. Waltemeyer, 95 N.M. 305, 621 P.2d 522 (Ct. App. 1980), the court of appeals held that a city may be liable for the malicious, fraudulent, or unjustified act of a law enforcement officer, even though the officer himself may also be liable. In Sugerman v. City of Las Cruces, Dona Ana County, and Memorial General Hospital, 95 N.M. 706, 625 P.2d 1223 (1980), the court held that settlement with a public employee does not bar a lawsuit against the public employers under N.M. Stat. Ann. §41-4-17(B) (1978), where settlement was with one not liable under the Tort Claims Act and not authorized to settle a claim brought under the Tort Claims Act. Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 (Ct. Ap. 1980), construed a notice provision of the Act. The court of appeals held first that N.M. Stat. Ann. §41-4-16 (1978), requiring notice within ninety days of the occurrence giving rise to the claim to the mayor of an intention to sue a city, is satisfied by actual notice within 90 days to the city's insurer. Second, the court held that notice pursuant to that section need not be given to an employee being sued in the same proceedings.

Finally, the legislature in its last session enacted two statutes which establish procedures relevant to the Tort Claims Act. 1981 N.M. Laws ch. 117, N.M. Stat. Ann. §41-4-16.1 (Cum. Supp. 1981) requires that the clerk of the district court give notice, upon the filing of any action for damages sustained while imprisoned in a state corrections facility, to the corrections and criminal rehabilitation department. This department must forward a copy of the notice to the *victim* of the crime for which the plaintiff was imprisoned. If the lawsuit is filed in federal court, the plaintiff or his representatives must give notice to the department.

1981 N.M. Laws ch. 267, N.M. Stat. Ann. §41-4-4 (Cum. Supp. 1981) states that a governmental entity shall provide a defense and shall pay any settlement or judgment entered for, any of its employees who are personally sued for wrongful acts committed while acting within the scope of duty. However, the governmental entity may recover from the employee any amount expended for defense, settlement, or satisfaction of judgment if the employee acted maliciously.

mental immunity with certain exceptions.[69] This statutory scheme causes victims of wrongful actions of public officials and employees to be treated differently (and much more harshly) than victims of wrongful actions of private entities. The New Mexico Supreme Court has not yet reached the question of whether this disparity of treatment offends the state[70] and federal[71] guarantees of equal protection of the laws. The court of appeals, however, has affirmed its earlier decision, and held that the disparate treatment is constitutional. *Garcia v. Albuquerque Public Schools Bd. of Education*[72] was an action brought against a teacher who allegedly struck a 12-year old student.[73] The trial court dismissed on the ground that the Tort Claims Act immunized the teacher from suit. The plaintiffs appealed, claiming that the Act "denies injured parties equal protection of the law since only those parties may recover damages who were injured by the negligence of state and public employees performing their duties in any of eight enumerated areas of governmental activity."[74]

The court of appeals rejected the claim, concluding that the discrimination created by partial immunity is rationally related to three legitimate governmental objectives: protecting the public treasuries, allowing governmental functions to proceed without inhibition, and allowing financially unprofitable operations to continue.[75] On the same basis, the court concluded that the Act may constitutionally distinguish between malicious and negligent torts.[76]

Judge Walters disagreed.[77] She could discern no rational bases for the inclusion of those particular categories and the exclusion of all others, especially in light of the legislative declaration within the Act, which states that "[l]iability for acts or omissions under the

69. §§41-4-1 to 41-4-25 N.M. Stat. Ann. (1978). In response to the supreme court decision abolishing sovereign immunity in New Mexico, Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975), the legislature created the Tort Claims Act in 1976. The Act generally reinstates sovereign immunity, §41-4-4, but then provides eight detailed categories of exceptions to immunity, §§41-4-5 to 41-4-12 N.M. Stat. Ann. (1978).

70. N.M. Const., art II, §§4 and 18.

71. U.S. Const. Amend. XIV.

72. 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), *cert. quashed,* 95 N.M. 426, 622 P.2d 1046 (1981).

73. The court of appeals first rejected an equal protection claim to sovereign immunity in Dairyland Ins. Co. v. Board of County Comm'rs, 88 N.M. 180, 538 P.2d 1202 (1975), construing the predecessor act. 1953 Comp. §§5-6-18 to 5-6-22 (Repl. Vol. 2, pt. 1, 1974). *See generally* Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico,* 6 N.M. L. Rev. 249, 250 n. 10 (1976).

74. *Id.* at 393, 622 P.2d at 701.

75. *Id.* at 394, 622 P.2d at 702.

76. *Id.* at 395, 622 P.2d at 703.

77. *Id.* at 397, 622 P.2d at 705 (Walters, J., dissenting).

Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty."[78] As the Judge colorfully stated:

> The Act does not aim at *responsibility* for misconduct; in all but eight areas it excuses [the wrongdoer] from wrongdoing. The 'reasonably prudent person's' standard of care, and the 'concepts of duty,' are reduced to nothing more than sanctimonious mummings.[79]

2. Recent Interpretations

In 1976 Professor Kovnat wrote of the Tort Claims Act, "[w]hile eliminating the uncertainties and inequities of judicially-created categories, the legislature has produced new artificial categories, thus inviting litigation prolonged by argument about whether an activity is included within the categories."[80] This statement, written half a decade ago, characterizes well this Survey year's major substantive developments under the Tort Claims Act. The scope of the legislative categories has been the subject of several appellate decisions. The New Mexico courts have faithfully pursued the examples set last year by the state supreme court[81] when it found liability in spite of the narrow provisions of the Act.

In *Fireman's Fund Insurance Co. v. Tucker,*[82] damages occurred

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78. N.M. Stat. Ann. §41-4-2(B) (1978).

79. 95 N.M. at 397, 622 P.2d at 705 (Walters, J., dissenting).

80. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico,* 6 N.M. L. Rev. 249, 268 (1976). The example Professor Kovnat employs, *id.* at n. 94, is the section of the act regarding liability for highways and streets, N.M. Stat. Ann. §41-4-11 (1978). This section is the subject of the cases examined in this part of the article. N.M. Stat. Ann. §41-4-11 states:

A. The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the maintenance of or for the existence of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

B. The liability for which immunity has been waived pursuant to Subsection A of this section shall not include liability for damages caused by:

1. a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or

2. the failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

81. *See* City of Albuquerque v. Redding, 93 N.M. 757, 605 P.2d 1156 (1980) (drain grate in curb lane of street not a "defect in plan or design of . . . street," thus city not immune from liability under §41-4-11(B); because primary purpose of drain grate is to afford disposal of waste, injuries arising from negligent provision of waste disposal would be actionable under §41-4-8(A)); Holiday Management Co. v. City of Santa Fe, 94 N.M. 368, 610 P.2d 1197 (1980) (damage resulting from backed up sewer does not constitute a failure to provide "an adequate supply" of sewer service, therefore city may not rely on exclusion from liability of §41-4-4(A)(1).

82. 95 N.M. 56, 618 P.2d 894 (Ct. App. 1980).

when a tractor-trailer collided with cows on a public highway. The cows had gotten through fences which the Highway Department had a statutory duty to maintain.[83] The Highway Department claimed that the Tort Claims Act granted it immunity from liability for any breach of this duty. Section 41-4-1(A) of the Act waives immunity for negligent "maintenance of . . . any . . . highway," but, claimed the Department, a fence is not part of the highway. The court of appeals disagreed, applying the "functional analysis" employed by the supreme court in *City of Albuquerque v. Redding.*[84] The court found that the "primary purpose" of the highway fence is to keep the streets safe for the motoring public, rather than to keep trespassers off private land. The legislature must have intended, therefore, to include failure to maintain a fence pursuant to statutory duty within the exception to governmental immunity.[85]

Two cases construed that section of the statute which creates an exception to immunity for negligence "in the maintenance of or for the existence of any . . . highway," but then excepts from the exception, or reimposes immunity, for damages caused by "a defect in plan or design of any . . . highway."[86] Some guidance is necessary in order to determine the difference, if any, between "maintenance . . . or . . . existence," on one hand, and "plan or design," on the other. The past year's decisions failed to clarify the statute.

In *Rickerson v. State and City of Roswell,*[87] plaintiff's decedent was killed while crossing an intersection at which there was only a stop sign, and plaintiff claimed that the city and state had negligently failed to install traffic signals. Prior to the accident, the city had communicated to the Highway Department the need for signals at that intersection. Subsequent to the accident, the Department agreed to install "complete signalization and illumination."[88] Summary judgment was granted to the defendants, the city and state. On appeal, the defendants claimed that the accident fell within "dam-

83. N.M. Stat. Ann. §30-8-13 (1978) which reads in pertinent part:

B. . . . The state highway department shall:

(1) unless it makes a fact determination that no livestock can enter the highway from a portion left unfenced, construct, inspect regularly and maintain fences along all highways under its jurisdictions. . . .

84. 93 N.M. 757, 759, 605 P.2d 1156 (1980).

85. 95 N.M. at 59-60, 618 P.2d at 897-98.

86. N.M. Stat. Ann. §41-4-11 (1978) reproduced *supra* note 80. *See also,* O'Brien v. Middle Rio Grande Conservancy District, 94 N.M. 562, 613 P.2d 432 (Ct. App. 1980), holding that the negligent maintenance of a cable across a service road not intended for public use is actionable under N.M. Stat. Ann. §41-4-11 (1978).

87. 94 N.M. 473, 612 P.2d 703 (Ct. App.), *cert. denied* 94 N.M. 675, 615 P.2d 922 (1980).

88. 94 N.M. at 475, 612 P.2d at 705.

ages caused by . . . a defect in plan or design of any . . . highway," and thus that they were immune from liability under §41-4-11(B)(1).[89]

The court of appeals reversed the grant of summary judgment, without consensus on the difference between "maintenance" and "design." Judge Walters, purporting to rely on *City of Albuquerque v. Redding,*[90] stated that the governmental defendants could not rely on the "plan or design" provision, since there are "more specific statutes concerning maintenance on existence of traffic control equipment."[91] The more specific statutes are §41-4-6,[92] which imposes liability for negligent "operation or maintenance" of "equipment or furnishings," and §41-4-11(A),[93] which imposes liability for negligence regarding "the maintenance of or the existence of any . . . highway, roadway, street." Indeed, all of §41-4-11 is more specific than §41-4-6, because the former refers to highways and streets rather than more general "equipment or furnishings." Section 41-4-11(B) is the "defect" exception to the sovereign immunity exception. However, this section which Judge Walters said does *not* apply, is itself an exception to §41-4-11(A). Judge Walters seemed to say that §41-4-11(A) is more specific than its exception. This cannot be the case. Furthermore, the question cannot be decided on grounds of relative specificity.

Judge Sutin specially concurred, arguing that no defect was alleged with respect to the initial design of the intersection. Rather, the alleged negligence was with respect to a proposed "improvement" of "plan or design," which improvement *would* fall within the ambit of "maintenance of a street."[94] That is, the improvement falls within the straightforward exception to sovereign immunity and the state and city could be liable. Judge Hernandez dissented on the ground that "[t]he decision to install or not to install traffic controls or warning devices is a primary part of the plan or design of a high-

89. Reproduced note 80, *supra.*

90. 93 N.M. 757, 605 P.2d 1156 (1980).

91. 94 N.M. at 476, 612 P.2d at 706.

92. N.M. Stat. Ann. §41-4-6 states:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

93. Reproduced note 80, *supra.*

94. 94 N.M. 473, 479, 612 P.2d 703, 709 (Sutin, J., concurring).

way,"[95] and thus, the defendants were immune from liability under §41-4-11(B).

The second case which interpreted this part of the statute offers even more interpretative alternatives. In *Moore v. State*[96] the plaintiff and his motorcycle were forced off a roadway. Because there was no guardrail, plaintiff fell into a concrete arroyo. Similar to *Rickerson,* the city and state had a plan to provide the needed safety feature. The court of appeals reversed a summary judgment for defendants. The court stated that "plan or design," as used in §41-4-11(B), *anticipates* the building of a highway, whereas in *Moore* there was a highway *in existence* which was defective, within the meaning of §41-4-11(A). Plaintiff's claim was construed to be that the absence of guardrails was not a defect in design but a negligent omission by defendants.[97] Therefore, Judge Sutin concluded that the state could be liable. Judge Andrews also found that the state could be liable, but on yet another theory. She stated that "[i]f the guardrail was the subject of agreements, [between the city and state highway department], and if it, therefore, was anticipated in the design, a failure to install after an extended period would most probably be a maintenance issue."[98]

Between *Rickerson* and *Moore,* no less than five different ways of analyzing the issue were enunciated. No common statement from the court emerged during the Survey year defining the circumstances under which governments may rely on the "plan or design" provision in order to shield themselves from liability. In spite of this analytical uncertainty, however, the results indicate that the "plan or design" exception is practically meaningless.

The supreme court also gave a broad remedial reading to the Act in *Methola v. County of Eddy.*[99] *Methola* consolidated three cases which involved the alleged negligent failures of law enforcement officers[100] to protect jail inmates from physical abuse by other inmates. In all three cases, the plaintiffs prevailed at trial and the court of appeals reversed. The court of appeals' construction of §41-4-12 of the Act[101] provided relief only for "intentional, malicious and

95. *Id.* at 480, 612 P.2d at 710 (Hernandez, J., dissenting).

96. 95 N.M. 300, 621 P.2d 517 (Ct. App. 1980).

97. *Id.* at 301, P.2d at 518.

98. *Id.* at 302, 621 P.2d at 519.

99. 95 N.M. 329, 622 P.2d 234 (1980), *rehearing denied,* Jan. 30, 1981.

100. The court determined preliminarily that the Sheriff of Eddy County, his deputies, and the jailers employed at the Eddy and Bernalillo County jails were "law enforcement officers" within the meaning of N.M. Stat. Ann. §41-4-12, *infra.* 95 N.M. at 342, 622 P.2d at 237.

101. N.M. Stat. Ann. §41-4-12 states:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful

fraudulent" acts of officers. The supreme court reversed the court of appeals and held that the words "caused by" as used in §41-4-12, would also include those injuries merely negligently caused by officers.[102]

### C. *Liability of Employers to Employees of Independent Contractors*

In *Harmon v. Atlantic Richfield Co.*,[103] the court of appeals considered the issue of whether an employer has a duty to provide a safe working place to the employees of an independent contractor. Atlantic Richfield (ARCO) contracted with E.H. Oil Well Servicing Co. (E.H.) for the latter to perform certain tasks in an ARCO oil field. The contract required E.H. to inspect the premises for safety and to see to it that safety practices were followed at the site. ARCO had no authority under the contract to control the manner and method of E.H.'s work. The plaintiff, an E.H. employee, was injured while doing a task which was undertaken by E.H. pursuant to the contract. The plaintiff recovered workmen's compensation benefits from E.H. and filed a negligence suit against ARCO. The trial court granted ARCO's motion for summary judgment and the court of appeals affirmed in an opinion wherein the left hand took away what the right had given.

Initially, the court recognized as a matter of first impression that an employer has a duty to provide a safe working place to the employees of its independent contractor where the work the contractor was hired to perform is not inherently dangerous.[104] The court

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death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

102. 95 N.M. 329, 332-33, 622 P.2d 234, 237-38.

103. 95 N.M. 501, 623 P.2d 1015 (Ct. App. 1981), *cert. denied,* 95 N.M. 593, 624 P.2d 535 (1981). For a more detailed analysis of this case, *see* Note, *Harmon v. Atlantic Richfield Co.: The Duty of an Employer to Provide a Safe Place to Work for the Employee of an Independent Contractor,* 12 N.M. L. Rev. 559 (1982).

104. 95 at 504, 623 P.2d at 1018. The court has answered a question left open by New Mexico Electric Service Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976) (employer has no duty to provide a safe working place for the employees of an independent contractor when the work contracted for is inherently dangerous) and Fresquez v. Southwestern Industrial Contractors and Riggers, Inc., 89 N.M. 525, 554 P.2d 986 (Ct. App. 1976), *cert. denied,* 90 N.M. 8, 558 P.2d 620 (1976) (general contractor not liable for negligence of a subcontractor unless the general contractor has retained control over the premises or the works to be accomplished). The *Harmon* court makes it clear that an employer has a duty to provide a safe working place where the work contracted for is not dangerous, but that employer may contract away his control over the premises.

then held that the owner was not liable for the employee's injury because he had contracted away his liability. An employer may, after *Harmon,* avoid the duty to provide a safe working place with a clause in the contract that the independent contractor has the responsibility for safety. This is possible only if the employer exercises no control over the manner, method, or means by which the work is to be performed under the contract.[105] Thus, an injured employee's fortunes will depend on a contract to which he or she was not a party. Theoretically, *Harmon* seems inequitable in this respect. Practically, *Harmon* clauses are likely to become standard features in contracts executed in New Mexico.

### *D. Uniform Contribution Among Tortfeasors Act*

The decision of the court of appeals[106] respecting the proper apportionment of damages under the Uniform Contribution Among Tortfeasors Act[107] was reversed by the supreme court in *Aalco Manufacturing Co. v. City of Espanola.*[108] A child was injured when a volleyball stand in a city recreation facility fell on her foot. The stand was made by Aalco Manufacturing Co. and retailed by Tiano's Sporting Goods Store. A jury found the city liable under a negligence theory and the manufacturer and retailer liable under a strict products liability theory. The trial court assessed one-half of the damages against the city and assessed the other half jointly against the manufacturer and retailer. Thus, at trial, the manufacturer, an active tortfeasor, was ordered to indemnify the retailer, in accord with the equitable principle of contribution.

The city appealed the judgment, claiming that it should pay only one-third of the judgment because there were three tortfeasors. The court of appeals agreed.[109] The decision of the court of appeals, would have resulted in the payment by the manufacturer of two-thirds of the judgment. This result would thwart the equitable considerations which underlie the doctrine of contribution.

The New Mexico Supreme Court reversed the court of appeals and reinstated the judgment of the trial court. The decision of the supreme court is equitable and comports with the purposes of the UCATA.[110] The retailer was a proper defendant, in accord with the

105. 95 N.M. at 505, 623 P.2d at 1019.

106. Sanchez v. City of Espanola, 94 N.M. 676, 615 P.2d 993 (Ct. App. 1980).

107. N.M. Stat. Ann. §§41-3-1 to -8 (1978).

108. 95 N.M. 66, 618 P.2d 1230 (1980).

109. *See* Gilstrap, *Torts,* 11 N.M. L. Rev. 217, 226-27 (1980-81).

110. Annot., N.M. Stat. Ann. §41-3-1: "[The purpose of this act is to provide] for a proportionate allocation of the burden among tort-feasors who are liable;" citing Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

policy behind strict products liability which affords maximum protection to the consumer.[111] However, the retailer had not committed an active tort. Each of the active tortfeasors, the city and the manufacturer, should pay half the judgement.[112] The supreme court holding allows this result.

111. 95 N.M. 66, 67, 618 P.2d 1230, 1231.
112. *Id.* at 68, 618 P.2d at 1232.