Uniform Jury Instructions — Civil

PREFACE — CIVIL RULE

1-051. Instructions to juries.

A. **Type of instruction.** The trial judge shall instruct the jury in the language of the Uniform Jury Instructions on the applicable rules of law and leave to counsel the application of such rules to the facts according to their respective contentions.

B. **Duty to instruct.** The court shall instruct the jury regarding the law applicable to the facts in the cause unless such instructions be waived by the parties.

C. **Admonitions to jury on conduct.** After a jury has been sworn to try a case, but before opening statements or the presentation of any testimony the court must read the applicable portions of UJI 13-106 to the jury. The instruction or appropriate portions thereof may be repeated to the jury before any recess of the trial if in the discretion of the judge it is desirable to do so. At the close of the case when the jury is instructed UJI 13-106 shall not be reread to the jury but applicable portions thereof shall be included with other instructions sent to the jury room.

D. **Use.** Whenever New Mexico Uniform Jury Instructions Civil contains an instruction applicable in the case and the trial court determines that the jury should be instructed on the subject, the UJI Civil shall be used unless under the facts or circumstances of the particular case the published UJI Civil is erroneous or otherwise improper, and the trial court so finds and states of record its reasons.

E. **Certain instructions not to be given.** When in UJI Civil it is stated that no instructions should be given on any particular subject matter, such direction shall be followed unless under the facts or circumstances of the particular case an instruction on the subject should be given, and the trial court so finds and states of record its reason.

F. **Instruction by the court.** Whenever the court determines that the jury should be instructed on a subject, the instruction given on that subject shall be brief, impartial and free from hypothesized facts. If there is a UJI Civil on that subject, it shall be given.

G. **Preparation and request for instructions.** Any party may move the court to give instructions on any point of law arising in the cause. At any time before or during the trial, the court may direct counsel to prepare designated instructions. The attorneys for the parties shall confer in good faith prior to the settling of instructions by the court and shall prepare a single set of instructions upon which the parties agree. Such instructions as well as instructions tendered by the parties shall be in writing and shall consist of an original to be used by the court in instructing the jury, adequate copies for the parties, and one (1) copy for filing in the case on which the judge shall note "given" or "refused" as to each instruction requested. Copies of instructions tendered by the parties shall indicate who tendered them. All copies of instructions shall also contain a

notation "UJI Civil No. _____" or "Not in UJI Civil" as appropriate. (The instructions which go to the jury room shall contain no notations.)

H. **Instructions to be in writing; waiver; to be given before argument and to go to jury.** Unless waived, the instructions shall be in writing. Except where instructions, either written or oral, are waived, the judge in all cases shall charge the jury before the argument of counsel. Written instructions shall go to the jury room.

I. **Error in instructions; preservation.** For the preservation of any error in the charge, objection must be made to any instruction given, whether in UJI Civil or not; or, in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury. Reasonable opportunity shall be afforded counsel so to object or tender instructions.

J. **Review.** All instructions given to the jury or refused, whether UJI Civil or otherwise, are subject to review by appeal or writ of error when the matter is properly preserved and presented.

[As amended, effective January 1, 1987; August 27, 1999.]

THE CONCEPT OF JURY INSTRUCTIONS

The purpose of jury instructions is to communicate the issues and the law to the jury. Judges should read the instructions in a conversational manner, moderately in speed and distinctly in tone. The instructions should be accurate, unslanted and understandable through the use of common parlance. It is for the advocate in argument to apply the law to the facts in evidence. Many "pattern" instructions have been omitted from this publication, not because the point should not be made to the jury, but because it should be made to the jury by counsel rather than by the court. To effectuate this concept of instructing juries in the State of New Mexico, the supreme court adopted Civil Procedure Rule 1-051 as set forth above.

The philosophy behind these uniform jury instructions includes a general opposition to negative instructions, i.e., instructions which tell the jury not to do something, or which tell the jury what is not the law; a dislike of instructions which single out a particular item of evidence for comment, it being felt that this is a function of counsel in argument and not a function of the court; and a reluctance to recommend instructions which would be appropriate in exceptional cases only, or in a field of law which is undergoing rapid change, it being considered by the committee only fundamental that such instructions are best drafted in the context of a case in controversy subject to traditional appellate review.

In accordance with Rule 1-051, it is necessary that the trial court use the instructions contained in this pamphlet where appropriate and that it adopt the style and philosophy of this pamphlet where no applicable instruction is stated. It is well established, of course, that it is the advocate's job to prepare jury instructions and that a failure to do so

ordinarily forecloses one's ability to assign as error the court's refusal to give a particular instruction. Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487 (1970). This rule applies even where the instruction in question is one which the trial court would have been legally required to give had a request been made. Montoya v. Winchell, 69 N.M. 177, 364 P.2d 1041 (1961).

GENERAL HISTORY AND ACKNOWLEDGMENTS

Pursuant to the recommendations of the state bar at its 1961 annual meeting in Farmington, under the presidency of James T. Jennings, the supreme court appointed a committee in January of 1962 to study the feasibility of drafting and adopting basic jury instructions for required use in the district courts on a statewide basis.

The committee was originally constituted of district judges, law professors and trial lawyers. William R. Federici was the first chairman. Committee members who worked on the 1966 first edition included John S. Catron, Vern Countryman, George T. Hannett, Henry A. Kiker, Jr., Honorable D. A. Macpherson, Jr., Don G. McCormick (the founder of N.M. UJI-Civil), Charles D. Olmsted, Honorable George L. Reese, Jr., Joseph E. Roehl, Lynell Skarda, Lewis R. Sutin and Honorable Joe W. Wood. Mr. Roehl was chairman at the time of the publication of the West Publishing Co. edition in 1966 and of the Michie edition in 1978. Mr. Catron was the committee's first secretary and Mr. Skarda was the committee's secretary from 1963 to 1982. Mr. Hannett served as vice-chairman from 1962 to 1982.

The first meeting of the committee was held in February of 1962, and it has generally met monthly thereafter. The committee made a study of the objectives, mechanics and consequences of the work product of other states. Vern Countryman, dean of the school of law and a member of the committee until he resigned to take a position at Harvard University, compiled a thirty-six page detailed summary under appropriate headings of all New Mexico cases ruling on jury instructions. Judge Wood continued the compilation until UJI citations became available in Shepard's New Mexico Citations. Judge Sutin remained particularly supportive of the committee upon ascending to the bench.

The first major hurdle encountered dealt with the constitutional, statutory and inherent power of the Supreme Court of New Mexico to promulgate and adopt compulsory uniform jury instructions. The legal issues were briefed by committee stalwarts Judge George L. Reese, Jr., and Don G. McCormick, and were then orally presented to the supreme court which concluded that the court had proper authority to institute uniform jury instructions.

The committee sustained a severe loss in November of 1964 with the untimely death of Henry A. Kiker, Jr., who had been a faithful member and hard-working participant since the designation of the committee in January of 1962. To Mr. Kiker, a leader of the "plaintiff's bar", had been assigned most of the knotty problems involving instructions in the field of tort law and automobile accident liability in particular. The committee

appreciated the calm, deliberate thoroughness of Mr. Kiker, and the bench and bar of this state for years to come will be deeply indebted to his work which is incorporated in the published instructions.

In its formative stages the committee was greatly assisted by the generous cooperation of Justice Irwin S. Moise, Justice M. E. Noble, Justice David Chavez, Jr., Chief Justice J. C. Compton, who activated the committee, and Chief Justice David W. Carmody, who carried the work through to completion.

Committee members of the 1970's who worked on the 1980 second edition included Frank Andrews II, Juan C. Burciaga, Bruce Hall, George W. Hannett, Harold L. Hensley, Jr., Willard F. Kitts, Richard E. Ransom, Joseph E. Roehl, Lynell G. Skarda and Honorable Paul Snead.

Committee members of the 1980's who worked on the 1987 third edition included Bruce Hall, Kenneth L. Harrigan, Honorable Joe H. Galvan, Honorable Lorenzo F. Garcia, Richard E. Ransom, Maureen A. Sanders and Matias A. Zamora, with continued help until retirement from the committee by Messrs. Hensley, Roehl, Skarda and Snead. Mr. Ransom was chairman from 1982 until 1987. Additions to the committee in 1985 and 1986 included Dick A. Blenden, Gordon J. McCulloch, John B. Pound, Edward R. Ricco and J. Duke Thornton. The committee is grateful to UNM Law School Professor Mario E. Occhialino, Jr., for his research and drafting aid in the work on libel and slander.

The committee was reconstituted in 1987 after the publication of the 1987 third edition under the chairmanship of Richard E. Ransom. After his election as justice of the New Mexico Supreme Court Mr. Ransom continued on the committee for a period of time but was replaced as chairman by Bruce Hall. The reconstituted committee began work in 1987 with a membership of John Pound, Matias Zamora, Edward R. Ricco, Honorable Rebecca Sitterly, Dick A. Blenden, J. Duke Thornton, Gordon McCulloch, Honorable Joe H. Galvan and Honorable Richard E. Ransom. The committee concentrated on a revision of Chapters 8 and 17, Contracts and Uniform Commercial Law. UNM law professor Joseph Goldberg was principal draftsman of revised Chapter 8. Mr. Goldberg was appointed to the committee in 1990. The committee is grateful to Hugh W. Dangler, a UNM law school student and later practicing lawyer who ably assisted over several years on the Contracts chapter.

After completion of the Contracts chapter the committee took up work on insurance bad faith actions, now contained in Chapter 17. The work continued with other subjects which appear in the 1991 Replacement Pamphlet: family purpose doctrine, revision of Chapter 15, statutes and ordinances, infliction of emotional distress, prima facie tort and punitive damages. As this work continued the membership of the committee changed. James R. Toulouse and Stuart D. Shanor joined the committee in 1988. Carl J. Butkus, Patrick A. Casey and David P. Garcia joined the committee in 1989. As a result of reappointment and resignations, the committee in 1991 is composed of Bruce Hall,

chairman, Edward R. Ricco, Gordon J. McCulloch, Rebecca Sitterly, Honorable Joe H. Galvan, Stuart D. Shanor, Joseph Goldberg, Patrick A. Casey and David P. Garcia.

[Revised, effective November 1, 1991.]

HOW TO USE

It is intended that in preparing instructions for a particular case, they be personalized. In other words, reference should be made without hesitation throughout the instructions to the particular names of the individuals involved in the lawsuit and the time and place in question.

Frequently the user will find blanks that must be completed and at other places are words in brackets or parentheses which need to be adapted in accordance with the acts in each particular case.

Illustrative sets of instructions are also incorporated herein. It is suggested that the user thoughtfully review the examples given.

In these instructions the words "shall", "will" and "is to be" are intended as mandatory; "should" and "may" are permissive or directory.

Instructions to the jury should commence with a statement of the issues which the jury is to determine. (The trial judge is not to read the pleadings.) The jury should know at the outset of deliberation specifically the questions for its determination, and all other instructions serve only as a guide to such conclusion.

[As amended, effective November 1, 1991.]

CHAPTER 1
Instructions Before Trial

Introduction

In 1999, the New Mexico Supreme Court constituted the Committee of the Chief Justice for Improvement of Jury Service in New Mexico. The Committee submitted its final report in November of 2000. This report was adopted by the Supreme Court by Order dated August 5, 2001, directing the UJI Committee to consider the report's recommendations relating to preliminary jury instructions. The result is included in this chapter.

To properly perform its function, the jury needs information about the case and about the law at the outset of the trial, from time to time during the course of the trial, and before commencing its final deliberations. The preliminary instructions in this chapter

will provide the venire and the jury with a blueprint to make their experience more comprehensible.

These instructions are divided into two sections. Preliminary Instructions 13-101 NMRA through 13-108 NMRA are to be given to the entire jury venire prior to the beginning of voir dire. (The practice of calling the order of prospective jurors by the jury clerk, before or after entering open court, varies from court to court and is not addressed in these instructions.) Preliminary Instructions 13-109 NMRA through 13-119 NMRA are to be given to the impaneled jury.

The preliminary instructions contemplate that the jury receive some orientation to the substantive elements of the claim prior to the beginning of voir dire. A description of the parties' contentions and short explanation of significant legal terms should be included between preliminary instruction 13-103 NMRA, Scheduling, and 13-105 NMRA, the Oath to jurors on voir dire examination. Exemplars appear at the end of this chapter.

[As amended, effective January 1, 1987; September 1, 1991; March 1, 2005.]

13-101. Voir dire orientation statement.

Good [morning] [afternoon] ladies and gentlemen:

You have been summoned here as prospective jurors.

Jury service is an honored tradition. From its beginning our country has relied on citizens to apply their collective wisdom, experience, and fact-finding abilities to decide disputes under the law.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — The trial judge who has the time to study the case in advance of the jury selection can undoubtedly prepare an outline of remarks which may be more cogent and applicable to the particular case. However, if the trial court has not had time to prepare for the particular jury trial, then the use of the remarks hereinabove outlined will be found helpful.

ANNOTATIONS

Cross reference. — *See* UJI Criminal 14-101 NMRA for comparable instruction in criminal cases.

The March 1, 2005 amendment, deleted all of this instruction except the opening greeting to the jury and added the last paragraph. The deleted material is now included within UJI 13-103 and 13-104 NMRA.

13-102. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-102 NMRA, "Oath to jurors on voir dire examination", has been recompiled to UJI 13-105A NMRA.

13-102A. Introduction of court and staff.

I am Judge _____. My bailiff, who will escort you and assist in communicating with the court, is _____. [My administrative assistant is _____.] If you need anything during the trial [either] the bailiff [or the assistant] would be happy to help. The court [reporter] [monitor] is _____. This person makes a record of everything said in court.

[Approved, effective March 1, 2005.]

ANNOTATIONS

The March 1, 2005 adoption of this instruction replaced similar language in the pre-2005 version of UJI 13-101 NMRA.

13-103. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005 UJI 13-103 NMRA, "Voir dire explanation", has been recompiled as UJI 13-106A NMRA.

13-103A. Scheduling during trial.

This trial is expected to last [until _____] [_____ days]. We will all do our best to move the case along, but delays will occur. During delays, I may be deciding legal questions in this case, or handling emergency matters in other cases.

The usual hours of trial will be from _____ a.m. to _____ p.m. with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by _____ a.m. Do not come back into the courtroom until you are called by the bailiff.

[Approved, effective March 1, 2005.]

ANNOTATIONS

The March 1, 2005 adoption of this instruction replaced similar language relating to the estimated length of trial in the pre-2005 version of UJI 13-101 NMRA.

13-104. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-104 NMRA, "Voir dire questioning by court", was recompiled as UJI 13-107A NMRA.

13-104A. Voir dire orientation statement.

The case which you are about to try is a civil case, not a criminal case. It is a lawsuit filed by _____, who is the plaintiff, against _____, who is the defendant.

In this case the plaintiff _____. (*Incorporate UJI 13-302A-E NMRA. See exemplars, Appendix 1 of this chapter.*)

USE NOTE

Settlement of the statement of the case at pretrial conference should serve as a worthwhile vehicle to identify issues and instructions that will govern the course of litigation and trial. No specific format is required, and the detail used in any statement of the case will depend upon the practice of the court and the multiplicity of claims and defenses.

[Approved, effective March 1, 2005.]

ANNOTATIONS

The March 1, 2005 adoption of this instruction replaces similar language found in the pre-2005 version of UJI 13-101 NMRA.

13-105. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-105 NMRA, "Oath to empaneled jury", was recompiled to UJI 13-108A.

13-105A. Oath to jurors on voir dire examination.

Do you and each of you solemnly swear or affirm that you will well and truly answer any and all questions asked you by the court or by the lawyers about your qualifications to serve as a juror in this case?

USE NOTE

This is a form of oath that should be administered to the jurors before the voir dire examination commences.

Upon request in lieu of the oath an affirmation can be given to any prospective juror.

[13-102 NMRA; as amended, effective January 1, 1987; as amended and recompiled effective March 1, 2005.]

Committee comment. — This oath or affirmation or any other oath or affirmation which generally complies with the requirements of Rule 11-603 NMRA of the Rules of Evidence must be administered prior to qualification of jurors and voir dire examination.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-102 NMRA, "Oath to jurors on voir dire examination", was recompiled to UJI 13-105A NMRA.

The 2005 amendment of this instruction (former UJI 13-102 NMRA), effective March 1, 2005, replaced "propounded to" with "asked" and replaced "under [his] [her] direction touching upon" with "about". The former committee comment was withdrawn.

13-106. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-106 NMRA, "Admonitions to jury on conduct" has been rewritten and divided into three separate instruction: UJI 13-110 NMRA, "Conduct of jurors", UJI 13-111, "Note taking permitted" and UJI 13-112 NMRA, "Questions by jurors".

13-106A. Voir dire explanation.

You now will be asked questions by me and by the lawyers so we can select the jury for this case. Each of you is under oath and must truthfully answer the questions. The court will not permit improper questions. Your answers should be straightforward and complete. You must speak out so the court and the lawyers for both sides can clearly hear your answers. If you would prefer not to answer any particular question in front of other people, please say so, and we will address your concerns privately.

We will select _____ jurors to serve as the jury to hear this case. _____ will be alternate jurors. We use alternates to avoid the time and expense of starting a new trial in the event one of you becomes sick or has an emergency. _____ jurors will participate in final deliberations.

[13-103 NMRA: recompiled as amended, effective March 1, 2005.]

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-103 NMRA, "Voir dire explanation" has been rewritten and recompiled as UJI 13-106A NMRA.

13-107. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-107 NMRA “The rule of exclusion” has been rewritten and recompiled as UJI 13-118 NMRA.

13-107A. Voir dire questioning by court.

I will begin the preliminary questions. After my questions, the attorneys for the parties may have further questions. If your answer is "yes" to any of these questions, please raise your hand until you are noticed. Also, if, at any time, there is reason for you to change or add to the answers you made to the written questionnaire, please raise your hand.

I will first introduce the parties to the lawsuit.

(*NOTE: The court then introduces the plaintiff. The court then introduces the defendant.*)

Do any of you know the plaintiff?

Do any of you know the family or friends of the plaintiff?

Do any of you know the defendant?

Do any of you know the family or friends of the defendant?

I will now introduce the attorneys for the parties.

(*NOTE: The court then introduces the attorneys for the plaintiff. The court then introduces the attorneys for the defendant.*)

Do you know the attorney for the plaintiff?

Do you know the family or friends of the attorney for the plaintiff?

Do you know any of the partners or associates of the attorney for the plaintiff?

Do you know the attorney for the defendant?

Do you know the family or friends of the attorney for the defendant?

Do you know any of the partners or associates of the attorney for the defendant?

Have you, any members of your family or any of your friends ever been sued or represented by any of the attorneys in this case or any of their partners or associates?

The following people may be called as witnesses in this case: _____.

Has anyone heard or do you know anything about this case, any parties, any witnesses or any of the circumstances surrounding the case?

Have you learned about this case in the newspapers, on radio or television, or over the internet?

Have you heard anyone discussing this case or anything about the case?

(*NOTE: After identifying the subject of affirmative answers to the three foregoing questions, the court may wish to pursue in private, personally or through counsel for the parties, such responses as could prejudice the jury.*)

Have you or any close friend or family member ever had any injuries to your _____ (leg, head, knee, low back, etc.)?

(*NOTE: If so, When? Where? Who? What? How? Recovery?*)

Can you think of any reason that would cause you to be uncomfortable, embarrassed, biased or prejudiced to serve as a juror in this case?

Is there any fact that might prevent you from returning a true verdict based solely upon the evidence presented here in court and the law which the court will later explain to you?

Do you now have an opinion, tendency or feeling, not known to the court, that might influence your verdict in this case?

Do you have any concern that if selected as a juror in this case you might not be able to render a fair and impartial verdict?

Does the anticipated time frame of this trial cause any hardships for any of you? Are there any daycare issues or other unavoidable scheduling conflicts that we need to be aware of?

Do any of you have any physical or other impairments, taking of scheduled medications, that need to be addressed? And I say this not to exclude you from service;

however, there are special arrangements we can make for certain situations to assist you if you are selected as a juror.

The lawyers may now ask some questions.

USE NOTE

Before trial begins, the court should prepare and make available to counsel involved, a list of all members of the venire, showing as a minimum their names, ages and employment, together with such other pertinent information as may be helpful to determining bias, prejudice or an agenda on the part of the prospective juror.

Preliminary Instruction 13-107A NMRA includes suggestions for voir dire questioning by the court. The purpose of the voir dire examination of prospective jurors is to avoid bias and prejudice to the litigant and to obtain jurors of understanding and intelligence. The court will ask all or some of these questions to introduce topics for follow-up by counsel who will search beliefs and feelings for disqualifying bias or prejudice. There is nothing improper and it may be helpful for the court or counsel to tell the venire about factual areas of the case, or governing legal principles, to assess jury qualifications. It is improper, however, for the court to suggest: "But this would not affect your ability to act fairly, would it?"

[13-104 NMRA; as amended, effective January 1, 1987; recompiled as amended, effective March 1, 2005; as amended by Supreme Court Order 07-8300-22, effective November 1, 2007; as amended by Supreme Court Order 08-8300-012, effective June 13, 2008.]

Committee comment. — The right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire. *State v. Glasgow*, 2000-NMCA-076, 129 N.M. 480, 484, 10 P. 3d 159, 163, *cert. denied*, 129 N.M. 385. However, while voir dire assists in the selection of a neutral and impartial jury, the trial court may limit the time allowed for each side; time limits may move the case along and prevent counsel from using voir dire to instruct the jury or ask repetitious questions. *State v. Martinez*, 2002-NMCA-036, 131 N.M. 746, 42 P.3d 851, cert. denied, 131 N.M. 737.

A juror has a constitutional right under the New Mexico Constitution to serve on a jury, regardless of inability to speak, read or write English. In is improper to strike a juror for cause because of difficulty in understanding the English language. The trial court must make every reasonable effort to accommodate prospective jurors' language difficulties. Reasonableness will be determined based on (1) steps taken to protect the juror's rights; (2) rarity of juror's native language and difficulty of finding an interpreter; (3) stage of jury selection process where difficulty is discovered; and (4) burden continuance would impose on the court, remaining jurors and parties. *State v. Rico*, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942 (2002) and N.M. Constitution, Art. 7, §3.

Committee comment. — The court, in its discretion, may allow a case-specific juror questionnaire to be distributed to the jury panel to supplement the general questionnaire originally given to the panel. This procedure is not mandatory but may be helpful. The right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire. *State v. Glasgow*, 2000-NMCA-076, 129 N.M. 480, 484, 10 P. 3d 159, 163, cert. denied, 129 N.M. 385. However, while voir dire assists in the selection of a neutral and impartial jury, the trial court may limit the time allowed for each side; time limits may move the case along and prevent counsel from using voir dire to instruct the jury or ask repetitious questions. *State v. Martinez*, 2002-NMCA-036, 131 N.M. 746, 42 P.3d 851, cert. denied, 131 N.M. 737.

A juror has a constitutional right under the New Mexico Constitution to serve on a jury, regardless of inability to speak, read or write English. It is improper to strike a juror for cause because of difficulty in understanding the English language. The trial court must make every reasonable effort to accommodate prospective jurors' language difficulties. Reasonableness will be determined based on (1) steps taken to protect the juror's rights; (2) rarity of juror's native language and difficulty of finding an interpreter; (3) stage of jury selection process where difficulty is discovered; and (4) burden continuance would impose on the court, remaining jurors and parties. *State v. Rico*, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942 (2002) and N.M. Constitution, Art. 7, §3.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-104 NMRA, "Voir dire questioning by court", has been revised and recompiled as UJI 13-107A NMRA.

Cross references. — *See* UJI 14-120 NMRA for comparable instruction in criminal cases.

The 2005 amendment of this instruction (former UJI 13-104 NMRA), effective March 1, 2005, revised the first sentence and added the last sentence of the first paragraph, changed "Are any of you" to "Do any of you" before each question and replaced "acquainted with" to "know" in each of the questions where that phrase appeared. The 2005 amendments also expanded the question relating to whether any member of the juror's "immediate family" had ever been a party to a lawsuit to include "any close friend or family member" and rewrote the Use Notes.

The 2007 amendment, approved by Supreme Court Order 07-8300-22, August 28, 2007, effective for cases files on and after November 1, 2007, added the last two paragraphs providing for an inquiry by the judge as to any individual juror hardship that may result if the juror is selected to serve on the jury.

The 2008 amendment, approved by Supreme Court Order 08-8300-012, effective June 13, 2008, added the reference to the internet in the question concerning the acquisition of knowledge from newspapers, radio or television.

13-108. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-108 NMRA, "Opening statement", has been revised and recompiled as UJI 13-119 NMRA.

13-108A. Oath to empaneled jury.

Do you and each of you solemnly swear or affirm that you will render a true verdict according to the law and evidence submitted?

[13-105 NMRA; as amended, effective January 1, 1987; February 14, 1997; recompiled as amended, effective March 1, 2005.]

Committee comment. — A sworn jury can be waived, tactically, only under limited circumstances. *State v. Arellano*, 1998-NMSC-026, 125 N.M. 709, 965 P.2d 293.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, former UJI 13-105 NMRA, "Oath to empaneled jury", has been recompiled as UJI 13-108A NMRA.

Cross references. — *See* UJI 14-123 NMRA for "Oath to impaneled jury" in criminal cases.

The 2005 amendment of this instruction (former UJI 13-105 NMRA), effective March 1, 2005, deleted in the "Use Note", "A jury is not properly empaneled until they have been sworn" and inserted the present language.

13-109. Introduction to preliminary instructions.

I now have additional instructions for you about your job, my job and the job of the lawyers. I will have other instructions during and at the end of the trial. You will also receive a written copy of all instructions.

[Approved, effective March 1, 2005.]

13-110. Conduct of jurors.

Your job is to find and determine the facts in this case, which you must do solely upon the evidence received in court. There are a number of important rules governing your conduct during the trial.

First, you may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present. During the recesses and adjournments, while this case is in progress, do not discuss the case with anyone other than yourselves. The kinds of things you may discuss include the witnesses, their testimony, and exhibits. Be careful, however, not to make up your minds or try to convince others about the final outcome of the case until you have heard everything - all the evidence, the final instructions of law, and the attorneys' closing arguments. It would be unfair to the parties if you attempt to decide the outcome of the case before you begin final deliberations.

Second, it is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits. You may take into account the witness's ability and opportunity to observe, any interest, bias or prejudice that the witness may have, and the reasonableness of the testimony considered in light of all the evidence in the case.

Third, to minimize the risk of accidentally overhearing something that is not evidence in this case, please continue to wear the jurors' badges while in and around the courthouse. If someone happens to discuss the case in your presence, report that fact at once to a member of the staff.

Fourth, though it is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators, either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying "good morning" or "good afternoon", but your conversation should end there. If the attorneys, parties and witnesses do not greet you outside of court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule.

Fifth, do not consider anything you may have read or heard about the case outside the courtroom. During the trial and your deliberations, avoid news accounts of the trial, whether on radio, television, in the newspaper, on the internet or elsewhere. If you happen to see or hear any news account of the trial, please report that fact to a member of the staff.

Sixth, do not attempt any research, tests, experiments, visits to any locations involved in this case, or other investigation, including on the internet. It would be difficult or impossible to duplicate conditions shown by the evidence; therefore, your results would not be reliable. Such conduct also runs contrary to the rule that your verdict must be based solely upon the evidence presented to you. Nonetheless, in your deliberations, you need not ignore your backgrounds, including professional, vocational, and educational experience.

Last, there are at least two sides to every lawsuit. It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this

trial you exercise your judgment impartially and without regard to any sympathy, bias or prejudice.

These rules apply at all times during the trial – 24 hours a day, 7 days a week – until you return a verdict in open court and are discharged by me.

[Approved, effective March 1, 2005; as amended by Supreme Court Order 08-8300-012, effective June 13, 2008.]

Committee comment. — Juror misconduct includes activity by members of the jury which is inconsistent with the instructions by the court. *State v. Sena*, 105 N.M. 686, 688, 736 P.2d 491, 493 (1987). Juror misconduct also includes members of the jury making an unauthorized visit to the scene or referring to material not in evidence and against the instructions of the court. *State v. Melton*, 102 N.M. 120, 122-24, 692 P.2d 45, 47-49 (Ct. App. 1984). However, jurors are allowed to take into consideration their knowledge and impressions founded upon experience in their everyday walks of life. *State v. Mann*, 2002-NMSC-001, 131 N.M. 459, 469, 39 P.3d 124, 134.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-106, "Admonitions to jury on conduct", has been revised and divided into three instructions, this instruction, UJI 13-111, "Note taking permitted" and UJI 13-112 NMRA, "Questions by jurors".

Cross references. — *See* UJI 14-101 NMRA for comparable instruction in criminal cases.

The 2008 amendment, approved by Supreme Court Order 08-8300-012, effective June 13, 2008, added the reference to the internet in the fifth and sixth rules.

It is gross misconduct on part of juror to violate the court's instructions and visit the scene of an accident. *Skeet v. Wilson*, 76 N.M. 697, 417 P.2d 889 (1966).

Jurors' communication on trial chronology. A juror's conversation with an alternate juror during deliberations regarding chronology of trial was not improper. There are sound practical reasons for jurors discussing matters such as the chronology of the trial and such communications do not indicate that, in making its decision, the jury improperly considered extraneous information. *Gallegos ex rel. Gallegos v. Southwest Community Health Servs.*, 117 N.M. 481, 872 P.2d 899 (Ct. App. 1994).

Ambiguous oral, pre-evidentiary instruction, that there "are at least two sides to every lawsuit" was not reversible error, in light of the court's subsequent instructions on the burden of proof and presumption of innocence. *State v. Lucero*, 110 N.M. 50, 791 P.2d 804 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 567 et seq.; 75B Am. Jur. 2d Trial § 1493 et seq.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety of juror's tests or experiments in jury room, 31 A.L.R.4th 566.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases, 31 A.L.R.4th 623.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases, 35 A.L.R.4th 626.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors, 31 A.L.R.5th 572.

89 C.J.S. Trial §§ 452 to 454.

13-110A. Instruction to jury.1

Ladies and gentlemen, we have at least one [non-English-speaking] [hearing-impaired]2 juror who is participating in this case. New Mexico law permits all citizens to serve on a jury whether or not [English is their first language] [they are hearing-impaired].2 You must include this [these] juror(s) in all deliberations and discussions on this case. To help you communicate, the juror(s) will be using the services of the official court interpreter. The following rules govern the conduct of the interpreter and the jury:

1. The interpreter’s only function in the jury room is to interpret between [English and [the non-English-speaking juror(s)’ native language]] [speech and sign language].2

2. The interpreter is not permitted to answer questions, express opinions, have direct conversations with other jurors or participate in your discussions or deliberations.

3. The interpreter is only permitted to speak directly to a member of the jury to ensure that the interpreter’s equipment is functioning properly and to advise the jury foreperson if a specific interpreting problem arises that is not related to the factual or legal issues in the case.

4. No gesture, expression, sound or movement made by the interpreter in the jury room should influence your opinion or indicate how you should vote.

5. If you can speak both English and [the language of the non-English speaker] [read sign language],2 you must speak only English in the jury room so the rest of the jury is not excluded from any conversation.

6. Leave all interpretations to the official court interpreter. The interpreter is the only person permitted to interpret conversations inside the jury room and testimony in the courtroom.

7. You must immediately report any deviation from these rules by submitting a note identifying the problem to the judge or court personnel.

USE NOTE

1. For cases filed before March 1, 2005, this instruction must be read before deliberations whenever a non-English-speaking juror or hearing-impaired juror is serving on the jury. For cases filed after March 1, 2005, this instruction must be read with the preliminary instructions whenever a non-English-speaking juror or hearing-impaired juror is serving on the jury.

2. Use only the applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 08-8300-43, effective December 31, 2008.]

Committee commentary. — This instruction is modeled on Appendix B to State v. Pacheco, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745. In civil cases filed after March 1, 2005, jurors are allowed to discuss, among themselves, the evidence during trial. *See* UJI 13-110 NMRA.

[Adopted by Supreme Court Order No. 08-8300-043, effective December 31, 2008.]

13-110B. Oath to interpreter.

"Do you solemnly swear or affirm that you will not interfere with the jury's discussions or deliberations in any way by expressing any ideas, opinions or observations that you may have during discussions or deliberations and that you will strictly limit your role during discussions or deliberations to interpreting?"

USE NOTE

This instruction must be given with the preliminary instructions for cases filed after March 1, 2005, whenever a non-English-speaking juror or hearing-impaired juror is serving on the jury. For cases filed before that date, it must be given before deliberations whenever a non-English-speaking juror or hearing-impaired juror is serving on the jury.

[Adopted by Supreme Court Order No. 08-8300-43, effective December 31, 2008.]

Committee commentary. — This instruction is modeled on Appendix A to State v. Pacheco, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745. In civil cases filed after March 1, 2005, jurors are allowed to discuss, among themselves, the evidence during trial. *See* UJI 13-110 NMRA.

[Adopted by Supreme Court Order No. 08-8300-043, effective December 3, 2008.]

13-111. Note taking permitted.

You are allowed, but not required, to take notes during the trial. Note paper will be provided for this purpose. Notes should not take the place of your independent memory of the evidence. When taking notes, please remember the importance of paying close attention to the trial. Listening to and watching witnesses during their testimony will help you to assess their appearance, behavior, memory and whatever else bears on their believability.

At each recess you may leave your notes on your chair or take them with you to the jury room. At the end of the day, the bailiff will store your notes and return them to you when the trial resumes. At no time will anyone read your notes. At the end of the case the notes will be collected and destroyed.

[Approved, effective March 1, 2005.]

ANNOTATIONS

Cross references. — *See* UJI 14-101 NMRA for comparable instruction in criminal cases.

The March 1, 2005 adoption of this instruction permitting note taking replaces Paragraph 8 of former UJI 13-106 which provided for note taking in the discretion of the trial judge.

13-112. Questions by jurors.

Ordinarily, the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will have a question that remains unanswered after all of the evidence is presented. However, if you feel an important question has not been asked or answered, write it down on a piece of your notepaper and give it to the bailiff before the witness leaves the stand. I will decide whether or when your question will be asked. Rules of evidence or other considerations apply to questions you submit and may prevent the question from being asked. If the question is not asked, please do not give it any further consideration, and please do not hold it against either side that you did not get an answer.

[Approved, effective March 1, 2005.]

ANNOTATIONS

Cross references. — *See* UJI Criminal 14-101 NMRA for comparable instruction in criminal cases.

The March 1, 2005 adoption of this instruction replaced former Paragraph 9 of UJI Civil 13-106 NMRA.

13-113. The court.

It is my job to preside over the trial, decide and instruct on questions of law and rule upon what evidence may be admitted for your consideration.

No gesture, remark or comment I make should influence your decision in this case. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

[Approved, effective March 1, 2005.]

ANNOTATIONS

Cross references. — *See* UJI Criminal 14-101 NMRA for comparable instruction in criminal cases.

13-114. Corporation a party. (*Optional as preliminary instruction*.)

The _____ (plaintiff, defendant, or other party) in this case is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual and you should decide the case with the same impartiality as you would use in deciding a case between individuals.

USE NOTE

In order to facilitate juror understanding of the law and the legal process, it is helpful to provide instructions on certain issues before trial begins or during trial, when particular issues arise. This learn-as-you-go approach avoids overloading the jurors with a mountain of instructions at the end of the case. The courts are encouraged to provide some instructions earlier in the case. Optional instructions 13-114 NMRA through 13-118 NMRA are the kind of instructions which may be appropriate to give before trial begins. They may be given whenever requested by counsel. When given before or during trial, instructions shall be read to the jury. These instructions will not be re-read at the end of the case, but may be submitted to the jury with the complete packet of written instructions at the end of the case, upon request of counsel. Nothing in these use notes precludes the submission of any other instruction before or during trial, if it may be helpful to the jury.

[13-206 NMRA; as amended, effective January 1, 1987; recompiled and amended, effective March 1, 2005.]

Committee comment. — Failure to give this instruction, when requested, was held to be reversible error in *De La O v. Bimbo's Restaurant, Inc.*, 89 N.M. 800, 558 P.2d 69 (Ct. App. 1976), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

ANNOTATIONS

Recompilations. — Effective March 1, 2005 UJI 13-206 NMRA was amended and recompiled as 13-114 NMRA.

The 2005 amendment of this instruction (former 13-206 NMRA), effective March 1, 2005, added "(*Optional as preliminary instruction*.)" in the catchline and replaced the former Use Note and replaced it with the present note.

13-115. Two or more plaintiffs. (*Optional as preliminary instruction.*)

Although there is more than one plaintiff in this action, it does not follow from that fact alone that if one is entitled to recover, another is entitled to recover. The rights of the various plaintiffs in this lawsuit are separate and distinct, and you should decide the issues as if each plaintiff had brought a separate lawsuit.

[In this connection, you will note that some of the instructions apply to one plaintiff, while other instructions apply to all plaintiffs.]

USE NOTE

See UJI 13-114 NMRA.

[19.1; 13-1901 NMRA; as amended, effective January 1, 1987; recompiled and amended, effective March 1, 2005.]

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-1901 NMRA has been amended and recompiled as UJI 13-115 NMRA.

The 2005 amendment of this instruction (former 13-1901 NMRA), effective March 1, 2005, added "(*Optional as preliminary instruction.*)" in the catchline and replaced the former Use Note and replaced it with the present note.

13-116. Two or more defendants. (*Optional as preliminary instruction.*)

Although there is more than one defendant in this action, it does not follow from that fact alone that if one is liable another is liable. Each defendant is entitled to a fair consideration of that defendant's own defense. You will decide each defendant's case separately, as if each were a separate lawsuit.

USE NOTE

See UJI 13-114 NMRA.

[13-1902 NMRA; as amended, effective January 1, 1987; recompiled and amended, effective March 1, 2005.]

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-1902 NMRA has been amended and recompiled as UJI 13-116 NMRA.

The 2005 amendment of this instruction (former 13-1902 NMRA), effective March 1, 2005, added "(*Optional as preliminary instruction.*)" in the catchline and replaced the former Use Note and replaced it with the present note.

13-117. Jury duty to consult. (*Optional as preliminary instruction.*)

In deliberating on this case, it is your duty to consult with one another and to decide the case only after an impartial consideration of the evidence. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if convinced it is wrong, but do not give up your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Remember that you are not partisans but judges - judges of the facts. Your sole interest is to determine the truth from the evidence in the case.

USE NOTE

See UJI 13-114 NMRA.

[13-1903 NMRA; as amended, effective January 1, 1987; recompiled and amended, effective March 1, 2005.]

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-1903 NMRA has been amended and recompiled as UJI 13-117 NMRA.

Cross references. — *See* UJI Criminal 14-6008 NMRA for comparable instruction in criminal cases.

The 2005 amendment of this instruction (former 13-1903 NMRA), effective March 1, 2005, added "(*Optional as preliminary instruction.*)" in the catchline, deleted "as the jurors", changed "erroneous" to "wrong" and "surrender" to "give up" and replaced the former Use Note with the present note.

It was not an abuse of discretion for the trial judge to refuse to give instruction on the duty of jurors to consult. *Perea v. Stout*, 94 N.M. 595, 613 P.2d 1034 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991, 449 U.S. 1035, 101 S.Ct. 610, 66 L.Ed.2d 496 (1980).

13-118. Exclusion of witnesses. (*Optional*)

The rule of exclusion of witnesses is in effect. This means that, until excused as a witness by me, all witnesses will remain outside the courtroom except when testifying. They will wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. The rule also forbids witnesses from telling anyone but the lawyers what they will testify about or what they have testified to. If witnesses do talk to the lawyers about their testimony, other witnesses and jurors should avoid being present or overhearing.

The lawyers are directed to inform all witnesses of these rules and to remind them of their obligations. The parties and their lawyers should keep a careful lookout to prevent any potential witness from remaining in the courtroom if they enter by mistake.

USE NOTE

Rule 11-615 NMRA of the Rules of Evidence specifically provides that witnesses may be excluded so that they cannot hear the testimony of other witnesses. When properly invoked, this instruction is mandatory.

The rule does not apply to a natural person who is a party or a designated representative of an association, corporation or like entity.

Likewise, the rule does not apply to a person whose presence is shown by a party to be essential to the presentation of a claim, e.g., an agent who handled the transaction being litigated or an expert witness.

[13-107; as amended, effective January 1, 1987; November 1, 1991; recompiled and amended, effective March 1, 2005.]

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-107 NMRA, "Rule of Exclusion", has been rewritten and recompiled as UJI 13-118 NMRA.

Cross references. — *See* UJI 14-101 NMRA for comparable instruction in criminal cases.

See Rule 11-616 NMRA of the Rules of Evidence for witnesses who may be excluded from the courtroom.

13-119. Opening statements.

A trial begins with the lawyers telling you what they expect the evidence to show. These statements and other statements made by the lawyers during the course of the trial can be of considerable assistance to you in understanding the evidence as it is presented at trial. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, the exhibits, and any facts agreed to by the parties. After you have heard all the evidence, I will give you final instructions on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a verdict.

The plaintiff's attorney will now make an opening statement.

[13-108 NMRA; as amended, effective January 1, 1987; November 1, 1991; recompiled and amended, effective March 1, 2005.]

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-108 NMRA, "Opening statement", has been rewritten and recompiled as 13-119 NMRA.

Cross references. — *See* UJI Criminal 14-101 NMRA for comparable instruction in criminal cases.

Appendix Chapter 1

APPENDICES

Appendix 1. Sample preliminary instructions to the venire.

LADIES AND GENTLEMEN:

Good [morning] [afternoon] ladies and gentlemen:

You have been summoned here as prospective jurors.

Jury service is an honored tradition. From its beginning our country has relied on citizens to apply their collective wisdom, experience, and fact-finding abilities to decide disputes under the law.

I am Judge Arturo Baca. My bailiff, who will escort you and assist in communicating with the court, is Charles Decker. If you need anything during the trial the bailiff would be happy to help. The court reporter is Ellen Fort. This person makes a record of everything said in court.

This trial is expected to last three days. We will all do our best to move the case along, but delays will occur. During delays, I may be deciding legal questions in this case, or emergency matters in other cases.

The usual hours of trial will be from 9:00 a.m. to 4:30 p.m. with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by 8:45 a.m. Do not come back into the courtroom until you are called by the bailiff.

The case which you are about to try is a civil case, not a criminal case. It is a lawsuit filed by Able Baker, who is the plaintiff, against C.D. Insurance Company, who is the defendant.

The plaintiff seeks compensation from the defendant for damages that plaintiff says were caused by Breach of Contract and by Bad Faith.

The plaintiff says that defendant denied payment of plaintiff's claim under the terms of a health insurance policy for reasonable medical treatment necessarily undergone by plaintiff. The plaintiff also says that defendant's failure to pay the claim was frivolous or unfounded and the result of defendant's failure to conduct a timely and fair investigation of the claim. The defendant denies that its failure to pay the claim was frivolous or unfounded. Defendant says that its investigation of the claim was timely and fair, and that the investigation showed that plaintiff's medical treatment was not reasonably necessary under the terms of the contract, but was excluded from coverage because it was experimental.

An erroneous or incorrect failure to pay a claim is a breach of contract. A frivolous or unfounded failure to pay a claim is a bad faith breach of the duty to act honestly in good faith in the performance of the insurance contract. The terms "frivolous or unfounded" mean an arbitrary or baseless refusal to pay, lacking support in the wording of the insurance policy or the circumstances surrounding the claim. An insurance company does not act in bad faith by denying a claim for reasons which are reasonable, even though incorrect, under the terms of the policy. Please stand for the administration of your oath.

Do you and each of you solemnly swear or affirm that you will well and truly answer any and all questions asked of you by the court or by the lawyers about your qualifications to serve as a juror in this case?

You now will be asked questions by me and by the lawyers so we can select the jury for this case. Each of you is under oath and must truthfully answer the questions. The court will not permit improper questions. Your answers should be straightforward and

complete. You must speak out so the court and the lawyers for both sides can clearly hear your answers. If you would prefer not to answer any particular question in front of other people, please say so, and we will address your concern privately.

We will select eight jurors to serve as the jury to hear this case. Two will be alternate jurors. We use alternates to avoid the time and expense of starting a new trial in the event one of you becomes sick or has an emergency. Six jurors will participate in final deliberations.

I will begin the preliminary questions. After my questions, the attorneys for the parties may have further questions. If your answer is "yes" to any of these questions, please raise your hand until you are noticed. Also, if, at any time, you need to change or add to the answers you made to the written questionnaire, please raise your hand.

(*The lawyers may now ask some questions.*)

(*To those selected.*)

Please stand for the administration of your oath.

Do you and each of you solemnly swear or affirm that you will render a true verdict according to the law and evidence submitted?

Other examples of statements of the case

The foregoing example is for an insurance-bad-faith case. The following are other examples of statements, some being more detailed than others. No specific format is required.

Slip and fall

The plaintiff says that defendant failed to use ordinary care to keep its grocery store premises safe and that plaintiff slipped in a puddle of water, suffering injuries as a result. Defendant says that it did keep its premises safe and that despite reasonable inspections it was unaware that water had accumulated where plaintiff fell. Defendant also says that plaintiff failed to exercise ordinary care for his own safety when he stepped into the puddle and that any injuries he received are a result of his own negligence.

Automobile accident

The plaintiff says that he was injured in an auto collision at the Albuquerque intersection of Washington and Lomas on July 17 last year. He says that defendant was negligent and violated the law by failing to stop at a red light. Defendant denies that the light was red and says that plaintiff was negligent in failing to keep a proper lookout. Defendant also says that the City was negligent in placing a traffic control box on the

northeast corner of the intersection that blocked his view of traffic coming from plaintiff's direction. And defendant says that plaintiff failed to exercise ordinary care to minimize or lessen his damages.

You will be required to apply certain legal definitions in deciding this case. For your guidance I am providing you with certain definitions at this time:

Duty of a driver

It is the duty of every operator of a vehicle to exercise ordinary care, at all times, to prevent an accident.

Ordinary care

"Ordinary care" is that care which a reasonably prudent person would use in the conduct of the person's own affairs. What constitutes "ordinary care" varies with the nature of what is being done. As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

Negligence

The term "negligence" may relate either to an act or a failure to act. An act, to be "negligence," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to himself or to another and which such a person, in the exercise of ordinary care, would not do. A failure to act, to be "negligence," must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to himself or to another.

Violation of statute

There was a law in effect at the time of the occurrence that provided traffic shall stop when facing a red light. Violation of this law constitutes negligence as a matter of law unless you determine that such violation was excusable or justified.

Duty to keep a proper lookout

It is the duty of every operator of a vehicle, at all times, to keep a proper lookout so as to avoid placing the operator or others in danger and to prevent an accident. The duty to keep a proper lookout requires more than merely looking. It also requires a person to actually see what is in plain sight or is obviously apparent to one under like or similar circumstances. Further, with respect to that which is not in plain sight or readily apparent, a person is required to appreciate and realize what is indicated by that which is in plain sight.

Mitigation of damages

An injured person must exercise ordinary care to minimize or lessen his damages. Damages caused by his failure to exercise such care cannot be recovered.

Medical negligence

The plaintiff says that defendant's diagnosis or treatment fell below the acceptable standard of care for doctors practicing under similar circumstances, and that plaintiff suffered injury and damages as a result. The defendant denies this, and says that if plaintiff has suffered any injury or damage, such resulted from negligence of hospital personnel or unavoidable medical complications.

Wrongful termination of employment

The plaintiff says that she was terminated from her employment with defendant for a reason prohibited by law, namely because she complained about unsafe working conditions to the State Occupational Health and Safety Bureau. The plaintiff seeks compensation for damages caused by the termination and for punitive damages. The defendant denies that it terminated the plaintiff because of her complaint, and says that plaintiff was terminated because of habitual tardiness and poor job performance.

[Approved, effective March 1, 2005.]

CHAPTER 2
Instructions During Trial

Introduction

Trial judges are encouraged, when the occasion arises during the course of the trial, to give pertinent instructions to the jury with the dual purpose of giving the jury meaningful aid when it will do the most good and also of reducing the volume of instructions at the close of the trial.

It may be advisable to instruct the jury both at the time the occasion arises and, if requested by counsel, at the close of the trial.

In this chapter, several forms of instructions are presented of the type which can be given at the appropriate time during the course of the trial. For example, the reading of a deposition or answers to interrogatories may be explained by the court. The trial court may find it expedient, and helpful to the jury, to instruct them during the course of the trial on matters such as cautionary instructions, the definition of circumstantial evidence, and instructions found in other chapters as well.

[As amended, effective January 1, 1987; March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, deleted from the second paragraph the second sentence which read: “In any event, all instructions sent to the jury room should have been read at the close of the trial.”

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1104.

88 C.J.S. Trial § 299.

13-201. Recess instruction.

During recess, do not discuss this case with anyone other than yourselves and, then, only in the jury room when all of you are present. Do not attempt to decide the outcome of the case before you begin final deliberations. Please continue to wear the jurors' badges while in and around the courthouse. If someone other than a fellow juror happens to discuss the case in your presence, report that fact at once to a member of the staff. If you happen to see or hear any news accounts of this trial, please report that fact to a member of the staff.

USE NOTE

This instruction given more completely as UJI 13-110 NMRA can be repeated from time to time at recesses and at the end of each day.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — This is not a mandatory instruction. See Rule 1-051 of the Rules of Civil Procedure. It is a summary of several admonitions contained in the general instructions which will be given to the jury after they are empaneled and before the presentation of evidence.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, rewrote this instruction.

Jurors' communication on trial chronology. — A juror's conversation with an alternate juror during deliberations regarding chronology of trial was not improper. There are sound practical reasons for jurors discussing matters such as the chronology of the trial and such communications do not indicate that, in making its decision, the jury improperly considered extraneous information. Gallegos ex rel. Gallegos v. Southwest Community Health Servs., 117 N.M. 481, 872 P.2d 899 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1493 et seq.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors, 31 A.L.R.5th 572.

89 C.J.S. Trial §§ 452 to 454.

13-202. Discussion of exhibits prohibited.

When an exhibit is presented to you in open court, you should not discuss it with other jurors. You should not point out to another juror matters that seem important to you. You should not whisper back and forth with other jurors about the exhibit. You will have an opportunity to discuss the exhibits in the jury room.

USE NOTE

This instruction may be given when exhibits are presented to the jury.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — See Committee Comment to UJI 13-201.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, added "in open court" in the first sentence and in the last sentence replaced "when the case is finally submitted to you for your decision" with "in the jury room".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1541 et seq.

89 C.J.S. Trial §§ 452 to 454.

13-203. Deposition testimony.

A deposition is testimony taken under oath before trial and has been preserved [in writing] [by video]. This testimony is entitled to the same consideration as any other testimony at this trial.

USE NOTE

This instruction should be given when a deposition is first admitted into evidence and may be repeated at the close of the case as provided in this chapter. The bracketed material will be used as required in each case.

At the time the deposition is offered, it may be appropriate for the court to explain the reason for the use of the deposition testimony.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — The circumstances under which depositions may be used at trial are set forth in Rule 1-032A of the Rules of Civil Procedure. This instruction emphasizes to the jury that deposition testimony should be considered the same as testimony offered by a witness personally appearing at the trial.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, revised the first sentence of this instruction to replace "Deposition testimony is testimony that was taken" to "A deposition is testimony taken" and to replace in the second sentence "that you give" with "as". The 2005 amendments also rewrote the first paragraph of the Use Note. The committee comment was deleted.

Failure to give instruction when deposition used to impeach. — Where a deposition is used to impeach testimony, the trial judge's failure to give this instruction is not reversible error. Adams v. United Steelworkers, 97 N.M. 369, 640 P.2d 475 (1982).

13-204. Interrogatories.

Interrogatories are written questions asked by one party to another before trial and answered under oath. The questions and answers may be read at trial as evidence. The answers read to you are entitled to the same consideration as any other testimony.

USE NOTE

This instruction should be given when the answers to interrogatories are first admitted into evidence and may be repeated at the close of the case as provided in this chapter.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — Answers to written interrogatories may be used against the party who made the answers, but they cannot ordinarily be used by the party answering interrogatories because they are not subject to cross-examination. Crabtree v. Measday, 85 N.M. 20, 508 P.2d 1317 (Ct. App. 1973), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973). When part of answers to interrogatories are offered in evidence, the person answering the interrogatories has a right to introduce or to have introduced all of the interrogatories which are relevant to or which tend to explain or correct the answers submitted. Albuquerque Nat'l Bank v. Clifford Indus., Inc., 91 N.M. 178, 571 P.2d 1181 (1977).

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, revised the second sentence to delete "are testimony under oath and" and to replace "that you give" with "as". The Use Note was amended to insert "first" prior to "admitted into evidence".

13-205. Patient's history as told to doctor.

A medical witness may testify about statements concerning a person's medical history and condition that were made for purposes of diagnosis or treatment. [Such statements are not evidence of their own truth, but they may be considered to show the information upon which the witness's diagnosis or medical opinion was based.] To whatever extent the opinion of the witness is based upon such statements, you may consider the trustworthiness of the statements in determining the weight to be given to the witness's opinion.

USE NOTE

This instruction should be given, if requested by counsel, when a medical witness testifies to a statement concerning a person's medical history or condition made for purposes of diagnosis or treatment. If the statement is not admissible for its truth, the bracketed sentence should be given and the instruction may be given as a limiting instruction at the time the witness testifies. If not given at that time, the instruction should be given at the conclusion of the case, if requested by counsel, with the other instructions to the jury.

[As amended, effective January 1, 1987; November 1, 1991; February 1, 1994; January 1, 1996.]

Committee comment. — Statements concerning a patient's medical history and condition, given for purposes of diagnosis or treatment, are admissible in evidence to show the basis for a medical witness's diagnosis or opinion, even if they are not admissible to prove the truth of the matters stated; when they are so admitted the court should, if requested, give an appropriate limiting instruction. *See Waldroop v. Driver-Miller Plumbing & Heating Corp.,* 61 N.M. 412, 301 P.2d 521 (1956); *see also* UJI 13-210 and Rule 11-105 of the Rules of Evidence. Such statement may also be admissible to establish the truth of the matters asserted, *e.g.* as the admissions of a party opponent or under an exception to the hearsay rule. *See* NMRA, Rules 11-801(D)(2) & 11-803(D). In either event this instruction informs the jury that it should independently evaluate the reliability of information used by expert witnesses in arriving at their opinions. *Cf.* UJI 13-209, 13-213.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first sentence of the instruction and in the first sentence of the Use Note.

The 1996 amendment, effective January 1, 1996, rewrote the instruction and rewrote the Use Note and Commentary.

13-206. Recompiled.

ANNOTATIONS

Recompilations. — UJI 13-206 NMRA relating to a corporation as a party was recompiled as UJI 13-114 NMRA, effective March 1, 2005.

13-207. Witness interviewed by attorney.

An attorney has the right to interview a witness for the purpose of learning what testimony the witness will give.

USE NOTE

This instruction should be given when some question has been raised with reference to the propriety of an attorney talking to a witness prior to his testimony.

[As amended, effective January 1, 1987; March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, deleted the last sentence of the instruction which provided "The fact that the witness has talked to an attorney does not reflect adversely on the truth of such testimony".

13-208. Insurance has no bearing.

[Whether a party is insured has no bearing on any issue in this case.]

[Evidence has been admitted that _____ (*plaintiff, defendant, etc.*) was insured. You may consider this evidence only for the limited purpose of proving _____ (*agency, ownership or control, bias or prejudice of a witness, etc.*).] You may not consider this evidence for any other issue in the case.

USE NOTE

When insurance is mentioned, the court, at the request of the party whose insurance coverage has been disclosed, shall immediately give the first paragraph of this instruction unless the court determines that the prejudice cannot be overcome in which case a mistrial should be granted. This instruction can also be given at the close of trial.

In a case where evidence of insurance has been admitted pursuant to Rule 11-411 NMRA after the court's consideration of such evidence under Rule 11-403 NMRA, then the bracketed paragraph shall be used inserting the proper basis for its use at the end of the sentence. The limited purpose of proof should be stated in the final blank with clarity, personalized to the case.

The use of evidence pursuant to Rule 11-411 NMRA presupposes disclosure to the court outside the presence of the jury that an insured status will be elicited for the purposes set forth in this instruction.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — This instruction follows the ruling of the supreme court in Safeco v. United States Fid. & Guar., 101 N.M. 148, 679 P.2d 816 (1984). When the reference to insurance is neither inadvertent nor for permissible purposes, mistrial may be the appropriate remedy. See Safeco. The compiler's notes under the cases listed under Rules 11-403 and 11-411 are of aid in determining whether or not insurance evidence is admissible.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, revised this instruction by adding brackets around the first sentence and substituting "any issue in this case" for "whether such a party was negligent", deleting from the second sentence of the second paragraph "not in determining negligence but" and adding the last sentence. The 2005 amendment also deleted the first paragraph of the Use Note and deleted from the first sentence of the former second paragraph "by inadvertence" and adding "This instruction can also be given at the close of trial".

What constitutes prejudicial reference to insurance. — To be prejudicial, a party must offer evidence that a defendant is covered by insurance, or intentionally use some circuitous method of informing the jury of liability insurance, followed by the admission thereof. Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Inadvertent reference not prejudicial. — If a lawyer propounds a question which calls for proper evidence, the fact that an irresponsive or inadvertent answer includes a reference to insurance will not be grounds for declaring a mistrial. Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Prompt admonishment by court eliminates prejudice. — Where a defense counsel's reference to insurance in an opening statement is improper, prompt admonishment thereof by the court is sufficient to avoid a mistrial because the admonishment eliminates any prejudicial effect. Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Permissible disclosure of insurance coverage may warrant jury instruction foreclosing consideration thereof on liability issue. — Parties whose insurance coverage has been disclosed by a permissible evidentiary revelation during the trial may request an instruction which, consistent with Rule 411 (see now Rule 11-411), N.M.R. Evid., explains the purpose of that evidence and forecloses juror consideration of insurance as an indicator of liability or the amount (if any) of liability. Safeco Ins. Co. of Am. v. United States Fid. & Guar. Co., 101 N.M. 148, 679 P.2d 816 (1984).

Instruction on insurance warranted. — In an action against a county race track by a jockey who was injured when his horse veered causing him to fall and strike a post and track rail, where the subject of insurance came up during voir dire, it was not error to give an instruction which stated that the jury was not to consider whether the county had insurance or the effect of its verdict on county taxes. Yardman v. San Juan Downs, Inc., 120 N.M. 751, 906 P.2d 742 (Ct. App. 1995).

13-209. Hypothetical question.

An expert witness is permitted to state an opinion based upon a question which, for the purposes of trial, assumes as true certain facts which may or may not be true.

It will be for you in your deliberations, however, to determine from all of the evidence whether or not the facts assumed have been proved to be true.

USE NOTE

The court should give this instruction so the jury may understand the purpose of the hypothetical question. When given, this instruction would usually follow UJI 13-213 NMRA.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — When the court allows the hypothetical question, it is the province of the jury to determine the truth of the facts upon which the hypothetical question is predicated. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337, 84 A.L.R.2d 1269 (1960).

Hypothetical questions must be based on facts in evidence (or which the propounding attorney assures the court will be put into evidence) and, if not, then the opinion of the expert should be stricken. Winder v. Martinez, 88 N.M. 622, 545 P.2d 88 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); Landers v. Atchison, T. & S.F. Ry., 68 N.M. 130, 359 P.2d 522 (1961); Sanchez v. Board of County Comm'rs, 63 N.M. 85, 313 P.2d 1055 (1957); 2 Wigmore on Evidence, § 680; Jones on Evidence, § 415, p. 781 (5th ed.).

ANNOTATIONS

The 2005 amendment of this rule, effective March 1, 2005, deleted at the beginning of the instruction "At the time the hypothetical question is asked, it may be appropriate for" and deleted from the Use Note. "This instruction may also be included in the general instructions at the conclusion of the case".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 88 C.J.S. Trial § 155.

13-210. Evidence for a limited purpose - *No uniform instruction*.

No uniform instruction.

USE NOTE

The trial court will simply spell out and explain each situation when evidence is offered for a limited purpose and then instruct a jury as to when and why the evidence will be considered.

[As amended, effective January 1, 1987.]

Committee comment. — Admissibility for a limited purpose is covered in Rule 11-105 of the Rules of Evidence.

13-211. Oath to witness.

Do you [and each of you] solemnly swear or affirm under penalty of law that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

USE NOTE

In some courts the practice is to call all the witnesses before the bench before any evidence is taken, and to swear all witnesses at the same time. In other courts the practice is to swear each witness separately before taking the witness stand. Either practice is acceptable in New Mexico. The foregoing oath is the one that should be used in either event.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — Rule 11-603 of the Rules of Evidence provides that, "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so". However, there is no judicial ruling regarding a specific form of oath. Section 14-13-1 NMSA 1978 provides requirements of an oath, and Section 14-13-2 NMSA 1978 provides requirements for an affirmation in lieu of an oath by anyone having conscientious scruples against an oath. However, in UJI 14-122 and

in UJI 14-123 the Supreme Court of New Mexico has provided an oath in substantially the same form as provided in this instruction.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "before taking" for "as he takes" in the second sentence of the Use Note.

13-212. Oath to interpreter.

Do you solemnly swear or affirm that you will correctly interpret from English to Spanish [or other applicable language] and from Spanish to English all questions and answers and matters pertaining to this cause under penalty of law?

USE NOTE

This is the form of oath that should be given to interpreters in the district court.

[As amended, effective January 1, 1987.]

Committee comment. — Rule 11-604 of the Rules of Evidence provides:

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Section 34-1-7 NMSA 1978 states that the courts may appoint interpreters and translators to interpret the testimony of witnesses.

With reference to deaf persons, there is a specific oath. Section 38-9-9 NMSA 1978 requires that every interpreter under the Deaf Interpreter Act [38-9-1 to 38-9-10 NMSA 1978], before entering upon his duties, shall take an oath that he will make a true interpretation "in an understandable manner to the deaf person for whom he is appointed".

Mandatory non-English speaking juror guidelines. — In addition to administering the initial interpreter's oath to correctly interpret testimony, the trial court must, prior to excusing the jury for deliberations, administer an oath, on the record in the presence of the jury, instructing the interpreter not to participate in the jury's deliberations; the interpreter must be identified on the record by name and state whether he or she is certified, and whether he or she understands the instructions; the trial court must instruct the jury about the interpreter's role during deliberations; after deliberations, but before the verdict is announced, the trial court must ask the interpreter on the record whether he or she abided by the oath not to participate in deliberations and the interpreter's response must be made part of the record and at the request of any party,

the trial court must allow jurors to be questioned to the same effect; and the trial court must instruct the interpreter not to reveal any part of the jury deliberations until after the case is closed. State v. Pacheco, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

13-213. Expert testimony.

The Rules of Evidence do not ordinarily permit a witness to testify as to an opinion or conclusion. However, a witness who is qualified as an expert in a subject may be permitted to state an opinion as to that subject. After considering the reasons stated for an opinion, you should give it such weight as it deserves. You may reject an opinion entirely if you conclude that it is unsound.

USE NOTE

This instruction should be given at the time the expert first testifies.

There is included in these uniform jury instructions an instruction on a hypothetical question which is found as UJI 13-209 NMRA.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — The Rules of Evidence dealing with expert testimony include Rules 11-702 through 11-705. The court of appeals apparently has held that the reasons for an expert opinion must be stated for the testimony to be competent. Four Hills Country Club v. Bernalillo County Property Tax Protest Bd., 94 N.M. 709, 616 P.2d 422 (Ct. App. 1979); State v. Brionez, 91 N.M. 290, 573 P.2d 224 (Ct. App. 1977), cert. denied, 91 N.M. 244, 572 P.2d 1257 (1977).

ANNOTATIONS

The March 1, 2005 amendment rewrote all but the first and last sentences of the instruction and the first paragraph of the Use Note.

When expert testimony not required. — Where negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required. Since manipulation of the spine which results in four fractured ribs is not a condition peculiarly within the knowledge of medical men, it is not necessary for an expert witness to testify concerning whether or not defendant used the necessary skill and care, in view of the injuries suffered and the testimony regarding the origin. Mascarenas v. Gonzales, 83 N.M. 749, 497 P.2d 751 (Ct. App. 1972).

UJI 13-1102, does not limit expert testimony to another specialist in the defendant's same field of medicine. Vigil v. Miners Colfax Medical Ctr., 117 N.M. 665, 875 P.2d 1096 (Ct. App. 1994).

Fact-finder not bound to accept opinion evidence of expert witness. Martinez v. Martinez, 101 N.M. 493, 684 P.2d 1158 (Ct. App. 1984).

Testimony of an economist to establish monetary worth of deceased's life is an expression of an opinion. The jury can give the economist's damage testimony such weight as the jury thinks it deserves, even if the testimony is uncontradicted. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Psychological stress evaluation evidence. — If the trial court admits psychological stress evaluation evidence, it must give this instruction. Simon Neustadt Family Center v. Bludworth, 97 N.M. 500, 641 P.2d 531 (Ct. App. 1982), overruled on other grounds Melnick v. State Farm Mut. Auto. Ins. Co., 106 N.M. 726, 749 P.2d 1105 (1988).

Complaint as to nonacceptance of testimony by jury barred absent objection to instruction. — Not having objected to the expert testimony instruction, a party may not complain of the jury's failure to accept 100 percent of an expert's uncontradicted testimony. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Law reviews. — For note, "Lie Detector Evidence - New Mexico Court of Appeals Holds Voice-Stress Lie Detector Evidence Conditionally Admissible: Simon Neustadt Family Center, Inc. v. Bludworth," see 13 N.M.L. Rev. 703 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 1190, 1226; 75B Am. Jur. 2d Trial 1408.

Propriety and effect of instructions in civil case on the weight or reliability of medical expert testimony, 86 A.L.R.2d 1038.

Cautionary instructions to jury as to reliability of, or factors to be considered in evaluating, voice identification testimony, 17 A.L.R.5th 851.

Necessity of expert testimony on issue of permanence of injury and future pain and suffering, 20 A.L.R.5th 1.

88 C.J.S. Trial §§ 290, 310, 400.

13-214. Objections.

It is the job of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper. I will sustain objections if the question or evidence sought is improper for you to consider. When I "sustain" an objection, the question or evidence is not allowed. You must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question

is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered. If I "overrule" an objection, then the question or evidence will be allowed.

USE NOTE

It is contemplated that this instruction will be given at the time the first witness is called.

[Approved, effective March 1, 2005.]

ANNOTATIONS

Cross references. — *See* UJI 14-101 NMRA for comparable instruction in criminal cases.

CHAPTER 3
Issues; Burden of Proof; Causation; Evidence

Introduction

The key to good instruction is the formulation of the issues of the lawsuit. The reading of a group of abstract statements of law, even though applicable to the evidence and artfully drawn, is of little guidance to the jury unless the law can be seen to relate to specific issues to be decided.

It is essential that the trial lawyers and the trial judge realize their duty to thoughtfully draft and clearly present the statement of the issues to the jury. UJI 13-302 NMRA exemplifies the desired manner of drafting this all-important instruction. For clear directions in this regard, *see Gallegos v. Citizens Insurance Agency*, 108 N.M. 722, 725-727, 779 P.2d 99, 102-104 (1989). A simple, common sense, logical presentation of the key issues is the objective. Other examples of the "statement of the issues" type of instruction are found in the appendices which appear throughout this book.

It will be helpful to the jury if the instructions are personalized.

[As amended, effective January 1, 1987; March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, deleted the second paragraph which provided that "The pleadings supply only a foundation for proper jury instructions. It is the evidence adduced at trial which truly determines the issues for jury determination. Regardless of the pleadings, it is the duty of the court to submit to the jury only those issues which are supported by the evidence and determinative of the case." The 2005

amendments also added the citation to *Gallegos v. Citizens Insurance Agency*, 108 N.M. 722, 779 P.2d 99 (1989).

Court of appeals is bound to follow supreme court's order requiring use of uniform jury instructions and it has no authority to alter, modify or abolish any instruction. Collins v. Michelbach, 92 N.M. 366, 588 P.2d 1041 (1979), but see State v. Wilson, 116 N.M. 793, 867 P.2d 1175 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1120 et seq.

88 C.J.S. Trial § 36.

13-301. Preliminary statement.

MEMBERS OF THE JURY:

The time has now come to give you final instructions that will guide your deliberations as the sole judges of the facts of this case.

First, I will summarize the issues between the parties. Second, I will state the rules of law governing this case.

Please pay close attention to these instructions. I will read them only once, but the written instructions will be given to you to take to the jury room.

USE NOTE

This will be the first instruction given to the jury by the court at the conclusion of all of the evidence. It is a preliminary statement to alert the jury on what is to follow.

[As amended, effective January 1, 1987; March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, rewrote this instruction.

Part A
Statement of Issues, Burden of Proof

13-302A. Statement of theory(ies) for recovery.

In this case the plaintiff(s) _____ (*name of each plaintiff*) seek(s) compensation from the defendant(s) _____ (*name of each defendant*) for damages that plaintiff(s) say(s) were caused by _____ (negligence, [and]

A Defective Product, [and]

Breach of Warranty, [and]

Breach of Contract, [and]

Fraudulent Misrepresentation, [and]

Etc.)

USE NOTE

Combined with UJI 13-302B through 13-302E NMRA, this instruction will be used in most cases to introduce by name the theory or theories of recovery relied upon by plaintiff. The format recommended in UJI 13-302A through 13-302E NMRA should result in an instruction that (A) identifies each theory of recovery, and (B) states factual contentions, causation and burden of proof for each theory followed by (C) a statement of denials and affirmative defenses applicable to that theory and (D) a statement of the factual contentions, causation and burden of proof for each affirmative defense.

Any counterclaim should be stated in Part D, which also includes a statement of plaintiff(s)' denial of affirmative defenses or in reply to counterclaims.

Part E is a statement of other contentions and denials, causation and burden of proof, which do not constitute essential elements of a claim or defense, but which do constitute special issues, *e.g.*, vicarious liability for the proportionate responsibility of a co-defendant, punitive damages, etc., which will be submitted to the jury in the special verdict form.

[As amended, effective March 1, 2005.]

Committee comment. — UJI 13-302A through 13-302E NMRA combine to make the most important single instruction in the lawsuit, the post to which all remaining instructions are tied, and the court and counsel should give particular attention to its finalization. This instruction ultimately will be completed when all of the evidence is in and the court has determined which issues are raised and whether there is evidence justifying their submission to the jury.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, substituted "case" for "civil action", inserted the blank spaces for the names of the plaintiffs and defendants and deleted "proximately" and "proximate" when used with "cause". The 2005 amendments also amended the Use Note to replace "proximate cause" with "causation" in two places, delete the first sentence of the second paragraph and deleted in the last sentence of the

second paragraph "[and] [or] [contentions in avoidance]", to replace "proximate cause" with "causation" in the third paragraph and delete the last paragraph.

Additional findings by jury mere surplusage. — A jury finding that there was no proximate cause between the negligence of a defendant and the injuries suffered by a plaintiff, renders any additional jury findings concerning the allocation of the percentage of fault to be mere surplusage. Ramos v. Rodriguez, 118 N.M. 534, 882 P.2d 1047 (Ct. App. 1994).

13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof.

To establish _____ (*theory of recovery by name, e.g., negligence*) on the part of [a] defendant(s), the plaintiff(s) [has] [have] the burden of proving [at least one of] [each of] the following:

_____.

(*NOTE: List by number each claimed act, omission, or condition, etc., referenced to specific defendant(s), which is supported by substantial evidence and that remains at issue.*)

The plaintiff(s) [has] [have] the burden of proving that such _____ (theory of recovery by name) was a cause of the [injuries and] damages.

USE NOTE

It is important to note that, unless two or more contentions must be proved, each numbered contention must contain a statement of facts which, standing alone, establishes a breach of duty, *e.g.*, "Unguarded gears were in a condition not substantially changed from the condition in which (the supplier) placed the product on the market or in which (the supplier) could have reasonably expected it to be used, and this condition presented an unreasonable risk of injury to the plaintiff who was a person whom (the supplier) could reasonably have expected to use the product for the purpose or in the manner it was being used at the time of the injury". If "supplier", "change in condition", or "foreseeability" have not been contested, then those elements would be false issues, and the statement of the contention would simply be that "The unguarded gears presented an unreasonable risk of injury".

If there are no alternative contentions, a compound contention may be stated under the "each of the following contentions" format, *e.g.*:

1. The unguarded gears presented an unreasonable risk of injury.

2. They were in a condition not substantially changed from the condition in which (the supplier) placed the product on the market or in which (the supplier) could have reasonably expected it to be used.

3. The plaintiff was a person whom (the supplier) could reasonably have expected to use the product for the purpose or in the manner it was being used at the time of the injury".

The "each of the following contentions" format is specifically designed for claims that have several essential elements, *e.g.*, defamation, which cannot be stated well in a single compound contention. Very special care must be taken in developing an instruction that presents alternative contentions, each of which are stated in the "each of the following contentions" format, *i.e.*, "at least one of" the contentions, each of which requires proof of "each of" the stated elements.

Where multiple contentions are not common to two or more defendants, the alternative "[a] defendant" and "[applicable to that defendant]" are to be used.

As an acceptable alternative to listing all contentions against multiple defendants under a single paragraph introducing contentions, this instruction may be drafted with a separate introductory paragraph for each defendant. (*See* Example B, *infra*.)

Because each contention must state facts which show a breach of duty, it is not sufficient to state, *e.g.*, "Defendant was driving 30 miles per hour" or "Defendant struck plaintiff's car". Rather, the contention should state that "Defendant was driving 30 miles per hour which was an unsafe speed under the circumstances" or "Defendant struck plaintiff's car because he failed to keep a proper lookout".

[As amended, March 1, 2005.]

Committee comment. — See the Use Note and Committee Comment to UJI 13-302A.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, replaced in the catchline "proximate cause" with "causation", deleted in the first paragraph "the claim of" and "contention(s) [applicable to that defendant]", inserted in the "Note" at the end of the first paragraph "and that remains at issue", deleted in the second paragraph "also contend(s), and" and replaced "proximate cause" with "cause".

Sufficiency of contentions. — In a patient's medical malpractice case against a doctor, the trial court did not err by requiring the patient to substantially trim and consolidate his 19 proffered contentions as the instruction contained factual statements that were too detailed, were repetitive, and that, standing alone, would not establish a breach of a duty. Allen v. Tong, 2003-NMCA-056, 133 N.M. 594, 66 P.3d 963.

Additional findings by jury mere surplusage. — A jury finding that there was no proximate cause between the negligence of a defendant and the injuries suffered by a plaintiff, renders any additional jury findings concerning the allocation of the percentage of fault to be mere surplusage. Ramos v. Rodriguez, 118 N.M. 534, 882 P.2d 1047 (Ct. App. 1994).

Alternative bases for punitive damages award. — Where the jury instructions provide two alternative bases for awarding punitive damages, the jury verdict will be upheld if there is substantial evidence in the record to support either. Atler v. Murphy Enterprises, Inc., 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001, cert. quashed, 2005-NMCERT-008.

Evidence justified award of punitive damages. — Where a review of the record leads to the conclusion that there was substantial evidence from which the jury could conclude that defendants demonstrated an utter indifference to the consequences or a conscious disregard for public safety when they failed to conduct the required inspections and abdicated their responsibility to operate the ride at the New Mexico State Fair in a safe manner, there was evidence to support a finding that defendants' conduct was reckless or wanton, justifying an award of punitive damages. Atler v. Murphy Enterprises, Inc., 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001, cert. quashed, 2005-NMCERT-008.

13-302C. Statement of denial and affirmative defense(s).

The defendant(s) deny(ies) what the plaintiff(s)] say(s) about _____ (theory of recovery(ies) by name)] [and defendant(s) say(s) that:

(Violation of the ordinance was excused or justified, [and]

The plaintiff(s) [was] [were] negligent, [and]

Another party was negligent, [and]

A non-party was negligent, [and]

Etc.).

USE NOTE

Here, the affirmative defenses applicable to a given theory are established by name. See the Use Note under UJI 13-302A NMRA.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — See the Committee Comment under UJI 13-302A.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, rewrote this instruction to substitute "what" for "the contentions of" "say(s) about" for "under the claim of" and "say's" for "claim(s)".

Instruction on comparative negligence warranted. — In an action against a county race track by a jockey who was injured when his horse veered causing him to fall and strike a post and track rail, failure to give defendants' tendered instruction on comparative negligence theories necessitated reversal and remand of the case for a new trial. Yardman v. San Juan Downs, Inc., 120 N.M. 751, 906 P.2d 742 (Ct. App. 1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — First Amendment guaranty of freedom of speech or press as defense to liability stemming from speech allegedly causing bodily injury, 94 A.L.R. Fed. 26.

13-302D. Statement of factual contentions of defendant(s), causation and burden of proof.

To establish _____ (*theory of affirmative defense, e.g., excuse or justification, negligence of another, etc.*), the defendant(s) [has] [have] the burden of proving [at least one of] [each of] the following:

_____.

(*NOTE: List by number each claimed act, omission, or condition, etc., referenced to the specific party or non-party, which is supported by substantial evidence and that remains at issue.*)

To establish _____ (*theory of second affirmative defense by name*),

(*NOTE: The format of the first paragraph is to be repeated for the contentions of all factually distinguishable affirmative defenses that remain at issue.*)

The defendant(s) also say(s), and [has] [have] the burden of proving, that _____ (*negligence of plaintiff(s) [and] [or] negligence of others*) was a cause of the [injuries and] damages.

[As a counterclaim, the defendant(s) seek(s) compensation from the plaintiff(s) for damages which defendant(s) say(s) were caused by _____ (*theory of counterclaim by name*). To establish _____ (*theory of counterclaim by name*) on the part

of [a] plaintiff(s), the defendant(s) [has] [have] the burden of proving [at least one of] [each of] the following:

_____.

(*NOTE: List by number each claimed act, omission, or condition, etc., referenced to specific plaintiffs, which is supported by substantial evidence and that remains at issue*.)

The defendant(s) also [has] [have] the burden of proving, that such _____ (*theory of counterclaim by name*) was a cause of the [injuries and] damages.]

The plaintiff(s) deny(ies) what defendant(s) say(s) [and plaintiff(s) say(s) that _____ (*theory of affirmative defense to counterclaim not already at issue under preceding claims*). To establish _____ (*theory of affirmative defense to counterclaim by name*) on the part of defendant(s), the plaintiff(s) [has] [have] the burden of proving _____].

USE NOTE

See the Use Note to UJI 13-302A NMRA. If there is an affirmative defense requiring proof of causation, in addition to negligence of the plaintiff [and] [or] others, it would be stated in the second regular paragraph of UJI 13-302D NMRA.

[As amended, effective January 1, 1987; March 1, 2005.]

Committee comment. — See Committee Comment to UJI 13-302A.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, replaced "proximate cause" with "causation", deleted "the claim of" and "contention(s)", "the contentions of", inserted at the end of each of the two "Notes" "and that remains at issue".

13-302E. Statement of other contentions and denials, causation and burden of proof.

Related to the above, _____ say(s) and [has] [have] the burden of proving that: _____.

(*NOTE: List by number each claimed act [and] [or] omission, condition, etc., referenced to specific defendant(s) which is supported by substantial evidence on all other incidental issues such as agency, punitive damages, e.g.,*

1. Defendant(s)' misconduct shows an utter indifference to, or conscious disregard for, the safety of others; and punitive damages should be awarded.

2. Defendant _____ was acting within the scope of his employment with defendant _____).

[This] [These] contention(s) [is] [are] denied.

[Also, _____ say(s) and [has] [have] the burden of proving that: _____. [This] [These] [is] [are] denied.]

USE NOTE

The test for what is appropriate to state as "other contentions" is whether the contention presents an issue which must be answered by the jury in the special verdict form.

[As amended, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, replaced "proximate cause" with "causation" in the catchline, in the first paragraph replaced "claims, _____ contend(s) with "above, _____ say(s)", and in the last paragraph replaced "contend(s)" with "say(s)" and deleted "contention(s)".

13-302F. Special verdict form; examples.

EXAMPLE A

INSTRUCTION NO. _____

In this case the plaintiff seeks compensation from the defendants for damages which plaintiff says were proximately caused by negligence.

To establish negligence on the part of a defendant, the plaintiff has the burden of proving at least one of the following contentions applicable to that defendant:

1. Defendant Richard Roe, a person in control of a motor vehicle, permitted the vehicle to be driven or operated by John Doe when Roe knew or should have known that Doe would be or was driving in violation of traffic ordinances.

2. Defendant Jane Smith authorized or permitted the motor vehicle owned by her to be driven by Doe when she had reason to believe that Doe was under the influence of intoxicating liquor or otherwise impaired in his ability, either mentally or physically or both, to operate a motor vehicle.

3. Defendant Doe failed to stop and yield the right-of-way to plaintiff's vehicle.

4. Defendant Doe was driving under the influence of intoxicating liquor.

5. Defendant Doe was driving carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, and without due caution in a manner so as to endanger or be likely to endanger others.

Plaintiff has the burden of proving that such negligence was a cause of the injuries and damages.

The defendants deny what the plaintiff says and defendants say that the failure of defendant Doe to stop and yield the right-of-way to plaintiff's vehicle was excused or justified, and that plaintiff [himself] [herself] was negligent.

To establish excuse or justification, the defendants have the burden of proving Doe violated the stop sign ordinance because the brakes on the vehicle he was driving unexpectedly and unforeseeably failed, and Doe did that which might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. If proved, this constitutes excuse or justification for what plaintiff says about Doe's failure to stop and yield the right-of-way to plaintiff's vehicle.

To establish negligence of plaintiff, the defendants have the burden of proving at least one of the following:

1. Plaintiff was driving at a speed in excess of the posted speed limit.

2. Plaintiff failed to keep a proper lookout.

The defendants have the burden of proving, that negligence of plaintiff was a cause of the injuries and damages.

The plaintiff denies what defendants say.

Related to the above, plaintiff says and has the burden of proving that:

1. Misconduct of each defendant was an act which shows an utter indifference to, or conscious disregard for, the safety of others and, therefore, punitive damages should be awarded.

2. The negligence of defendant Doe was the act of an agent of either defendants Roe or Smith, or both of them, within the scope of an agency to do a service for Roe or Smith, or both of them.

These are denied.

SPECIAL VERDICT

On the questions submitted, the jury finds as follows:

Question No. 1: Was defendant Doe negligent?

Answer: _____ (*Yes or No*)

If the answer to Question No. 1 is "No", you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2.

Question No. 2: Was any negligence of defendant Doe a cause of plaintiff's injuries and damages?

Answer: _____ (*Yes or No*)

If the answer to Question No. 2 is "No", you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 2 is "Yes", you are to answer the remaining questions on this special verdict form. When as many as ten of you have agreed upon each of your answers, your foreperson must sign this special verdict, and you will all return to open court.

Question No. 3: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by plaintiff to be $ _____. (*Here enter the total amount of damages without any reduction for comparative negligence and without any inclusion of punitive damages.*)

Question No. 4: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%, but the percentage for any one or more of the persons named may be zero if you find that such person was not negligent or that any negligence on the part of such person was not a proximate cause of damage.

Defendant Roe	_____%
Defendant Smith	_____%
Defendant Doe	_____%
Plaintiff	_____%
	100%

Question No. 5: Was defendant Doe acting as an agent of defendant Roe within the scope of that agency at the time and place of the collision?

Answer: _____ (*Yes or No*)

Question No. 6: Was defendant Doe acting as an agent of defendant Smith within the scope of that agency at the time and place of the collision?

Answer: _____ (*Yes or No*)

Question No. 7: Were the acts of defendant Roe either willful, wanton, reckless or grossly negligent?

Answer: _____ (*Yes or No*) (*If "Yes", enter in answer to Question No. 10 the amount of punitive damages, if any, to be awarded*.)

Question No. 8: Were the acts of defendant Smith either willful, wanton, reckless or grossly negligent?

Answer: _____ (*Yes or No*) (*If "Yes", enter in answer to Question No. 10 the amount of punitive damages, if any, to be awarded.*)

Question No. 9: Were the acts of defendant Doe either willful, wanton, reckless or grossly negligent?

Answer: _____ (*Yes or No*) (*If "Yes", enter in answer to Question No. 10 the amount of punitive damages, if any, to be awarded.*)

If the answers to Questions Nos. 7, 8 and 9 are "No", you are not to answer Question No. 10. Your foreperson must sign this special verdict and you will all return to open court. If the answer to Question No. 7, 8 or 9 is "Yes", you are to answer Question No. 10. Your foreperson must sign this special verdict and you will all return to open court.

Question No. 10: In accordance with the exemplary or punitive damage instructions given by the court, we find the total amount of punitive damages to be awarded against defendants to be as follows:

Defendant Roe _____%
Defendant Smith _____%
Defendant Doe _____%

The court will enter judgment for plaintiff against each defendant for punitive damages in the amount found as to that defendant. For any defendant for which your answer to Question No. 7, 8 or 9 is "No", the amount of punitive damages must be "None".

_____

Foreperson

EXAMPLE B

INSTRUCTION NO. _____

In this case the plaintiffs seek compensation from the defendants for damages that plaintiffs say were caused by negligence.

To establish negligence on the part of defendant X-Transportation Company, the plaintiffs have the burden of proving at least one of the following:

1. X-Transportation Company transported the mobile home on the highway at an excessive rate of speed.

2. X-Transportation Company did not use warnings required by statute for wide loads.

To establish negligence on the part of defendant John Doe, the plaintiffs have the burden of proving the defendant John Doe failed to use ordinary care when, and without warning, he suddenly stopped his vehicle upon the highway.

The plaintiffs have the burden of proving that the negligence of a defendant was a cause of the injuries and damages.

The defendants deny what the plaintiffs say about negligence and defendants say that the decedent was negligent.

To establish negligence of the decedent, the defendants have the burden of proving at least one of the following:

1. The decedent failed to keep a proper lookout.

2. The decedent was driving at an excessive rate of speed.

3. The decedent did not have his vehicle under control to avoid collision. The defendants have the burden of proving that negligence of the decedent was a cause of the injuries and damages.

The plaintiffs deny what the defendants say.

EXAMPLE C

INSTRUCTION NO. _____

In this case the plaintiff Public Utility Company seeks compensation from the defendant Ajax Construction Company for damages that plaintiff says were caused by negligence and breach of express warranty.

To establish negligence on the part of defendant, the plaintiff has the burden of proving at least one of the following:

1. Ajax departed from the standard of care of reasonably well-qualified contractors in the design of the absorber towers for Units 1 and 2 of the removal system.

2. Ajax failed to use ordinary care in the placement of the concrete for the absorber tower walls in that the walls contained excessive honeycombs, voids and sandpockets.

Public Utility Company has the burden of proving, that such negligence was a cause of the structural crack that appeared in the wall of G-H cell, and of resulting damages.

Ajax denies what Public Utility Company says about negligence and Ajax says that Public Utility Company itself was negligent.

To establish negligence of Public Utility Company, Ajax has the burden of proving at least one of the following:

1. Operational personnel of Public Utility Company failed to use ordinary care by allowing the absorbers to be filled with water beyond their designed capacity.

2. In the design of the absorber towers, engineers for Public Utility Company failed to use ordinary care when it rejected the Ajax recommendation for an overflow valve to prevent inadvertent overfilling of the absorbers.

Ajax has the burden of proving that such negligence of Public Utility Company was a cause of the structural crack which appeared in the wall of G-H cell.

Public Utility Company denies what Ajax says about such negligence.

To establish breach of express warranty on the part of Ajax, Public Utility Company has the burden of proving Ajax affirmed in writing that the absorber walls would be constructed without defects in material and workmanship and the walls, as constructed, contain substandard placement of concrete including voids, honeycombs and sandpockets.

Public Utility Company has the burden of proving that a breach of express warranty was a proximate cause of the damages.

Ajax denies what Public Utility Company says about breach of express warranty and Ajax says Public Utility Company failed to provide written notice of any breach of express warranty within the time period specified in the contract.

Public Utility Company denies what Ajax says about failure to provide written notice of breach of express warranty.

[As amended, effective January 1, 1987; November 1, 1991; March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the Use Note.

The 2005 amendment, effective March 1, 2005, deleted all of the instruction and "Directions for Use" and revised the Examples as follows: in Example A, replaced "civil action" with "case" and "claims" with "says", deleted "the claim of" and "contention", deleted from the paragraph numbered "5", "and circumspection", deleted "proximate" when used with "cause" and, changed "These contentions are denied" to "These are denied" and deleted the remainder of the example; in Example B replaced "civil action" with "case, "claim were proximately caused" with "say were caused", deleted "claim", "contends", "contentions" and "proximate" throughout the example, and, changed "The plaintiffs deny the contentions of the defendants" to "The plaintiffs deny what the defendants say" and deleted the remainder of the example; in Example C changed "civil action" to "case" deleted "claims", "claims of", "contends", "contentions" and "proximately", replaced "Public Utility Company denies the contention of Ajax with respect to failure to provide written notice of breach of express warranty" to "Public Utility Company denies what Ajax says about failure to provide written notice of breach of express warranty" and deleted the remainder of the example.

13-303. Crossclaims and third-party claims, theories, contentions, proximate cause and burden of proof.

No specific instruction drafted.

Committee comment. — The committee has not included a specific instruction on theories, contentions, proximate cause and burdens of proof for crossclaims or third-party claims. Where there would be no conflict or confusion in the instruction or the special verdict form, crossclaims and third-party claims may be included in the single instruction contemplated for all parties under UJI 13-302A through 13-302E NMRA, as suggested for counterclaims. (*See* Use Note, UJI 13-302A NMRA.) However, crossclaims and third-party claims may well have to be treated as separate lawsuits. In that event, the jury should be told that there is a separate lawsuit and be given a

separate series of instructions in accordance with UJI 13-302A through 13-302F NMRA for that separate lawsuit. [Revised, effective March 1, 2005.]

Part B
Burden of Proof

13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.

A party seeking a recovery [or a party relying upon a defense] has the burden of proving every essential element of the claim [or defense] by the greater weight of the evidence.

To prove by the greater weight of the evidence means to establish that something is more likely true than not true. [When I say, in these instructions, that the party has the burden of proof on _____ (*theory(ies) of recovery by name*), I mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient.]

On _____ (*fraud, etc.*), however, a higher degree of proof is required. Plaintiff has the burden of proving _____ by clear and convincing evidence.]

USE NOTE

This instruction should be given in every civil case. The bracketed portion of the second paragraph is always used where an appropriate burden of proof is by the greater weight of the evidence. That bracketed portion of the second paragraph is omitted when the only appropriate burden of proof is by clear and convincing evidence. The third paragraph is used only where an appropriate burden of proof is by clear and convincing evidence.

If the defendant is not relying upon a defense other than a general denial, then the bracketed portions of the first paragraph should not be used.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — "Preponderance of the evidence" simply means the greater weight of the evidence. Campbell v. Campbell, 62 N.M. 330, 341, 310 P.2d 266, 272 (1957). A party is said to have established his case by a preponderance of the evidence when the evidence tips the scales in favor of the party on whom rests the burden of proof, even though it barely tips them. Lumpkins v. McPhee, 59 N.M. 442, 453, 286 P.2d 299, 306 (1955).

Fraud, including undue influence, deceit or other theories involving fraudulent conduct, must be proven by clear and convincing evidence under New Mexico law. E.g., Rael v. Cisneros, 82 N.M. 705, 487 P.2d 133 (1971).

"It is the general rule . that issues of fact in civil cases are to be determined according to the preponderance of the evidence .. [T]he requirement of clear and convincing proof to sustain an issue claimed is the exception rather than the rule." United Nuclear Corp. v. Allendale Mut. Ins. Co., 103 N.M. 480, 709 P.2d 649, 654 (1985). But cf., Thorp v. Cash, 97 N.M. 383, 392, 640 P.2d 489, 498 (Ct. App. 1981), cert. quashed, and Echols v. N.C. Ribble Co., 85 N.M. 240, 511 P.2d 566 (Ct. App. 1973), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973), holding that the rule of "preponderance of the evidence" and the requirement of "clear and convincing evidence" are not mutually exclusive.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

The 2005 amendment, effective March 1, 2005, deleted at the beginning of the first sentence "It is a general rule in civil cases that", deleted at the beginning of the third paragraph "An exception to the general rule is that on the claim(s) of" and inserted "On", deleted from the second sentence of the third paragraph "On the claim(s) of _____," and "the claim".

Uncontradicted but equivocal evidence. — Uncontradicted evidence is not required to be accepted as true if the evidence is equivocal. Evidence may be considered equivocal if the circumstances cast doubt on the accuracy of the evidence. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

"Clear and convincing evidence" defined. — The word "instantly" is not essential in the definition of "clear and convincing evidence": "For evidence to be clear and convincing, it must [instantly] tilt the scales in the affirmative when weighed against the evidence in opposition and leave your mind with a conviction that such evidence is true." Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Applicability to cases arising under Probate Code. — Under 45-1-304 NMSA 1978, this instruction is properly given in district court cases arising under the Probate Code. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Use in proceeding to invalidate will for undue influence. — Although proof of undue influence to invalidate a will must be by clear and convincing evidence, this instruction is proper in such a case when an instruction is also given that the evidence must be clear and convincing. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Burden of persuading jury as to the amount of damages is upon the plaintiff; the defendant has no such burden. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Standard of proof. — Issues of punitive damages are to be determined according to the preponderance of evidence. United Nuclear Corp. v. Allendale Mut. Ins. Co., 103 N.M. 480, 709 P.2d 649 (1985); Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 779 P.2d 99 (1989).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1289 to 1292.

Instructions defining term "preponderance or weight of evidence," 93 A.L.R. 155.

Error as to instructions on burden of proof under doctrine of res ipsa loquitur as prejudicial, 29 A.L.R.2d 1390.

Part C
Causation

13-305. Causation (*Proximate cause*).

An [act] [or] [omission] [or] [_____ (*condition*)] is a "cause" of [injury] [harm] [_____ (*other*)] if [, unbroken by an independent intervening cause,] it contributes to bringing about the [injury] [harm] [_____ (*other*)] [, and if injury would not have occurred without it]. It need not be the only explanation for the [injury] [harm] [_____ (*other*)], nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause", the [act] [or] [omission] [or] [_____ (*condition*)], nonetheless, must be reasonably connected as a significant link to the [injury] [harm].

USE NOTE

This instruction should be used in all cases in which an act, omission or condition is said to have caused injury or harm, and ties to UJI 13-302 NMRA.

The 2004 amendments to this instruction eliminated the word "proximate". The trial court and counsel should be careful, when preparing other instructions that use the term "proximate cause" to eliminate the word "proximate" until appropriate amendments to those instructions are published. The Court, by administrative order dated December 10, 2005, authorized the elimination of the word "proximate" for all civil Uniform Jury Instructions that had formerly referred to "proximate cause".

The bracketed "independent intervening cause" clause shall not be used for a plaintiff's comparative negligence or in cases involving multiple acts of negligence by concurrent tortfeasors. *Torres v. El Paso Electric Co.*, 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386, dramatically limits the application of independent intervening cause under New Mexico tort law. The clause is to be used when there is an unforeseeable force, not in operation at the time the defendant acted that is not a concurrent cause of the plaintiff's injury, such as a force of nature, an intentional tort, or a criminal act. *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, 130 N.M. 532, 27 P.3d 1019, *cert. denied*, 130 N.M. 713.

Independent intervening cause is not appropriate when a defendant is merely arguing lack of causation. An instruction on independent intervening cause presupposes a defendant's negligence and causation in fact. Without some initial tortious act or omission by a defendant that precipitates the plaintiff's ultimate injury, subsequent causes and their injuries cannot "intervene".

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. 08-8300-61, effective February 2, 2009.]

Committee comment. — The changes to this instruction approved in 2004, including the elimination of the word "proximate", are intended to make the instruction clearer to the jury and do not signal any change in the law of proximate cause. The proximate cause element of causation is expressed by the phrase "reasonably connected as a significant link" in lieu of "natural and continuous sequence".

The changes to this instruction approved in 2004, including the elimination of the word "proximate", are intended to make the instruction clearer to the jury and do not signal any change in the law of proximate cause. The proximate cause element of causation is expressed by the phrase "reasonably connected as a significant link" in lieu of "natural and continuous sequence".

The committee feels that the but-for clause may be unnecessary or inappropriate in particular cases, such as when the plaintiff cannot show, more likely than not which one of multiple negligent acts was the cause of injury, e.g., *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), or when multiple acts each may be a cause of indivisible injury regardless of the other(s). *E.g., Restatement (Second) of Torts,* Section 432(2). In the former situation, it will be for the trial court to decide whether the burden of proof on causation may be more appropriately shifted to the defendant; in the latter situation, the trial court might determine that the "cause-in-fact" element of causation is more adequately expressed through use of the terms "contributes to bringing about", "explanation for", "the reason that". The present instruction leaves these issues for determination by the trial court, in each case pending controlling guidance from the Court.

The elements of proximate cause were set out in *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973).

Even in a case where negligence is admitted or found as a matter of law, proximate cause generally remains an issue in the case. *Fitzgerald v. Valdez*, 77 N.M. 769, 427 P.2d 655 (1967).

The applicability of the doctrine in comparative negligence cases was discussed in *Armstrong v. Industrial Elec. & Equip. Serv.*, 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981).

The following is an example of how the instruction may read:

An act or omission is a "cause" of injury if it contributes to bringing about the injury, and if the injury would not have occurred without it. It need not be the only explanation for the injury, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause", the act or omission, nonetheless, must be reasonably connected as a significant link to the injury.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, deleted the first sentence defining "proximate cause" and inserted a new first sentence in its place, rewrote the second sentence and added the last sentence. The 2004 amendments also added all but the first phrase of the Use Note and replaced the Committee Comment with a new Committee Comment.

The 2009 amendment, as approved by Supreme Court Order 08-8300-061, effective February 2, 2009, amended the "USE NOTE" as follows: in the third paragraph, replaced "others" with "concurrent tortfeasors" in specifying that the bracketed "independent intervening clause" was not to be used for "cases involving multiple acts of negligence.by concurrent tortfeasors"; added that Torres v. El Paso Electric Co., 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386 "dramatically limits the application of independent intervening cause under New Mexico tort law"; and changed "The clause is to be used when there is an unforseeable force, whether a force of nature, an intentional tort, or a cruminal act" to "The clause is to be used when there is an unforseeable force, not in operation at the time the defendant acted that is not a concurrent cause of the plaintiff’s injury, such as a force of nature, an intentional tort, or a criminal act"; and added a fourth paragraph.

Use of bracketed language. — Ordinarily in tort actions where comparative negligence claims are present, the trial court should give the language included in the second bracketed portion (now the last two sentences) of this instruction. Armstrong v. Industrial Elec. & Equip. Serv., 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981).

Chain of causation. — This instruction and UJI 13-306, directing the jury to decide whether a defendant's acts produced the plaintiff's injury and to consider independent intervening causes, are designed to give the jury guidance in determining whether and when to break the causative chain, depending on the factual circumstances before it.

Enriquez v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Lost chance of survival. — In an action based on misdiagnosis of a preexisting medical condition, plaintiff had the burden to show that decedent had a better-than-even chance of surviving the condition; however, because she never established to a reasonable degree of medical probability that decedent's cancer would have been detected by an x-ray at an earlier date, she could not show that the failure to x-ray more likely than not caused a reduction in the chance of survival. Baer v. Regents of the Univ. of Cal., 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9.

Recovery for "loss of chance." — New Mexico recognizes the doctrine of "lost chance," i.e., that a patient can recover in a medical malpractice action for negligence that results in the loss of a chance for a better outcome; however, to prevail on such a theory, a patient must prove all the elements of negligence, including causation, and specifically must prove that there was indeed a window of time during which action might have produced the superior outcome. Alberts v. Schultz, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279.

Independent intervening cause not applicable to plaintiff's negligence. — In cases in which a defendant alleges that a plaintiff's negligence proximately caused his or her injury, UJI 13-306 and the reference to independent intervening cause in this instruction unduly emphasize a defendant's attempt to shift fault to a plaintiff; thus, the jury shall not be instructed on independent intervening cause for a plaintiff's alleged comparative negligence. Torres v. El Paso Elec. Co., 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386.

Negligent selection of independent contractors. — The proximate cause issue takes on a particularized form in cases involving claims of negligent selection of independent contractors. Talbott v. Roswell Hosp. Corp., 2005-NMCA-109, 138 N.M. 189, 118 P.3d 194, cert. denied, 2005-NMCERT-008.

Law reviews. — For note, "Negligent Hiring and Retention - Availability of Action Limited by Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

For note, "The Doctrine of Independent Intervening Cause Does Not Apply in Cases of Multiple Acts of Negligence - *Torres v. El Paso Electric Company,*" see 30 N.M.L. Rev. 325 (2000).

For note, "The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance - *Alberts v. Schultz,*" see 30 N.M.L. Rev. 387 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence §§ 138, 148, 163, 261.

Sufficiency of instruction on contributory negligence as respects the element of proximate cause, 102 A.L.R. 411.

13-306. Independent intervening cause.

An independent intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.

USE NOTE

This instruction is to be used when the evidence presents an issue with regard to an independent intervening cause. This instruction deals with the issue of causation and is a companion instruction to UJI 13-305.

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 08-8300-61, effective February 2, 2009.]

Committee comment. — This principle was defined in Thompson v. Anderman, 59 N.M. 400, 411, 285 P.2d 507 (1955). *See also Shephard v. Graham Bell Aviation Serv., Inc.*, 56 N.M. 293, 243 P.2d 603 (1952). New Mexico, as have other jurisdictions, has identified an "independent intervening cause" as a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original wrongdoer; the intervening cause must be sufficient to break the natural sequence of the first negligence and serve as the efficient cause of the injury. Ordinarily, the concurrent negligence of another person is not an independent intervening cause.

ANNOTATIONS

The 2009 amendment, as approved by Supreme Court Order 08-8300-061, effective February 2, 2009, in the second sentence of the first paragraph of the "USE NOTE", replaced "proximate cause" with "causation" and corrected "UJI-13-307" to "UJI . 14-111 The 2009 amendment, as approved by Supreme Court Order 08-8300-060, effective February 2, 2009, in the third sentence of the first paragraph changed "A sample questionnaire is provided below, which would be altered to fit an individual case" to "A sample questionnaire is provided below, which must be altered to fit the individual case"; and in numbered item 2 of the "SAMPLE SUPPLEMENTAL JUROR QUESTIONNAIRE", added "the internet".

Chain of causation. — This instruction and UJI 13-305, directing the jury to decide whether a defendant's acts produced the plaintiff's injury and to consider independent intervening causes, are designed to give the jury guidance in determining whether and when to break the causative chain, depending on the factual circumstances before it. Enriquez v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Instruction properly refused. — Court properly refused intervening cause instruction, where no evidence was presented that any cause other than employee's sexual

harassment and its allowance by employer led to plaintiff's injuries. Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

Independent intervening cause not applicable to plaintiff's negligence. — In cases in which a defendant alleges that a plaintiff's negligence proximately caused his or her injury, this instruction and the reference to independent intervening cause in UJI 13-305 unduly emphasize a defendant's attempt to shift fault to a plaintiff; thus, the jury shall not be instructed on independent intervening cause for a plaintiff's alleged comparative negligence. Torres v. El Paso Elec. Co., 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386.

Suicide. — When an individual commits suicide using a gun owned by someone else, the owner of the gun is not liable for the death. In the absence of intentional conduct that creates the risk of suicide or a legally recognized special relationship and knowledge of a specific likelihood of harm that gives rise to a duty to avoid harm, suicide operates as an independent intervening cause of death. Johnstone v. City of Albuquerque, 2006-NMCA-119, 140 N.M. 596, 145 P.3d 76.

Part D
Evidence

13-307. Rules of evidence.

The evidence which you are to consider in this case consists of the testimony of the witnesses and the exhibits admitted into evidence by the court [and any facts admitted or agreed to by counsel] [and any facts which the court instructs you to accept as true].

The production of evidence in court is governed by rules of law. From time to time it has been my duty, as judge, to rule on the evidence. You must not concern yourselves with the reasons for these rulings. You should not consider what would or would not have been the answers to the questions which the court ruled could not be answered.

USE NOTE

This instruction is designed to reinforce the rules governing consideration of evidence about which the jury would have been admonished prior to trial under paragraphs 6 and 7 of UJI 13-106.

The bracketed material will be used only when justified. The judge shall instruct the jury to accept as conclusive any fact judicially noticed. See Rule 11-201G.

Committee comment. — The judge is prohibited from commenting to the jury upon the evidence or the credibility of the witnesses, see Rule 11-107; but, whether requested or

not, the judge may take judicial notice of adjudicative facts not subject to reasonable dispute. See Rule 11-201.

ANNOTATIONS

Law reviews. — For note, "The Doctrine of Independent Intervening Cause Does Not Apply in Cases of Multiple Acts of Negligence - *Torres v. El Paso Electric Company,*" see 30 N.M.L. Rev. 325 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1282.

13-308. Circumstantial evidence.

A fact may be proved by circumstantial evidence. Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved.

USE NOTE

This instruction will be given where circumstantial evidence has been produced which warrants instructing the jury that the same may be used along with direct evidence on the issue.

[As amended, effective January 1, 1987.]

Committee comment. — In civil cases, an instruction on circumstantial evidence is proper under certain circumstances. This instruction was quoted with approval in Springer Corp. v. Dallas & Mavis Forwarding Co., 90 N.M. 58, 559 P.2d 846 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); Carter Farms Co. v. Hoffman-LaRoche, Inc., 83 N.M. 383, 492 P.2d 1000 (Ct. App. 1971).

ANNOTATIONS

Inferences may be drawn from circumstantial evidence. Ulibarri v. Village of Los Lunas, 79 N.M. 421, 444 P.2d 606 (Ct. App. 1968); Andrus v. Gas Co., 110 N.M. 593, 798 P.2d 194 (Ct. App. 1990) See Gutierrez v. Albertsons, Inc., 113 N.M. 256, 824 P.2d 1058 (Ct. App. 1991).

Transcript necessary for review. — Without the transcript of proceedings, an appeals court cannot determine whether circumstantial evidence existed to warrant giving this instruction to the jury. Ford v. Board of County Comm'rs, 118 N.M. 134, 879 P.2d 766 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1387 et seq.

CHAPTER 4
Agency; Respondeat Superior

Introduction

Agency principles may arise in both contract and tort. Reference is made to the Restatement of Agency 2d § 2 where the distinctions are pinpointed. The terms "employer and employee" are used herein for the benefit of the jury in substitution for the traditional terms of "master and servant."

The subject matter of instructions included in this chapter has been discussed by the New Mexico appellate courts as follows:

A. Employer-employee (generally)

Reynolds v. Swigert, 102 N.M. 504, 697 P.2d 504 (Ct. App. 1984); Armijo v. Albuquerque Anesthesia Services, 101 N.M. 129, 679 P.2d 271 (Ct. App. 1984); Gonzales v. Southwest Sec. & Protection Agency, Inc., 100 N.M. 54, 665 P.2d 810 (Ct. App. 1983); Ulibarri Landscaping v. Colony Materials, 97 N.M. 266, 639 P.2d 75 (Ct. App. 1981); Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981); Chevron Oil Company v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973).

B. Employee or independent contractor (generally)

Budagher v. Amrep. Corp., 97 N.M. 116, 637 P.2d 547 (Ct. App. 1981); Harmon v. Atlantic Richfield Co., 95 N.M. 501, 623 P.2d 1015 (Ct. App.), cert. denied, 95 N.M. 593, 624 P.2d 535 (1981); Fresquez v. Southwestern Indus. Contractors & Riggers, 89 N.M. 525, 554 P.2d 986 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); Abbott v. Donathon, 86 N.M. 477, 525 P.2d 404 (Ct. App. 1974); Sutton v. Chevron Oil Co., 85 N.M. 604, 514 P.2d 1301 (Ct. App.), rev'd, 85 N.M. 679, 515 P.2d 1283 (1973).

C. Corporation acts through employees

Segura v. Molycorp, Inc., 97 N.M. 13, 636 P.2d 284 (1981); Cornell v. Albuquerque Chem. Co., 92 N.M. 121, 584 P.2d 168 (Ct. App. 1978); Echols v. N.C. Ribble Co., 85 N.M. 240, 511 P.2d 566 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

D. Principal-agent

Tabet v. Campbell, 101 N.M. 334, 681 P.2d 1111 (1984); Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984); Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc., 99 N.M. 95, 654 P.2d 548 (1982); Turley v. State, 96 N.M. 579, 633 P.2d 687 (1981); Bank of New Mexico v. Priestly, 95 N.M. 569, 624 P.2d 511 (1981); Barnes v. Sadler Assocs., 95 N.M. 334, 622 P.2d 239 (1981); Vicker's v. North Am. Land Devs., 94 N.M. 65, 607 P.2d 603 (1980).

E. Partnerships

Dotson v. Grice, 98 N.M. 207, 647 P.2d 409 (1982); United Nuclear Corp. v. General Atomic Co., 90 N.M. 97, 560 P.2d 161 (1976); Kinetics, Inc. v. El Paso Prods. Co., 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982).

[As amended, effective January 1, 1987.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Agency §§ 372, 373.

3 C.J.S. Agency § 553.

13-401. Agent; principal; definition.

An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation. The agreement may be oral or written, [and may be either expressed or implied by a course of conduct showing an intention that the relationship exists.]

USE NOTE

This instruction is always to be used with UJI 13-402 when respondeat superior is in issue. It may also be used with UJI 13-405 to explain the terms even when respondeat superior is not in issue.

Where the doctrine of "respondeat superior" is involved under the traditional master-servant relationship, reference is made to UJI 13-403.

The material in the brackets is appropriate when an implied agreement of agency is a question for the jury.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Claim based on theory of direct liability. — Court did not err in rejecting defendant's proffered instructions derived from UJI 13-401 and 13-402, based on respondeat superior and franchisee theory of liability, where plaintiff's claim was based on a theory of direct liability based on defendant's failure to train or supervise. Enriquez v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

13-402. Liability of principal.

If you find there was a principal and agent relationship, the principal is liable for the acts of [his] [her] [its] agent when:

1. The agent was acting within the scope of [his] [her] agency; and

2. The principal had the right to control the manner in which the details of the work were to be performed at the time of the occurrence, even though the right of control may not have been exercised.

USE NOTE

Always use this instruction with UJI 13-401.

[As amended, effective November 1, 1991.]

Committee comment. — Fundamentally, and according to both the Restatement and the American courts, there is no distinction to be drawn between the liability of a principal for the tortious act of an agent and the liability of a master for the tortious act of a servant. In both cases, the tort liability is based on the master and servant, rather than any agency principle; the liability for the tortious act of the employee is grounded upon the maxim of "respondeat superior" and is to be determined by considering, from a factual standpoint, the question of whether the tortious act was done while the employee, whether agent or servant, was acting within the scope of employment. 3 Am. Jur. 2d Agency 267. See also McCauley v. Ray, 80 N.M. 171, 453 P.2d 192, rehearing denied (1969).

Echols v. N.C. Ribble Co., 85 N.M. 240, 511 P.2d 566 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973), notes that when an agent is acting within the scope of authority, the principal is liable for false representations made by the agent, even if the principal was without knowledge of its agent's fraud and otherwise innocent of wrongdoing.

With respect to tort liability, the principal is liable for the acts of an agent only when the principal's relationship to the agent is actually that of "employer-employee" at the time of the occurrence in question and the principal has the "right of control" on the occurrence.

Sutton v. Chevron Oil Company, 85 N.M. 679, 515 P.2d 1283 (1973), involved the indicia of control necessary to find an oil company principal liable for the tortious acts of a service station owner agent. The courts found that a factual issue, sufficient to avoid summary judgment, existed as to the degree of control exercised by Chevron.

Punitive damages are the subject of Samadan Oil Corp. v. Neeld, 91 N.M. 599, 577 P.2d 1245 (1978), and Cornell v. Albuquerque Chem. Co., 92 N.M. 121, 584 P.2d 168

(Ct. App. 1978). A master or principal is liable for punitive damages if it can be shown that the principal is guilty of wrongful motives. [As revised, effective November 1, 1991.]

ANNOTATIONS

Prima facie showing of no right to control. — Where evidence established a prima facie showing that defendant had the right to direct the result to be accomplished by defendant but did not have the right to control the manner in which the details of the work were to be performed, there were no genuine issues of material fact as to the applicability of either the doctrine of respondeat superior or the law of agency, and since plaintiff had not presented any evidence to cast at least a reasonable doubt upon defendant's evidence, defendant was entitled to summary judgment as a matter of law on plaintiff's cause of action. Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

Claim based on theory of direct liability. — Court did not err in rejecting defendant's proffered instructions derived from UJI 13-401 and 13-402, based on respondeat superior and franchisee theory of liability, where plaintiff's claim was because of a theory of direct liability based on defendant's failure to train or supervise. Enriquez v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Agency § 3.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 A.L.R.4th 127.

3 C.J.S. Agency § 4.

13-403. Employee-employer; definition (master and servant).

An employer is one who has another perform certain work and who has the right to control the manner in which the details of the work are to be done, even though the right of control may not be exercised.

The person performing the work is the employee.

USE NOTE

This instruction is to be used in lieu of "master and servant" instructions. It is always to be used with UJI 13-406 when respondeat superior is in issue. It may also be used with UJI 13-405 to explain the terms even when respondeat superior is not in issue.

[As amended, effective January 1, 1987.]

Committee comment. — An employer-employee relationship is a particular kind of agency relationship where the "right of control" exists. "Principal-agent" is the broader concept and "employer-employee" the narrower concept. The terms "employer and employee" have been substituted throughout these instructions for "master and servant". The latter terms are considered outmoded and confusing.

ANNOTATIONS

Prima facie showing of no right to control. — Where evidence established a prima facie showing that defendant had the right to direct the result to be accomplished by defendant but did not have the right to control the manner in which the details of the work were to be performed, there were no genuine issues of material fact as to the applicability of either the doctrine of respondeat superior or the law of agency, and since plaintiff had not presented any evidence to cast at least a reasonable doubt upon defendant's evidence, defendant was entitled to summary judgment as a matter of law on plaintiff's cause of action. Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

Unpaid housesitter not employee. — As a matter of law, upaid housesitter provided with general instructions by homeowner was not an employee of the homeowner. Madsen v. State, 1999-NMSC-042, 128 N.M. 255, 992 P.2d 268.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Employment Relationship §§ 1, 2, 4.

3 C.J.S. Agency § 16.

13-404. Independent contractor.

An independent contractor is one who agrees to do certain work where the person who engages the contractor may direct the result to be accomplished but does not have the right to control the manner in which the details of the work are to be performed.

One who employs an independent contractor is not liable to others for the wrongful acts or omissions of the contractor [or for the wrongful acts or omissions of the employees of the independent contractor].

USE NOTE

This instruction may be used immediately following UJI 13-403 when there is a valid issue of "independent contractor".

[As amended, effective November 1, 1991.]

Committee comment. — Juries are often required to determine the status of the alleged tortfeasor as an employee, independent contractor or employee of an independent contractor. A defendant's liability will hinge on the right to control the physical details of the job to be accomplished. See Paragraph B of the Introduction to this chapter.

When an independent contractor is engaged in the performance of inherently dangerous work, the employer of the contractor is liable to third persons for physical harm caused by the contractor. Montanez v. Cass, 89 N.M. 32, 546 P.2d 1189 (Ct. App.), aff'd in part, rev'd in part sub nom. New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral in the first paragraph.

Operation of water truck is not inherently dangerous. — The operation of an eighteen-wheeled truck to deliver water is not an inherently dangerous activity and defendant, who had retained an independent contractor to haul fresh water to defendant’s drilling site, was not liable for the negligence of the independent contractor’s employee who was involved in the accident that resulted in the death of the decedent. Valdez v. Yates Petroleum Corp., 2007-NMCA-038, 141 N.M. 381, 155 P.3d 786.

Contractor's liability to employee of independent contractor. — While defendant would not normally be liable for the wrongful acts of an employee of its independent contractor, (security service employing armed guard), its liability could arise if its independent contractor was engaged in inherently dangerous work. Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

Prima facie showing of no right to control. — Where evidence established a prima facie showing that defendant had the right to direct the result to be accomplished by defendant but did not have the right to control the manner in which the details of the work were to be performed, there were no genuine issues of material fact as to the applicability of either the doctrine of respondeat superior or the law of agency, and since plaintiff had not presented any evidence to cast at least a reasonable doubt upon defendant's evidence, defendant was entitled to summary judgment as a matter of law on plaintiff's cause of action. Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

Building owner liable for negligence of independent contractor. — An owner of a commercial building can be held vicariously liable for an independent contractor's negligence where the negligence creates a dangerous condition causing injury to a business visitor in those areas of the building over which the owner retains control. Broome v. Byrd, 113 N.M. 38, 822 P.2d 677 (Ct. App. 1991).

Joint and several liability where peculiar risk of harm. — When an employer hires an independent contractor to do work that the law recognizes as likely to create a peculiar risk of harm, the employer is jointly and severally liable for harm resulting if reasonable precautions are not taken against the risk. The liability is direct, not vicarious, and what the independent contractor knew or should have known is not at issue. This imposition of liability falls within the public policy exception of Subsection (C)(4) to the general abolition of joint and several liability set forth in 41-3A-1 NMSA 1978. Saiz v. Belen Sch. Dist., 113 N.M. 387, 827 P.2d 102 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Independent Contractors § 32.

Storekeeper's liability for personal injury to customer caused by independent contractor's negligence in performing alterations or repair work, 96 A.L.R.3d 1213.

30 C.J.S. Employer-Employee §§ 13 to 20.

13-405. Employer sued; no issue of employment, scope of employment or agency.

_____ ***(name of employee)*** **was the employee [agent] of**
_____ ***(name of employer)*** **at the time of the occurrence. Therefore,**
_____ ***(name of employer)*** **is liable for any wrongful act or omission of**
_____ ***(name of employee).***

USE NOTE

This instruction is to be used where the parties admit a relationship giving rise to respondeat superior or the court finds the same as a matter of law.

[As amended, effective January 1, 1987.]

Committee comment. — The employer is bound by the acts of an employee committed or performed within the course and scope of employment. [As revised, effective November 1, 1991.]

ANNOTATIONS

Negligent hiring and supervision. — To sustain an action based on theories of negligent hiring and supervision of an employee, the plaintiff must show that the employer’s business itself must bring a potential plaintiff both into a physical zone of foreseeable danger and in contact with the employee. Ovecka v. Burlington Northern Santa Fe Railway Co., 2008-NMCA-140, 145 N.M. 113, 194 P.3d 728.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Employment Relationship §§ 461, 462.

Tort as act of servant, necessity of pleading in action against master, 4 A.L.R.2d 292.

Imputation of servant's or agent's contributory negligence to master or principal, 53 A.L.R.3d 664.

13-406. Employer sued; employment and scope of employment denied.

If you find that _____ *(name of employee)* was the employee of _____ *(name of employer)* and as acting within the scope of [his] [her] [its] employment at the time of the occurrence, then _____ *(name of employer)* is liable to plaintiff for any wrongful act or omission of the employee.

However, if you find that _____ *(name of employee)* was not the employee of _____ *(name of employer)* or that [he] [she] was not acting within the scope of [his] [her] [its] employment at the time of the occurrence, then _____ *(name of employer)* is not liable to plaintiff for any such act or omission.

USE NOTE

This instruction is to be used together with UJI 13-403 and 13-407 when there is a proper issue for jury deliberation as to liability of the employer for the wrongful acts of the employee.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — This instruction is to be used where a relationship giving rise to respondeat superior is in issue. See Hansen v. Skate Ranch, Inc., 97 N.M. 486, 641 P.2d 517 (Ct. App. 1982).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Employment Relationship § 485.

Inference of master and servant relationship and scope of authority in action for negligent injury from fact that person whose acts or statements are relied upon was apparently performing services for defendant, upon latter's premises, 112 A.L.R. 337.

30 C.J.S. Master and Servant §§ 205 to 217.

13-407. Scope of employment; definition.

An act of an employee is within the scope of employment if:

1. It was something fairly and naturally incidental to the employer's business assigned to the employee, and

2. It was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

USE NOTE

This instruction must be used whenever UJI 13-406 is used in order that the jury might better understand what is meant by the term of "scope of employment".

[As amended, effective January 1, 1987.]

Committee comment. — For all practical purposes, the terms "scope of employment" and "course of employment" are synonymous. In New Mexico, as in other jurisdictions, the two terms have been used interchangeably, despite the fact that it is possible to draw distinctions in their meanings. For this reason, only "scope of employment" is used in these instructions.

In the case of Benham v. All Seasons Child Care, Inc., 101 N.M. 636, 686 P.2d 978 (Ct. App. 1984), Judge Wood cites this instruction and reviews New Mexico case law interpreting the term "scope of employment". See also Lang v. Cruz, 74 N.M. 473, 394 P.2d 988 (1964).

As to intentional torts of employees committed in the course and scope of employment, see Gonzales v. Southwest Sec. & Protection Agency, Inc., 100 N.M. 54, 665 P.2d 810 (Ct. App. 1983).

ANNOTATIONS

Return to scope and course of employment. — Where an employee deviated from the scope and course of his employment by driving an extended distance away from the site of his work assignment, pursued personal business with family members, and imbibed enough alcohol to render him severely intoxicated, the employee had not returned to the scope and course of his employment at the time he was driving back to the site of his work assignment and collided with the automobile driven by the decedent. Ovecka v. Burlington Northern Santa Fe Railway. Co., 2008-NMCA-140, 145 N.M. 113, 194 P.3d 728.

Scope of employment in automobile accident. — An employer who consented to the use of the vehicle driven by its employee and who had a right to control the employee's operation of the vehicle was not liable for injuries to plaintiff in an automobile accident that occurred when the employee was driving home after work. Lessard v. Coronado Paint & Decorating Center, Inc., 2007-NMCA-122, 142 N.M. 583, 168 P.3d 155, cert. granted, 2007-NMCERT-009.

Personal activity outside scope of employment. — The employee was not acting in the scope of his employment when he negligently installed a gas stove that ignited and caused extensive damages to plaintiff's home where the employee's employer was in the business of selling and installing windows; the employer sent the employee to plaintiff's home to install windows; plaintiff asked the employee to install a door; plaintiff called the employee on the employee's personal telephone to arrange for the installation of the door; the employee installed the door on his day off with the help of his son; when the employee installed the door, plaintiff asked the employee to install the gas stove; the employee was not driving the employer's vehicle when he installed the door and the gas stove; the employer did not know whether or when the employee was going to install the door; and the employer did not know that the employee was going to install the gas stove. Cain v. Champion Window Co. of Albuquerque, LLC, 2007-NMCA-085, 142 N.M. 209, 164 P.3d 90.

Claim must be connected to employment. — To be connected to employment, it is not necessary that the matter be "fairly and naturally incidental to the employer's business assigned to the employee" or that it be done "with the view of furthering the employer's interest," as required by the jury instruction on scope of employment. It is enough that the "employment-related" claim is connected to the claimant's employment. Horanburg v. Felter, 2004-NMCA-121, 136 N.M. 435, 99 P.3d 685.

Principal not to accept benefits of agent's unauthorized act without burdens. — A principal who expressly or impliedly elects to ratify unauthorized acts of an agent will not be permitted to accept the benefits and reject the burdens of the acts. Ulibarri Landscaping Material, Inc. v. Colony Materials, Inc., 97 N.M. 266, 639 P.2d 75 (Ct. App. 1981).

Failure to repudiate agent's action as affirmance. — One may infer affirmance by a principal of an unauthorized transaction of its agent from the principal's failure to repudiate it. Ulibarri Landscaping Material, Inc. v. Colony Materials, Inc., 97 N.M. 266, 639 P.2d 75 (Ct. App. 1981).

When negligence within scope of employment. — Where the servant, while traveling in pursuit of his master's business, is guilty of negligence in stopping on or near the highway, even for the purpose of inquiring whether aid or assistance can be rendered another vehicle in distress, where the negligence is closely related to the master's task, and where the servant is traveling the route to be followed in the execution thereof, the servant is deemed to be within the scope of his employment; thus, the doctrine of

respondeat superior can be invoked. Spradley v. United States, 119 F. Supp. 292 (D.N.M. 1954)(brought under the Federal Tort Claims Act).

But not if servant turns away from master's business. — Where the servant actually turns away from the master's business and changes the course of the vehicle, unmistakably appropriating the vehicle for a use unrelated to the master's interest and for the exclusive purpose of aiding a third person in distress, such a deviation amounts to a temporary leaving of the scope of employment and the immediate succeeding acts are not chargeable to the master. Spradley v. United States, 119 F. Supp. 292 (D.N.M. 1954)(brought under the Federal Tort Claims Act).

And personal activity out of scope of employment. — Where the driver of a truck had varied from official government business so that at the time of his accident he was engaged in a personal activity, completely independent from government duties, his actions were not within the scope of employment. Spradley v. United States, 119 F. Supp. 292 (D.N.M. 1954)(brought under the Federal Tort Claims Act).

Where it is fairly clear that defendant employee was furthering his own interests when he attacked plaintiff, as his purpose in leaving his duties at the bar and going outside was to see about the damage done by plaintiff to his personal car, the trial court's refusal to give an instruction on scope of employment was not in error. Valdez v. Warner, 106 N.M. 305, 742 P.2d 517 (Ct. App. 1987).

Summary judgment for defendants was appropriate where plaintiff, who had been injured in a traffic accident while returning to work during his lunch break, failed to controvert defendants' asserted material facts and plaintiff also failed to establish that employer exercised any control over employee while he returned to work during lunch breaks. Richardson v. Glass, 114 N.M. 119, 835 P.2d 835 (1992).

Even if clerical worker was acting as defendant corporation's servant or agent at the time of an alleged embezzlement, the court correctly determined that, as a matter of law, the worker's acts of embezzlement from the plaintiff were activated by personal motives and were not within the scope of employment. Los Ranchitos v. Tierra Grande, Inc., 116 N.M. 222, 861 P.2d 263 (Ct. App. 1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Employment Relationship § 463.

Employers liability for negligence of employee in driving his or her own automobile, 27 A.L.R.5th 174.

13-408. Apparent authority; reliance.

The defendant, _____ *(name of alleged employer)*, may, if there has been no actual employment, with right to control, nonetheless be liable for

the acts or omissions of _____ *(name of alleged apparent employee)*, if:

1. _____ *(name of alleged employer)* by [his] [her] [its] statements, acts or conduct led the plaintiff to reasonably believe _____ *(name of apparent employee)* was defendant's employee.

[No direct communication between plaintiff and _____ *(name of alleged employer)* employer is required; the statements, acts or conduct may consist of those made to the public in general.]

2. Plaintiff dealt with _____ *(name of apparent employee)* in justifiable reliance upon representations of _____ *(name of alleged employer)*;

[3. At the time of the injury _____ *(name of apparent employee)* was acting in the scope of the apparent employment.]

USE NOTE

This instruction is to be used together with UJI 13-403 when apparent authority is an issue. The bracketed language in paragraph number 1 is appropriate when the communication is not direct. If the scope of apparent authority is also in issue, then the bracketed paragraph number 3 should be included and UJI 13-407 should follow this instruction.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — This instruction assumes that the defendant was not an employer. In Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973), the situation was one where there was no employer-employee relationship as between a service station owner and the service station operator, but third persons relied upon the apparent relationship.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in Item 1.

13-409. Corporation acts through employees.

A corporation can act only through its officers and employees. Any act or omission of an officer or an employee of a corporation, within the scope or course of [his] [her] employment, is the act or omission of the corporation.

USE NOTE

This instruction may be used in any case where a corporation is a party or non-party, and the jury needs to be advised as to the manner in which a corporation may act.

It may be necessary, if there is an issue as to whether or not the officer or employee of a corporation was acting within the scope or course of [his] [her] employment, to give the separate UJI 13-406 and 13-407 instruction.

[As amended, effective November 1, 1991.]

Committee comment. — The above instruction is sufficient to present any issue with regard to wrongful acts or omissions of a corporation.

This instruction was cited in the case of De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976). In Armijo v. Albuquerque Anesthesia Servs., 101 N.M. 129, 679 P.2d 271 (Ct. App. 1984), the court affirmed a summary judgment in favor of the corporation where plaintiffs did not allege that the corporation was liable for the acts of its employees and no allegation that the individual doctors were acting in the course of their employment was made.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the second sentence of the instruction and in the second paragraph of the Use Note.

No error to give other instructions on corporation's liability. — The giving of an instruction regarding a corporation's liability for actions committed while the corporation was under different ownership, although not found in Uniform Jury Instructions, meets the requirements of Rule 51(1)(e), N.M.R. Civ. P. (now see Rule 1-051F), and despite the fact that the committee comments to this instruction state that this instruction is sufficient for any issue of liability of a corporation, the "directions for use" suggest an additional instruction may be necessary, and that no error was committed in giving an additional instruction. O'Hare v. Valley Utils., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), modified on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

Or status. — This instruction did not obviate the giving of U.J.I. Civ. 15.5 (now see UJI 13-206), providing that a corporation is to be treated as an individual; although defendant's corporate status was established by the pleadings, the jury was never informed of that fact. De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Individual liability for retaliatory discharge. — Although the decision to hire and fire personnel for the company lied with the individual defendants, it is difficult to see how a retaliatory discharge cause of action would apply to the individual defendants acting in the course and scope of their employment. There was no evidence in the record that either of the individual defendants acted outside the course and scope of their

employment, nor was there any evidence of malicious, willful, or wanton conduct. Bourgeous v. Horizon Healthcare Corp., 117 N.M. 434, 872 P.2d 852 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18B Am. Jur. 2d Corporations §§ 2124 to 2127.

19 C.J.S. Corporations § 586 et seq.

13-410. Joint venture - *No instruction drafted*.

No instruction drafted.

Committee comment. — Those engaged in a joint enterprise or a joint venture may incur vicarious liability for the tortious conduct of one participant whose negligence may be imputed to other members of the joint enterprise or joint venture upon the same principles which apply to partners.

In the case of Cooper v. Curry, 92 N.M. 417, 589 P.2d 201 (Ct. App. 1978), the court reviewed the factors necessary to create a joint venture:

[T]here must be a community interest in the performance of a common purpose, a joint proprietory interest in the subject matter, a mutual right to control, a right to share in the profits, and a duty to share in any losses which may be sustained. [Citation omitted.]

92 N.M. at 421.

See also Committee Comment to UJI 13-411.

13-411. Partnership - *No instruction drafted*.

No instruction drafted.

Committee comment. — Generally, partners are jointly and severally liable for wrongful acts or omissions of one of the partners in the course of the partnership business and such liability is predicated upon the mutual agency arising out of the partnership relationship which holds one partner liable for a tort, committed by another partner, which arises out of, and in the scope of, the partnership business.

Kinetics, Inc. v. El Paso Prods. Co., 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982), tracked the wording of the New Mexico Uniform Partnership Act, NMSA 1978, 54-1-1 et seq. [now 54-1A-101 NMSA 1978 et seq.], and stated that where plaintiff in a negligence action sued the partnership for acts and omissions of the partnership, the liability of the partners was of necessity vicarious.

When the need arises, counsel should draft appropriate instructions covering the issues presented in accordance with the guides contained in this pamphlet.

13-412. Deviation - *No instruction drafted*.

No instruction drafted.

Committee comment. — No instruction has been drafted on this legal principle. Most cases presenting a question of deviation are workmen's compensation cases which are not subject to jury deliberations.

The resolution of the question, whether a deviation by an agent from the scope of his employment is casual or so substantial in kind or area that, in fairness, the principal should not be held for the actions of the agent, depends on many detailed circumstances which vary widely from case to case; because of this fact, the committee did not draw an instruction more specific than the other instructions contained in this chapter which relate to the scope of authority.

The committee suggests that if the instructions here on scope of employment are not sufficient, then the trial lawyers will have to submit an instruction of their own drafting.

See Velkovitz v. Penasco Indep. School Dist., 96 N.M. 577, 633 P.2d 685 (1981), for a discussion of deviation in the workmen's compensation context.

13-413. Liability of employer or co-employee defendant.

_____ (*defendant employer or co-employee*), is responsible only for damages caused to _____ (*plaintiff*) only if _____ (*employer or co-employee*) intentionally or willfully injured _____ (*plaintiff*).

_____ (*employer or co-employee*) acted intentionally if [he] [she] [it] [committed an act] [or] [failed to act] when [he] [she] [it] knew or should have known, under the conditions existing at the time, that _____ (*plaintiff*) was substantially certain to be injured as a result.

_____ (*employer or co-employee*) acted willfully if [he] [she] [it]:

(1) intentionally [acted] [or] [failed to act], without just cause or excuse in a way reasonably expected to result in injury to _____ (*plaintiff*); and

(2) either expected the injury to occur or utterly disregarded the consequences of [his] [her] [its] [act] [or] [failure to act].

DIRECTION FOR USE

This instruction is to be used whenever the plaintiff is suing an employer or co-employee for injuries suffered in the course and scope of employment.

[Approved, effective March 21, 2005.]

Committee comment. — Under *Delgado v. Phelps Dodge Chino*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148, an employer or co-employee may be held liable for an on-the-job injury only if the defendant either intentionally or willfully caused the plaintiff's injury.

CHAPTER 5
Animals

Introduction

Most litigation in New Mexico involving animals has arisen as a result of livestock on highways - both fenced and unfenced.

General law and case law of other jurisdictions are of little assistance in drafting jury instructions in this area, as the matter is governed by statutory law peculiar to New Mexico. The rule of law in New Mexico involving livestock has been a matter of legislative concern for many years. The livestock industry is a matter of grave consideration not only to the legislature but to the state as a whole.

New Mexico has had very little litigation involving other animals but this chapter does contain an instruction applicable in dog bite cases.

The following decisions from the New Mexico appellate courts have been written since the publication of the first edition with reference to livestock on highways: Biesecker v. Dean, 86 N.M. 564, 525 P.2d 924 (Ct. App. 1974), rev'd, 87 N.M. 389, 534 P.2d 481 (1975); Mitchell v. Ridgway, 77 N.M. 249, 421 P.2d 778 (1966); Carrasco v. Calley, 79 N.M. 432, 444 P.2d 617 (Ct. App. 1968); Lebow v. McIntyre, 79 N.M. 753, 449 P.2d 661 (Ct. App. 1968); Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971); Tapia v. McKenzie, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973); Carrillo v. Hoyl, 85 N.M. 751, 517 P.2d 73 (Ct. App. 1973).

13-501. Trespassing livestock.

In order to recover damages for trespassing livestock, plaintiff must prove [that there was a legal fence around [his] [her] land] [that the defendant drove [his] [her] animals on plaintiff's land] [that the defendant willfully turned [his] [her] animals loose knowing that they would necessarily enter onto plaintiff's land and intending that they should do so].

USE NOTE

Material in brackets is to be used as indicated by the evidence submitted in the trial.

Under New Mexico law, there are three separate and distinct liability situations as spelled out in the cases referred to in the committee comment. They are:

(1) where a plaintiff has a legal fence enclosing his land or the damaged crops (77-16-1 NMSA 1978);

(2) where the defendant drives his animals onto the land of the plaintiff;

(3) where defendant willfully turns his animals loose knowing that they would enter upon the land of another and intending that they do so.

This instruction does not apply in a herd law district.

Included within the term of "livestock" are cattle, horses, sheep, hogs, goats and even buffaloes (77-16-2 NMSA 1978).

[As amended, effective November 1, 1991.]

Committee comment. — The cases generally hold that unless the lands of the plaintiff are within a herd law district, no recovery can be had absent proof of a willful trespass, unless properly fenced.

Carnes v. Withers, 38 N.M. 441, 34 P.2d 1092 (1934): Lands not under Herd Law [77-12-1 to 77-12-12 NMSA 1978] (C.S. 1929 § 4-401 et seq.) and lands of parties separated by a fence but not a lawful one per §§ 50-101 [77-16-1 NMSA 1978] and 50-103 [77-16-4 NMSA 1978] C.S. 1929, and contiguous and defendant's sheep drifted into plaintiff's land, held, in absence of legal fence, *a willful trespass "is necessary* before a recovery of damages for the injury occasioned by trespassing animals" (affirming for defendant and citing Vanderford v. Wagner, 24 N.M. 467, 174 P. 426 (1918)) (emphasis added).

Wright v. Atkinson, 39 N.M. 307, 46 P.2d 667 (1935): Plaintiff had 15 sections fenced within which were 2 sections owned by state and leased to one of the defendants and on which was a 1,000 gallon water tank filled by hauling; defendants turned 200 head of cattle on their unfenced land *knowing and intending* they would and should graze on plaintiff's land; held facts disclose a willful and continuing trespass entitling plaintiff to a permanent injunction in that: (1) no good faith on part of defendant; (2) relief as against willful trespass is not dependent upon the existence of the statutory fence; (3) if defendant drove the animals upon plaintiff's land or turned them loose knowing that they would necessarily enter plaintiff's land and intended that they do so, the case is one of willful trespass.

Gallegos v. Allemand, 49 N.M. 97, 157 P.2d 493, 158 A.L.R. 373 (1945): Plaintiff owned 14,000 *fenced* acres; defendant owned 300 unfenced acres separated by three miles of land owned by one Vigil; defendant grazed 50 head on his "totally insufficient" pasture, and without objection by Vigil, the 50 head grazed Vigil's land, but also plaintiff's land.

Reversed, holding for defendant, because no evidence that defendant "turned" his cattle upon (plaintiff's) lands *"knowing"* that they would *necessarily* enter the lands of (plaintiff) and that the (defendant) intended that they should do so. Court noted that inference of "intention and knowledge" of grazing on plaintiff's land not proven as record failed to show that defendant's and Vigil's lands afforded insufficient pasturage.

Stewart v. Oberholtzer, 57 N.M. 253, 258 P.2d 369 (1953): Plaintiff's riding stable of 35-40 horses on 40 acres of unfenced land adjoining defendant's forty thousand dollar ($40,000) residence at Ruidoso; defendant, without making an effort to drive horses off his premises, shot and wounded 3 animals with a rifle. Affirmed for plaintiff holding that, since *not in herd law district,* Judge Harris' instruction was correct that, where defendant's premises were not fenced, he could frighten horses away, but he had no right to shoot them, even if horses were injuring defendant's lawn, flowers, shrubs or property, as a result of what is now 47-17-1, 1953 Comp. [77-16-1 NMSA 1978], which makes running of livestock lawful and makes it the *duty of the landowner to effectively enclose* his land if he desires to keep roaming stock off of it, as one cannot "exercise force in expelling trespassing livestock . unless the trespass is willful."

Woofter v. Lincoln, 62 N.M. 297, 309 P.2d 622 (1957): Plaintiff's land not enclosed by lawful fences as provided by 47-17-1, 1953 Comp. [77-16-1 NMSA 1978], but plaintiff's fence was of barbed wire, and, when irrigation water turned off, defendant's 800 ewes and lambs crossed ditch into plaintiff's irrigated alfalfa field for about twenty-five (25) minutes. Reversed, for defendant, because, notwithstanding plaintiff's lack of legal fence, he can recover only if defendant drove his animals and willfully turned them loose knowing they would necessarily enter plaintiff's lands and intended that they should do so. Johnson v. Hickel, 28 N.M. 349, 212 P. 338 (1923).

The special cases occurring within herd law districts, provided for by 47-13-1 et seq., 1953 Comp. [77-12-1 NMSA 1978 et seq.], give an opposite result in that "when any trespassing shall have been done by any cattle, horses, sheep, goats, hogs or other livestock, upon the land or property within said (herd law) district, whether such land or property is enclosed with a legal fence or not, the . owner . may recover any damages he may sustain by reason thereof . ". 77-12-5 NMSA 1978. Owner or holder of livestock in herd law district "*who shall permit* such . to run at large on any public road within any such . shall be guilty of a misdemeanor . ". 77-12-11 NMSA 1978. Trespass by herds, 47-15-2, 1953 Comp. [77-14-3 NMSA 1978], and running at large in unincorporated towns or conservancy districts, being rare, do not merit elaboration in these instructions. Similarly, 47-15-35, 1953 Comp. [77-14-35 NMSA 1978], making it a misdemeanor for hogs or swine to run at large within city, town or village limits or to trespass upon cultivated fields or gardens and 47-15-36, 1953 Comp. [formerly 77-14-37 NMSA 1978, now repealed], prohibiting "mustang[s] or other inferior stallion[s]" (one-fourth mustang or bronco blood) over eighteen (18) months of age from running at large within 3 miles of any city, town or village.

The Herd Law, 47-13-11, 1953 Comp. [77-12-11 NMSA 1978], provides: "Any owner or holder of livestock in [herd law district] *who shall permit* such livestock to run at large on

any public road within any such herd law district shall be guilty of a misdemeanor . . . ". This statute is applicable in automobile collision with animal in herd law district. No New Mexico cases. See 59 A.L.R.2d 1330; Scarbrough v. Wooten, 23 N.M. 616, 170 P. 743 (1918) where the court stated that "[t]he act prohibits the running at large of livestock in those precincts which have adopted a herd law, and whether or not the trespass was willful is not material, except as affecting the amount of damages. Chapter 94, Laws 1909, prohibits trespass by livestock, and subjects owners to liability for damages without regard to whether the trespass was willful".

Kinsolving v. Reed, 74 N.M. 284, 393 P.2d 20 (1964): Plaintiff owned 320 acres of unfenced land surrounded by lands owned by defendant, Reed. Not a herd law district. No finding of fact or request for finding to effect that trespass was willful. Defendant's cattle had grazed on plaintiff's land for five (5) or six (6) years. A finding that defendant's own grass was insufficient and that one could infer from such insufficiency that defendant's cattle would graze plaintiff's land is not enough upon which to base a finding that defendant "intended" that his cattle should trespass. The facts have to show a willful trespass and anything less is insufficient to avoid the prohibition of 47-17-1 and 47-17-2, 1953 Comp. [77-16-1 and 77-16-3 NMSA 1978]. (The emphasis in committee comment is of the committee.)

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Compiler's notes. — Laws 1909, ch. 94, referred to near the end of the ninth paragraph of the committee comment, is a special act, providing for the establishment of a herd law in Quay, Roosevelt and a portion of Guadalupe Counties, and was never compiled.

Library references. — 3A C.J.S. Animals §§ 168, 169, 238 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Animals § 70.

Liability for personal injury or death caused by trespassing or intruding livestock, 49 A.L.R.4th 710.

3A C.J.S. Animals § 268.

13-502. Legal fence.

There was in force in this state, at the time of the occurrence in question, a certain statute which describes a legal fence as follows:

(Quote or paraphrase the applicable parts of the statute in question.)

If you find from the evidence that the lands or crops of the plaintiff were enclosed within a legal fence, then you are instructed that the plaintiff had complied with the law.

USE NOTE

This instruction is to be used with UJI 13-501 but only if the evidence raises a substantial issue that the damages were caused by the failure of the plaintiff to have his crops or land enclosed by a legal fence.

Committee comment. — The lawyers and judge involved in a case of this nature are directed to Article 16 of Chapter 77 of the 1978 Compilation of the New Mexico Statutes. Section 4 [77-16-4 NMSA 1978] states the specifications of a barbed wire fence. Section 6 [77-16-6 NMSA 1978] lists the specifications of a board fence. Section 7 [77-16-7 NMSA 1978] declares the required specifications of a pole and post fence. Section 8 [77-16-8 NMSA 1978] describes the requirements of a stone, adobe or woven wire fence.

The format of this instruction is similar to that used in Chapter 15 but has been modified to fit the particular situation. Whether or not excuse or justification is applicable in a case for damages arising out of trespassing animals apparently has not been decided by the New Mexico appellate courts.

13-503. Livestock on fenced highway.

There was in force in this state, at the time of the occurrence in question, a certain statute which provided:

"It is unlawful for any person negligently to permit livestock to wander or graze upon any fenced highway at any time".

If you find from the evidence that the defendant violated this statute in the specific manner claimed by the plaintiff, then you are instructed that such conduct constituted negligence as a matter of law.

USE NOTE

This instruction is a quotation from 66-7-363B NMSA 1978 and is the instruction which will be used in most cases involving livestock wandering or grazing on a fenced highway.

As with other contentions of negligent conduct, it is necessary that the plaintiff prove specific negligence and that the jury not be cast adrift with such an indefinite term.

The usual tort instructions explaining negligence, ordinary care and duty should all be given with this instruction.

This instruction will need to be modified if any other pertinent provision of the statute dealing with animals on the highway is involved. It should be pointed out that the legislature has not used the requirement of negligence with reference to Subsection A of the statute, but has with reference to Subsection C, and, therefore, care need be exercised in drafting the instruction applicable to the particular facts and circumstances of the case in question.

Committee comment. — New Mexico appellate courts have pointed out that the doctrine of res ipsa loquitor does not always apply merely because an accident involving livestock occurs on a highway. Akin v. Berkshire, 85 N.M. 425, 512 P.2d 1261 (Ct. App. 1973).

The mere fact that an animal is on the highway, of itself, is not evidence of negligence. Mitchell v. Ridgway, 77 N.M. 249, 421 P.2d 778 (1966); Steed v. Roundy, 342 F.2d 159 (10th Cir. 1965); Hyrum Smith Estate Co. v. Peterson, 227 F.2d 442 (10th Cir. 1955); Poole v. Gillison, 15 F.R.D. 194 (E.D. Ark. 1953).

The word "negligently" was added to Subsection B of 66-7-363 NMSA 1978 by the 1965 legislature. In other words, the owner or keeper of livestock who did not "permit" his livestock to wander or graze on the highway was not liable, but now there is need for a further element of proof and a finding to support a judgment.

In 1966, the legislature overruled the court-enunciated principle of law from the case of Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965) with the enactment of Subsection C of 66-7-363 NMSA 1978. This provision, of course, applies only in unfenced rangeland.

Other livestock cases which should be reviewed and analyzed in preparing jury instructions in this area are: Dean v. Biesecker, 87 N.M. 389, 534 P.2d 481 (1975); Carrillo v. Hoyl, 85 N.M. 751, 517 P.2d 73 (Ct. App. 1973); Tapia v. McKenzie, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973); Lebow v. McIntyre, 79 N.M. 753, 449 P.2d 661 (Ct. App. 1968); Carrasco v. Calley, 79 N.M. 432, 444 P.2d 617 (Ct. App. 1968); Knox v. Trujillo, 72 N.M. 345, 383 P.2d 823 (1963).

Reference should also be made to 30-8-13 and 30-8-14 NMSA 1978.

This instruction was numbered UJI Civ. 5.2 in the first edition.

ANNOTATIONS

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Animals § 141.

Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence, 34 A.L.R.2d 1285.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 A.L.R.4th 132.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 A.L.R.4th 159.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 A.L.R.4th 431.

3A C.J.S. Animals § 248.

13-504. Riding animals on highway after dark.

A person is liable for damages proximately caused by riding a horse [or other animal] after dark upon the traveled portion of any highway which is normally used by motor vehicles.

USE NOTE

This instruction should be used in cases involving accidents arising out of livestock being driven along a highway after dark.

Committee comment. — See 66-7-363A NMSA 1978.

13-505. Livestock on unfenced highway.

Owners of livestock ranging in pastures through which unfenced roads or highways pass are liable for damages proximately caused by collisions of vehicles with the livestock, only if the owner of the livestock was negligent in some manner other than allowing the livestock to range along the highway.

USE NOTE

The statute upon which this instruction is predicated (66-7-363C NMSA 1978) was passed by the legislature with an emergency clause, in order to overrule the opinion of the New Mexico Supreme Court in the case of Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965).

The UJI definition for negligence (UJI 13-1601) would need to be used with this instruction.

Committee comment. — An example of the type of specific negligence required would be putting salt or minerals on the highway so that the cattle had to get on the highway in

order to reach the salt or minerals. Another example would be where the roundup of the cattle was held on the highway or the cattle were being detained on the highway.

It was the opinion of the committee that the words "along the highway" should be stricken and, in lieu thereof, there should be used the words "in pastures" for better understanding by the jury. Likewise, to include in the instructions the exact words of the statute, "specific negligence", would probably be further confusing to the jury. However, the committee recognizes that it would hardly be error for the trial court to instruct the jury in accordance with the verbatim words of this or any other statute. The changes in phraseology from the statute to this instruction are solely suggestions for the better understanding of the jury.

13-506. Liability of dog owner.

An owner of a dog is liable for damages proximately caused by the dog if the owner knew, or should have known, that the dog was vicious or had a tendency or natural inclination to be vicious.

[The owner of such a dog is not liable to the person injured, if the injured person had knowledge of the propensities of the dog and wantonly excited it or voluntarily and unnecessarily put himself in the way of the dog.]

USE NOTE

This instruction should be used when the issue and the evidence is that of damages from attack or bite by a dog.

Committee comment. — Section 77-1-10 NMSA 1978 states that it is unlawful for a person to keep an animal known to be vicious and liable to attack and injure human beings unless the animal is secure.

Reference to the case of Perkins v. Drury, 57 N.M. 269, 258 P.2d 379 (1953), should be made by the trial lawyers and the court in any case involving a claim of damages as the result of an attack by a domestic animal. It is apparent that the common law prevails in this area in New Mexico. Scienter on the part of the defendant is required. The vicious propensity of the dog must have been previously manifested against a human being. It is insufficient that the dog exhibited vicious tendencies toward other animals.

See also the case of Torres v. Rosenbaum, 56 N.M. 663, 248 P.2d 662 (1952).

In the first edition, the substance of this instruction was covered by UJI 5.3.

ANNOTATIONS

Instruction mandatory in dog-bite cases. — It is error for the district court to give jury instructions on the issues of negligence and contributory negligence when this

mandatory instruction states the entire law of liability and relief from liability in connection with dog-bite injuries. Aragon v. Brown, 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979).

Instruction imposes strict liability. — This instruction imposes strict liability once knowledge is proven, thus, it cannot be given to the jury in an action under the waiver of immunity provision of 41-4-6 NMSA 1978, which embodies a negligence theory of recovery. Smith v. Village of Ruidoso, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

Negligence claims against a municipality not precluded. — This section does not provide the sole theory of liability in dog-bite cases. A negligence claim under 41-4-6 NMSA 1978 is appropriate where the dog owner lacks knowledge of the dog's vicious propensities and ineffectively controls the animal in a situation where it would reasonably be expected that injury could occur. Smith v. Village of Ruidoso, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

Law reviews. — For note, "Torts: Smith v. Ruidoso: Tightening the Leash on New Mexico's Dogs," see 32 N.M.L. Rev. 335 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Animals § 114 et seq.

Liability of owner of dog known by him to be vicious for injuries to trespasser, 64 A.L.R.3d 1039.

3A C.J.S. Animals § 232.

CHAPTER 6
Common Carriers

Introduction

The instructions contained in this chapter should not preclude the court from giving other instructions justified by the evidence, e.g., Chapter 12 (Motor Vehicles), Chapter 13 (Owners and Occupiers of Land Tort Liability), and Chapter 16 (Tort Law - Negligence).

Railroads may eject passengers under certain circumstances (63-2-2M NMSA 1978).

[As amended, effective January 1, 1987.]

13-601. Passenger - Train, plane, bus, taxi; definition.

A passenger is a person who, with the actual or implied consent of a carrier, is in the act of boarding, has boarded or is in the act of alighting from the _____ *(description of vehicle operated by carrier).*

USE NOTE

This instruction should be used only in those cases where there is an issue as to whether a person is in fact a passenger on a common carrier.

[As amended, effective January 1, 1987.]

Committee comment. — The term "carrier" applies to all carriers authorized by law to transport persons from place to place for hire regardless of the type of vehicle used. It does not apply to elevators, escalators and similar means of conveyance. See Committee Comment to UJI 13-602.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Carriers § 740.

13 C.J.S. Carriers § 504.

13-602. Passenger - Elevator, escalator; definition - *No instruction drafted*.

No instruction drafted.

Committee comment. — The committee believes that this subject is adequately covered in Chapter 13.

13-603. Duty of carrier; boarding or alighting.

It was the duty of the defendant to use a reasonably safe place for the passenger to board or alight from its _____ *(describe vehicle).*

USE NOTE

In the blank line at the end of this instruction, the trial court should add the word describing the type of vehicle involved, whether it is a train, plane, bus, taxi or any other type of common carrier.

[As amended, effective January 1, 1987.]

Committee comment. — The word "use" was adopted in preference to the word "provide" or some other synonymous word because not all common carriers provide

facilities for boarding or alighting and because a common carrier, in some instances, may be required to use an area specified by a municipality or other governing authority.

The duty of common carriers is to use ordinary care under the circumstances. Ellis v. Southern Pac. Co., 50 N.M. 76, 169 P.2d 551 (1946); Archuleta v. Jacobs, 43 N.M. 425, 94 P.2d 706 (1939); Thayer v. Denver & R.G.R.R., 21 N.M. 330, 154 P. 691 (1916).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Carriers §§ 983, 984, 999.

Duty and liability of carrier as to "step box" or other device to facilitate entering and leaving car, 20 A.L.R. 914.

Carrier's liability to person in street or highway for purpose of boarding its vehicle, 7 A.L.R.2d 549.

Falling on alighting where carrier's negligence is predicated on open door, 7 A.L.R.2d 1427.

Liability of taxicab carrier to passenger injured while alighting from taxi, 98 A.L.R.3d 822.

Liability of motor carrier for injury or death of passenger inflicted by the vehicle from which he has alighted, 58 A.L.R.2d 932.

Liability of taxicab carrier to passenger injured while boarding vehicle, 75 A.L.R.2d 988.

Duty and liability of carrier by motorbus to persons boarding bus, 93 A.L.R.2d 237.

Application of res ipsa loquitur doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 A.L.R.3d 776.

Liability of taxicab carrier to passenger injured while alighting from taxi, 98 A.L.R.3d 822.

Liability for injury on, or in connection with, escalator, 1 A.L.R.4th 144.

13 C.J.S. Carriers §§ 542 to 551.

13-604. Duty of carrier; facilities.

It was the duty of the defendant to use ordinary care to provide and maintain in a safe and suitable condition the facilities which it made available for the use of its passengers or persons accompanying, waiting for or meeting passengers.

USE NOTE

This instruction would apply to all facilities provided by a common carrier, within its stations, parking lots and other facilities maintained by it.

[As amended, effective January 1, 1987.]

Committee comment. — See Dominguez v. Southwestern Greyhound Lines, 49 N.M. 13, 155 P.2d 138 (1945), where plaintiff was denied recovery for injuries suffered when she fell while leaving the bus depot because of a change in grade at the depot entrance; and Riseling v. Potash Mines Transp. Co., 76 N.M. 544, 417 P.2d 38 (1966), where a passenger failed to prove that the bus driver was negligent in the operation of the bus door which caused injury to the passenger.

ANNOTATIONS

Law reviews. — For survey of 1990-91 tort law, see 22 N.M.L. Rev. 799 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Carriers § 871.

Duty and liability of carrier toward one accompanying departing passenger or present to meet incoming one, with respect to conditions at or about station, 92 A.L.R. 614.

Products liability: equipment and devices directly relating to passengers' standing or seating safety in land carriers, 35 A.L.R.4th 1050.

13 C.J.S. Carriers §§ 532 to 541.

13-605. Ordinary care.

The defendant as a common carrier has a duty to exercise ordinary care for the safety of its passengers and their property.

[As amended, effective January 1, 1987.]

Committee comment. — New Mexico does not have a special statute creating a higher duty of care for common carriers. The duty of the carrier to protect passengers from injuries by third persons appears to be that of ordinary care under the circumstances. See Smith v. Greyhound Lines, 382 F.2d 190 (10th Cir. 1967).

No special instructions are required with reference to the duty of a common carrier to disabled, infirm or intoxicated persons or to children.

ANNOTATIONS

Law reviews. — For annual survey of New Mexico law of torts, see 16 N.M.L. Rev. 85 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of operator of ambulance service for personal injuries to person being transported, 68 A.L.R.4th 14.

CHAPTER 7
Condemnation; Eminent Domain

Introduction

The instructions in this chapter generally contemplate condemnation by the state under the alternative procedure (42-2-1 NMSA 1978 et seq.). When municipalities, counties, public utilities, etc., are involved, these instructions can be used with minor changes. The instructions will also be useful in inverse condemnation actions.

[As amended, effective January 1, 1987.]

13-701. Statement of the case and issues; burden; duty; condemnation proceedings.

This is a condemnation proceeding.

The _____ *(here state name of condemning authority)* has filed this lawsuit against the [owner(s)] [tenant(s)], _____ *(here state name of owner/tenant or party in interest)* to condemn the property commonly described as:

(Here give common, lay description and location of property.)

The date of the taking was _____ *(here state legal date of taking).*

The condemning authority contends the damages of _____ are $ _____.

The [owner] [tenant] claims the damages are $ _____.

Each party has the burden of proving its claims by the greater weight of the evidence, which means that you must be persuaded, considering all of the evidence in the case, that the claims on which the party has the burden of proof are more likely true than not true.

It is your duty to determine, from the greater weight of the evidence, the amount of money damages to be paid the [owner] [tenant] as just compensation for the taking.

USE NOTE

In completing the blanks in this instruction it is not necessary to use the full legal name of condemning authority or legal description of the property involved. All that is necessary is reasonable identification.

This instruction is the "statement of issues" to be used in eminent domain proceedings in lieu of UJI 13-302. The issues to be decided by the jury in each case should be delineated in simple, concise, understandable terms.

When a leasehold estate is involved, in lieu of the word "owner" use the word "tenant".

[As amended, effective January 1, 1987.]

Committee comment. — As practically all condemnations are filed under the alternative procedure (42-2-1 NMSA 1978 et seq.), rather than under the Eminent Domain Code (42A-1-1 NMSA 1978 et seq.), this instruction is framed for the alternative procedure. The committee has not prepared instructions under the commissioners' de novo appeal procedure (42A-1-21 NMSA 1978) but leaves this to the court and counsel, should such a case arise. In this connection, see Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961), involving a commissioners' appeal proceeding, together with the cases cited therein, as well as 2 Nichols, Eminent Domain § 432, p. 1139 (2d ed.); 27 Am. Jur. 2d Eminent Domain § 668 et seq. Also see Wells v. Arch Hurley Conservancy Dist., 89 N.M. 516, 554 P.2d 678 (Ct. App. 1976) and U.S. v. 46,672.96 Acres of Land, 521 F.2d 13 (10th Cir. 1975).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain §§ 627 et seq., 896, 897, 898.

Right to open and close argument in trial of condemnation proceedings, 73 A.L.R.2d 618.

13-702. Power to condemn; constitution.

The _____ *(here state the name of the condemning authority)* has the right by law to condemn the property involved in this case.

The property was taken for public use.

The Constitution of New Mexico provides that private property shall not be taken for public use [or damaged] without just compensation.

USE NOTE

This basic instruction should be given in all cases, followed by either the supplemental instructions on full taking, or supplemental instructions for partial taking or instructions relating to situations where there is no taking but damages result to the property.

[As amended, effective January 1, 1987.]

Committee comment. — N.M. Const., art. XI, § 18, makes corporations, like individuals, subject to the eminent domain power.

See N.M. Const., art. II, § 20. For "just compensation", see Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953).

From the procedural standpoint, there are two alternative methods of condemning property for public use: (1) The commissioner method with a jury trial de novo on appeal, (2) the direct method. (See 42-2-1 through 42-2-16 NMSA 1978.) These instructions are applicable under either procedural method adopted, although not specifically drafted for commissioner-type procedure.

The constitutional provision does not require payment in advance of the taking. State Hwy. Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 389 P.2d 606 (1963); Timberlake v. Southern Pac. Co., 80 N.M. 770, 461 P.2d 903 (1969).

Section 42-2-6 NMSA 1978 provides that no order of entry to any property being taken from a private property owner for rights-of-way may be granted until there is deposited with the clerk of the court the amount offered as just compensation. The section also provides conditions for disbursement of the deposit and defines the amount of the minimum award.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain § 476.

13-703. Full taking; fair market value.

In this case, the owner's entire parcel was taken. The owner is entitled to money damages equal to the fair market value of the property on the date of taking.

USE NOTE

This instruction will be used only where all of a given property was taken, and the problems of partial taking or residual damage are absent.

The definition of fair market value, UJI 13-711, will be given, along with other appropriate instructions.

This instruction is not to be used when UJI 13-707 or 13-709 is used.

[As amended, effective January 1, 1987.]

Committee comment. — The measure of damages for a full taking is the fair market value of the land. State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 84 N.M. 424, 504 P.2d 634 (1972); Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961); Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953); and Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945).

The term "money damages" is all-inclusive and is intended to include "just compensation" under N.M. Const. Art. II, § 20, and "measure of compensation and damages", as used in § 42A-1-24 NMSA 1978.

The word "property", as used in this chapter, includes real property, personal property and all interests therein.

There are many ways to determine damages, including, but not limited to, sales and income.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain § 627 et seq.

13-704. Partial taking; fair market value.

In this case, only a part of the defendant's property was taken. The money damages to be paid the owner for the property actually taken is the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remaining property immediately after the taking.

USE NOTE

This instruction is not appropriate in cases involving partial condemnation of leaseholds. If a case is presented where there are multiple defendants owning separate properties, it is suggested that "each owner's" be inserted in lieu of the singular possessive.

[As amended, effective January 1, 1987.]

Committee comment. — See State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 84 N.M. 424, 504 P.2d 634 (1972); El Paso Elec. Co. v. Pinkerton, 96 N.M. 473, 632 P.2d 350 (1981); City of Clovis v. Ware, 96 N.M. 479, 632 P.2d 356 (1981). Where multiple interests are involved in a single tract, each party with a separate interest may be entitled to a separate trial. If multiple interests in a single tract are tried in a single lawsuit, then each defendant is entitled to an instruction applicable to defendant's interest, as parties are always entitled to instructions on theories of the case when supported by the evidence. [As revised, effective November 1, 1991.]

ANNOTATIONS

Value based on highest and best use. — The value of the property is determined by considering not merely the uses to which it was applied at the time of condemnation, but the highest and best uses to which it could be put. Determination of the highest and best use should be made with regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. City of Albuquerque v. PCA-Albuquerque #19, 115 N.M. 739, 858 P.2d 406 (1993).

Devaluation caused by public perception compensable. — In a partial condemnation action, a property owner is entitled to receive as compensation the diminution in value of the remainder of the property caused by public perception of the use to which the condemned property will be put. Under this view, compensation is awarded for loss of market value even if the loss is based on fears not founded on objective standards. City of Santa Fe v. Komis, 114 N.M. 659, 845 P.2d 753 (1992).

Law reviews. — For note, "Property Owners in Condemnation Actions May Receive Compensation for Diminution in Value to Their Property Caused by Public Perception: *City of Santa Fe v. Komis*," see 24 N.M.L. Rev. 535 (1994).

13-705. Partial taking; damages/benefits to land remaining.

In addition to the money damages to be paid to the owner for the property actually taken, you shall determine whether the owner should also recover special items of money damages in connection with the remaining property. In so doing, you shall first determine whether the following special items of claimed damages have been proved by the owner:

(NOTE: The trial lawyers and judge will need here to insert the particular elements of special damages, depending upon the trial proof, such as:

(a) Change of grade;

(b) Loss of view;

(c) Impaired ingress, egress and circuitous indirect access, etc.;

(d) Cost of fencing;

(e) Reestablishment of parking areas and signs;

(f) Loss of fertilizing;

(g) Reestablishment of irrigation works;

(h) Relocation expenses.)

Any damages so proved must be reduced to the extent it is proved by the _____ *(here state name of condemning authority)* that the proposed _____ *(insert type of project)* project will result in benefits to the remaining property. If you find that any, or all, of the owner's claimed items of special damages have been proved, then you shall consider whether the _____ *(here state name of condemning authority)* has proved that the proposed project will benefit the remaining property in any of the following particulars:

(NOTE: The trial lawyers and judge will need here to insert the particular elements of special damages, depending upon the trial proof, such as:

(a) Improved access;

(b) Increased or decreased traffic flow;

(c) Desirability for commercial use.)

This determination should not change or, in any way, affect the money damages to be paid to the owner for the property actually taken.

USE NOTE

This instruction, as indicated by the catchline, is to be used only when an issue is presented by the owner as to damages to the remaining property, whether caused by or in connection with the taking. When this instruction is utilized, it should be used in conjunction with UJI 13-704, which would be applicable in determining the base amount of compensation to be paid the owner for the property actually taken. In the event multiple parties, owning separate properties, are involved, the words "each owner" should be used. In inverse condemnation proceedings, the words "owner" and "condemning authority" should be reversed since the condemnee is the moving party.

The New Mexico Supreme Court has not completely delineated the limits of special damages recoverable but it would seem those enumerated would be applicable as well as others which may be pertinent in a particular case.

[As amended, effective January 1, 1987.]

Committee comment. — See State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 84 N.M. 424, 504 P.2d 634 (1972), as to the applicability of 22-9-9.1, 1953 Comp. (now 42A-1-26 NMSA 1978) to this instruction. The court in Hesselden held that the instruction as to damage to the remainder tract should specifically set forth claimed consequential or special items of damage. Under the provisions of § 42A-1-26 NMSA 1978, general or special benefits can be considered only as an offset against damages to the remaining property. See also 6 Fla. Stat. Ann. § 73.071 for a comparable uniform instruction used in Florida.

As to damages, see Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1962), where a change in highway grade making access difficult was held compensable. See also Board of Trustees v. Spencer, 75 N.M. 636, 409 P.2d 269 (1965), dealing with disruption of irrigation water supply and City of Clovis v. Ware, 96 N.M. 479, 632 P.2d 356 (1981) (placement of a sewage treatment facility diminishing the value of the remaining tract is compensable).

As to benefits, see City of Albuquerque v. Chapman, 76 N.M. 162, 413 P.2d 204 (1966); Board of Trustees v. Spencer, supra; Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961); and City of Tucumcari v. Magnolia Petroleum Co., 57 N.M. 392, 259 P.2d 351 (1953).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Eminent Domain § 151; 27 Am. Jur. 2d Eminent Domain §§ 627 et seq., 896.

Constitutionality of statute which permits consideration of enhanced value of lands not taken, in fixing compensation for property taken or damaged in exercise of eminent domain, 68 A.L.R. 784.

Deduction of benefits in determining compensation or damages in eminent domain, 145 A.L.R. 7

Deduction of benefits in determining compensation or damages in proceedings involving opening, widening or otherwise altering highway, 13 A.L.R.3d 1149.

29A C.J.S. Eminent Domain §§ 303 to 307.

13-706. Entire taking of leasehold; damages to landlord.

The owner of the property taken is also the landlord under a lease on the property for a term ending _____.

The owner-landlord is entitled to recover money damages for the total of the following:

(1) The net rental loss due for cancellation of the lease for the remaining term;

(2) The depreciated value of the improvements the landlord would have owned at the end of the lease term; and

(3) The fair market value of the land at the end of the lease term.

All damages awarded for the above items shall be discounted to present value as of the date of taking.

The term "net rental loss", as used in this instruction, means the total rent payable by the tenant less the total expenses, if any, payable by the landlord for the balance of the lease term.

USE NOTE

When this instruction is given, the blank in the first paragraph will need to be completed.

Committee comment. — This instruction and the following instructions, relating to landlord-tenant, are drafted in contemplation that the trial court will instruct on the separate interests of each party and submit separate verdicts accordingly. In the past, many courts relied on a single verdict representing the aggregate of all interests and estates, utilizing the theory that property subject to a lease should be appraised and valued as unencumbered by the lease to ensure that total damages awarded do not exceed the fee value. The committee is of the opinion that such an approach ignores the reality that the existence of a currently enforceable lease has a definite effect on the value of the property which any prospective buyer would consider. One author in commenting on this problem states that to evaluate the property as a whole tends to plunge the valuation question "into a semantic bog which is not very helpful for analytical purposes". Polasky, The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477, 490. See also Hitchens, The Valuation in Condemnation Proceedings, 17 U. Miami L. Rev. 245 (1963). The fact that, in a particular situation, the separate valuation of the interests of the landlord and the tenant may result in a value exceeding the unencumbered fee is not due to the multiple ownership of the property, but results from the particular nature of the leasehold itself, such as where land is leased to a financially responsible tenant at a high rental. Nichols, Eminent Domain §§ 12.36, 12.42; Cleveland Allerton Hotel, Inc. v. Commissioner, 166 F.2d 805 (6th Cir. 1948); and In re Appropriation for Hwy. Purposes, 166 Ohio St. 249, 142 N.E.2d 219 (1957). In this connection, the committee has carefully considered 42-2-15 D NMSA 1978, which would permit a trial court to submit the claims of the landlord and the tenant in a single charge, and then apportion the award between the separate interests. For the reasons above stated, the committee feels such an approach would deny full and complete

compensation. In addition, this approach would contravene 42A-1-26 NMSA 1978, where recovery of damages to the remainder tract in a partial taking can include damages which "might otherwise be deemed noncompensable." See 6 Fla. Stat. Ann. § 73.071 for a comparable uniform instruction used in Florida.

Finally, it should be understood that this instruction assumes the nonexistence of a condemnation clause in the lease. If the lease contains a condemnation clause, then this instruction will have to be redrafted to conform therewith.

Ordinary business expenses, payable by the landlord, might include utility expenses, taxes, repairs, janitorial services, etc.

13-707. Entire taking of leasehold; damages to tenant.

In this case, the taking of the property resulted in the termination of the lease.

The tenant is entitled to recover money damages for the total of the following:

(1) The value, at the time of taking, of all improvements and fixtures owned by the tenant which have been taken; and

(2) The fair rental value of the remaining term of the lease, less the total rent due the landlord for the same term, discounted to present value, as of the date of taking.

USE NOTE

When this instruction is given, it is not necessary to use UJI 13-703.

UJI 13-712 should be used with this instruction.

Committee comment. — Where there is an entire taking, the lease is deemed terminated by the condemnation, and, except for the value of the leasehold improvements owned by the tenant, the tenant is entitled to no compensation unless the fair rental value of the property exceeds the contract rental. See generally 2 Nichols, Eminent Domain § 5.23(1), pp. 38, 39; 4 Nichols, Eminent Domain §§ 12.42(1)-(3), pp. 163-177. The termination occurs by means of paramount title and gives the tenant no claim against the landlord for the fact of termination itself. 2 Nichols, Eminent Domain § 5.23(3).

See Comments to UJI 13-709.

Paragraph (2) of this instruction should be given only if fair rental value exceeds the contract rental stipulated in the lease.

If the property is taken under the Relocation Assistance Act (42-3-1 NMSA 1978 et seq.), then certain additional relocation expenses can be recovered, as provided for in such act.

13-708. Partial taking of leasehold; damages to landlord.

The owner of the property being taken is also the landlord under the lease on the property for a term of years ending _____.

The owner-landlord is entitled to recover money damages for the sum total of the following:

(1) The depreciated value of improvements taken and which the landlord would have owned at the end of the lease;

(2) The value of the land taken and which the landlord would have owned at the end of the lease; and

(3) The cost of restoration of the remaining premises, if required by the lease agreement.

USE NOTE

This instruction, as indicated by the catchline, is to be used only when an issue is presented by the lessor as to damages caused by the taking or in connection with the remaining property. When this instruction is utilized, it should be used in conjunction with UJI 13-704, which would be applicable in determining the amount of compensation to be paid to lessor for the property actually taken. In the event that multiple parties, leasing separate properties, are involved, the words "each lessor" should be used. In inverse condemnation proceedings, the words "lessor" and "condemning authority" should be reversed since the condemnee is the moving party.

[As amended, effective January 1, 1987.]

Committee comment. — See State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 84 N.M. 424, 504 P.2d 634 (1972), as to the applicability of 42-1-1 (now 42A-1-1) NMSA 1978 et seq., to this instruction, which case holds that the instruction, as to damage to the remainder tract, should specifically set forth claimed consequential or special items of damage. Under the provisions of 42-1-1 (now 42A-1-1) NMSA 1978 et seq., general or special benefits can be considered *only* as an offset against damages to the remaining property. See also 6 Fla. Stat. Ann. § 73.071 for a comparable uniform instruction used in Florida.

As to damages, see Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1962), where a change in highway grade, making access difficult, was held

compensable. See also Board of Trustees v. Spencer, 75 N.M. 636, 409 P.2d 269 (1965), dealing with disruption of irrigation water supply.

As to benefits, see City of Albuquerque v. Chapman, 76 N.M. 162, 413 P.2d 204 (1966); Board of Trustees v. Spencer, supra; Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961); and City of Tucumcari v. Magnolia Petroleum Co., 57 N.M. 392, 259 P.2d 351 (1953).

13-709. Partial taking of leasehold; damages to tenant.

At the time of the taking, the tenant had a lease on the property for a term ending _____.

The tenant is entitled to recover money damages for the value of the leasehold loss, which you find to have resulted from the taking. You shall determine any loss as follows: from the fair rental value of the lease property immediately before the taking, subtract the fair rental value of the remaining lease property immediately after the taking. [From the resulting loss of the fair rental value, subtract the reduction in rent provided for in the condemnation clause of the lease.]

[The tenant is also entitled to the value of the loss resulting from the taking or devaluation of the fixtures and improvements which were owned by the tenant.]

Damages for leasehold loss should be discounted to present value as of the date of taking.

USE NOTE

This instruction, as indicated by the catchline, is to be used only when an issue is presented by the lessee as to damages caused by the taking to, or in connection with, the remaining property. When this instruction is utilized, it should be used in conjunction with UJI 13-705, which is applicable in determining the amount of compensation to be paid lessee for the property actually taken. In the event that multiple parties, leasing separate properties are involved, the words "each lessee" should be used. In inverse condemnation proceedings, the words "lessee" and "condemning authority" should be reversed since the condemnee is the moving party.

Committee comment. — As to the tenant's right to recover damages for that part of the land taken, see 1 American Law of Property § 354 (1953); 4 Nichols, Eminent Domain § 12.42(2), note 2; and 43 Iowa Law Rev. 279, 283-84 (1954).

See also Committee Comment under UJI 13-706 and 13-708.

Concern may arise over restoration or relocation expenses and, in this connection, see Board of Trustees v. B.J. Serv., Inc., 75 N.M. 459, 406 P.2d 171 (1965) and 42-1-1

(now 42A-1-1) NMSA 1978 et seq., which provides that all elements, enhancing or diminishing fair market value, should be considered, even though some damages in themselves might otherwise not be compensable. See 42A-1-26 NMSA 1978.

13-710. Damages without taking.

In this case, none of the owner's property was taken. However, if you find that the property was damaged by the project, you should award the owner the difference between the fair market value of the property immediately before the damage and the fair market value immediately after the damage.

USE NOTE

If the jury finds owner entitled to compensation where no land was taken, but damage was suffered, then the above instruction, giving the measure or yardstick of damages, is proper. Instances of liability in such cases are rare, but do exist, as in the Harris case below.

Committee comment. — This instruction would normally only be used in inverse condemnation cases. See 42A-1-29 NMSA 1978.

See Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961), where no land was taken, but owner recovered under "before and after rule", where damage resulted from change in grade of street, making access to business more difficult.

Also see Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982), where the court held that the owner of private property may obtain compensation, even without an actual taking, if the owner can show consequential damages and the damage is different in kind, and not merely degree, from that suffered by the public in general. This is consistent with the court's earlier holding in McClure v. Town of Mesilla, 93 N.M. 447, 601 P.2d 80 (Ct. App. 1979).

ANNOTATIONS

Crop damage as element of damages in eminent domain action. — It is not an error for a trial court to give this instruction, allowing the jury to consider crop damage as an element of special damages in an eminent domain action, in that an existing crop is a condition which a willing, unobligated buyer would consider in arriving at a price for the property, and any damage to or loss of a crop is properly considered special or consequential damages. El Paso Elec. Co. v. Pinkerton, 96 N.M. 473, 632 P.2d 350 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Eminent Domain § 214.

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 A.L.R. 516.

29A C.J.S. Eminent Domain § 284.

13-711. Fair market value; definition.

Fair market value is considered to be the highest amount of cash a willing seller would take, and a willing buyer would offer, for the property if it were offered for sale in the open market for a reasonable time to find a purchaser, buying with knowledge of all the uses to which the property is suitable or adaptable; the seller not being required to sell nor the purchaser being required to purchase.

USE NOTE

This instruction is necessary in every condemnation case, except when the only property interest involved is that of the tenant.

Committee comment. — New Mexico authority supporting this definition will be found in Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953) and Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961) and El Paso Elec. Co. v. Pinkerton, 96 N.M. 473, 632 P.2d 350 (1981). The Yandell case pointed out, however, that in condemnation cases the element of the willing seller is lacking. See also Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965), rev'd on other grounds, 77 N.M. 801, 427 P.2d 677 (1967).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain §§ 298, 299, 300.

29A C.J.S. Eminent Domain § 147.

13-712. Fair rental value; definition.

Fair rental value is considered to be the highest amount of cash a willing owner would take and a willing tenant would offer for the lease of the property if it were offered for lease in the open market for a reasonable time to find a tenant, leasing with knowledge of all the uses to which the property was suitable or adaptable; the owner not being required to lease nor the tenant being required to rent.

The rent actually paid is one factor which you may consider, along with all the other evidence of fair rental value at the time of taking.

USE NOTE

This instruction should be used when there is an entire taking of property under lease for determination of just compensation for the tenant. It should also be used when there has been a partial taking and resulting damages to the tenant are to be determined, if the lease is not terminated by the partial taking.

This instruction is to be used with UJI 13-707 and 13-709.

Committee comment. — The foregoing instruction has not, heretofore, been included in uniform instructions or stock instructions because the rule of law, prior to the adoption of the alternative procedures (42-2-1 NMSA 1978 et seq.), was that only one award was given and the court apportioned that amount between the landlord and the tenant. This may still be the federal rule, but it is not the New Mexico rule. Such procedure can result in inequities to the tenant and, therefore, the committee has prepared an instruction comparable to the fair market value instruction which is applicable to the landlord. See Committee Comment to UJI 13-707 and 13-711.

13-713. Present value; determination; discount.

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages by making allowance for the fact that any award you make would, if properly invested, earn interest. To determine "present value", you should, therefore, allow a reasonable discount for the earning power of such money and arrive at the present cash value of the total money damages, if any.

Damages, not arising in the future, shall not be discounted.

USE NOTE

This instruction should be given whenever the term "present value" is used in the body of the instruction, such as in UJI 13-707 and 13-709.

Committee comment. — This instruction is taken from the chapter on damages and applies to all cases where discount is required in order to determine present value. See also State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

13-714. Consideration of land uses.

In determining damages, you will consider the uses made of the property at the time of taking and also the highest and best uses for which the property may have been suitable and adaptable in the near future.

USE NOTE

This instruction is proper where there is evidence that the location of the property and its adaptability for special uses affects the market value.

Committee comment. — For authority from the federal bench involving condemnation of New Mexico lands, see United States v. Cox, 190 F.2d 293 (10th Cir.), cert. denied, 342 U.S. 867, 72 S. Ct. 107, 96 L. Ed. 652 (1951). See also State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966); City of Albuquerque v. Chapman, 76 N.M. 162, 413 P.2d 204 (1966); and United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951); and U.S. v. 46,672.96 Acres of Land, 521 F.2d 13 (10th Cir. 1975).

In U.S. v. 77,819.10 Acres of Land, 647 F.2d 104, cert. denied, 456 U.S. 926, 102 S. Ct. 1971, 72 L. Ed. 2d 441 (1981), the court held that the standard in determining whether the owner has demonstrated an alternative highest and best use is whether there is a reasonable probability that the land is physically adapted for such use and there is a need for such use in the reasonably near future.

In U.S. v. 46,672.96 Acres of Land, more or less, supra, the court held that where the market for a particular use of land is created solely as a result of the project for which the land is condemned, the value based on that use must be excluded.

ANNOTATIONS

Considerations as to damages in condemnation suit. — In a condemnation suit it was proper for the jury, in fixing damages, to consider the property owner's plans for the development of its property. However, the jury was entitled to have presented to it, for its consideration, alternate plans for the further development of the property for commercial purposes, as well as, evidence of other uses for which it was suitable or adaptable, in determining the before and after fair market value of the property; thus, the development of the property for commercial purposes is not being limited to the owner's plans for such development. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611, aff'd, 91 N.M. 240, 572 P.2d 1248 (1977).

Allowable exhibits and testimony. — In a condemnation suit, exhibits and testimony offered by the state, proposing a redesign of a parking area and the utilization of this area by reducing the width of the striped stalls from 10 feet to eight and one-half feet, were elements to be considered in determining the difference between the before and after fair market values, particularly in view of the fact that the property owner was permitted to introduce evidence to show that the effect of the taking was to substantially reduce the rental area of the proposed building because of lost parking space. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611, aff'd, 91 N.M. 240, 572 P.2d 1248 (1977).

Evidence to assess damages occasioned by construction. — A condemnee may not recover damages by way of expenses or loss of business for temporary inconvenience, annoyance or interference with access occasioned by construction, unless the period of construction is unduly long or the conduct of the condemnor

causing the loss is unreasonable, arbitrary or capricious; and where there is no evidence which would warrant a finding that a period of construction was unduly long or that the contractor or highway department acted unreasonably, arbitrarily or capriciously in accomplishing the construction, the evidence, as to loss or damage by reason of construction, itself, merited no legal recognition and should not have been admitted. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611, aff'd, 91 N.M. 240, 572 P.2d 1248 (1977).

13-715. Expert testimony.

A witness who, by education or experience, has become expert in the appraisal of property is permitted to state an opinion as to [market value] [rental value] [damages] [other].

You should consider such expert opinion received in evidence and give it such weight as you think it deserves, or you may reject it entirely.

USE NOTE

Juries are entitled to be informed as to the status of expert witnesses. This instruction or that in the chapter referring to witnesses should be used when the court has permitted expert testimony.

[As amended, effective January 1, 1987.]

Committee comment. — Testimony of "experts" on other sales is hearsay and sometimes of questionable validity, but the courts have held that there is a practical need of proof and, therefore, in a proper situation, the general use restrictions on hearsay evidence have been relaxed. City of Santa Fe v. Gonzales, 80 N.M. 401, 456 P.2d 875 (1969); State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry., 76 N.M. 587, 417 P.2d 68 (1966); City of Albuquerque v. Chapman, 76 N.M. 162, 413 P.2d 204 (1966); El Paso Elec. Co. v. Pinkerton, 96 N.M. 472, 632 P.2d 350 (1981). See also 12 A.L.R.3d 1064.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain §§ 674, 675, 685 et seq.

29A C.J.S. Eminent Domain §§ 303 to 307.

13-716. Landowner's or tenant's value testimony.

An [owner] [tenant] may testify to the [fair market value] [fair rental value] of [his] [her] [its] property, and that testimony may be considered by you the same

as that of any other witness expressing an opinion as to the [fair market value] [fair rental value] of the property.

USE NOTE

The landowner or the tenant has the right to express an opinion as to the fair market value of the property. Selection of the bracketed material will depend upon whether it is the landowner or the tenant testifying. When either testifies, the instruction is appropriate.

[As amended, effective November 1, 1991.]

Committee comment. — See City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971), and State ex rel. State Hwy. Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969). See also 20 Am. Jur. Evidence § 892, p. 751.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the instruction and in the first sentence of the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain § 674; 31 Am. Jur. 2d Expert and Opinion Evidence § 142.

29A C.J.S. Eminent Domain §§ 303 to 307.

13-717. Comparable sales.

The price paid for similar or comparable property in the open market may be considered by you in determining the value of the property condemned or damaged. You may give such evidence the weight you deem proper; or you may reject it entirely.

USE NOTE

This instruction is proper when the jury has heard testimony of witnesses on actual sales.

Committee comment. — For a statement of the general rule supporting the above instruction, see 27 Am. Jur. 2d Eminent Domain § 692. See also State ex rel. State Hwy. Comm'n v. Tanny, 68 N.M. 117, 359 P.2d 350 (1961).

The purchase price of the property actually involved in the condemnation may be material.

See 15 Nichols, Eminent Domain § 21-3(1) (1962 ed.). See also State ex rel. State Hwy. Comm'n v. Bassett, 81 N.M. 345, 467 P.2d 11 (1970) and State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry., 76 N.M. 587, 417 P.2d 68 (1966).

ANNOTATIONS

Comparable sales properties may be considered in determining fair market value in the property condemned. Leigh v. Village of Los Lunas, 2005-NMCA-025, 137 N.M. 119, 108 P.3d 525.

Party may not object where instruction modified to accommodate his evidence. — Having presented evidence of another land sale by the condemnor, the condemnee cannot then complain that the sale was an unfair measure of value, or that this instruction should not have been modified so as to explain to the jury how they should consider such evidence. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain §§ 674, 685 et seq.

29A C.J.S. Eminent Domain §§ 303 to 307.

13-718. Minimum and maximum values.

In determining [market value] [rental value], you must base your findings on the evidence that has been presented to you. You may not render a verdict in an amount less than the lowest, nor more than the highest, estimate of damages.

In this case, the lowest estimate of damages was $ _____ and the highest estimate was $ _____.

USE NOTE

Material bracketed in the instruction will need to be selected depending upon the particular circumstances of the case. The dollar blanks will need to be completed by the trial court.

Committee comment. — This is a proper guide to the jury as the verdict rendered should not be based upon whim or caprice, but based upon evidence adduced at the trial.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain §§ 294, 295, 304, 305, 314.

13-719. Access; loss of.

The _____ *(insert name of condemning authority)* may control, regulate and designate reasonable access to and from the owner's property, but, if such control, regulation or designation is unreasonable, the owner is entitled to compensation for such limitation of this access.

USE NOTE

If the court finds a fact issue present on the question of reasonableness, then the above instruction would appear to be proper.

Committee comment. — With one exception, no New Mexico case is to be found allowing compensation for loss of access to an existing highway system. The exception is Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961), where a change of a highway grade, making access difficult, was held compensable. Nevertheless, in the decision next discussed, denying compensation, the court announced the principle contained in the above instruction on "Access".

Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945), holds that damage to defendant's business, resulting from a change of a highway, diverting traffic away from defendant's property, is noncompensable.

A series of recent cases, developing as a result of interstate highway projects, uniformly holds that the right of direct access to the highway is subject to reasonable traffic regulations. As long as there is access to the highway system, although involving circuity of travel (which may be considerable), no damage results. As above mentioned, however, the court in these cases recognizes the principle that an "unreasonable interference" with the property owner's access, under the circumstances of a particular case, might become compensable. See State ex rel. State Hwy. Comm'n v. Mauney, 76 N.M. 36, 411 P.2d 1009 (1966); State ex rel. State Hwy. Comm'n v. Lavasek, 73 N.M. 33, 385 P.2d 361 (1963); State ex rel. State Hwy. Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964); State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962); and State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968); Hill v. State Hwy. Comm'n, 85 N.M. 689, 516 P.2d 199 (1973).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain § 373.

Right of abutting owner to compensation for interference with access by bridge or other structure in public street or highway, 45 A.L.R. 534.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 148.

13-720. Monetary interest on amount of award.

You are not to add interest to the amount of the award, in arriving at your verdict. The court will add interest from the proper date.

USE NOTE

To eliminate a possible element of doubt as to whether the award carries interest, this instruction is recommended.

Committee comment. — Under the direct method of condemnation, interest accrues on the compensation fixed by judgment from the date the petition was filed. See 42-2-15 NMSA 1978.

In State Hwy. Dep't v. First Nat'l Bank, 91 N.M. 240, 572 P.2d 1248 (1977), it was held that the trial court erred in including in the amount eligible to bear interest the sum of the accrued interest on the unpaid balance of the award from the date of the petition to the date of entry of judgment in the second trial.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain § 364.

13-721. Remote and speculative elements.

You should not take into consideration anything which is remote, uncertain or speculative.

USE NOTE

This is a basic instruction which will be requested by one side or the other in the usual condemnation action.

Committee comment. — This follows the same principle expressed in other instructions on the measure of damages, wherein appears the caution that "your verdict must be based upon proof and not speculation, guess or conjecture".

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain §§ 297, 322.

13-722. Special responsibility of jury.

The owner of property is usually reluctant to have [his] [her] [its] property taken. Thus, [he] [she] [it] is not a willing seller. Nevertheless, [he] [she] [it] is

entitled to recover for damage to the property caused by the taking. You should exercise care and good judgment in determining damages so that both the defendant and the plaintiff are treated fairly. Each defendant should receive and the plaintiff should pay just compensation, as required by law.

USE NOTE

In the foregoing instruction, it is assumed that the plaintiff is the state or other governmental agency and, thus, is either taking the land involved or causing damage thereto and the defendant is the landowner, landlord or tenant. When the tenant is involved in the condemnation proceedings, the word "owner" should be stricken and modification should be made to show that it is the tenant who is reluctant to have his interest in the property taken, or to lose his leasehold. In the appropriate case, perhaps other designations of the parties may be required.

[As amended, effective November 1, 1991.]

Committee comment. — Generally, in a condemnation action, the only issue left for the determination of the jury, after all of the evidence has been presented, is the amount to be awarded. Thus, the above special cautionary instruction is justified.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain §§ 627 et seq., 897, 898.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 A.L.R.3d 1449.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

13-723. Jury view.

You are permitted to use the knowledge gained by your view of the property to interpret the evidence in the case.

USE NOTE

When a jury view is made, a special instruction needs to be given to the jury before they go to the scene, and the foregoing instruction can be included in the final instructions before oral arguments.

Committee comment. — See Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 457, 367 P.2d 938 (1961); Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953) and Board of County Comm'rs v. Little, 74 N.M. 605, 396 P.2d 591, 594 (1964), wherein the court in a nonjury case said:

The fact trier is permitted to use the knowledge gained by a view of the premises, not only to interpret the evidence offered, but also as independent evidence of the facts as these appear to him.

See also City of Truth or Consequences v. Pietruszka, 81 N.M. 3, 462 P.2d 137 (1969).

Jury views are seldom used by the district courts anymore. They are of questionable assistance to a jury which, now, usually has plats, diagrams, drawings and pictures from every conceivable angle. Frequently, the scene has changed considerably at the time of trial from what the facts were at the time of the taking. The granting or denying of a jury view is within the sound discretion of the court.

In El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (1982), a case in which the parties had agreed to a jury view of the property, it was held that the condemnee was not entitled to reversal where the condemnors had improperly marked one spot on the easement with a red flag. The record showed that the condemnee had picked the spot, the condemnors marked it, there was no claim that the flags were in the wrong place or that the distance was improperly measured and the trial court had instructed the jury that the spot marked was not necessarily a typical spot.

ANNOTATIONS

Jury may also use knowledge from view as independent evidence. — Juries are permitted to use their knowledge gained by a view of the property not only to interpret the evidence offered in the case, but also as independent evidence of the facts as these appear to them individually on the view. El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain § 620 et seq.

Right to view by jury, 77 A.L.R.2d 548.

Evidentiary effect of view by jury in condemnation case, 1 A.L.R.3d 1397.

13-724. Verdict in condemnation-eminent domain cases.

VERDICT

We find for the defendant [property owner] [landlord] [tenant] in the sum of $ _____.

_____
Foreperson

USE NOTE

This form of a verdict should be sufficient in most cases. If there is a tenant, as opposed to an owner, then the necessary change should be made in the form of verdict.

If there should be a case where the jury might find within the realm of the evidence, a zero verdict then, of course, they can so indicate with this verdict. The jury already has been informed by UJI 13-718 as to the minimum and maximum limits of their verdict.

[As amended, effective November 1, 1991.]

Committee comment. — Verdicts are generally left to the special chapter in the pamphlet containing verdicts, but in condemnation actions, generally, there can be but one form of verdict and, therefore, the draft of a verdict is included here for the benefit of the court and the bar.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "foreperson" for "foreman".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Eminent Domain § 699 et seq.

29A C.J.S. Eminent Domain §§ 308 to 314.

CHAPTER 8
Contracts and UCC Sales

Introduction

These instructions cover both contracts actions and Uniform Commercial Code sales actions (Article 2 of the UCC). Former Chapter 17 (UCC) is deleted. The instructions in this contracts/sales chapter are divided into five subdivisions. First are the instructions dealing with the formation of a contract. These instructions include not only definitional elements, but also instructions addressing modification of a contract and the rights and obligations of third parties to a contract. Second are the instructions dealing with breach of contract. Third are the instructions dealing with interpretation of contract terms. Fourth are the instructions dealing with defenses available to breach of contract claims. Fifth are the instructions dealing with remedies available for breach of contract.

The instructions in this chapter have been written in an attempt to personalize the instructions to the names of the parties and to tailor the instructions to the particular factual disputes arising from the claimed breach of contract. Therefore, the instructions seek to avoid the use of the terms "plaintiff" and "defendant" or "promisor" and "promisee" or "seller" and "buyer." Instead, the names of the parties should be inserted. Similarly, the instructions call for the insertion of the particular contract terms that are in dispute or the particular ways in which the parties claim that the contract has been breached. As with other chapters in these instructions, the key to the use of the instructions lies in the proper use of the "theory of the case" instruction, UJI 13-302, which should bear a large share of the burden of focusing the jury's attention on what is in dispute and what law should apply. The theory of the case instruction should be followed only by those instructions that are pertinent to the particular matters in dispute. Definitional instructions should be used only where a matter is in dispute and the definition is essential to guide the jury to the proper determination of the factual issue.

Definitional instructions can be incorporated in the statement of issues and, where this is done, need not be repeated. This technique is especially useful in contract actions to reduce the instructions given to the jury. When preparing instructions under this Chapter the trial court and counsel are encouraged to study and employ the recommendations of the Supreme Court in Gallegos v. Citizens Insurance Agency, 108 N.M. 722, 779 P.2d 99 (1989).

As a final caution, most contractual issues are determined by the trial court and not the jury. The inclusion of an instruction in this chapter does not mean that the issue should be submitted to the jury. Jury submission requires a genuine issue of fact arising from conflicting evidence. Where reasonable minds may not differ upon an issue the trial court makes the determination as a matter of law. Contract actions more than other civil cases give rise to issues properly determined by the judge and not the jury.

Breach of contract claims will often arise in disputes that touch on other areas of the law as well. Agency questions may be involved, requiring the inclusion of instructions from Chapter 4. Negligence or other tort questions such as fraud or misrepresentation may arise, requiring instructions from Chapters 16 or 14.

[Adopted, effective November 1, 1991.]

13-801. Contract; definition.

A contract is a legally enforceable promise [set of promises]. In order for a promise [set of promises] to be legally enforceable, there must be an offer, an acceptance, consideration, and mutual assent.

[Any of these four requirements, although not expressly stated, may be found in the surrounding circumstances, including the parties' words and actions, what they wanted to accomplish, the way they dealt with each other, and how others in the same circumstances customarily deal or would deal.]

In this case, the parties agree that there [was] [were] _____. What is in dispute is whether there [was] [were] _____.

USE NOTE

Where the existence of a contract is in dispute, this instruction should be given with instructions for whichever elements of the purported contract are in dispute (UJI 13-805 to 13-816). Instructions should be given only for those elements in dispute. The bracketed language with respect to implied promises should be given only when a party claims that the promise which forms the basis of the contract arises from an inference and not from an expression, written or oral.

[Adopted, effective November 1, 1991.]

Committee comment. — This instruction is applicable only to cases involving true contracts. A true contract is one in which the legal obligation arises from the intentional undertaking of the promisor or the reasonable understanding of the promisee that the promisor has made such an undertaking. See Restatement of Contracts § 5, and Restatement (Second) of Contracts § 4 comment b. True contracts are differentiated from quasi-contracts by the presence in true contracts of an intention of the parties to undertake the performances in question. State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 364, 355 P.2d 291, 294 (1960); Restatement (Second) of Contracts § 4 comment b.

Where no such intention exists, the law may impose obligations created for reasons of justice. Occasionally, in such cases, the obligations are described as "quasi-contractual" or arising from an "implied in law" contract. Restatement (Second) of Contracts § 4, Reporter's Note, comment b; 1 Corbin, Contracts § 19 (1963). These labels are fictional and liability in such cases has nothing to do with contract.

A true contract may exist, however, where there is no contractual intent or undertaking on the part of the purported promisor. In these situations, when a true contract is found, the contractual obligation is founded on the reasonable apprehension by the promisee of an undertaking by the purported promisor.

An implied contract can arise by a course of conduct or through custom and usage. Toppino v. Herhahn, 100 N.M. 564, 673 P.2d 1318 (Ct. App. 1983); Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982); Gordon v. New Mexico Title Co., 77 N.M. 217, 421 P.2d 433 (1966); Trujillo v. Chavez, 76 N.M. 703, 417 P.2d 893 (1966).

The distinction between express and implied contract lies not in legal effect but in the parties' mode of manifesting assent to the agreement. State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 364, 355 P.2d 291, 295 (1960); Restatement (Second) of Contracts § 4 comment a. Assent may be manifested by words or by implication from

other circumstances, including course of dealing, usage of trade, or course of performance. Restatement (Second) of Contracts § 4 comment a.

Although all four elements of a contract must exist, each element need not be independently expressed. For example, when there has been an explicit offer and acceptance, often there is consideration and mutual assent, even though not separately expressed. See Clark v. Sideras, 99 N.M. 209, 656 P.2d 872 (1982).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-801, relating to statement of issues, counterclaim, and burden of proof, is withdrawn, and the above instruction is adopted, effective November 1, 1991.

Acceptance and mutual assent require actual knowledge of offer. – The purpose of the knowledge requirement for an offer is to assure that there was a conscious assent to the offer and a meeting of the minds as to its terms; the type and extent of knowledge varies, depending on the context. DeArmond v. Halliburton Energy Servs., Inc., 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003.

The employer failed to prove the elements of acceptance and mutual assent to an arbitration agreement contained in materials mailed to the employee's home which provided that continued employment would constitute acceptance of the agreement where there was no evidence that the employee actually read the agreement. DeArmond v. Halliburton Energy Servs., Inc., 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003.

Contract legally enforceable promise. A promise of the existence of insurance is not a promise to procure insurance. Nance v. L.J. Dolloff Associates, Inc., 2006-NMCA-012, 138 N.M. 851, 126 P.3d 1215.

13-802. Contract; material terms.

A material term is any term without which [_____] would not have entered into the contract.

USE NOTE

This instruction should be given in every case where one party claims that a contract has not been formed because there has not been agreement on a material term. This instruction should be given with UJI 13-816.

[Adopted, effective November 1, 1991.]

Committee comment. — If a term is material with respect to either the contract as a whole (see UJI 13-816) or to the intent of a party, then the absence of this term from the

contract could negate the existence of a contract. Trujillo v. Glen Falls Insurance Co., 88 N.M. 279, 540 P.2d 209 (1975); Silva v. Noble, 85 N.M. 677, 515 P.2d 1281 (1973); UJI 13-808. Where a party claims that a material term is missing, the jury question is whether that term was essential to the party's intent to contract at the time the party made the decision to contract. Bogle v. Potter, 72 N.M. 99, 380 P.2d 839 (1963); Jones v. United Minerals Corp., 93 N.M. 706, 604 P.2d 1240 (1979).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-802, relating to definition of "express contracts", is withdrawn, and the above instruction is adopted, effective November 1, 1991.

13-803. Withdrawn.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-803, relating to definition of "implied contracts", is withdrawn, effective November 1, 1991.

13-804. Contract; intentions of the parties.

You should determine the intentions of the parties by examining their language and conduct, the objectives they sought to accomplish, and the surrounding circumstances.

USE NOTE

This instruction should be given where the existence and/or terms of a contract are subject to varying factual interpretation. This instruction should be given in conjunction with UJI 13-825.

[Adopted, effective November 1, 1991.]

Committee comment. — The intentions of the parties may be ascertained from the language used, the parties' conduct, and surrounding circumstances. Secura v. Kaiser Steel Corp., 102 N.M. 535, 697 P.2d 954 (Ct.App. 1984). The jury should focus on the parties' intentions up to the time the parties formed their purported contract. Shaeffer v. Kelton, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-804, relating to definition of "quasi-contract", is withdrawn, and the above instruction is adopted, effective November 1, 1991.

13-805. Offer; definition.

An offer is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

First, the communication must have included a definite promise by _____ showing [her] [his] willingness to contract;

Second, the material terms upon which that willingness was based must have been definite;

Third, the terms must have been communicated to _____; and

Fourth, by the communication _____ must have intended to give _____ the power to create a contract by accepting the terms.

In this case, the parties agree that: [include here the conditions which are not in dispute]. What is in dispute is: [include here the conditions that are in dispute].

[Adopted, effective November 1, 1991.]

Committee comment. — While each of the four requirements just described must be present, it is not necessary that each element be expressly stated. See UJI 13-802.

The issue may arise whether a particular communication constitutes an offer or only an invitation to deal. The requirement that the communication must empower the offeree to create a contract by an acceptance distinguishes an offer from preliminary negotiations. See Restatement (Second) of Contracts § 26. Conduct which resembles an offer may not be so intended because there is an intent not to affect legal relations, see id. § 18, or because the actor does not intend to engage in the conduct, see id. § 19, or because the proposal is not addressed to the recipient or is not received by the addressee, see id. §§ 23, 26 comment a.

A proposal by the offeror is not an offer until it is made known to the offeree who thereby is in a position to accept or to reject the offer, Foster v. Udall, 335 F.2d 828, 831 (10th Cir. 1961); Restatement (Second) of Contracts § 26, and unless the terms of the proposed contract are reasonably certain, Las Cruces Urban Renewal Agcy. v. El Paso Elec. Co., 86 N.M. 305, 523 P.2d 549 (1974); Restatement (Second) of Contracts § 32.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-805, relating to acceptance and formation of contract, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instructions, see UJI 13-807 to 13-813.

Conflicting inferences of intent resolved by jury. — Where no direct evidence appears to have been presented on the question of intent to enter into a contract, and conflicting inferences could be drawn from the indirect evidence, these conflicting inferences should have been resolved by the jury. Talbott v. Roswell Hosp. Corp., 2005-NMCA-109, 138 N.M. 189, 118 P.3d 194, cert. denied, 2005-NMCERT-008.

13-806. Offer; revocation; effect of performance.

An offer may be withdrawn at any time before notice of its acceptance has been received. To have withdrawn [his] [her] offer, _____ must have notified _____ that the offer was withdrawn.

Once notice of withdrawal has been received, the offer may no longer be accepted and any attempt to accept thereafter will not be effective. If _____ was notified that the offer was withdrawn, _____ could no longer accept the offer.

[If, however, the offer allows for acceptance by performance, the offer cannot be withdrawn once performance has begun. Instead, a reasonable amount of time must be given to allow completion of performance. If _____ had started performing before [he] [she] received notice of _____ 's withdrawal of the offer, then _____ must be given reasonable time to complete the performance. What constitutes reasonable time should be determined by you from the surrounding circumstances.]

USE NOTE

The first two paragraphs of this instruction should be used where an offeror claims to have revoked the offer. The third paragraph should be given where the offeree claims that she or he has justifiedly relied on the offer by beginning the performance requested by the offeror.

[Adopted, effective November 1, 1991.]

Committee comment. — The offeror is master of the offer. Except for offers given for consideration (see UJI 13-814) the offeror has the power to revoke the offer at any time prior to an acceptance by the offeree. McCoy v. Alsup, 94 N.M. 255, 609 P.2d 337 (Ct. App. 1980); Tatsch v. Hamilton-Erickson Manufacturing Co., 76 N.M. 729, 418 P.2d 187 (1966). A revocation must be communicated to the offeree to be effective. See McCoy v. Alsup, supra.

An offeror may, however, promise not to revoke his or her offer. If this promise not to revoke is supported by consideration or is otherwise justifiably relied on, an "option contract" is created and the offeror cannot effectively revoke the offer. See Restatement (Second) of Contracts § 87; J. A. Farnsworth, Contracts § 3.23.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-806, relating to modification of contracts, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instruction, see UJI 13-817.

13-807. Acceptance; definition.

An acceptance is a statement or conduct made by one party to the other, showing that party's agreement to the terms of the other party's offer. For _____ to have accepted _____'s offer, [he] [she] must have informed _____ by a statement or conduct that [he] [she] agreed to the terms of the offer.

USE NOTE

This instruction should be given in conjunction with whichever additional acceptance instructions are necessary to resolve the particular dispute. If it is contended that a purported acceptance changed the terms of the offer, then this instruction should be given with UJI 13-808. If it is contended that the offeree failed to respond in the way called for within the offer, then this instruction should be given with UJI 13-810. Where it is contended that an offer was accepted by silence (UJI 13-811), or by performance (UJI 13-812), or that the offer was revoked (UJI 13-813), the appropriate instruction should be given.

[Adopted, effective November 1, 1991.]

Committee comment. — For there to be a contract, the offer must be accepted unconditionally and unqualifiedly by the offeree. Corr v. Braasch, 97 N.M. 279, 639 P.2d 566 (1981); Picket v. Miller, 76 N.M. 105, 412 P.2d 400 (1966). The acceptance must be to all terms. Tatsch v. Hamilton-Erickson Manufacturing Co., 76 N.M. 729, 418 P.2d 187 (1966). The offer can be accepted only by the offeree. Polhamus v. Roberts, 50 N.M. 236, 175 P.2d 196 (1946); Restatement (Second) of Contracts § 52.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-807, relating to definition of "performance" and "performed", is withdrawn, and the above instruction is adopted, effective November 1, 1991.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract, 11 A.L.R.4th 774.

13-808. Acceptance; terms of the offer.

A reply is not an acceptance if it adds a material qualification or requests a new condition not in the offer. If, however, you determine that _____'s reply departs from the terms of _____'s offer, that reply is still an acceptance if:

[_____ agreed to the new term;] [or]

[the new term is so consistent with the offer that _____'s agreement to the term could reasonably be inferred from [his] [her] offer;] [or]

[_____ makes it clear in the reply that [his] [her] acceptance is not dependent upon _____'s agreement to the new term.]

USE NOTE

Only those bracketed exceptions to a material qualification which are relevant to the case should be given. This instruction should be given only when the contract does not involve sales of goods governed by the Uniform Commercial Code. Where the contract is for sales of goods, UJI 13-809 should be given.

[Adopted, effective November 1, 1991.]

Committee comment. — When the "acceptance" reply is qualified or adds conditions which materially vary the terms of the offer, the reply is a rejection of the offer and a counteroffer. It is not an acceptance. Polhamus v. Roberts, 50 N.M. 236, 175 P.2d 196 (1946); Restatement (Second) of Contracts §§ 39, 59.

An acceptance, however, need not be an exact mirror image of the offer. If the offeree accepts the offer unconditionally but requests a change or addition, making it plain that granting the request is not a condition of the acceptance, then, assuming that the time and manner of acceptance was authorized, the offeree's acceptance creates a contract. Polhamus v. Roberts, 50 N.M. 236, 240, 175 P.2d 196, 198-99 (1946); Restatement (Second) of Contracts § 61. In addition, an acceptance is not inoperative because conditional, if the requirement of the condition could be implied from the offer. Ross v. Ringsby, 94 N.M. 614, 614 P.2d 26 (Ct. App. 1980); Pickett v. Miller, 76 N.M. 105, 109, 412 P.2d 400, 403 (1966). A conditional acceptance is also operative if the condition was within the manifested intention of the parties. Tatsch v. Hamilton-Erickson Manufacturing Co., 76 N.M. 729, 418 P.2d 187 (1966) (where a supplier's offer to provide school desks was conditional upon the project architect's acceptance of the supplier's brand of desk and the supplier made the conditional nature of the offer clear to the contractor, the contractor was empowered to accept supplier's offer on the condition that the project architect would approve the substituted product).

Where the contract is one involving a transaction in goods, this issue will be governed by § 2-207 of the Uniform Commercial Code, which in some instances could reach a different result. See UJI 13-809.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-808, relating to waiver, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instruction, see UJI 13-842.

13-809. Acceptance; terms of the offer (Sales of Goods).

If _____ clearly and definitely communicated to _____ that [he] [she] intended to accept _____'s offer, then _____ will have accepted that offer even though the acceptance contained different or additional terms.

USE NOTE

This instruction should be used where the contract in question is for sale of goods governed by Article 2 of the Uniform Commercial Code. In all other contracts, UJI 13-808 should be used.

[Adopted, effective November 1, 1991.]

Committee comment. — Section 2-207 of the UCC altered the common law, mirror-image rule with respect to the legal efficacy of acceptance which alters the terms of the offer. As to what to do with the additional or different terms contained in the acceptance, see UCC § 2-207(2), (3).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-809, relating to reasonable time for performance, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instruction, see UJI 13-831.

13-810. Acceptance; manner of acceptance.

_____'s notice of acceptance may be communicated in any reasonable way [unless _____'s offer required a particular manner of acceptance].

USE NOTE

This instruction should be used with UJI 13-807 when the offeree's method of communicating a purported acceptance is at issue. If the offeror claims that he or she requested a particular form of acceptance, the entire instruction should be given. If the only issue is whether the acceptance was reasonably communicated, give only the first part of the instruction.

[Adopted, effective November 1, 1991.]

Committee comment. — Unless a particular method of acceptance is required in the offer, acceptance can be made in any reasonable way. Silva v. Noble, 85 N.M. 677, 515 P.2d 1281 (1973); Pickett v. Miller, 76 N.M. 105, 412 P.2d 400 (1966); Polhamus v. Roberts, 50 N.M. 236, 175 P.2d 196 (1946). The reasonableness of the method of acceptance is a question of fact to be determined by the jury, depending upon what would reasonably be expected by prevailing business usages and other circumstances. Polhamus v. Roberts, supra; Restatement (Second) of Contracts § 65. An oral or formal acceptance is not always necessary. Keeth Gas Co., Inc. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1973).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-810, relating to specific time for performance, is withdrawn, and the above instruction is adopted, effective November 1, 1991.

13-811. Acceptance; when silence is acceptance.

Silence is acceptance only under [one or more of] the following condition[s]:

[If _____ took the benefits of an offer, knowing of _____'s intent to receive something in return;]

[or]

[If an offer gave _____ reason to understand that _____ would consider silence as an acceptance;]

[or]

[If the previous dealings of the parties reasonably indicate that an offer can be accepted by silence or inaction].

USE NOTE

Where silence is claimed to constitute an acceptance, this instruction should be given with UJI 13-807 and 13-816. Use only the condition(s) listed above which may be applicable to the facts.

[Adopted, effective November 1, 1991.]

Committee comment. — Silence or inaction may become an acceptance only when the circumstances would impose upon the offeree a duty to speak. Garcia v. Middle Rio Grande Conservancy District, 99 N.M. 802, 664 P.2d 1000 (Ct. App. 1983); Vance v.

Forty-Eight Star Mill, 54 N.M. 144, 215 P.2d 1016 (1949); Restatement (Second) of Contracts § 69.

The first condition described in this instruction is illustrated by Acme Cigarette Services, Inc. v. Gallegos, 91 N.M. 577, 577 P.2d 885 (Ct. App. 1978), in which a party accepted the benefits of an option contract and, after one year, attempted to break the contract and avoid his obligations, claiming that his silence had not constituted an acceptance. The construction of silence in the course of dealing between parties (the third condition above) is illustrated by McCoy v. Alsup, 94 N.M. 255, 609 P.2d 337 (Ct. App. 1980) (offerors' silence in response to offeree's letter confirming conditional acceptance constituted an admission and assent to the conditional acceptance).

The conditions described in this instruction reflect those clearly recognized by the existing reported decisions. The question is one of reasonableness in the circumstances and the listed conditions are not intended to be exclusive. They may be supplemented in a particular case where appropriate.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-811, relating to demand for performance, is withdrawn, and the above instruction is adopted, effective November 1, 1991.

13-812. Acceptance; performance as acceptance; notification of the offeror; partial performance.

Performance by _____ would be an acceptance of the offer only if:

_____ reasonably understood that _____ wanted performance rather than a return promise,

and if

[_____ reasonably believed _____ would learn of the performance.]

[or]

[_____ took reasonable steps to notify _____ of the performance.]

In order to be effective as acceptance, performance must be complete.

USE NOTE

This instruction should be given in conjunction with UJI 13-807 and 13-816. One or both of the bracketed paragraphs must be given, as the evidence warrants.

[Adopted, effective November 1, 1991.]

Committee comment. — An offer may be accepted by performance before revocation. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977); Restatement (Second) of Contracts §§ 54, 34(2); but see Restatement (Second) § 53 for the qualification that the offer must invite acceptance by performance. Where an offeree who accepts by rendering a performance knows that the offeror has no adequate means of learning of the performance, the offeror's duties are discharged unless one of three conditions exists:

(1) the offeror learns of the performance within a reasonable time;

(2) the offer indicates that notification is unnecessary; or

(3) the offeree exercises reasonable diligence to notify the offeror of acceptance. Restatement (Second) of Contracts § 54. Reasonable time is defined in Restatement (Second) of Contracts § 41(2).

Where the offer calls for performance as consideration for the contract, partial performance which is a part of the consideration creates an option contract in which completion of the performance by the offeree invokes the duties of the offeror. Marchiondo v. Scheck, 79 N.M. 440, 432 P.2d 405 (1967); Restatement (Second) of Contracts §§ 45, 63. What constitutes partial performance will vary from case to case since what can be done toward performance is a question of fact, depending on the circumstances in which the offer is made. Marchiondo v. Scheck, supra.

Use of a subcontractor's bid in a general contractor's bid may constitute an acceptance by the contractor, binding both parties to the terms of the subcontractor's offer. Stites v. Yelverton, 60 N.M. 190, 289 P.2d 628 (1955); Restatement (Second) of Contracts § 87. If a subcontractor's bid contains language specifically limiting the duration of the offer and the contractor does not confirm reliance upon the offer before the time limit, the subcontractor is not bound. K. L. House Construction v. Watson, 84 N.M. 783, 508 P.2d 592 (1973).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-812, relating to hindering performance of a contract, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instruction, see UJI 13-841.

13-813. Acceptance; timeliness of acceptance; power of revocation.

In order for a communication to be an acceptance, it must have been received by _____ [within the time period established by the offer] [within a reasonable time] [before the offer was withdrawn by _____]. [What constitutes a reasonable time should be determined by you from the surrounding circumstances.]

USE NOTE

Use only those bracketed parts of the first sentence which are relevant to the evidence. The bracketed last sentence should only be used where the reasonableness of the time is at issue.

[Adopted, effective November 1, 1991.]

Committee comment. — The timeliness of an acceptance is a question of fact depending upon the circumstances of the case. Balboa Const. Co., Inc. v. Golden, 97 N.M. 299, 639 P.2d 586 (1981). An offer not given for consideration may be withdrawn at any time prior to unconditional acceptance by the offeree. K. L. House Const. Co., Inc. v. Watson, 84 N.M. 783, 508 P.2d 592 (1973).

There is some question as to whether an acceptance occurs when an offeree complies with the terms of the offer, or whether acceptance occurs when the offeror receives notification of the offeree's acceptance. According to the Restatement (Second) of Contracts § 63 and § 68 comment a, there is no requirement that the acceptance be received by the offeror where the offeree complies with the manner and medium of acceptance requested by the offeror and the acceptance is out of the offeree's control (e.g., in the mail).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-813, relating to discharge of contract due to impossibility of performance, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instruction, see UJI 13-840.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Absence from or inability to attend school or college as affecting liability for or right to recover payments for tuition or board, 20 A.L.R.4th 303.

13-814. Consideration; definition.

Consideration is any bargained-for benefit or advantage to _____ *(promisor)* which was a reason why _____ *(promisor)* wanted to enter into the contract, or any loss or detriment to _____ *(promisee)*, which _____ *(promisor)* desired _____ *(promisee)* to suffer or which was a reason for

_____ *(promisor)* to enter into the contract. Consideration may consist of a return promise, an act, a forbearance, or the creation, modification, or destruction of a legal relation.

USE NOTE

In the blanks insert the proper names of the promisor and the promisee, as appropriate.

[Adopted, effective November 1, 1991.]

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-814, relating to rescission, is withdrawn, and the above instruction is adopted effective November 1, 1991.

13-815. Promissory estoppel; definition.

[If there was no consideration for _____'s promise, the promise still may be enforceable if:]

[A promise may be enforceable if:]

1. _____ made the promise;

2. _____ reasonably relied on _____'s promise;

3. _____'s reliance on the promise was reasonably foreseeable to _____; and

4. _____ suffered some economic loss or other detriment as a result of [his] [her] reliance on _____'s promise.

USE NOTE

The first bracketed opening clause should be used where this instruction is given together with UJI 13-814. If this instruction is not given in conjunction with UJI 13-814, the second bracketed opening clause should be used. The judge has a threshold responsibility in promissory estoppel cases to determine what items of damages may be recovered (e.g., expectancy damages, consequential damages). This may require the judge to make determinations of reasonableness and fairness which in other situations might be considered factual. Once the judge determines which items of damages may be recovered, these items should be included in UJI 13-843 and the jury charged to make the fact-finding as to the amount of damages, if any.

[Adopted, effective November 1, 1991.]

Committee comment. — Even where a promise is not supported by traditional consideration, it may be enforceable against the promisor under the doctrine of "promissory estoppel." See, e.g., Eavenson v. Lewis Means, Inc., 105 N.M. 161, 730 P.2d 464 (1986); Restatement (Second) of Contracts § 90. The New Mexico courts in adopting promissory estoppel have commented favorably on the Restatement version of the doctrine. See Eavenson, supra. "Promissory estoppel," as a theory, should be distinguished from the doctrine of "equitable estoppel." The latter doctrine may also be appropriate in a contracts situation. See, e.g., Capo v. Century Insurance Co., 94 N.M. 373, 610 P.2d 1202 (1980).

Where the promise is enforced under promissory estoppel, the court may limit damages or the remedy, "as justice requires." Restatement (Second) of Contracts § 90(1). Usually, damages under a "promissory estoppel" theory are limited to "reliance damages." See J. A. Farnsworth, Contracts § 2.19 (1982). Some of the factors which may be considered in determining the extent to which the remedy should be limited or expanded are referred to in comment b to Restatement (Second) of Contracts § 90. Where the claim of promissory estoppel arises in the context of a charitable pledge, there is no need for any reliance on the part of the promisee in order to make the promise enforceable. See Restatement (Second) of Contracts § 90(2).

Where an oral promise is sought to be enforced under promissory estoppel, the statute of frauds is not a defense. See Eavenson, supra; Restatement (Second) of Contracts § 139; J. A. Farnsworth, Contracts § 6.12 (1982).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-815, relating to discharge by other's breach, is withdrawn, and the above instruction is adopted effective November 1, 1991.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Promissory estoppel of lending institution based on promise to lend money, 18 A.L.R.5th 307.

13-816. Mutual assent; definition.

For there to be a mutual assent, the parties must have had the same understanding of the material terms of the agreement.

To determine what each party understood, you should look at the parties' intentions, words, and actions, and at the surrounding circumstances.

[If the understanding of the parties was not the same, _____ may still be held to have agreed if _____'s understanding was reasonable and _____'s understanding was unreasonable.]

USE NOTE

This instruction should be given where a question of fact exists as to whether the parties' objective manifestations of assent indicate that the parties believed they had entered into a contract. If the jury determines that the parties had different understandings, each consistent with their subsequent acts, then the jury must determine whether one party's understanding is so extraordinary as to create estoppel. Paragraph three enables the jury to make this judgment, thereby protecting the reliance interest of the party claiming the sole reasonable interpretation of the words and acts of the exchange. Paragraph three differs from UJI 13-804 in that the jury is asked to consider not what the parties actually intended, but whether one party's subjective understanding comports with an objective view of the exchange while the other party's does not.

[Adopted, effective November 1, 1991.]

Committee comment. — If both parties have reasonable views of an exchange and these views differ, then there is mutual mistake. The law does not make a contract when the parties intend none. If the parties create relations different from what both parties thought they had created, the contract will likewise fail for mutual mistake. Jacobs v. Phillippi, 102 N.M. 449, 697 P.2d 132 (1985); Restatement (Second) of Contracts § 20. Where one party meant one thing, and the other party meant another, and the difference goes to the essence of the contract, there is no contract unless one party knew or had reason to know what the other party meant or understood. Trujillo v. Glen Falls Insurance Co., 88 N.M. 279, 540 P.2d 209 (1975); Restatement (Second) of Contracts § 20.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-816, relating to anticipatory repudiation, is withdrawn, and the above instruction is adopted effective November 1, 1991.

13-817. Modification of contract; definition.

A modification occurs when the parties intend to continue the contractual relationship but wish to change one or more of the terms of the contract. In order for a modification to the contract to be effective, there must be mutual assent of [both] _____ and _____ to the modification.

[Adopted, effective November 1, 1991.]

Committee comment. — "[I]n the absence of a prohibiting statute, [a] written contract may be orally modified by the parties who made the original agreement." Wendell v. Foley, 92 N.M. 702, 705, 594 P.2d 750, 753 (1979). A course of dealing may also modify an agreement. Wal-Go Assoc. v. Leon, 95 N.M. 565, 624 P.2d 507 (1981)

(lessor's policy always to redeposit lessee's checks modified contract so that lessee was not in breach when its check was returned marked "insufficient funds"). The Uniform Commercial Code also specifies that a contract can be modified by conduct. §§ 55-2-207(3), 55-2-209(3) NMSA 1978.

The ability of the parties to modify a contract orally may be circumscribed by their written agreement. Danzer v. Professional Insurers, Inc., 101 N.M. 178, 679 P.2d 1276 (1984) (oral modification of a written contract failed because contract called for modification in writing of the party to be charged).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-817, relating to "workmanlike manner", is withdrawn, and the above instruction is adopted effective November 1, 1991. For present comparable instruction, see UJI 13-829.

13-818. Assignment and delegation; definition and presumptions.

[An assignment is an act or an expression that is intended to transfer a right under the contract to another person. Unless the parties have agreed otherwise, _____ *(the assignor)* is entitled to assign [his] [her] rights and interest under the contract. If _____ *(the assignor-obligee)* has made an assignment to _____ *(the assignee)*, then _____ *(the assignee)* is entitled to receive the benefits of the contract and is entitled to enforce _____'s *(the obligor)* obligations under the contract.]

[A delegation is a transfer of a duty or an obligation under the contract to another. Normally, if a person assigns [his] [her] rights and interests under the contract, [he] [she] also delegates [his] [her] duties of performance. Therefore, unless the language and conduct of _____ *(the assignor)* and _____ *(the assignee)*, and the surrounding circumstances, show that _____ *(the assignor)* did not intend to delegate [his] [her] duties to _____ *(the assignee)*, then _____ *(the assignee)* is also obligated to perform _____'s *(the assignor)* duties under the contract.]

USE NOTE

Where questions of fact arise as to whether an assignment or delegation has occurred, the jury should be given the general definition of assignment or delegation or both, in conjunction with UJI 13-804 and 13-819 as applicable.

[Adopted, effective November 1, 1991.]

Committee comment. — As a general rule, "assignment" refers only to rights or interests under a contract. Unless a contrary intention appears from the language or the circumstances, an "assignment of the contract" is both an assignment of the assignor's rights and a delegation of the assignor's duties. Paperchase Partnership v. Bruckner, 102 N.M. 221, 693 P.2d 221 (1985); Restatement (Second) of Contracts § 328 (1979). A provision prohibiting assignment of the contract, however, bars only the delegation of duties, unless a contrary intent is clearly shown. Paperchase Partnership v. Bruckner, supra; Restatement (Second) of Contracts § 322. This follows from the law favoring the right to assignment. See Cowan v. Chalamidas, 98 N.M. 14, 644 P.2d 528 (1982), in which lessees to a commercial lease were contractually bound to enter into a subleasing agreement only upon consent of the lessor. The court held that the lessor's consent could not arbitrarily or unreasonably be withheld.

To be enforceable, an assignment must manifest an intention to transfer some right or interest. Nickell v. United States ex. rel. D.W. Falls, Inc., 355 F.2d 73 (10th Cir. 1966). The assignment must describe the subject matter with sufficient particularity to make it identifiable. Benton v. Albuquerque Nat'l Bank, 103 N.M. 5, 701 P.2d 1025 (Ct. App. 1985); Nickell v. United States, supra.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-818, relating to custom and usage, is withdrawn, and the above instruction is adopted effective November 1, 1991. For present comparable instruction, see UJI 13-826.

13-819. Assignment; no reversionary interest.

For the assignment to be valid, _____ must have retained no rights in what was assigned.

USE NOTE

This direction should be given in conjunction with UJI 13-818.

[Adopted, effective November 1, 1991.]

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-819, relating to negligent misrepresentation, is withdrawn, and the above instruction is adopted effective November 1, 1991.

13-820. Third party beneficiary; enforcement of contract.

To recover the benefits of the contract between _____ (*contract promisor*) and _____ (*contract promisee*), _____ (*third party*) must show that _____ (*contract promisee*) and _____ (*contract promissor*) intended to benefit _____ (*third party*) [either individually or as a member of a class].

USE NOTE

This instruction should be used where the third-party beneficiary seeking to enforce the contract is an intended beneficiary. The first two blanks should be filled in with the names of the immediate parties to the contract. The third blank should be filled in with the name of the third party seeking to enforce the contract. The fourth and fifth blanks should be filled in with the names of the immediate parties to the contract, and the last blank should be filled in with the name of the third party.

[Adopted, effective November 1, 1991; amended by Supreme Court Order No. 08-8300-43, effective December 31, 2008.]

Committee Commentary. — New Mexico has long recognized that persons who are third parties to a contract may still have rights to enforce that contract where at least the contract promisee so intended. See Hamill v. Maryland Casualty Co., 209 F.2d 338 (10th Cir. 1954). It is not necessary that the third party be named in the contract or specifically identified to be able to enforce it. Id.; see also Valdez v. Cilleson & Son Inc., 105 N.M. 575, 734 P.2d 1258 (1987). The "paramount indicator" that a third party may have rights to enforce the contract is the intent of the contract promisee that the third party have the right to enforce it. Id. at 581; see Restatement (Second) of Contracts § 302. It is not necessary that the third party be specifically or individually intended to be able to enforce the contract; it is sufficient that the third party be a member of a class of intended beneficiaries. Valdez, 105 N.M. at 581, 734 P.2d at 1264. In appropriate cases, parole evidence may be used to show that at least one of the parties to a contract intended it to benefit third parties. Id.; see UJI 13-825.

A third-party beneficiary to a contract has enforceable rights under the contract, even though not in privity with the contracting parties. *Casias v. Continental Gas Co.*, 1998-NMCA-083, ¶ 11, 125 N.M. 297, 960 P.2d 839. A party claiming third-party beneficiary status has the burden of proving that the actual parties to the contract intended to benefit the third party, either individually or as a member of a class of beneficiaries. *Valdez v.Cilleson & Sons, Inc.*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987). Such intent must appear either from the contract itself or from some evidence that the person claiming to be a third-party beneficiary is an intended beneficiary. *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 20, 139 N.M. 201, 131 P.3d 51. In addition, the intent to benefit may be implied if the very nature of the agreement is to benefit the third party. *See Flores v. Baca*, 117 N.M. 306, 310-11, 871 P.2d 962, 966-67 (1994) (explaining that surviving family members may be implied in fact to be the intended beneficiaries of funeral and burial contracts). Third-party beneficiary status, however, is not conferred on a mere incidental beneficiary who derives benefit under the contract

but cannot establish that the contracting parties intended to confer the benefit. *Fleet Mortgage Corp. v. Schuster*, 112 N.M. 48, 50, 811 P.2d 81, 83 (1991). If the case involves the rights of statutory beneficiaries, the jury may also have to be instructed on the multi-factor balancing test set forth in *Leyba v. Whitley*, 120 N.M. 768, 775, 907 P.2d 172, 179 (1995).

[As amended by Supreme Court Order No. 08-8300-43, effective December 31, 2008.]

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-820, relating to fraudulent misrepresentation, is withdrawn, and the above instruction is adopted effective November 1, 1991.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-43, effective December 31, 2008, changed the phrase "must show that at least _____ (contract promisee) intended that ____ (third party) [have the benefits of the contract and the right to enforce the contract] [either individually or as a member of a class]" to the phrase "must show that _____ (contract promisee) and ____ (contract promissory) intended to benefit ____ (third party) [either individually or as a member of a class]"; and rewrote the Committee Commentary.

13-821. Third-party beneficiary; creditor beneficiary; enforcement of contract.

_____ *(third party)* may recover the benefits of the contract between _____ and _____ if the performance of _____ *(promisor's)* obligation under the terms of the contract will satisfy a debt that _____ *(promisee)* owed to _____ *(third party).*

USE NOTE

This instruction should be used only when the third party seeking to enforce the contract is a "creditor" beneficiary of the contract obligee. In all other situations where a third party seeks to enforce a contract, UJI 13-820 should be used.

[Adopted, effective November 1, 1991.]

Committee comment. — A third party is a "creditor beneficiary" and is thereby entitled to enforce a contract directly if the contract obligates the promisor to satisfy the promisee's existing debt or obligation to the third party. See Restatement (Second) of Contracts § 302 (1); Kennedy v. Lynch, 85 N.M. 479, 513 P.2d 1261 (1973); Lawrence Coal Co. v. Shanklin, 25 N.M. 404, 183 P. 435 (1919).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-821, relating to effect of incompetency on capacity to contract, is withdrawn, and the above instruction is adopted effective November 1, 1991. For present comparable instruction, see UJI 13-837.

13-822. Breach of contract; definition.

For you to find _____ liable to _____, you must find that _____ breached [his] [her] contract with _____. A person may breach a contract by

[failing to perform a contractual obligation when that performance is called for (unless that performance is otherwise excused)]

or

[announcing ahead of time that he or she will not perform a contractual obligation when the time for that performance comes due].

USE NOTE

One or both of the bracketed instances of breach should be given, depending on what claims of breach the evidence raises. The bracketed limitation in the "failure of performance" instance should be given only if called for by the claims of the parties. This instruction should be given in conjunction with one or both of UJI 13-823, 13-824.

[Adopted, effective November 1, 1991.]

Committee comment. — A contract calls upon each party to the contract to perform some promise or obligation. The full performance of that promise or obligation satisfies that party's obligations under the contract and thereby constitutes a discharge. See J. A. Farnsworth, Contracts § 8.8. The failure of a party to the contract to perform satisfactorily his or her contract promise or duty, on the other hand, constitutes a breach of the contract, giving rise to a remedy, typically damages. The breach of a contract promise or duty should be distinguished from the failure to satisfy a condition on performance. The failure to satisfy a condition does not constitute a breach of contract, but rather will result in relieving the other party to the contract of having to perform some or all of that party's obligations under the contract. See Restatement (Second) of Contracts §§ 224, 225. It is only a breach of the contract, however, which gives rise to the remedy of damages.

The promise or obligation which is breached may be either expressed in the contract or implied, such as any obligation of good faith or implied warranties of quality. See J. A. Farnsworth, Contracts § 8.15. The breach may occur either through a total failure to perform or a negligent or incomplete performance. Cochrell v. Hiatt, 97 N.M. 256, 638 P.2d 1101 (Ct. App. 1981). The announced intention not to perform a contract obligation

when it becomes due (repudiation) may constitute a breach of contract. See McKinney v. Gannett Co., Inc., 817 F.2d 659 (10th Cir. 1987); UJI 13-824.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-822, relating to undue influence, is withdrawn, and the above instruction is adopted effective November 1, 1991. For present comparable instruction, see UJI 13-839.

13-823. Breach of contract; failure to perform.

Unless the parties expressly make technical performance a condition of the contract, a failure to perform a contractual obligation, in order to be a breach, must be substantial rather than a minor or technical failure. A failure to perform need not be willful or negligent in order to be a breach of contract.

[Adopted, effective November 1, 1991.]

Committee comment. — Failure of performance, either through nonperformance, incomplete performance or insufficient performance, is a breach of contract. Cochrell v. Hiatt, 97 N.M. 256, 638 P.2d 1101 (Ct. App. 1981). Failure of performance, however, cannot be a breach until that performance is called for under the contract. See Restatement (Second) of Contract § 235. Unless the contract expressly makes technical performance a condition of the contract, see J.A. Farnsworth, Contracts § 8.12, failure to perform will constitute a breach only where that failure is substantial and not merely minor or technical. See Yucca Mining v. Phillips Oil Co., 69 N.M. 281, 365 P.2d 925 (1961). A "substantial" failure to perform is one that goes to the "root of the contract" or renders the remainder of the contract "different in substance from that which was contracted for." Id. at 285, 365 P.2d at 927.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-823, relating to mental weakness, fraudulent misrepresentation, undue influence, is withdrawn, and the above instruction is adopted effective November 1, 1991. For present comparable instruction, see UJI 13-839.

13-824. Breach of contract; repudiation of contractual obligation.

It is a breach of contract if, before performance became due, _____ *(promisor)* announced or otherwise demonstrated [his] [her] intention not to perform a contractual obligation [where _____ *(promisee)* had not fully carried out [his] [her] contractual obligations].

USE NOTE

The bracketed part of the instruction should be given only when the evidence and claims of the parties raise the issue. The blanks should be filled in with the names of the parties.

[Adopted, effective November 1, 1991.]

Committee comment. — Where the time has not yet arrived for contract performance, the contract performer may still breach by announcing ahead of time that he or she will not perform the contract obligation. Such an announcement is typically called a "repudiation" or "anticipatory repudiation" or "renunciation". Any such repudiation must be clear and unequivocal. See Viramontes v. Fox, 65 N.M. 275, 335 P.2d 1071 (1959). Expressions of doubt or concern about performance are insufficient to constitute a repudiation. J. A. Farnsworth, Contracts § 8.21. The repudiation need not be explicit. It may be signified by either words or conduct. Id. For example, where a contract performer intentionally destroys or abandons the only means available to him or her for performance, such action may constitute a repudiation. The repudiation must relate to a material duty rather than to an insignificant one. See Restatement (Second) of Contracts § 250; § 55-2-610 NMSA 1978 (repudiation limited to nonperformance "which will substantially impair the fair value of the contract to the other").

At least in contracts for the sale of goods, the failure of a party to provide "adequate assurances" of willingness to perform when justifiably called on to do so may constitute an anticipatory repudiation. See § 55-2-609 NMSA 1978. The Restatement (Second) of Contracts extends this principle to non-sales contracts. See Restatement (Second) of Contracts § 251.

The repudiation is not automatically a breach, but it may be treated as such at the election of the promisee. See J.A. Farnsworth, Contracts § 8.21. In order to treat a repudiation as a breach, the other party must so signify in some reasonable way, thus constituting an "acceptance" of the repudiation. See Ostic v. Mackmiller, 53 N.M. 319, 207 P.2d 1008 (1949). Until there has been such an "acceptance" of the repudiation, the contract performer may retract the repudiation. An anticipatory repudiation also may suspend or discharge the promisee's obligation to perform his or her duties. See U.S. Potash Co. v. McNutt, 70 F.2d 126 (10th Cir. 1934).

The announcement of prospective nonperformance will not constitute a breach of contract where the repudiating party has received his or her full exchange prior to repudiation.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-824, relating to duress, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instruction, see UJI 13-838.

13-825. Ambiguity in term or terms; general rule of interpretation.

There is a dispute as to the meaning of the following term[s] in the contract: [Fill in term or terms]. If you find that the parties, at the time the contract was made, had the same understanding of [this] [these] term[s], then you shall give that meaning to the term[s]. Where, however, the parties at the time the contract was made had different meanings in mind about [this] [these] term[s], then you shall give that meaning which you find to be most reasonable, taking into consideration all the circumstances, including the following:

[the intentions of the parties]

[the words that the parties used]

[the purposes the parties sought to achieve]

[custom in the trade]

[the parties' course of dealing]

[the parties' course of performance]

[whether a party, at the time the contract was entered into, knew or should have

known that the other party interpreted the term[s] differently.]

USE NOTE

This instruction should be given together with UJI 13-804, as well as together with any applicable instruction from UJI 13-826, 13-827 or 13-828. The term or terms in dispute should be inserted after the colon in the first sentence. Before a court may submit a question of interpretation of a contract term or terms to the jury, however, the court must make the threshold determinations that there is ambiguity as to the meaning of the term or terms at issue and that the resolution of any ambiguity requires extrinsic evidence. These threshold issues are ones of law for the court to determine. If the court determines that ambiguity exists, then extrinsic evidence, which is helpful in resolving the ambiguity, is admissible to demonstrate the parties' intentions and the surrounding circumstances and the question of interpretation may be submitted, where appropriate, to the jury. If the court finds no ambiguity, however, then the unambiguous meaning of the term or terms, as determined by the court, is controlling, and no question of interpretation is submitted to the jury. The bracketed language at the end of the instruction should be used where appropriate from the evidence.

[Adopted, effective November 1, 1991.]

Committee comment. — The court's function is to interpret and enforce the contract as made by the parties with reference to the intent of the parties. CC Housing Corp. v.

Ryder Truck Rental, 106 N.M. 577, 746 P.2d 1109 (1987); Segura v. Kaiser Steel Corp., 102 N.M. 535, 697 P.2d 954 (Ct. App. 1984); Manuel Lujan Insurance, Inc. v. Jordan, 100 N.M. 573, 673 P.2d 1306 (1983); Schaefer v. Hinkle, 93 N.M. 129, 597 P.2d 314 (1979). A contractual term is ambiguous "only if it is reasonably and fairly susceptible of different constructions." Levenson v. Mobley, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). Disagreement between the parties as to what the terms of the contract mean does not in itself establish ambiguity. Id. Once it has been determined that a contract is ambiguous and its construction depends on extrinsic facts and circumstances, terms of a contract become questions of fact for triers of fact. Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 734 P.2d 1258 (1987); Mobile Investors v. Spratte, 93 N.M. 752, 605 P.2d 1151 (1980); Schaeffer v. Kelton, 95 N.M. 182, 619 P.2d 1226 (1980); Young v. Thomas, 93 N.M. 677, 604 P.2d 370 (1979).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-825, relating to definition of "consideration" (but for which no instruction was drafted), is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present comparable instruction, see UJI 13-814.

13-826. Custom in the trade.

A custom in the trade is any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties.

USE NOTE

This instruction should be used, in conjunction with UJI 13-825 when a question of interpretation exists as to a term or terms in a contract and there is evidence submitted concerning custom in the trade.

[Adopted, effective November 1, 1991.]

Committee comment. — Evidence of trade custom is admissible to determine the meaning of disputed terms in the contract. This instruction should not be considered as having created any duty independent of the contract.

The existence and scope of the trade custom must be proved as facts, and the issue should not be submitted to the jury unless there is evidence to make a triable issue. See § 55-1-205(2) NMSA 1978. While a practice, in order to be considered "custom," must be sufficiently common so as to justify the expectation that it will be followed, it is not necessary that the practice be long-standing, universal or without dissent.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-826, relating to implied warranty to use reasonable skill, is withdrawn, and the above instruction is adopted effective November 1, 1991. For present comparable instruction, see UJI 13-830.

13-827. Course of dealing.

A course of dealing is a manner of dealing between the parties in previous transactions which it is reasonable to regard as establishing a common understanding with respect to the meaning of the term[s] in dispute.

USE NOTE

This instruction should be given in conjunction with UJI 13-825, when a question of interpretation exists as to a term or terms in a contract and there is evidence submitted concerning course of dealing.

[Adopted, effective November 1, 1991.]

Committee comment. — Evidence of how the parties have dealt with each other in other similar transactions may be relevant to the proper construction of the contract at issue. This type of evidence is referred to as "course of dealing." See § 55-1-205(1) NMSA 1978. The evidence of course of dealing may assist in construing ambiguous terms in a contract or it may also serve to supplement or amplify explicit terms in a contract. Id.; J.A. Farnsworth, Contracts § 7.13. While the UCC makes this concept clearly applicable in sales of goods, the Restatement of Contracts applies an analogous rule to nongoods contracts. See Restatement (Second) of Contracts § 223.

In order for there to be a "course of dealing," it is necessary that the prior conduct not be an isolated instance but rather reflect a sufficient sequence of events to support the conclusion that it reliably evinces the understanding of the parties. See § 55-1-205(1) NMSA 1978; J.A. Farnsworth, Contracts § 7.13. The concept of "course of dealing" should not be confused with the concept of "course of performance," which deals with the parties' performance of the contract at issue. See UJI 13-828. Similarly, the concept of "course of dealing" must be distinguished from prior negotiations of the contract at issue.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-827, relating to general instruction as to measure of damages, is withdrawn, and the above instruction is adopted effective November 1, 1991. For present comparable instruction, see UJI 13-843.

13-827A to 13-827F. Withdrawn.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-827A to 13-827F, relating to measures of damage for contract price modification of contract, specific undertaking, delay, contracts for construction, and personal employment, respectively, are withdrawn, effective November 1, 1991. For present instructions regarding elements of contract damages, see UJI 13-846 to 13-852.

13-828. Course of performance.

A course of performance is the way the parties have conducted themselves in the performance of this contract, reflecting a common understanding of the meaning of the term[s] in dispute.

USE NOTE

This instruction should be given in conjunction with UJI 13-825 when a question of interpretation exists as to a term or terms in a contract and there is evidence submitted concerning course of performance.

[Adopted, effective November 1, 1991.]

Committee comment. — How the parties have performed the obligations of the contract at issue may be relevant to the construction of that contract and hence admissible. See § 55-2-208(1) NMSA 1978. Such evidence is considered "course of performance" and should be distinguished from "course of dealing" (see UJI 13-827) and "trade custom" (see UJI 13-826).

In order for performance of the contract to constitute a "course" of performance, the evidence must describe more than just an isolated act or instance, but must be sufficiently established to indicate reliably the intents of the parties. See J. A. Farnsworth, Contracts § 7.13; 55-2-208(1) NMSA 1978, comment 4. The concept of course of performance is closely associated with the concepts of waiver (see UJI 13-842) and modification of the contract (see UJI 13-817).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-828, relating to verdicts in contract cases, is withdrawn, and the above instruction is adopted effective November 1, 1991.

13-828A to 13-828F. Withdrawn.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-828A to 13-828F, relating to verdicts in contract cases, are withdrawn, effective November 1, 1991.

13-829. Workmanlike manner.

Where a person contracts to perform work of a particular skill, [he] [she] promises to exercise the judgment and to display the quality of workmanship which is standard to that field of work.

USE NOTE

This instruction should be given when a question of fact arises as to whether a person failed to exercise the judgment or to produce the product which could be expected from any person working in that field. Situations where the parties have contracted for more or less than the standard in the industry can be argued to the jury without further instruction or may give rise to an instruction on waiver.

[Adopted, effective November 1, 1991.]

Committee comment. — The standard of "workmanlike manner" includes both the promises that the work done will be of a quality comparable to the standard in the industry and that the judgment exercised by the skilled worker will equal that industry standard. Wendenburg v. Allen Roofing Co., Inc., 104 N.M. 231, 719 P.2d 809 (1986); Andrila v. Milligan, 52 N.M. 65, 191 P.2d 716 (1948). What that standard of judgment may be in professional services may be difficult to ascertain. See State ex rel. Risk Mgt. v. Gathman-Matotan Architects & Planners, Inc., 98 N.M. 790, 653 P.2d 166 (Ct. App.) (architects held to reasonable skill standard, but not held to warrant fitness for a particular purpose in design plans), cert. quashed, 99 N.M. 47, 653 P.2d 878 (1982). But see First Nat. Bank of Clovis v. Diane, Inc., 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985) (lawyer held to such skill, prudence, and diligence as lawyers of ordinary skill and capacity); Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982) (insurance agent held to standard requiring purchase of insurance for clients or notification of non-insurance); Amato v. Rathbun Realty, Inc., 98 N.M. 231, 647 P.2d 433 (Ct. App. 1982) (real estate broker held to duty of communicating information).

The standard for performance in a workmanlike manner does not prevent the parties from agreeing to performance which is either below or above industry standards. See Martin v. Foster, 81 N.M. 583, 470 P.2d 304 (1970) (housing contract providing for superior workmanship could be enforced according to its terms); Moss Theatres, Inc. v. Turner, 94 N.M. 742, 616 P.2d 1127 (Ct. App. 1980) (where contractor had discussed potential problems of fencing with buyer, contractor not liable held for fence's subsequent failure, despite industry standard revealed in building code).

13-830. Implied warranty to use reasonable skill.

When a person undertakes to practice a trade or to do a kind of work which requires some learning, special training or experience, [he] [she] is obligated to exercise that degree of skill which a reasonably prudent person skilled in such work would exercise in the circumstances.

USE NOTE

UJI 13-829 and 13-830 are similar in their statement of the standard of performance required by contracts to perform services. Either or both may be used as appropriate to the evidence and the pleadings.

[Adopted, effective November 1, 1991.]

Committee comment. — New Mexico implies in every contract to perform services a warranty that those services will be rendered in conformity to the standard of care within the profession or trade. Clear v. Patterson, 80 N.M. 654, 459 P.2d 358 (1969); State ex rel. Risk Mgt. Div. v. Gathman-Matotan Architects & Planners, Inc., 98 N.M. 790, 653 P.2d 166 (Ct. App. 1982), cert. quashed, 99 N.M. 47, 653 P.2d 878 (1982). While the standard of performance required by the warranty sounds in tort, its origin is the contractual undertaking.

ANNOTATIONS

No action for architect's breach of warranty to furnish adequate plans. — New Mexico does not recognize a cause of action against an architect for breach of an implied warranty to furnish the plans and specifications adequate for a specified purpose. State ex rel. Risk Mgt. Div. of Dep't of Fin. & Admin. v. Gathman-Matotan Architects & Planners, Inc., 98 N.M. 790, 653 P.2d 166 (Ct. App. 1982).

Person must not be negligent in exercise of skills. — The gist of the implied warranty stated in this instruction is that a person who contracts to do work requiring certain skills must not be negligent in exercising those skills. State ex rel. Risk Mgt. Div. of Dep't of Fin. & Admin. v. Gathman-Matotan Architects & Planners, Inc., 98 N.M. 790, 653 P.2d 166 (Ct. App. 1982).

Law reviews. — For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

13-831. Reasonable time.

_____ was obligated to perform the contract within a reasonable time. What is a reasonable time should be determined by you from the surrounding circumstances.

[Adopted, effective November 1, 1991.]

Committee comment. — Where the contract is silent on time of performance, the law implies that a reasonable amount of time is the proper standard. Smith v. Smith, 95 N.M. 4, 617 P.2d 1325 (Ct. App. 1980); Hagerman v. Cowles, 14 N.M. 422, 94 P. 946 (1908). Where the contract specifies a different time, however, the courts will not substitute reasonable time. Edward H. Snow Development Co. v. Omshear, 62 N.M. 113, 305 P.2d 727 (1957) (court refused remedy of specific performance on contract which called for deferred payments). Reasonable time for completion of performance should not be confused with duration of contract. But see McCasland v. Prather, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

13-832. Good faith and fair dealing - *No instruction drafted*.

No instruction drafted.

[Adopted, effective November 1, 1991.]

Committee comment. — New Mexico Stat. Ann. § 55-1-203 (1978) imposes a duty of good faith in the performance of all contractual obligations governed by the Uniform Commercial Code. The Restatement (Second) of Contracts § 205 similarly recognizes a duty in all contract situations. While New Mexico recognizes a similar duty in insurance contracts, there is no appellate decision recognizing such a duty in all non-UCC, non-insurance cases. The extent to which such a duty of good faith is recognized in New Mexico outside of insurance contract cases and cases governed by the UCC is open to some doubt. In some cases, the appellate courts have recognized such a duty. See, e.g., Wilson v. Hayners, 98 N.M. 514, 516, 650 P.2d 36 (Ct. App. 1982) (recognizing duty of good faith in real estate brokerage contract); Amoco Production Co. v. Jacobs, 746 F.2d 1394 (10th Cir. 1984) (applying New Mexico law as imposing good faith obligation in oil/gas lease). In other cases, the courts appear to reject a good faith obligation. See, e.g., Melnick v. State Farm Mutual Automobile Insurance Co., 106 N.M. 726, 749 P.2d 1105 (1988) (no good faith duty in employment-at-will contract). Until the contours of the law in this area become clearer, however, the Committee has determined that the issue whether this good faith obligation should be extended beyond UCC and insurance cases to other cases must be decided by individual trial judges on a case by case basis.

In the event that the trial judge does make such a decision, the following instruction may be helpful:

Each party to a contract is required to [perform [his] [her]] [enforce the] obligations under the contract in good faith. It is a breach of contractual duty to act in bad faith. Good faith requires that a party act honestly and in accordance with standards of fair dealing under the surrounding circumstances.

This instruction is illustrative and is not intended to describe every instance or every category of bad faith conduct. Examples of bad faith include, but are not limited to,

situations where one seeks to enforce a contractual obligation or performs his or her contractual obligation with an intent to harm the other party.

This instruction should be given where there is a question of fact concerning the good faith of one or more of the parties with respect to the performance or the enforcement of the contract. The bracketed language in the first sentence should be selected, depending on whether the good faith issue arises in the context of performance of the contract or, alternatively, in the enforcement of the contract.

Evidence supported an instruction of breach of covenant of good faith and fair dealing. — Where the plaintiff was an independent contractor charged with making pick-ups and delivers along a specified route; the contract between the plaintiff and the defendant did not contain an express provision granting plaintiff a right to buy other routes; the defendant refused on several occasions to permit plaintiff to purchase additional routes; and plaintiff presented sufficient extrinsic evidence from which the jury could reasonably infer that the parties intended the term "independent contract" to include the right to buy other routes, the evidence supported an instruction with regard to breach of the implied covenant of good faith and fair dealing with respect to the plaintiff's right to purchase other routes. Sanders v. Fedex Ground Package System, Inc., 2008-NMSC-040, 144 N.M. 449, 188 P.3d 1200.

13-835. Illegality; enforceability of contractual obligations.

There was in force in the State of New Mexico at the time this contract was entered into a certain [statute] [ordinance] [regulation] which provided:

(set out statutory language)

If you find that _____ violated this statute, then _____ was excused from performing [his] [her] obligations under the contract.

USE NOTE

This instruction is to be used when the defendant has asserted that the making or performance of the contract violated public policy as expressed in a statute, ordinance, or regulation and there is evidence to support a finding that the violation occurred. Before the instruction is given, however, the court must determine as a matter of law that the public policy allegedly violated is of sufficient importance to justify invalidating the contract. Where the evidence warrants, the court should instruct on excuse or justification with respect to violation of the statute or ordinance as provided in UJI 13-1503.

[Adopted, effective November 1, 1991.]

Committee comment. — A contract made or performed in violation of a statute may be unenforceable on public policy grounds. See DiGesu v. Weingart, 91 N.M. 441, 575 P.2d 950 (1978) (violation of liquor license regulation). The statute itself may so provide. In many instances, however, the effect of the violation, if proved, must be determined by the court. In making this determination, the court should balance the public policy that is alleged to have been violated against the interest in enforcing the contract. See Restatement (Second) of Contracts § 178; 6A Corbin, Contracts § 1375 (1962). The court should examine the subject matter, object, and purpose of the statute, the wrong or evil which it is intended to remedy or prevent, and the class of persons sought to be controlled in order to ascertain whether the legislature intended to invalidate contracts in violation of the statute. Forrest Currell Lumber Co. v. Thomas, 81 N.M. 161, 464 P.2d 891 (1970); see also Niblack v. Seaberg Hotel Co., 42 N.M. 281, 76 P.2d 1156 (1938); Douglas v. Mutual Benefit Health & Accident Ass'n, 42 N.M. 190, 76 P.2d 453 (1937).

13-836. Accord and satisfaction.

_____ *(obligor)* is excused from further performance of [his] [her] obligations under the contract if _____ *(obligor) (third party)* has [offered] [performed] and _____ *(obligee)* has accepted _____ in full satisfaction of _____ *(obligor's)* obligations under the contract.

USE NOTE

This instruction is applicable to the defense traditionally labeled "accord and satisfaction," as well as to other defenses which go beyond strict accord and satisfaction, such as "novation," "substituted contract," or "executory accord." When applicable, this defense may require use of UJI 13-805 through 13-813 (offer and acceptance).

[Adopted, effective November 1, 1991.]

Committee comment. — A party to a contract may agree to accept something different in satisfaction of the other party's contractual obligations. When this occurs, the other party to the contract is discharged from his or her original contractual obligation. National Old Line Insurance Co. v. Brown, 107 N.M. 482, 760 P.2d 775 (1988). This type of discharge or relief from contractual duty may take different forms and be subject to different characterizations such as "substituted contract," "novation," "accord and satisfaction" or "executory accord". See J. A. Farnsworth, Contracts § 4.24 (1982). It is the substance of the transaction and not its characterization which is important, however, and for purposes of convenience the term "accord and satisfaction" will be employed throughout to apply to all transactions where discharge of a contract duty occurs through acceptance of something in substitution. Discharge by means of this defense, however, occurs only when what is accepted in satisfaction of the contract obligation in fact occurs.

For an accord and satisfaction to relieve a party's original obligations under a previous contract, it must be shown that the obligee accepted the accord as full satisfaction for the debt or obligation owed. Albuquerque Nat. Bank v. Albuquerque Ranch Estates, Inc., 99 N.M. 95, 654 P.2d 548 (1982); Sparks v. Melmar Corp., 93 N.M. 201, 598 P.2d 1161 (1979); Smith Const. Co. v. Knights of Columbus, Council No. 1226., 86 N.M. 50, 519 P.2d 286 (1974). Accord and satisfaction is an affirmative defense which must be pleaded effectively or raised during the proceedings. Gallup Gamerco Coal Co. v. Irwin, 85 N.M. 673, 515 P.2d 1277 (1973).

The substituted performance need not be performed by the original contract obligor who is discharged from the contractual duty. Thus, a contract obligor will be discharged from performance if the obligee agrees to accept performance by a third party in substitution. See Restatement (Second) of Contracts, § 278.

13-837. Incapacity.

[If _____ *(obligor)* due to [mental infirmity] [physical infirmity] [intoxication] was incapable of understanding what [he] [she] was doing when [he] [she] entered into the contract, then _____ *(obligor)* is excused from the obligation to perform the contract.]

[_____ was a minor when [he] [she] entered into the contract. Therefore, if _____ demonstrated [within a reasonable time after reaching majority] that [he] [she] does not intend to be bound by the contract, then [he] [she] is excused from the obligation to perform the contract.]

USE NOTE

The bracketed paragraphs are to be used as alternatives depending on whether the claim of incapacity arises from minority or some physical, mental or other infirmity. The first bracketed paragraph addresses incapacity arising from infirmity. The list of disabling causes is not intended to be exhaustive. Other categories may be used if supported by the law and the facts. The bracketed language in the second alternative paragraph is to be used only if the evidence creates a fact issue as to the timeliness of the minor's claimed disaffirmance. If the fact of the contract obligor's minority at the time the contract was entered into is at issue, the instruction will have to be rewritten appropriately. See UJI 13-839 regarding undue influence.

[Adopted, effective November 1, 1991.]

Committee comment. — There is a presumption of competency which must be overcome with evidence that a person was incompetent at the time the contract was made. Estate of Head, 94 N.M. 656, 615 P.2d 271 (Ct. App. 1980). Proof of lack of capacity is not precluded by the parole evidence rule. Demers v. Gerety, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973). Incapacity does not arise just because the contract obligor was inexperienced or ignorant about the subject matter of the contract. Rather,

this defense arises only when the contract obligor, because of some infirmity or specific cause, was incapable of appreciating the very fact that he or she was entering into a contract.

What constitutes a "reasonable time" for purposes of disaffirmation after reaching majority will vary depending on the circumstances. See Terrace Co. v. Calhoun, 347 N.E.2d 315, 319 (Ill. 1976). Where suit is brought on the contract, however, the contract obligor, if he or she has reached majority, must make an election to disaffirm or otherwise lose the defense. Incapacity should not be confused with undue influence, which is addressed in UJI 13-839.

13-838. Duress.

If _____ entered into the contract under duress, then [he][she] is excused from performing [his][her] obligations under the contract.

[_____ is duress, if under the circumstances it induces the other person to enter into a contract that [he][she] otherwise would not have entered into.]

[Duress is intentional action by one person presenting such a serious business or financial loss or injury to the other person to the contract that he or she has no reasonable choice or alternative. _____ has the burden of proving duress by clear and convincing evidence.]

USE NOTE

This instruction should be given when a party has raised a triable issue of duress as a defense to the obligations to perform a contract duty. The bracketed paragraphs are alternatives. The second alternative bracketed paragraph should be used when the claim of duress arises from "business duress" or "economic compulsion." The first alternative bracketed paragraph should be used in all other instances. In the first alternative, the court should fill in the wrongful conduct which is claimed to constitute the act causing duress. See Comment for examples of wrongful conduct.

[Adopted, effective November 1, 1991.]

Committee comment. — Contracts entered into by the force of duress are not enforceable against the party whose conduct was influenced by the duress. See Restatement (Second) of Contracts § 174. Wrongful acts which will constitute duress extend to "economic compulsion" or "business duress," in which a person is presented with such a severe business or financial loss as to present no reasonable alternative but to enter into a contract which he or she otherwise would not have. In the case of "business duress," at least, the party claiming the defense must prove its elements by clear and convincing evidence.

The conduct claimed to cause the duress must be wrongful, although not necessarily criminal. See Restatement (Second) of Contracts § 176. Examples of wrongful conduct are (1) physical threats to life or safety; (2) imprisonment; (3) destruction of goods or things of value; (4) institution of criminal proceedings; or (5) bad faith threat to breach a contract or fail to perform a duty. See generally J. A. Farnsworth, Contracts §§ 4.16, 4.17.

13-839. Undue influence.

If _____ entered into the contract through undue influence, then [he] [she] is excused from performing [his] [her] obligations under the contract. "Undue influence" is the abuse of a close or special relationship by one party which persuades the other party to enter into the contract.

_____ has the burden of proving undue influence by clear and convincing evidence.

USE NOTE

This instruction is intended for use in contract cases and is not intended for use in its present form in other situations, such as gifts, wills, etc.

[Adopted, effective November 1, 1991.]

Committee comment. — Undue influence is not susceptible to a fixed formula. Brown v. Cobb, 53 N.M. 169, 204 P.2d 264 (1949) (legatees sue to cancel decedent's ranch lease); Restatement (Second) of Contracts § 177. While influence alone is not prohibited, undue influence will relieve the party of that contract obligation. Nance v.Dabau, 78 N.M. 250, 430 P.2d 747 (1967) (suit brought by widow's guardian to set aside deeds and contracts). Many cases involve either a confidential or fiduciary relationship. Shultz v. Ramey, 64 N.M. 366, 328 P.2d 937 (1958) (suit to cancel farm lease with son-in-law); Salazar v. Manderfield, 47 N.M. 64, 134 P.2d 544 (1943) (suit to cancel deed to fiduciary); Cardenas v.Ortiz, 29 N.M. 633, 226 P. 418 (1924) (suit to cancel deed to farm.)

Undue influence must be contrasted with the concept of "duress" (see UJI 13-838) or "incapacity" (see UJI 13-837). Duress focuses on threats which induce fear and hence the deprivation of free will. Undue influence focuses on improper influence of a weaker or dependent party by a person who, through a special relationship, abuses his or her favorable position to influence the weaker party into an agreement that he or she normally would not enter. "Undue influence" does not need to rise to the level of "duress," nor is fraud or actual misrepresentation required.

A confidential or fiduciary relationship, coupled with suspicious circumstances, may raise a presumption of undue influence causing the burden of proof to shift. Nance v. Dabau, supra; Walters v. Walters, 26 N.M. 22, 188 P. 1105 (1920) (ill father transferred

all properties to his son who promised to treat brothers and sisters equally); see N.M. Evid. Rule 11-301. Parent and child relationship or kinship alone is not sufficient to raise a presumption of undue influence. Giovannini v. Turrietta, 76 N.M. 344, 414 P.2d 855 (1966) (deed by mother to son and daughter did not create confidential relationship); Trujillo v. Trujillo, 75 N.M. 724, 410 P.2d 947 (1966) (parents conveyed farm to son who worked it for sixteen years before parents sought to recover it).

Where the undue influence arises from a fiduciary relationship, a special instruction may be necessary to define the term. "A confidential or fiduciary relationship exists 'whenever trust and confidence is reposed by one person in the integrity and fidelity of another.'" In re Ferrill, 97 N.M. 383, 387, 640 P.2d 489, 493 (Ct. App. 1981).

13-840. Impossibility or impracticability of performance.

When the performance of a contract obligation becomes impossible or unreasonably burdensome because of circumstances or events beyond the _____ *(promisor's)* control which are substantially and materially different from what both _____ *(plaintiff)* and _____ *(defendant)* reasonably anticipated would exist, then the _____ *(promisor)* is excused from performing that contractual obligation.

[Adopted, effective November 1, 1991.]

Committee comment. — Ordinarily the promisor bears the risk that a contractual promise may become more burdensome or less desirable than anticipated. The law may relieve the obligor of this risk, however, where "[a]n extraordinary circumstance . make[s] performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance." Restatement (Second) of Contracts ch. 11 at 309.

The defense of impossibility or impracticability does not apply where the contract either expressly or implicitly allocates to a party the risk that the extraordinary circumstance at issue would occur. Rather, the defense arises when the occurrence of the circumstance was not within the contemplation of the parties at the time of contracting, see Uniform Commercial Code § 2-615 comment 1, or, in other words, when the occurrence contravenes a basic assumption on which the contract was made, see Restatement (Second) of Contracts § 261 comment b.

A good discussion of the principles underlying the doctrine of impossibility or impracticability of performance can be found in chapter 11 of the Restatement (Second) of Contracts and in the official comment to § 55-2-615 NMSA 1978.

13-841. Hindrance; prevention; excuse for nonperformance.

A party to a contract cannot recover damages if [his] [her] own act or failure to act prevented the other party from performing the contract.

USE NOTE

This instruction is to be used where one party prevents either fulfillment of a condition precedent to performance or performance itself.

[Adopted, effective November 1, 1991.]

Committee comment. — One cannot take advantage of [his] [her] own act or omission to escape liability thereon. Bogle v. Potter, 72 N.M. 99, 380 P.2d 839 (1963); Gibbs v. Whelan, 56 N.M. 38, 239 P.2d 727 (1952); Restatement of Contracts § 295.

13-842. Waiver.

Waiver is the voluntary giving up of a known right. A waiver may be express or implied from a person's statements or conduct. If _____ waived [his] [her] right to _____ *(identify contractual right)*, then _____ is excused from [his] [her] obligation to comply with that condition of [his] [her] performance.

[Adopted, effective November 1, 1991.]

Committee comment. — The elements of waiver are an existing right, knowledge of such right, and an intention to relinquish or surrender that right. Talley v. Security Service Corp., 99 N.M. 702, 663 P.2d 361 (1983). But see Restatement (Second) of Contracts § 84 comment b (promisor need not always know his/her legal rights nor intend the legal effect of his/her promise).

Waiver usually arises in the context of conditions (such as timeliness) attached to the contract obligor's performance rather than in the context of the performance itself. See, e.g., Green v. General Accident Insurance Co., 106 N.M. 523, 746 P.2d 152 (1987). It is not clear, however, that absent a "novation," "accord and satisfaction" or the like, a party may "waive" the other party's contract performance.

Waiver covered by this instruction is waiver which occurs by a voluntary act whose effect is intended. The instruction addresses both waiver which may be found in the express declaration and implied from a party's representations that fall short of such declaration or from conduct. Waiver may also be presumed or implied contrary to the intention of a party from a course of conduct showing waiver by estoppel. To prove waiver by estoppel a party must show that he/she was misled to his/her prejudice by the conduct of the other party into the honest and reasonable belief that such waiver was intended. Hale Contracting Co., Inc. v. United N.M. Bank, 110 N.M. 712, 799 P.2d 581 (1990). UJI 13-842 does not cover waiver by estoppel; counsel and the trial court must draft an appropriate instruction where this doctrine is available on the evidence.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17A Am. Jur. 2d Contracts § 655 et seq.

13-843. Contracts; measure of damages; general instruction.

If you should decide in favor of _____ *(plaintiff)* on [any of] [his] [her] claim[s] of breach of contract, then you must fix the amount of money damages which will restore to _____ *(plaintiff)* what was lost by _____ *(defendant's)* breach [and what _____ *(plaintiff)* reasonably could have expected to gain]. _____ *(plaintiff's)* claims for damages are:

(NOTE: Here insert the proper elements of damages.)

[If you should decide in favor of _____ *(defendant)* on any of [his] [her] claims, then you must fix the amount of money damages which will restore to _____ *(defendant)* what was lost by _____ *(plaintiff's)* [breach] [act(s)] [and what _____ *(defendant)* reasonably could have expected to gain if _____ *(plaintiff)* had not [breached] [acted]].
_____ *(defendant's)* claims for damages are:

(NOTE: Here insert the proper elements of damages.)

[Any damages found by you must be damages which, at the time of making the contract, the parties reasonably could have expected to be a consequence of any breach.]

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof, and not upon speculation, guess or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTE

This is the basic form for all damages instructions in contract cases. Common elements of damages that may be inserted are set forth in UJI 13-844 through 13-859. Other elements may have to be included in particular cases.

Although this chapter on the law of contracts is self-contained, it will be necessary also to use instructions applicable in other jury cases, such as instructions from the chapter on damages generally and the first instruction in that chapter, as well as the instructions generally applicable to duties of jurors.

[Adopted, effective November 1, 1991.]

Committee comment. — The purpose of allowing damages for breach of contract is to restore to the injured party what was lost by the breach and what he or she reasonably could have expected to gain had there been no breach. Allen v. Allen Title Co., 77 N.M. 796, 427 P.2d 673 (1967); Brown v. Newton , 59 N.M. 274, 282 P.2d 1113 (1955). Damages based on a "rough estimate" by a witness are insufficient to support a judgment. Rather damages must be of a kind and character susceptible of proof, and the amount of damages allowed must be subject to reasonable ascertainment and not based on speculation or guesswork. Louis Lyster, Gen. Contractor v. Town of Las Vegas, 75 N.M. 427, 405 P.2d 665 (1965). Proof does not have to be to a mathematical certainty, however. Eccher v. Small Business Administration, 643 F.2d 1388, 1392 (10th Cir. 1981). The elements of damages must be the natural and foreseeable consequences of the breach, as contemplated by the parties at the time of making the contract. State Farm Gen. Ins. Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974); Mitchell v. Intermountain Cas. Co., 69 N.M. 150, 364 P.2d 856 (1961). As to damages for breach of contract generally, see Restatement (Second) of Contracts §§ 346-356.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Contractual provision for per diem payments for delay in performance as one for liquidated damages or penalty, 12 A.L.R.4th 891.

Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract, 41 A.L.R.4th 131.

Liability of contractor who abandons building project before completion for liquidated damages for delay, 15 A.L.R.5th 376.

13-844. Seller's remedy for buyer's breach; executed contract.

The [unpaid balance of the] contract price.

[Adopted, effective November 1, 1991.]

13-845. Seller's remedy for buyer's breach; executory contract.

The [unpaid balance of the] contract price, less the costs saved to _____ *(seller)* by not having to perform [his] [her] part of the contract.

[Adopted, effective November 1, 1991.]

13-846. Seller's incidental damages.

The reasonable expense to _____ *(seller)* for _____ *(identify claimed expenses)* as a result of _____ *(buyer's)* breach.

USE NOTE

This instruction should be employed where the evidence creates a triable issue as to incidental expenses incurred by the plaintiff as a result of the claimed breach of contract. The court should identify the claimed incidental expenses in the second blank in the instruction. If the list of claimed incidental expenses is long, the instruction, as structured, will become awkward and difficult for the jury to understand. In that event, the form of the uniform instruction should be abandoned and the court should fashion its own instruction.

[Adopted, effective November 1, 1991.]

Committee comment. — The types of expense which may be recovered as incidental damages include expenses incurred in transporting goods, insuring them, stopping delivery, maintaining custody over rejected goods, and reselling rejected goods.

13-847. Buyer's remedy for seller's breach.

The difference between the contract price and the reasonable cost to _____ *(buyer)* of a substituted performance, less any costs saved as a result of _____ *(seller's)* breach.

[Adopted, effective November 1, 1991.]

13-848. Buyer's incidental damages.

The reasonable expense to _____ *(buyer)* for _____, as a result of _____ *(seller's)* breach.

USE NOTE

This instruction should be employed where the evidence creates a triable issue as to incidental expenses incurred by the plaintiff as a result of the claimed breach of contract. The court should identify the claimed incidental expenses in the second blank in the instruction. If the list of claimed incidental expenses is long, the instruction, as structured, will become awkward and difficult for the jury to understand. In that event, the form of the uniform instruction should be abandoned and the court should fashion its own instruction.

[Adopted, effective November 1, 1991.]

Committee comment. — The types of expense which may be recovered as incidental damages include expenses incurred in inspecting the goods, procuring substantial performance, transporting, caring for, insuring or returning rejected goods, reselling rejected goods, and expenses reasonably attributable to delay in performance.

13-849. Buyer's consequential damages.

The reasonable value of any loss to _____ *(buyer)* resulting from [his] [her] inability to [satisfy an obligation] [meet a need] about which [seller] should have known.

[Adopted, effective November 1, 1991.]

13-850. Damages to owner; contracts for construction.

For [defective] [and] [or] [unfinished] construction [The reasonable cost of completing the construction called for in the contract.]

[The difference between the value of the construction called for in the contract and the value of the performance that has been received.]

USE NOTE

The two bracketed paragraphs reflect alternative measures of damages. The first bracketed paragraph represents the favored measure of damages and should be used, unless the court finds special circumstances require use of the second paragraph. The second bracketed paragraph is to be used only where completion of the contract would involve unreasonable waste of money.

[Adopted, effective November 1, 1991.]

Committee comment. — The purpose of contract damages is to, and the normal measure of damages will, put the breached party in the same position he or she would have occupied had the contract been completed. The first bracketed paragraph, providing damages measured against what the reasonable cost of substituted performance would be, will typically accomplish this goal and therefore should normally be given. See Restatement (Second) of Contracts § 348, the substance of which has been adopted in New Mexico. See Chavez v. Gribble, 83 N.M. 688, 496 P.2d 1084 (1972); Montgomery v. Karavas, 45 N.M. 287, 114 P.2d 776 (1941) (adopting § 346 of the Restatement of Contracts, substantially similar to § 348 of the Restatement (Second)).

The second bracketed paragraph should be given only in the unusual situation where the normal measure of damages will cause economic waste; that is, where the cost of correcting the incomplete or defective performance will be disproportionate to the added economic value to the building. See Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E.

889 (1921) (tearing out nonconforming piping in completed building would involve a cost disproportionate to the added value of putting in conforming pipe).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract, 41 A.L.R.4th 131.

13-851. Damages; personal employment.

The [unpaid balance of the] contract price, less [the greater of] [the amount _____ actually earned from other employment in the time made available as a result of the breach] [or] [the amount _____ could through the exercise of reasonable diligence have earned, in the time made available as a result of the breach, from employment of the same quality as [his] [her] employment under the breached contract].

USE NOTE

This instruction should be given with UJI 13-843 when the claim for damages arises from breach of an employment contract. The portion in braces should be given only when the breaching party raises mitigation of damages as an affirmative defense; in that case, UJI 13-860 should also be given.

Within the braces, the appropriate bracketed language should be selected, depending on whether the mitigating amount was actually earned from other employment obtained in place of the breached contract or was income that could reasonably have been earned during the period of the breach through employment similar to that under the breached contract. If both elements of mitigation are included, the first bracketed phrase should usually be incorporated into the instruction together with the bracketed "[or]". Under the proper facts, however, both elements of mitigation could appropriately be deducted from damages, and the instruction would have to be modified.

This instruction may be supplemented when other relief, such as reliance damages, is requested. It is intended to provide a common, but not an exclusive, instruction for breach of employment agreements.

[Adopted, effective November 1, 1991.]

Committee comment. — Ordinary rules for measuring damages for breach of contract may be applied in an employment context. Board of Education of Alamogordo Public School District No. 1 v. Jennings, 102 N.M 762, 701 P.2d 361 (1985). Damages may include lost wages while unemployed, the cost and inconvenience of searching for a new job, moving costs for relocating, as well as any other actual pecuniary losses, and

possibly punitive damages. Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), rev'd in part, 101 N.M. 687, 687 P.2d 1038 (1984).

The doctrine of mitigation (also called "avoidable consequences") in wrongful discharge cases is based on the principle that a wrongfully discharged employee will not be permitted to remain idle at his previous employer's expense when suitable work is available and will not be placed in a better position by the award of damages than he would have occupied had the contract been performed. Consequently, income that the employee earned or reasonably could have earned from similar employment during the period of the breach will be deducted from damages. See Jennings, supra; Spurck v. Civil Service Board, 231 Minn. 183, 42 N.W. 2d 720 (1950). Employment is "similar" if it is of the same quality. Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970). Also, income that the employee actually earned from any other employment during the period of the breach will be deducted. Jennings, supra; Spurck, supra. Income in mitigation of damages must, however, relate to employment that the employee could not have pursued had he remained employed under the breached contract, rather than to activities which the employee could have undertaken while also continuing with the original employment. See Sandler v. U.S. Development Co., 44 Wash. App. 98, 721 P.2d 532 (1986); Soules v. Independent School District No. 518, 258 N.W. 2d 103 (Minn. 1977).

13-852. Reliance damages.

The reasonable cost to _____ *(plaintiff)* of having relied on the contract, [less any loss which _____ *(plaintiff)* would have sustained had the contract been fully performed].

[Adopted, effective November 1, 1991.]

13-860. Mitigation of damages.

A party may not recover as damages any cost or loss which [he] [she] reasonably could have avoided.

[Adopted, effective November 1, 1991.]

Committee comment. — The non-breaching party has a duty to use "reasonable diligence" to mitigate damages, and the standard for reasonable diligence for the resale of goods is a "commercially reasonable" standard. Elephant Butte Resort Marina, Inc. v. Wooldridge, 102 N.M. 286, 694 P.2d 1351 (1985).

13-861. Punitive damages.

If you find that _____ *(name of party making claim for punitive damages)* should recover compensation for damages, and if you further find that the conduct of _____ *(name of party whose conduct gives rise to a*

claim for punitive damages) **was [malicious], [reckless], [wanton], [oppressive], or [fraudulent], then you may award punitive damages.**

Such additional damages are awarded for the limited purpose of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the injury and to the damages given as compensation and not disproportionate to the circumstances.

[Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful.]

[Reckless conduct is the intentional doing of an act with utter indifference to the consequences.]

[Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's rights.]

USE NOTE

Appropriate bracketed language should be selected depending on the type of conduct offered to justify punitive damages.

[Adopted, effective November 1, 1991.]

Committee comment. — In Romero v. Mervyn's, 109 N.M. 249, 784 P.2d 992 (1989), the New Mexico Supreme Court thoroughly reviewed punitive damages in breach of contract cases. The Court noted that in New Mexico, the award of punitive damages for breach of contract is "conceptualized . . . in terms of the quality of the conduct constituting the breach itself," rather than in terms of an independent tort or breach of the implied covenant of good faith, as in some other jurisdictions. Id. at 257, 784 P.2d at 1000. "Overreaching, malicious, or wanton conduct" justifying punitive damages "is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships." Id. at 258, 784 P.2d at 1001.

The Court observed that "[o]ur previous cases clearly establish that, in contract cases not involving insurance, punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights." 109 N.M. at 255, 784 P.2d at 998. "Each of the terms listed, standing alone, will support an award of punitive damages." Id. "[I]n the sense that malice and wantonness ... suggest an absence either of a good faith reason or of an innocent mistake, they describe the conduct targeted by

our punitive damages rule." Id. "[T]hese words broadly distinguish 'wrongful' breaches of contract from those committed intentionally for legitimate business reasons or those that are the result of inadvertence." Id. at 256, 784 P.2d at 999. "Nonetheless, we remain convinced that the nuances distinguishing the terms 'malice,' 'fraud,' and 'oppression' make it useful to retain these words as distinct standards to guide the jury's exercise of discretion in particular cases." Id.

With regard to the definitional language included in the bracketed parts of the instruction, see UJI 13-834 and 13-1827. In Romero the Supreme Court stated that oppressive conduct would exist when a party "has breached a contract believing that the wronged party cannot afford to contest the matter in court." 109 N.M. at 258 n.6, 784 P.2d at 1001 n.6. Because oppressive conduct has not been sufficiently well defined in New Mexico case law, no definition is provided. Such conduct is a foundation for punitive damages, and in the appropriate case the Court should provide a definition drawing upon Romero and other sources. The Committee suggests the following definition as appropriate in some contexts: "Oppressive conduct is marked by an unjust use of power or advantage."

No definition is provided of fraudulent conduct because the elements of fraud are separately stated in UJI 13-834, and the jury will already have been instructed on conduct that constitutes fraud.

ANNOTATIONS

Criteria of reasonableness. — In ascertaining the reasonableness of a punitive damages award, the court is guided by (1) the reprehensibility of the defendant's conduct, or the enormity and nature of the wrong; (2) the relationship between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil and criminal penalties authorized or imposed on comparable cases. Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717.

Reasonableness. — Where court awarded plaintiffs $17,900 compensatory damages and where defendant was involved in a series of misrepresentations, forgeries, and fraudulent conduct that deprived plaintiffs, who were a low-income couple, of the four-bedroom home they wanted for their family and instead burdened them with a defective home of like size to their old home at an increased financial obligation, the defendant's conduct was reprehensible and a substantial punitive damages award was appropriate. Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717.

APPENDICES
APPENDIX 1. Sample Contracts Instructions.

The following is an example of a simple contracts case where both parties are claiming money damages.

Statement of facts

John Garcia owns his own business in which he sells his services as a computer programmer and a consultant in computer software design. He entered into a contract with Albuquerque Construction Company to design a computer software system for use by the Albuquerque Construction Company in their accounting and bookkeeping functions, general ledger functions, account receivables and accounts payable functions, inventorying and capital asset control. The contract called for Mr. Garcia to be paid in installments according to certain "milestones." The last "milestone" required payment of $7,500 upon satisfactory installation of the software in Albuquerque Construction Company's computer. The contract included the following terms:

Article III

Seller shall design, prepare and install the software in buyer's computer within a reasonable time after buyer has provided seller with the "detailed statement of criteria" called for an described in Article II above.

Article IV

Seller agrees to provide to buyer, at no additional cost, adequate instruction manuals on the software, training of buyer's personnel upon installation of the software and backup and consultation services for one year after installation of the software.

Albuquerque Construction Company provided Garcia with the "detailed statement of criteria" on February 15, 1988. Garcia did not deliver and install the software until October 30, 1988. Albuquerque Construction claims that this delay was unreasonable and in breach of contract. Garcia installed the software in Albuquerque Construction's computer, held a one-day training session for Albuquerque Construction's staff, and provided Albuquerque Construction with a training manual. Because of the delay in the installation, however, Albuquerque Construction refused to pay Garcia the last $7,500 installment on the purchase price of the software. In addition, Albuquerque Construction claims that because of the delay in the installation, it was required to expend $11,000 in additional outside accounting services that would not have been expended if the software had been installed by July 1, 1988, the commencement of Albuquerque Construction's fiscal year. Finally, in December 1988, a power surge wiped out a considerable part of the data base on Albuquerque Construction's computer. Albuquerque Construction believed that it had its database "backed up" in a backup file but was having difficulty finding the backup file on the computer's "hard disk." Albuquerque Construction called Garcia for "backup" assistance and consultation in finding the backup files on the hard disk. Garcia refused, claiming that the request was not for "backup" services and because Albuquerque Construction did not pay the last $7,500 milestone. As a consequence, Albuquerque Construction Company hired someone for $3,500 to retrieve the backup files.

Albuquerque Construction brought suit against Garcia for damages, claiming breach of contract in the late delivery and in the failure to provide backup. Garcia defended in counterclaim for the $7,500 payment at the final milestone.

Instruction No. 1: Theory of the Case; Statement of the Issues; Claim; Burden of Proof

In this civil action Albuquerque Construction Company seeks compensation from Mr. John Garcia for damages which Albuquerque Construction Company claims were proximately caused by the breach by Mr. Garcia of the contract entered into between Mr. Garcia and Albuquerque Construction Company.

To establish its claim of breach of contract on the part of Mr. Garcia, Albuquerque Construction Company has the burden of proving one or more of the following contentions:

1. That Mr. Garcia failed to deliver and install the computer software within a "reasonable time" as required by the contract; or

2. That Mr. Garcia failed to provide "backup" or "consultation" services as required by the contract.

In addition, Albuquerque Construction Company contends and has the burden of proving that any breach of contract caused Albuquerque Construction Company to incur damages as a consequence of Mr. Garcia's breach of contract.

Mr. Garcia denies that he breached any of his contract obligations to Albuquerque Construction Company. Specifically, Mr. Garcia:

1. Denies that he did not deliver and install the computer software within a "reasonable time;" and

2. Contends that any requests made by Albuquerque Construction Company were not for "backup" services and, therefore, he did not fail to provide backup services as called for under the contract.

In addition, as to the claim of breach of contract for failure to provide backup services, Mr. Garcia contends and has the burden of proving that he was excused from performing any backup services because Albuquerque Construction Company itself breached the contract by failing to make final payments to Mr. Garcia.

In addition, Mr. Garcia counterclaims against Albuquerque Construction Company under the contract, claiming that Albuquerque Construction Company breached its contract obligations to Mr. Garcia by failing to pay the called for final payment of $7,500. To establish his claim for breach of contract on the part of

Albuquerque Construction Company, Mr. Garcia has the burden of proving that Albuquerque Construction Company failed to pay $7,500 as called for under the contract. Albuquerque Construction Company denies that it breached any contract obligation to Mr. Garcia and contends and has the burden of proving that it is excused from paying Mr. Garcia $7,500 because Mr. Garcia failed to perform his obligations under the contract.

[Adopted, effective November 1, 1991.]

Appendix 2. Sample formation of contract instructions.

Statement of facts

Smith, an avid hunter, owns a prize hunting dog named Zeke that is much admired by his friend Jones. Smith is in the National Guard. An international conflict erupts in the Middle East, and Smith's unit is activated. Anticipating a long absence from the country, Smith writes to his friend: "I feel bad about having to put Zeke in a kennel. I would sell him to a good home if I could get $500 for him." Jones writes back immediately: "Five hundred is a fair price for Zeke, but things are pretty tight here and I wish you would take $400 and my old shotgun instead."

The Middle East conflict is unexpectedly brief, and several days later Smith writes to Jones: "I am back to civilian life already. Thank goodness I won't be selling Zeke." Jones claims never to have received this letter. The next month, Jones comes to visit Smith and brings $400 cash and his shotgun. Smith refuses to part with Zeke. Jones pulls out some more cash and offers Smith $500, still to no avail. Zeke is worth $1000. Jones sues Smith for damages for breach of contract.

Sample instructions

Note: These sample instructions are prepared by including definitional instructions where possible in the statement of issues, *see Gallegos v. Citizens Ins. Agency, Inc.*, 108 N.M. 722, 779 P.2d 99 (1989), and by including only those instructions, or portions thereof, that are pertinent to the particular matters in dispute, *see* Introduction to UJI ch. 8. "Stock" instructions and damage instructions are omitted from this example.

[13-302A]

In this civil action the plaintiff Jones seeks compensation from the defendant Smith for damages that plaintiff says were caused by breach of contract.

A contract is a legally enforceable promise. It is formed by an offer and an acceptance.

To establish his claim of breach of contract on the part of Smith, Jones has the burden of proving each of the following:

1. Smith offered to sell Jones his dog for $500.

2. Jones accepted Smith's offer.

3. Smith refused to sell the dog to Jones.

Jones also contends and has the burden of proving that such breach of contract was a cause of his damages.

[13-302B]

To establish his claim of breach of contract on the part of Smith, Jones has the burden of proving each of the following:

1. Smith offered to sell Jones his dog for $500.

2. Jones accepted Smith's offer.

3. Smith refused to sell the dog to Jones.

Jones has the burden of proving that such breach of contract was a cause of his damages.

[13-302C]

Smith denies that he offered to sell his dog to Jones. In the alternative, Smith contends and has the burden of proving that he withdrew any offer to sell the dog before Jones accepted the offer or that Jones failed to accept the offer within a reasonable time.

[13-805]

An offer is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

First, the communication must have included a definite promise by Smith showing his willingness to contract;

Second, the material terms upon which that willingness was based must have been definite;

Third, the terms must have been communicated to Jones;

Fourth, by the communication Smith must have intended to give Jones the power to create a contract by accepting the terms.

In this case, the parties agree that the terms at issue were communicated to Jones. What is in dispute is whether the terms were definite and whether the communication was one which included a definite promise by Smith showing his willingness to contract and by which Smith intended to give Jones the power to create a contract by accepting the terms.

[13-807]

An acceptance is a statement or conduct made by one party to the other, showing that party's agreement to the terms of the other party's offer. For Jones to have accepted Smith's offer, he must have informed Smith by a statement or conduct that he agreed to the terms of the offer.

[13-808]

A reply is not an acceptance if it adds a material qualification or requests a new condition not in the offer. If, however, you determine that Jones's reply departs from the terms of Smith's offer, that reply is still an acceptance if Jones makes it clear in the reply that his acceptance is not dependent on Smith's agreement to the new term.

[13-806]

An offer may be withdrawn at any time before notice of its acceptance has been received. To have withdrawn his offer, Smith must have notified Jones that the offer was withdrawn.

Once notice of withdrawal has been received, the offer may no longer be accepted and any attempt to accept thereafter will not be effective. If Jones was notified that the offer was withdrawn, Jones could no longer accept the offer.

[13-813]

In order for a communication to be an acceptance, it must have been received by Smith within a reasonable time. What constitutes reasonable time should be determined by you from the surrounding circumstances.

[13-804]

You should determine the intentions of the parties by examining their language and conduct, the objectives they sought to accomplish, and the surrounding circumstances.

[13-822]

For you to find Smith liable to Jones, you must find that Smith breached his contract with Jones. A person may breach a contract by failing to perform a contractual obligation when that performance is called for.

[As amended, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was prepared to be consistent with the revision of UJI 13-302A and 13-302B NMRA. On December 10, 2004, the Supreme Court entered an order authorizing the Compilation Commission to revise the UJI Civil to remove the word "proximate" from UJI Civil. The word "contentions" has been deleted from the sample of UJI 13-302B NMRA to be consistent with the March 1, 2005 amendment of that instruction.

CHAPTER 9
Federal Employers' Liability Act

INTRODUCTION

This subject is governed by N.M. Const., Article 20, Section 16, and Article 22, Section 2, and, by reference, it is covered by the Federal Employers' Liability Act, being 45 U.S.C.A. §§ 51 to 60. Constitutional provision Article 20, Section 16, according to its own language, "shall not be construed to affect the provisions of Section Two of Article Twenty-Two of this constitution, being the article upon Schedule".

N.M. Const., Article. 20, Section 16 applies to "Every person, receiver or corporation owning or operating a railroad within this state" (emphasis added). The Federal Employers' Liability Act applies to "Every common carrier by railroad while engaging in commerce between any of the several States or Territories". 45 U.S.C.A. § 51 (emphasis added).

This chapter, then, applies only to common carriers by railroad, engaging in interstate commerce. The liability of an intrastate railroad in New Mexico is within the provisions of N.M. Const., Article 20, Section 16 and is governed by that section.

The following matters should be noted relative to this chapter.

A. The Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq.

1. Negligence of railroad

The railroad is liable in damages to any employee suffering injury or death, "for such injury or death resulting in whole or in part from the negligence of " the railroad. 45 U.S.C.A. § 51 (emphasis added).

2. Contributory negligence

Contributory negligence of the employee does not bar recovery. Damages shall be "diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C.A. § 53. According to some authority, evidence of contributory negligence is admissible for reduction of damages, even though not pleaded as a defense. *Kansas City S. Ry. v. Jones*, 241 U.S. 181, 36 S. Ct. 513, 60 L. Ed. 943 (1916).

There is a proviso in 45 U.S.C.A. § 53 to the effect that contributory negligence will not defeat or diminish a recovery for damages where the death or injury is found to have been caused or contributed to by the violation by the common carrier of any statute enacted for the safety of employees. (As in the Safety Appliance Acts and the Boiler Inspection Acts, *infra.*)

3. Assumption of risk

Assumption of risk by an employee has been abolished where injury or death resulted in whole or in part from negligence of the railroad. 45 U.S.C.A. § 54. *Chavez v. Atchison, T. & S.F. Ry.*, 79 N.M. 401, 444 P.2d 586 (1968).

4. Common-Law fellow-servant doctrine

"The common-law fellow-servant doctrine has been abrogated in this jurisdiction as to railroads by section 16 of article 20 of the constitution, . " *Morstad v. Atchison, T. & S.F. Ry.*, 23 N.M. 663, 170 P. 886 (1918).

5. Causation

No mention, whatever, of causation should be made to the jury. *Eidson v. Atchison, T. & S.F. Ry.*, 80 N.M. 183, 453 P.2d 204 (1969). California uses the term "proximate cause."

6. No Third Party Involved

These proposed instructions relate only to plaintiff and defendant, and not to any third party charged with negligence. The other UJI - Civil instructions should apply to a third-party defendant.

7. Note All Sections of F.E.L.A.

45 U.S.C.A. §§ 51 to 60 should be noted. There are a vast number of cases on F.E.L.A.

8. Law of New Mexico Applies to Procedural Matters

The Supreme Court has held that " . all procedural matters, including review of verdicts for excessiveness, are governed by the law of the forum and not by the Federal

Decisional Law", *Rivera v. Atchison, T. & S.F. Ry.*, 61 N.M. 314, 299 P.2d 1090 (1956); *Vivian v. Atchison, T. & S.F. Ry.*, 69 N.M. 6, 363 P.2d 620 (1961), or are governed by the common law. *Rival v. Atchison, T. & S.F. Ry.*, 62 N.M. 159, 306 P.2d 648, 64 A.L.R.2d 1098 (1957).

9. Substantive law governed by decisions of Supreme Court of United States

Issues of negligence and contributory negligence are substantive and governed by decisions of the Supreme Court of the United States. *Chavez v. Atchison, T. & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967); *Vivian v. Atchison, T. & S.F. Ry.*, 69 N.M. 6, 363 P.2d 620 (1961). Also, whether the employer and employee are engaged in interstate commerce and whether an employee is acting within the scope or course of his employment would seem to be questions of substantive law, governed by federal decisions.

10. UJI - Civil

All instructions now used in UJI - Civil should be used to supplement F.E.L.A. where necessary. The UJI - Civil instructions "Accident alone not negligence" and "corporation a party" are examples of the applicability of general UJI - Civil instructions to this chapter.

11. No affirmative defenses in F.E.L.A.

Granotis v. New York Cent. R.R., 342 F.2d 767 (6th Cir. 1965): "One of the purposes of the Federal Employers' Liability Act, as amended, was to abolish the common law defenses of assumption of risk, fellow servant rule and contributory negligence".

B. Safety Appliance Acts, 45 U.S.C.A. §§ 1-16.

Liability under the Federal Employers' Liability Act may be predicated on a carrier's violation of the Safety Appliance Acts, which were enacted to require carriers, engaged in interstate commerce, to equip their locomotives and cars with various safety devices and appliances and to maintain these in efficient condition.

The critical difference between the liability provisions of F.E.L.A. and the Safety Appliance Acts is this: Whereas F.E.L.A. requires proof of some negligence on the part of the railroad which caused or contributed to the employee's injuries, the obligations imposed on railroad carriers by the Safety Appliance Acts are absolute in nature and are not limited to the exercise of reasonable care in maintaining the prescribed appliances. Nor is liability excused by the use of even the highest degree of care if the prescribed standards are not met. Although a breach of the Safety Appliance Acts may constitute negligence under the general liability provisions of the Federal Employers' Liability Act, the violation of any specific safety requirement, resulting in injuries to an employee, gives rise to liability on the part of the railroad, irrespective of a showing of negligence on its part.

Under the Safety Appliance Acts, to justify a recovery of damages for injury or death of an employee on the basis of the railroad's violation of the provisions of the Safety Appliance Acts, it must be shown that there was a causal connection between the injury or death and the railroad's failure to comply with the safety requirements. However, the causal relationship requirement is met when the violation at issue was the cause, in whole or in part, of the alleged injury or death.

A railroad employee who has sustained injury as a result of a violation of the Safety Appliance Acts is not barred from recovery, or even subject to diminution of damages, on the basis of contributory negligence.

C. Boiler Inspection Acts, 45 U.S.C.A. §§ 22-34.

Other statutes enacted for the safety of the railroad employees and the general public are commonly known as the Boiler Inspection Acts (45 U.S.C.A. §§ 22-34). These acts prohibit the use of any locomotive, including its parts and appurtenances, such as boilers and tenders, which is not in proper condition and safe to operate, and which has not been subjected to, and passed, periodic safety inspections. It has been said that, by these acts, the carrier is absolutely bound to furnish what under the common law, was its duty to exercise only ordinary care to provide. *Baltimore & O.R.R. v. Groeger*, 266 U.S. 521, 45 S. Ct. 169, 69 L. Ed. 419 (1925). However, the carrier is not liable for failure to furnish the best mechanical contrivances and inventions, provided that the equipment used is in proper condition and safe to operate, as required by statute. *Baltimore & O.R.R. v. Groeger, supra.*

Provided that the necessary causal relationship is found to exist, a violation of these acts constitutes negligence per se on the part of the defendant railroad. Contributory negligence on the part of the injured employee does not operate to bar his recovery nor to diminish the damages recoverable.

For other references to other jury instructions in F.E.L.A. cases, *see*: Federal Jury Practice And Instructions, Chapter 84; Illinois Pattern Jury Instructions, 2nd Ed., Chapter 160; Kansas Pattern Instructions, 2nd Ed., Chapter 16; Missouri Approved Jury Instructions, Chapter 24; Virginia Jury Instructions, Chapter 40.

[As amended, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was prepared pursuant to a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. In the paragraph designated "5", "proximate cause" was replaced with "causation" in two places.

13-901. Special F.E.L.A. voir dire of jurors by court.

Plaintiff brings this action under a law known as the Federal Employers' Liability Act. The title only identifies the law and does not imply that the defendant railroad is liable.

This case involves . . .

(NOTE: The court will here briefly summarize the facts to state something equivalent to this example:

An accident occurred on _____ *(date)* at _____ *(name of location)* while the plaintiff [deceased] was an employee of the defendant railroad and was then engaged in _____ *(here briefly describe the work that plaintiff or deceased was doing at the time of the accident).)*

[The plaintiff in this case is the personal representative of _____ *(name of workman)*, deceased. The plaintiff brings this action for the benefit of _____ *(name of survivors or dependents)*].

At this time I will introduce the parties and their attorneys.

(The court then introduces the plaintiff and his attorneys, followed by the defendant representative and the defense attorneys.

NOTE: At this point, the court will pursue the voir dire examination of jurors as set forth in Chapter 1 concerning the general voir dire of jurors by the court.)

USE NOTE

The above portion of voir dire is to supplement the general voir dire under Chapter 1.

The paragraph relating to the personal representative and with reference to the deceased and survivors is only to be used where the injury to the workman resulted in his death.

Committee comment. — The above quoted portion of a voir dire examination in F.E.L.A. cases is only to help the jury better understand the type of action involved. The probabilities are that at some point during the trial, even with reasonable precautions, there is going to be some reference to an F.E.L.A. or federal employers' liability case and, therefore, it is better that the court explain this right at the outset of the lawsuit.

45 U.S.C.A. § 51 provides that, in case of death of the employee, the liability of the carrier shall be to his or her personal representative, "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next-of-kin dependent upon such employee...".

13-902. Special F.E.L.A. statement of the case issues; claims; formula.

The plaintiff claims that [he] [she] sustained damages from personal injuries. [The plaintiff, as personal representative, claims damages because of the death of _____ *(name of deceased worker)*.

Plaintiff also claims that one or more of the following claimed acts of negligence caused or contributed to the [injury] [death] and resulting damages.

(NOTE: Here set forth, in simple form, the specific acts of negligence which are supported by the evidence, as in UJI 13-302A to 13-302F or the following examples:

(1) The defendant railroad failed to furnish the plaintiff with a reasonably safe place in which to work;

(2) The defendant railroad failed to provide the plaintiff reasonably safe tools with which to work;

(3) The defendant railroad failed to provide plaintiff with a sufficient number of fellow employees to safely perform the work assigned; and

(4) The defendant railroad's engineer was not keeping a proper lookout for workers on the track.)

The burden is on the plaintiff to prove, by the greater weight of the evidence, the following facts:

(A) That the defendant railroad was negligent in one of the particulars alleged; and

(B) That the defendant railroad's negligence caused or contributed to the [injury] [death] and resulting damage to the plaintiff.

The defendant railroad denies the plaintiff's claims and in addition asserts, as a further defense, that plaintiff was contributorily negligent in that:

(NOTE: Here set forth, in simple form, the acts of contributory negligence relied upon by the defendant which are supported by the evidence such as:

(1) The plaintiff failed to request additional help to perform [his] [her] work, which would have been given to [him] [her]; and

(2) The plaintiff failed to heed the whistle of the oncoming train and to exercise ordinary care to remove plaintiff from danger.)

The defendant railroad has the burden of proving, by the greater weight of the evidence, that the plaintiff was contributorily negligent.

The issues to be determined by you in this case are these:

(1) Was the defendant railroad negligent in any one of the particulars claimed?

If your answer to this question is "no", you will return a verdict for the defendant; but if your answer is "yes", you then have a second issue to determine, namely:

(2) Did the negligence of the defendant railroad cause or contribute to any injury and damage to the plaintiff?

If your answer to this question is "no", you will return a verdict for the defendant railroad; but if your answer is "yes", you must then find the answer to a third question, namely:

(3) Was the plaintiff guilty of some contributory negligence?

If your answer to this question is "no", then you will proceed to determine the amount of plaintiff's damages and return a verdict in the plaintiff's favor for that amount.

On the other hand, if you should find that the [plaintiff] [plaintiff's decedent] was guilty of some negligence and that [his] [her] negligence contributed to [his] [her] [injuries] [death], then you must return a verdict for the plaintiff for a reduced amount based upon a comparison of the negligence of the parties, as I will further instruct you.

USE NOTE

The paragraphs referring to contributory negligence are not applicable if the Safety Appliance Acts, 45 U.S.C.A. §§ 1-16, or the Boiler Inspection Acts, 45 U.S.C.A. §§ 23-24, are applicable.

This follows the format of UJI 13-302A to 13-302F, and should be the first instruction given to the jury at the close of the evidence and before final argument - following UJI 13-301.

The form, above, includes only contributory negligence as an affirmative defense, and contributory negligence is not an "absolute defense" in F.E.L.A. cases. Assumption of risk and fellow-servant doctrine are not available as affirmative defenses in F.E.L.A. actions.

Should the trial judge treat such defenses as "act of God" or "independent intervening cause" as absolute, affirmative defenses, rather than as "denials of

causation," then the affirmative defense format found in UJI 13-302A to 13-302F can be utilized.

[As amended, effective November 1, 1991.]

Committee comment. — The court should not instruct on a specific claim of negligence unless there is some indication that such negligence could have caused the accident. *See Idzojtic v. Pennsylvania R.R.*, 47 F.R.D. 25 (D.C. Pa. 1969). *See also* UJI 13-302A to 13-302F.

It will be noted that this instruction does not include the elements of "proximate cause". This is in line with the suggestion found in Devitt & Blackmar, Federal Jury Practice and Instructions, notes to Section 89.12 and cited cases. *See also Eidson v. Atchison, T. & S.F. Ry*., 80 N.M. 183, 453 P.2d 204 (1969) and Federal Jury Practice and Instructions § 84.19. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Compiler's note. — The committee commentary was revised March 21, 2005 to delete "requirement" after "proximate cause". The revisions were made to conform the commentary with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The word "requirement" was deleted after "proximate cause" as a proximate cause instruction is no longer a requirement in UJI Civil.

13-903. Burden of proof and greater weight of evidence, meaning of.

When I say that the burden is on a party to prove a proposition by the greater weight of the evidence, I mean that the proposition is more likely than not true.

Evenly balanced evidence is not sufficient.

If you are persuaded, considering all the evidence in the case, that a proposition on which one party has the burden of proof is more probably true than not true, then this proposition has been proved by the greater weight of the evidence.

USE NOTE

This instruction should be given in every F.E.L.A. case.

Committee comment. — The burden of proof requirement in F.E.L.A. cases is no different from that established under New Mexico law. See Devitt & Blackmar, Federal Jury Practice and Instructions, § 89.12.

Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957): "[p]reponderance of the evidence simply means the greater weight of the evidence..."; Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955): "... the evidence ... if it tips the scales in favor of the party on whom rests the burden of proof, even though it *barely* tips them. He is then said to have established his case by a preponderance of the evidence".

See also Federal Jury Practice and Instructions, § 84.11 and Virginia Jury Instructions, § 40.06.

13-904. The rule of liability; interstate commerce not an issue.

When an employee of a railroad is [injured] [killed] while engaged in [his] [her] employment in interstate commerce and the [injury] [death] is caused in whole or in part by the negligence of the railroad or by reason of any defect or insufficiency resulting from the railroad's negligence, the railroad is liable in damages.

USE NOTE

This instruction is to be used when it is admitted, or established by the evidence as a matter of law, that the plaintiff was employed by the railroad while engaged in interstate commerce.

[As amended, effective November 1, 1991.]

Committee commentary. — This instruction is based upon the first paragraph of Section 1 of the act (45 U.S.C.A. § 51).

"Injury or death resulting in whole or in part from the negligence . . ." of the railroad means that the slightest negligence is sufficient if it played any part, however small, in causing or contributing to the injury or death (quotation from 45 U.S.C.A. § 51 with emphasis added). *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970); *Chavez v. Atchison, T. & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967); *Atchison, T. & S.F. Ry. v. Simmons*, 153 F.2d 206 (10th Cir. 1946); *Tillian v. Atchison, T. & S.F. Ry.*, 40 N.M. 80, 55 P.2d 34 (1935).

In cases under the Safety Appliance Acts and the Boiler Inspection Acts, the railroad's negligence may be immaterial, but the contributory negligence of the employee is a factor, where such contributory negligence is the sole cause. *Schmidt v. Great N. Ry.*, 7 Wash. App. 40, 497 P.2d 959 (1972). [Revised, effective March 1, 2005.]

ANNOTATIONS

Compiler's note. — The committee commentary was revised effective March 21, 2005 to delete "proximate" after the word "sole" and before the word "cause". The revisions were made to conform the commentary with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil.

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

13-905. The rule of liability; interstate commerce an issue.

When an employee of a railroad is [injured] [killed] while engaged in [his] [her] employment in interstate commerce and the [injury] [death] is caused in whole or in part by the negligence of the railroad or by reason of any defect or insufficiency resulting from the railroad's negligence, the railroad is liable in damages.

An employee is considered as being employed by a railroad while engaging in interstate commerce when any part of [his] [her] duties shall be in the furtherance of interstate commerce or shall, in any way, directly or closely and substantially affect such commerce.

USE NOTE

This instruction is to be used only when interstate commerce is an issue.

[As amended, effective November 1, 1991.]

Committee comment. — The question as to whether the employee was injured or killed while the railroad was engaging in interstate commerce, as distinguished from the question of whether the employee was acting in the scope or course of employment at the time of the injury, does not seem to have been an issue in any reported New Mexico case, with the exception of Rivera v. Atchison, T. & S.F. Ry., 61 N.M. 314, 299 P.2d 1090 (1956). A careful reading of Rivera, however, indicates that the basic question was whether the after-hours activity of the employee, while returning from an outdoor toilet, was within the course or scope of his employment "in interstate commerce".

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in two places in the instruction.

13-906. A railroad acts through its employees.

The defendant railroad can act only through its officers, agents and employees. Any act or omission of an officer, agent or employee, within the

scope or course of [his] [her] employment with the railroad, is the act or omission of the railroad.

USE NOTE

This instruction shall be used in every case.

[As amended, effective November 1, 1991.]

Committee comment. — Whereas the railroad must be engaged in interstate commerce and the employee of the carrier must be so engaged at the time of injury in order to make the act applicable, 45 U.S.C.A. § 51 does not seem to require that a coemployee, whose negligence causes the injury, be so employed. This has been noted in Glidewell v. Quincy O. & K. C.R.R., 208 Mo. App. 372, 236 S.W. 677 (1922); Hines v. Keyser, 268 F. 772 (3d Cir. 1920), cert. denied, 254 U.S. 656, 41 S. Ct. 218, 65 L. Ed. 460 (1921); Louisville & N.R.R. v. Walker's Adm'r, 162 Ky. 209, 172 S.W. 517 (1915); Pedersen v. Delaware, L. & W.R.R., 229 U.S. 146, 33 S. Ct. 648, 57 L. Ed. 1125 (1913). The federal decisions do indicate, however, that the act or omission of the officer, agent or employee must be within the scope or course of employment in order to make the railroad liable and, in this respect, are no different from New Mexico law, as embodied in this instruction and in UJI 13-409, which it follows closely. However, note that scope or course of employment is a question of substantive law and, therefore, governed ultimately by decisions of the Supreme Court of the United States.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral.

Library references. — Federal Jury Practice and Instructions § 84.15.

13-907. Scope or course of employment.

For an employee to recover damages [he] [she] must have been doing something [he] [she] was employed to do or which was reasonably incidental to [his] [her] employment.

USE NOTE

This instruction should be given only when the scope or course of employment is an issue.

[As amended, effective November 1, 1991.]

Committee comment. — This issue is one of substantive law, governed by decisions of the federal court. However, the New Mexico cases are in accord with the general law

on this point. See and compare cases discussed at 76 A.L.R.2d 1257-1276 and Garcia v. Atchison, T. & S.F. Ry., 66 N.M. 339, 347 P.2d 1005 (1959), cert. denied, 362 U.S. 989, 80 S. Ct. 1077, 4 L. Ed. 2d 1022 (1960); Rivera v. Atchison, T. & S.F. Ry., 61 N.M. 314, 299 P.2d 1090 (1956); Atchison, T. & S.F. Ry. v. Wottle, 193 F.2d 628 (10th Cir.), cert. dismissed, 344 U.S. 850, 73 S. Ct. 89, 97 L. Ed. 661 (1952).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 A.L.R.5th 1.

13-908. Negligence; definition.

The term "negligence" may relate either to an act or to a failure to act.

An act to be negligent must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.

A failure to act to be negligent must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to [himself] [herself] or to another.

USE NOTE

A definition of negligence must be used in F.E.L.A. matters and for convenience the definition of Chapter 16 is repeated here.

[As amended, effective November 1, 1991.]

Committee comment. — UJI 13-1601 is the basic instruction defining negligence and can be used in F.E.L.A. cases. Negligence is a substantive matter, governed by federal cases, but the definition found in UJI - Civil is in accord with that found in federal decisional law.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Library references. — Federal Jury Practice and Instructions § 84.02.

Virginia Jury Instructions § 40.06.

13-909. Contributory negligence; definition.

In this case, contributory negligence means negligence on the part of the [plaintiff] [decedent] that contributed, in some degree, to cause damages of which plaintiff complains.

USE NOTE

This instruction should be used whenever contributory negligence is a jury issue. This instruction should be read immediately after UJI 13-908 (see UJI 13-908, Committee Comment) in order that the jury might have a better understanding of the application of the terms.

Committee comment. — This instruction is very similar to former U.J.I. Civ. 16.2 (withdrawn effective October 1, 1984). However, since a definition of "proximate cause" will not be given in these F.E.L.A. instructions (*see Eidson v. Atchison, T. & S.F. Ry.*, 80 N.M. 183, 453 P.2d 204 (1969) and 13-305 NMRA), it would be inappropriate here to use the term "proximately contributed." [Revised, effective March 1, 2005.]

ANNOTATIONS

Compiler's notes. — The committee commentary was revised effective March 1, 2005 to insert a reference to 13-305 NMRA. The revisions were made to reflect the March 1, 2005 amendment of 13-305 NMRA.

Library references. — Federal Jury Practice and Instructions § 84.0.

13-910. Ordinary care.

Ordinary care is that care which a reasonably prudent person exercises in the management of [his] [her] own affairs. "Ordinary care" is not an absolute term, but a relative one. In deciding whether ordinary care has been exercised, the conduct in question must be considered in light of all the surrounding circumstances, as shown by the evidence.

What constitutes "ordinary care" varies with the nature of what is being done. As the danger that should reasonably be foreseen increases, so the amount of care required also increases.

USE NOTE

As in Chapter 16, it is proper to give this instruction following the negligence or contributory negligence instruction.

[As amended, effective November 1, 1991.]

Committee comment. — UJI 13-1603, defining ordinary care, is customarily used in every case where UJI 13-1601 is also used. Here again, although what is "ordinary care" is a substantive question, governed by federal decisional law and F.E.L.A. cases, the definition of "ordinary care" found in federal cases will not vary from UJI 13-1603.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first sentence of the first paragraph.

Library references. — Federal Jury Practice and Instructions §§ 84.03, 84.04.

13-911. Employee's conduct the sole cause.

There can be no recovery of damages by the plaintiff if the [plaintiff's] [decedent's] conduct was the sole cause of the injuries.

USE NOTE

This instruction shall be given at the request of the defendant, when supported by the evidence. It is equally appropriate in cases under the Safety Appliance Acts, 45 U.S.C.A. §§ 1-16, and in cases under the Boiler Inspection Acts, 45 U.S.C.A. §§ 22-34.

Committee comment. — In Tillian v. Atchison, T. & S.F. Ry., 40 N.M. 80, 55 P.2d 34 (1935), the court held that whether the employee's injuries were caused solely by his own negligence, in failing to recognize and heed an obvious danger, was a question of fact for the jury. See also Miller v. Gulf, M. & O.R.R., 386 S.W.2d 97 (Mo. 1964); Kenefick v. Terminal R.R. Ass'n, 207 S.W.2d 294 (Mo. 1948).

Library references. — Virginia Jury Instructions § 40.05.

13-912. Duty of employer as to place of work.

It was the duty of the defendant railroad to use ordinary care, under the circumstances, to furnish its employees with a safe place in which to work and to keep such place of work in a safe condition.

USE NOTE

This instruction shall be given in every case where the issue is a question of fact under the evidence.

Committee comment. — Several New Mexico cases have involved the duty of the employer as to place of work. Clinard v. Southern Pac. Co., 82 N.M. 55, 475 P.2d 321 (1970); McBee v. Atchison, T. & S.F. Ry., 80 N.M. 468, 457 P.2d 987 (Ct. App. 1969); Chavez v. Atchison, T. & S.F. Ry., 79 N.M. 401, 444 P.2d 586 (1968); Abeyta v. Atchison, T. & S.F. Ry., 65 N.M. 291, 336 P.2d 1051 (1959); Wright v. Atchison, T. & S.F. Ry., 64 N.M. 29, 323 P.2d 286 (1958); Rivera v. Atchison, T. & S.F. Ry., 61 N.M. 314, 299 P.2d 1090 (1956); Padilla v. Atchison, T. & S.F. Ry., 61 N.M. 115, 295 P.2d 1023 (1956).

See also Shenker v. Baltimore & O.R.R., 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963); New York, N.H. & H.R.R. v. Henagan, 364 U.S. 441, 81 S. Ct. 198, 5 L. Ed. 2d 183 (1960); Sana v. Pennsylvania R.R., 282 F.2d 936 (3rd Cir. 1960).

ANNOTATIONS

Library references. — Federal Jury Practice and Instructions § 84.09.

Missouri Approved Jury Instructions § 24.01.

Virginia Jury Instructions § 40.01.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 A.L.R.5th 1.

13-913. Duty to provide safe tools, etc.

It was the duty of the railroad to use ordinary care to provide its employees with safe [tools] [machinery and appliances] with which to do their work and keep [it] [them] in a safe condition. In exercising ordinary care, the railroad need not necessarily provide the latest or best [tools] [machinery and appliances] which could have been provided to do the work.

USE NOTE

This instruction shall be given in every case where the issue is a question of fact under the evidence.

Committee comment. — See Committee Comment to UJI 13-911 and cases cited therein. See also McBee v. Atchison, T. & S.F. Ry., 80 N.M. 468, 457 P.2d 987 (Ct. App. 1969); Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959); Morstad v. Atchison, T. & S.F. Ry., 23 N.M. 663, 170 P. 886 (1918).

ANNOTATIONS

Library references. — Federal Jury Practice and Instructions § 84.09.

Missouri Approved Jury Instructions § 24.01.

Virginia Jury Instructions § 40.01.

13-914. Duty to provide sufficient employees.

It was the duty of the railroad to exercise ordinary care to provide the plaintiff with a sufficient number of fellow employees to safely perform the work being done.

USE NOTE

This instruction shall be given in every case where the issue is a question of fact under the evidence.

Committee comment. — See Committee Comments to UJI 13-911 and 13-912 and cases cited therein.

The leading New Mexico case on the duty to provide a sufficient number of employees is Clinard v. Southern Pac. Co., 82 N.M. 55, 475 P.2d 321 (1970), and the language of this instruction follows closely the language in that decision.

13-915. "Cause"; explained.

An injury or damage is caused, or contributed to, by an act or a failure to act when the act or failure to act played any part, no matter how small, in bringing about the injury or damage.

USE NOTE

This instruction shall be used in every case where the cause of the injury or damage is an issue.

Committee comment. — The rule in F.E.L.A. cases is that the defendant is liable if it was guilty of the slightest negligence which played any part, however small, in causing or contributing to the injury or death. *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970); *Chavez v. Atchison, T & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967); *Atchison, T. & S.F. Ry. v. Simmons*, 153 F.2d 206 (10th Cir. 1946); *Tillian v. Atchison, T & S.F. Ry.*, 40 N.M. 80, 55 P.2d 34 (1935). [Revised, effective March 1, 2005.]

ANNOTATIONS

Compiler's notes. — The committee commentary was revised effective March 1, 2005 to delete the last two paragraphs. The revisions were made to reflect the March 1, 2005 amendment of 13-305 NMRA.

Library references. — Federal Jury Practice and Instructions § 84.12.

13-916. Amount of damages; injury; not death.

If you should decide for the plaintiff on the question of liability, you should first determine the amount of the plaintiff's damages [without reference to plaintiff's contributory negligence]. You must fix the amount of money which will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence of the defendant railroad:

(NOTE: Here insert the proper elements of damage such as, UJI 13-1803 through 13-1809, and UJI 13-1822 through 13-1824.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

Further, sympathy or prejudice, for or against a party should not affect your verdict and is not a proper basis for determining damages.

USE NOTE

Bracketed material to be used only where contributory negligence is an issue.

[As amended, effective November 1, 1991.]

Committee comment. — This instruction follows the format of UJI 13-1802, but it is felt that a distinct and separate instruction is necessary under this chapter because of the fact that contributory negligence does not bar a recovery under the F.E.L.A.

Similarly, in the case of an action involving a death under the F.E.L.A., an instruction may be drawn following the format of UJI 13-1817, but with the admonition that damages must first be determined without reference to the decedent's contributory negligence.

It is to be noted that the appellate review of verdicts for excessiveness is a procedural matter and thus governed by the law of the forum, not by the federal decisional law. Vivian v. Atchison, T. & S.F. Ry., 69 N.M. 6, 363 P.2d 620 (1961); Rivera v. Atchison, T, & S.F. Ry., 61 N.M. 314, 299 P.2d 1090 (1956).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral in the second sentence of the first paragraph.

13-917. Assumption of risk - *No instruction should be given.*

No instruction should be given.

USE NOTE

Since assumption of risk is not a defense under the F.E.L.A., no instruction should be given on this subject matter.

Committee comment. — Counsel is not permitted to argue that the employee voluntarily works in a hazardous or ultrahazardous occupation. Under the Federal Employers' Liability Act, an employee does not
assume the risk of employment in any case where either injury or death resulted, in whole or in part, from the negligence of any of the officers, agents or employees of the railroad.

13-918. Verdict for plaintiff; comparative negligence.

In this case, the procedure to be followed in comparing the negligence of the parties and returning a verdict in favor of the plaintiff for a reduced amount based upon that comparison is:

(1) Determine the full amount of all damages sustained by the plaintiff;

(2) Determine the percentage of plaintiff's damages caused by [his] [her] own negligence and convert that percentage to dollars; and

(3) Reduce the full amount of plaintiff's damages by that portion of the total damages caused by plaintiff's own negligence and return a verdict in favor of the plaintiff for the amount remaining.

USE NOTE

If contributory negligence is not an issue, this instruction shall not be given.

[As amended, effective November 1, 1991.]

Committee comment. — 45 U.S.C.A. § 53 is the basis for this instruction, which would seem to be the logical procedure to follow.

For New Mexico cases recognizing that contributory negligence may not defeat a recovery by plaintiff, but may merely reduce it, see Clinard v. Southern Pac. Co., 82 N.M. 55, 475 P.2d 321 (1970); Padilla v. Atchison, T. & S.F. Ry., 61 N.M. 115, 295 P.2d 1023 (1956); Tillian v. Atchison, T. & S.F. Ry., 40 N.M. 80, 55 P.2d 34 (1935).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral in Item (2).

Library references. — Federal Jury Practice and Instructions § 84.20.

13-919. Verdict for plaintiff.

We find for the plaintiff in the sum of $ _____.

_____
Foreperson

USE NOTE

The full, legal caption of the case should be used on each and every verdict submitted to the jury. The verdicts, properly, should be prepared by counsel prior to settling of jury instructions.

[As amended, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-920. Verdict for defendant.

We find for the defendant.

_____
Foreperson

USE NOTE

The full, legal caption of the case should be used on each and every verdict submitted to the jury. The verdicts, properly, should be prepared by counsel prior to settling of jury instructions.

[As amended, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-921. Special interrogatories.

(*NOTE: The following is an example of a set of special interrogatories that can be used in an F.E.L.A. case.*)

These interrogatories shall be answered only in the event your verdict is for the plaintiff.

(1) What was the total amount of damages which you determined to be due to the plaintiff by reason of the injury sustained, before considering any contributory negligence on the part of [plaintiff] [decedent]?

_____ ***(here state the amount)*.**

(2) Did you find the [plaintiff] [decedent] guilty of any contributory negligence?

_____ ***(Yes)*** _____ ***(No)***

If your answer to Interrogatory 2 is "no," you shall not answer Interrogatory 3. However, if your answer to Interrogatory 2 is "yes," then you should answer Interrogatory 3.

(3) If you found that the [plaintiff] [decedent] was guilty of contributory negligence, please state what proportion or percentage of the negligence on the part of the said [plaintiff] [decedent] contributed to the injuries of [plaintiff] [decedent].

_____ ***(here state the percentage)*.**

_____
Foreperson

USE NOTE

In F.E.L.A. cases special interrogatories have been commonly used, but the matter still rests in the discretion of the trial court.

[As amended, effective November 1, 1991.]

Committee comment. — The foregoing special interrogatories are simply examples of the types of special interrogatories which can and have been used in F.E.L.A. cases.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman" at the end of the instruction.

CHAPTER 10
Defamation

ANNOTATIONS

Compiler's notes. — Pursuant to an order of the supreme court, former Chapter 10, relating to libel and slander, was withdrawn and new Chapter 10 is adopted effective January 1, 1987.

13-1001. Defamation: Defined.

Defamation is a wrongful [and unprivileged] injury to [a person's] reputation.

USE NOTE

This introductory instruction is to be given in all defamation actions. If the defendant raises the defense of privilege, the first bracketed portion of the instruction should be given. Otherwise, it should be omitted.

The term "defamation" is to be used throughout the instructions instead of "libel" or "slander". Where the law varies depending upon whether written or spoken defamation is involved, the judge will select the appropriate instruction from among those contained herein. The jury need not be made aware of the distinction.

If the plaintiff is a person, the bracketed phrase "a person's" should be used. When a corporation is the plaintiff, or other forms of business organization or entities are determined to be proper plaintiffs in a defamation action, the judge should draft appropriate language for insertion here.

Committee comment. — The word "defamation" is used throughout the instructions in preference to "libel" or "slander". Libel and slander are merely subcategories of defamation. Traditionally, libel is written defamation while slander is spoken defamation. See Restatement (Second) of Torts § 568 (1977). The line between libel and slander has blurred to the point that the supreme court declared that "there are good reasons for abolishing the distinction between libel and slander". Reed v. Melnick, 81 N.M. 608, 612, 471 P.2d 178, 182 (1970). The current instructions do not require that the distinction be made in New Mexico any longer.

The definition of defamation contained here is merely an introduction to the meaning of defamation. The instructions which follow this instruction provide the elements of a defamation action and definitions of each element. The language of this instruction is derived from a federal case applying New Mexico law: "The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation". Gruschus v. Curtis Publishing Co., 342 F.2d 775, 776 (10th Cir. 1965).

In New Mexico, a corporation as well as a person may bring a defamation action: "A corporation may maintain an action for libel or slander if it has been defamed by a false imputation about its financial soundness or business ethics". Coronado Credit Union v. KOAT Television, Inc., 99 N.M. 233, 237, 656 P.2d 896, 900 (Ct. App. 1982); see generally, Annot., Action by Corporation for Libel or Slander, 52 A.L.R. 1199 (1928). It is unclear whether partnerships or other business entities may also be plaintiffs in defamation actions. See Poorbaugh v. Mullen, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982) (dictum suggesting that partnership may be a plaintiff in defamation action).

ANNOTATIONS

Law reviews. — For article, "Defamation in New Mexico," see 14 N.M.L. Rev. 321 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Imputation of allegedly objectionable political or social beliefs or principles as defamation, 62 A.L.R.4th 314.

Defamation: designation as scab, 65 A.L.R.4th 1000.

Who is "public official" for purposes of defamation action, 44 A.L.R.5th 193.

13-1002. Defamation action: Prima facie case; general statement of elements.

(A) The plaintiff claims that the following communication was defamatory and entitles the plaintiff to recover damages:

(B) To establish the claim of defamation on the part of defendant, the plaintiff has the burden of proving each of the following contentions:

[(1) The defendant published the communication; and]

[(2) The communication contains a statement of fact; and]

[(3) The communication was concerning the plaintiff; and]

[(4) The statement of fact was false; and]

[(5) The communication was defamatory; and]

[(6) The person[s] receiving the communication understood it to be defamatory; and]

[(7) The defendant [knew that the communication was false or negligently failed to recognize that it was false] [or] [acted with malice]; and]

[(8) The communication caused actual injury to the plaintiff's reputation; and]

[(9) The defendant abused [its] privilege to publish the communication.]

(C) The defendant denies the contention[s] of the plaintiff [and also claims in defense that (*the communication was true*)].

(D) To establish the defense of _____ (*theory of affirmative defenses*), the defendant has the burden of proving [at least one of] [each of] the following contention[s]:

(NOTE: List disputed factual elements relevant to affirmative defense.)

(NOTE: Repeat this format for each affirmative defense.)

(E) Related to the claims, [plaintiff] [defendant] contends and has the burden of proving that:

(NOTE: List each additional issue relevant to a party's claim or defense together with a statement of the elements of the claim or defense about which there is a factual question for the jury to resolve. For example, if plaintiff seeks punitive damages, or relies upon a theory of respondeat superior, those issues should be treated initially here.) (This [these] contention[s] is [are] denied by [plaintiff] [defendant].)

(NOTE: Repeat this format for each issue.)

(F) After considering the evidence and these instructions as a whole, you are to determine the following question[s]:

(NOTE: Here repeat the disputed contentions listed in (B) supra but now in the form of questions. For example, "Was the communication defamatory?")

If you decide that the answer to any of these questions is "No" you shall return a verdict for the defendant and against the plaintiff.

If you decide that the answer to each of the questions presented is "Yes," then [you are to determine the following question[s]:

(NOTE: Here repeat the disputed contentions listed in (C) or (D), supra, but now in the form of questions. For example, "Was the communication true?")

If you decide that the answer to this [these] question[s] is [are] "Yes", then you shall return a verdict for the defendant and against the plaintiff. If instead, you answer "No" to

this [any of these] question[s], then you shall determine the amount of money that will compensate plaintiff for the plaintiff's injuries and damages in accordance with the instructions which follow, and shall return a verdict for the plaintiff in the amount you determine.

USE NOTES

The structure of this instruction is similar to the current negligence instructions. UJI 13-302A to 13-302F NMRA. This instruction focuses the jury's attention on the matter alleged to be defamatory, UJI 13-1002(A) NMRA, states the elements of a defamation action which are in dispute, UJI 13-1002(B) NMRA, the name of the defenses alleged by the defendant, UJI 13-1002(D) NMRA, and the elements of the defenses which are in dispute. UJI 13-1002(D) NMRA. In addition, provision is made for identification of and a statement of the elements of additional issues, such as respondeat superior, that may be relevant to particular cases. UJI 13-1002(E) NMRA.

Finally, the instruction reformulates the issues in dispute into a series of questions for the jury to consider and explains to the jury the relationship of its answers to the ultimate outcome of the case. UJI 13-1002(F) NMRA. This portion of the instruction varies from UJI 13-302F NMRA in that the negligence instruction is written with the assumption that a special verdict form will be used. In contrast, UJI 13-1002(F) NMRA omits reference to special verdict forms and can be used with whatever form of verdict the court chooses to use.

This instruction merely sets out the skeletal outline of the case and the issues to be resolved by the jury. Subsequent instructions define the elements.

In Section (A), the trial judge identifies for the jury the communication which the plaintiff alleges is defamatory. If plaintiff asserts that several different communications or portions of a communication are defamatory, the trial judge should here include each such communication. If the trial judge has decided as a matter of law that a communication alleged by the plaintiff to be defamatory is not capable of supporting an action for defamation, that portion of the communication should not be included here. *See Marchiondo v. Brown,* 98 N.M. 394, 404, 649 P.2d 462, 472 (1982).

Section (B) lists each of the elements of a defamation action. Not every element should be listed for the jury in every case. Each provision of Section (B) is in brackets because the judge is to mention only those elements about which there is a factual dispute for resolution by the jury. If, for example, the defendant has admitted, or the judge has determined as a matter of law, that the defendant did publish the communication that is the subject of the action, the trial judge would not include Section (B)(1) in the list of contentions that the plaintiff has the burden of proving.

Section (B)(4) places the burden of proof of falsity upon the plaintiff. The United States Supreme Court mandates that the plaintiff bear this burden rather than the defendant bearing the responsibility of proving truth as a defense in most defamation

actions. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). The provision is in double brackets because in one category of defamation case, where a private plaintiff alleges defamation and the defamatory statement was not of public concern, the former general New Mexico rule that truth is a defense is probably still applicable. In such a case, the judge will give an instruction that identifies truth as an affirmative defense. *See* UJI 13-1013 NMRA.

Section (B)(7) contains separate brackets because there are two standards of fault - negligence and malice - used in defamation actions, depending upon whether the plaintiff is a public official or figure on the one hand or a "private" person. *See Marchiondo v. Brown,* 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). The determination of which type of plaintiff is involved and thus whether the malice or negligence standard is applicable is a matter of law to be decided by the judge. *Id.* at 399, 649 P.2d at 467. Based on this decision, the trial judge will select which of the bracketed provisions of Section (B)(7) to give. The first bracketed phrase in Section (B)(7) is to be used when the plaintiff must establish negligence. The second bracketed phrase is used when the plaintiff must establish that the defendant acted maliciously.

Section (B)(8) sets forth the requirement that plaintiff prove that the defamatory communication caused actual injury to plaintiff's reputation. New Mexico no longer allows presumed damages in defamation actions. *Poorbaugh v. Mullen,* 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), *cert. denied*, 98 N.M. 47, 653 P.2d 878 (1982).

Section (B)(9) is to be used when the defendant raises the defense of qualified privilege and the trial judge concludes that such a qualified privilege exists. *See Stewart v. Ging,* 64 N.M. 270, 274, 327 P.2d 333, 336 (1958) (trial judge decides whether qualified privilege exists). When a qualified privilege exists, plaintiff bears the burden of proof that defendant abused the privilege. *Id.* at 274-75, 327 P.2d at 336. This instruction informs the jury of the plaintiff's burden when the judge determines that defendant had a qualified privilege to publish the allegedly defamatory communication.

Section (C) introduces any affirmative defenses which the defendant relies upon, and Section (D) provides an opportunity to list in summary fashion the required elements of each defense in the same manner that Section (B) affords for the listing of the elements of the prima facie case of defamation. Because the existence of a privilege is a matter of law for the judge to decide, *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958), and truth is only infrequently a defense, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), this section may be seldom used.

Section (E) provides an opportunity for introduction of issues other than the elements of a prima facie case and the defenses asserted. For example, if the plaintiff alleges that the person who published the defamation was an employee of the defendant acting within the scope of [his] [her] employment, the respondeat superior issue and its relevant elements would be presented here together with a statement allocating the burden of proof.

Section (F) follows the format of UJI 13-302F, with the single exception that no mention is made of special verdict forms because the court is free to use a general verdict in defamation actions. *See* Rule 1-049 NMRA. After framing the relevant questions and describing the legal significance of particular findings as to each, the instruction concludes with a direction to consider issues of damages if the jury finds that plaintiff has established the elements of the action and the defendant either has raised no affirmative defense or has failed to prove the elements of the defense, or defenses.

The language contained within the brackets in the last paragraph of the instruction should be included only if there are affirmative defenses in issue; otherwise the language must be omitted, and the last paragraph will read, "If you decide . . . ."

[As amended, effective November 1, 1991; as amended by Supreme Court Order No. 08-8300-33, effective November 24, 2008.]

Committee commentary. — The committee recommended abolishing all distinctions between libel and slander and the "per se" and "per quod" variations of each. These instructions do so. The distinctions previously made no longer make sense. Defamation spoken on national media has as much capacity for harm as a written statement published in a periodical of limited circulation. Written defamation published to a huge audience many members of which are aware of the extrinsic facts making it defamatory probably is more harmful than "per se" libel contained in a letter or other communication of limited circulation. Indeed, almost twenty-five (25) years ago, the supreme court in dictum agreed that "there are good reasons for abolishing the distinction between libel and slander" and found "arbitrary and unsatisfactory" the dichotomy between slander "per se" and "per quod". *Reed v. Melnick,* 81 N.M. 608, 612, 471 P.2d 178, 182 (1970). Since then, the court of appeals has declared that "[t]he New Mexico variation on the per se-per quod rule . . . has probably been overtaken by rulings of the United States Supreme Court." *Marchiondo v. New Mexico State Tribune Co.,* 98 N.M. 282, 289, 648 P.2d 321, 325 (Ct. App. 1981), *cert. quashed,* 98 N.M. 336, 648 P.2d 794 (1982). The supreme court, likewise, signalled its dissatisfaction with existing instructions incorporating the traditional distinction, *Marchiondo v. Brown,* 98 N.M. 394, 403, 649 P.2d 462, 471 (1982), and suggested the need for "specific uniform jury instructions to substitute for the instructions which are new in existence". *Id.* The current instructions comply with the clear import of the language in *Marchiondo.*

[Amended by Supreme Court Order No. 08-8300-33, effective November 24, 2008.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made minor stylistic changes in Section (F); and, in the Use Note, substituted "defamation" for "that he was defamed" in the third sentence of the sixth paragraph, made substitutions to make references gender neutral in the eleventh and twelfth paragraphs, and added the last paragraph.

The 2008 amendment, approved by Supreme Court Order 08-8300-33, effective November 24, 2008, in Subparagraph (8) of Paragraph B, changed "communication proximately caused" to "communication caused" and in the eighth paragraph of the Use Note, changed "communication proximately caused" to "communication caused".

Standard of proof. — Under the law of defamation, the standard of strict liability no longer applies. The ordinary common-law negligence standard of proof shall apply to private defamation plaintiffs to establish liability. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982).

No defamation found. — Employer and its loss prevention supervisor did not slanderously accuse employee of embezzlement or theft, where the supervisor's statement that the employee's use of the employer's name to order oil for retail sale violated company policy was not defamatory and the employee was assured that he was not accused of profiting from his oil sales. Paca v. K-Mart Corp., 108 N.M. 479, 775 P.2d 245 (1989).

Verdict for plaintiff need not award damages. — This rule and Rule 13-1010, read together, establish a two-step process under which the jury first determines whether the defendant is liable for defamation and then decides the amount of damages to be awarded. The jury instructions do not require a plaintiff to prove that her injuries have a monetary value as part of her case. Therefore, a verdict for the plaintiff but awarding the plaintiff no damages is not, as a matter of law, a verdict for the defendant. Cowan v. Powell, 115 N.M. 603, 856 P.2d 251 (Ct. App. 1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Refusal of defendant in "public figure" libel case to identify claimed sources as raising presumption against existence of source, 19 A.L.R.4th 919.

Proof of injury to reputation as prerequisite to recovery of damages in defamation action - post-Gertz cases, 36 A.L.R.4th 807.

False light invasion of privacy - disparaging but noncriminal depiction, 60 A.L.R.4th 51.

13-1003. Publication: Defined.

To support a claim for defamation, there must be a publication. Publication is an intentional or negligent communication to one other than the person defamed. [If, however, the communication is only to a person who knows that the communication is false, then there has been no publication.]

USE NOTE

There can be no defamation if the communication was not published. See Bookout v. Griffin, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982). Often, the fact of publication will be apparent, and the defendant will not deny that a publication occurred. In such

cases, this instruction need not be given. Indeed, in some cases, publication will be presumed from the facts. See, e.g., Hornby v. Hunter, 385 S.W.2d 473, 476 (Tex Civ. App. 1964) (paper with circulation of 4100: "It is not necessary that the article was read, as that can be presumed".), cited with approval in Martinez v. Sears, Roebuck & Co. 81 N.M. 371, 467 P.2d 37 (Ct. App.), cert. denied, 81 N.M. 425, 467 P.2d 997 (1970).

Where appropriate, the judge may supplement this instruction with a definition of the word "negligent" used in the instruction. If the negligence standard is used in UJI 13-1009, the judge might choose to incorporate the definition of negligence given there. If the malice standard is used in UJI 13-1009, however, the judge should provide a definition of negligence in the instruction.

The bracketed matter informs the jury that if the communication was received only by persons who knew that the communication was false, there is not, in law, a publication; the defamation action must fail. Id. at 375, 467 P.2d at 41. Because publication is an element of defamation upon which the plaintiff bears the burden of proof, presumably the plaintiff must establish that at least one person to whom the alleged defamation was communicated was unaware that the communication was false. The bracketed portion of the instruction should be given when the defendant has not admitted the fact of publication and an issue of fact has arisen concerning whether any recipient of the communication believed it to be true.

Former UJI Civ. 10.26 (Repl. 1980) stated that no instruction on the issue of "republication" had been formulated because "[t]here is no New Mexico case law in point on the matter and the rulings from other states are in conflict". This observation is still true and, once again, the committee has not promulgated an instruction.

Committee comment. — The definition of publication contained in this instruction is taken almost verbatim from Poorbaugh v. Mullen, 99 N.M. 11, 21, 653 P.2d 511, 521 (Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982). Poorbaugh contains a discussion of the proper interpretation of the publication requirement when the defamatory statement is jointly defamatory of a married couple, joint venturers or partners and the defendant communicates the defamatory matter only to the members of the unit jointly defamed, 99 N.M. at 21, 653 P.2d at 521. In such situations, there is no publication in law and the court should direct a verdict for the defendant. Where defendant asserts that all the recipients of the communication are covered by this exception, but a factual issue exists as to the status of one of the recipients, the judge should fashion an instruction consistent with the discussion in Poorbaugh.

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Publication. — Intra-corporate communication could be considered as published for purposes of determining that a corporate employee could be liable to an employee for defamation. Hagebak v. Stone, 2003-NMCA-007, 133 N.M. 75, 61 P.3d 201.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action, 62 A.L.R.4th 616.

13-1004. Statement of fact: Fact defined; opinion contrasted.

To support a claim for defamation, the communication by defendant must contain a statement of fact.

In contrast, statements of opinion alone cannot give rise to a finding of defamation.

[However, an opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact.]

In deciding whether the communication is or contains a statement of fact, you should consider the following:

(A) The entirety of the communication and the context in which the communication was made; and

(B) Whether reasonable persons would be likely to understand the communication to be a statement of the defendant's opinion or a statement of fact.

USE NOTE

In Marchiondo v. Brown, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982), the supreme court described the proper role of judge and jury in determining whether the alleged defamatory statement was or contained a statement of fact:

Where the statements are unambiguously fact or opinion, . . . the court determines as a matter of law whether the statements are fact or opinion. However, where the alleged defamatory remarks could be determined either as fact or opinion and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.

If the trial judge determines that, as a matter of law, the alleged defamatory statement is wholly opinion, then the court should direct a verdict for the defendant. If the judge determines that, as a matter of law, the statement is factual, there is no need to give this instruction; instead, the judge normally should omit any instruction or discussion of this issue.

Where the alleged defamation is made up of many statements, it is possible that some of the statements will be opinion as a matter of law, some will be factual as a matter of law and some will raise a jury issue as to whether they constitute facts or

opinion. In such cases, the trial judge should make clear to the jury which portions of the statements the judge has ruled upon and which statements raise a jury issue as to their factual or nonfactual nature.

The bracketed instruction contained in the third paragraph should be given only when the judge determines that the alleged defamatory statement is or may be a statement of opinion, but further determines that the statement, if opinion, nonetheless may imply the existence of undisclosed facts:

It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication.

Restatement (Second) of Torts § 566 comment c (1977). In such cases, if the jury concludes that the statement is an opinion but that it implies the existence of undisclosed facts, the requirement of a factual statement, described in this instruction, is satisfied.

Committee comment. — Statements of opinion alone cannot be the basis of an action for defamation:

Under the First Amendment, there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value to false statements of fact.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). New Mexico acknowledges this fundamental premise of defamation law: "Ideas and opinions, although incorrect or faulty in their premise, are protected by the United States constitution. False statements of fact, whether intentionally or negligently published, are unprotected". Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 291, 648 P.2d 321, 330 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982); see also Marchiondo v. Brown, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982) ("Opinions are protected but defamatory falsehood is not".).

In Marchiondo v. Brown, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982), the supreme court noted that "[t]he problem which arises under the new standard is distinguishing between an opinion and a mere statement of fact". The criteria for determining whether a statement constitutes a fact or opinion are derived from that decision.

The third paragraph addresses the special problem which arises when the communication may be classified as opinion, but may imply the existence of underlying facts. Two decisions of the court of appeals hold that the constitutional requirement that defamation actions be limited to factual statements is satisfied under these

circumstances. Kutz v. Independent Publishing Co., 97 N.M. 243, 638 P.2d 1088 (Ct. App. 1981); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 321 (1982). The Supreme Court of New Mexico accepted this view in Marchiondo v. Brown, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982).

ANNOTATIONS

Mere statement of opinion. — A newspaper article which stated that the plaintiff, a public official, had spent "most of his career in an overseas agency closely linked to brutal police torture in Latin America," and which quoted a source to the effect that the plaintiff must have known what was going on, was not defamatory. The statement that the plaintiff must have known what was going on fell within the category of opinion rather than fact. The source identified his factual premises, based a conclusion on those premises, and specifically disclaimed any knowledge that the plaintiff was personally involved. Saenz v. Morris, 106 N.M. 530, 746 P.2d 159 (Ct. App. 1987).

13-1005. Concerning the plaintiff: Defined.

To support a claim for defamation, the communication must be concerning the plaintiff. The communication is concerning the plaintiff if the person to whom it was communicated reasonably understood that it was intended to refer to the plaintiff.

[The communication may be concerning the plaintiff even though it is equally applicable to other unnamed persons.]

[The communication may be concerning the plaintiff where it refers to a group if the circumstances indicate that the communication was reasonably understood to refer to the plaintiff.]

USE NOTE

This instruction is to be used only when there is an issue of fact whether the alleged defamatory statement refers to the plaintiff.

The bracketed second paragraph should be used only when the issue arises whether a statement is concerning the plaintiff because it encompasses within its scope persons in addition to the plaintiff.

The bracketed third paragraph should be used only when the issue arises whether a statement is concerning the plaintiff because it describes a group of persons, one of whom is or may be the plaintiff.

Committee comment. — This instruction is similar to previous instruction UJI Civ. 10.25 (Repl. 1980). The legal principle it embodies is derived from Restatement

(Second) Torts § 564 (1977): "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer". New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), illustrates the proper application of the law. In Sullivan, the alleged defamatory publication did not mention the police commissioner by name and referred only to "truckloads of police" and the occurrence of seven "arrests". Id. at 289. The supreme court held that the references to the police and the arrests could not reasonably be interpreted to apply to the police commissioner personally. Id.

The second paragraph also is derived and continued from prior UJI Civ. 10.25 (Repl. 1980) as is the applicable direction for use.

The third paragraph is derived from Poorbaugh v. Mullen, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982), where the court first stated the rule concerning group libel and then "[b]y analogy", applied it to permit a partner to sue for libel when the alleged defamation was directed to the partnership containing the name of the plaintiff in its partnership title. The United States supreme court has approved the principle: "[W]e do not mean to suggest that the fact that more than one person is libeled by a statement is a defense to suit by a member of the group." Rosenblatt v. Baer, 383 U.S. 75, 82 n.6, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966).

Previous instruction UJI Civ. 10.25 (Repl. 1980) and the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 290, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), use the term "of and concerning" the plaintiff. The current instruction simplifies the wording but is not intended to change the meaning of the phrase or the requirement it embodies.

13-1006. Falsity: Defined.

[To support a claim for defamation, the communication must be false.

One or more statements of fact in the communication must be false in a material way. Insignificant inaccuracies of expression are not sufficient.]

USE NOTE

The traditional rule in New Mexico, both at common law and by statute, is that truth is an affirmative defense to an action for defamation and as such, the defendant has the burden of pleading and proof on the issue. Eslinger v. Henderson, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969); see Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), cert. denied, 436 U.S. 936, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); N.M. Stat. Ann. § 38-2-9 (1978).

The United States Supreme Court has made significant inroads into this common law rule. Where the plaintiff is a public official, the plaintiff must now prove that the

alleged defamatory statement is false. Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 1563, 89 L. Ed. 2d 783 (1986). A "public-figure plaintiff" must also show the falsity of the statements at issue in order to prevail on a suit for defamation. Id.

In Hepps, the supreme court also ruled that "at least where a newspaper published speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false". Id. at 1559. Thus, in only one type of case can New Mexico's common law rule that truth is an affirmative defense possibly continue to apply. The supreme court has not barred the treatment of truth as an affirmative defense rather than falsity as part of the plaintiff's case where the plaintiff is a private figure and the subject matter of the alleged defamation is solely a matter of private concern. See Dun & Bradstreet Inc. v. Greenmoss Bldrs. Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (recognizing separate category of private plaintiff/subject matter not of public concern).

Until and unless the United States Supreme Court extends the ruling in Hepps to private plaintiffs asserting defamation concerning a matter not of public concern, the New Mexico common law rule that truth is a defense presumably continues to apply in defamation actions of that type. Therefore, this bracketed instruction should be given in all defamation cases except where private plaintiffs seek damages for defamatory statements that are not matters of public concern. In "private plaintiff/private concern" cases, the trial judge should omit this instruction and instead give UJI 13-1013 until the United States Supreme Court mandates otherwise, or until the New Mexico Supreme Court modifies the common law rule.

This instruction informs the jury that proof of insignificant errors in the published statement are not sufficient to prove the requisite falsity. The burden is on the plaintiff to demonstrate that the communication was false in a material aspect. The language chosen is a modification of the language of Franklin v. Blank, 86 N.M. 585, 588, 525 P.2d 945, 948 (1974), in which the court explained the requirement in the context of an instruction describing what was then the defense of truth:

It is not necessary to prove the literal truth of statements made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance and it is sufficient to show that the imputation is substantially true.

13-1007. Defamatory communication: Defined.

To support a claim for defamation, a communication must be defamatory.

Defamatory communications are those which tend to expose a person to contempt, to harm the person's reputation, or to discourage others from associating or dealing with [him] [her].

In deciding whether the communication was defamatory, you must consider its plain and obvious meaning.

[In determining whether the communication was defamatory, you may consider whether there are other facts in evidence known to the person to whom the communication was published which, when taken into consideration with the communication, gave it a defamatory meaning.]

USE NOTE

Sometimes a communication is so obviously defamatory that the court may declare it to be so as a matter of law. See Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 287, 648 P.2d 321, 326 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982). This instruction is to be used when the court determines that the communication, while not defamatory as a matter of law, is capable of a defamatory meaning. In such cases it is for the jury to determine whether the communication is defamatory.

The bracketed fourth paragraph applies both to spoken and written defamation. It addresses the situation where the defamatory meaning is not apparent on the face of the written or oral pronouncement. Nonetheless, if the plaintiff is able to establish that the person receiving the communication was aware of additional facts and circumstances which would render the communication defamatory, the plaintiff can still recover.

[As amended, effective November 1, 1991.]

Committee comment. — The language in the initial three paragraphs is taken almost verbatim from the previous relevant instruction approved by the supreme court. UJI Civ. 10.11 (Repl. 1980). Its roots are found in Colbert v. Journal Publishing Co., 19 N.M. 156, 142 P. 146 (1914). The language in the first paragraph is also similar to that contained in the Restatement (Second) of Torts § 559 (1977).

The bracketed fourth paragraph reflects the fact that sometimes publications "are not on their face defamatory, but . may become so when considered in connection with innuendos and explanatory circumstances". Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 288, 648 P.2d 321, 327 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982). The language contained in the third paragraph is derived from the previous relevant instructions approved by the supreme court. UJI Civ. 10.6, 10.7 (Repl. 1980).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral in the second paragraph.

Defamation based on implication recognized. — Because defamation by implication is consistent with prior New Mexico cases analyzing claims of libel and slander per quod, New Mexico will recognize an action for defamation based on implication. The theory behind defamation by implication recognizes that the reputational injury caused by a communication may result not from what is said but from what is implied. Moore v. Sun Publishing Corp., 118 N.M. 375, 881 P.2d 735 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — False light invasion of privacy - accusation or innuendo as to criminal acts, 58 A.L.R.4th 902.

13-1008. Defamatory meaning understood.

To support a claim for defamation, the defamatory meaning of the communication must be understood by the person to whom it was communicated.

The defamatory meaning of a communication is that which the recipient reasonably understands it was intended to express. It is what the recipient of the communication reasonably understood the meaning to be that controls; not what the defendant may have intended to convey.

Committee comment. — A communication will not do harm if it is not understood as defamatory by the recipient, and it will do harm if it is so understood by the recipient even if other persons might not consider the communication defamatory. This instruction, adopted from the Restatement, sets out the twin requirements that the recipient actually understand the communication to be defamatory and that the recipient's understanding be reasonable:

If the maker of the communication intends to defame the other and the person to whom it is made so understands it, the meaning so intended and understood is to be attached to it. This is true although the meaning is so subtly expressed that the ordinary person would not recognize it. On the other hand, although the person making the communication intends it to convey a defamatory meaning, there is not defamation if the recipient does not so understand it. This is true although the defamatory meaning is so clear that an ordinary person would immediately recognize it.

[Finally,] it is not enough that the particular recipient of the communication actually attaches a defamatory meaning to it. If the defamatory meaning is not intended, it must be a reasonable construction of the language.

Restatement (Second) of Torts § 563, comments a, b (1977).

Defamatory understanding of statements depends on context. – Where one academic brought action against another for professional defamation, summary judgment for the defendant was proper where he made a prima facie showing that the academic recipients of the allegedly defamatory statements did not attribute a

defamatory meaning to them; unrebutted testimony supported an inference that the statements were not taken literally by the recipients, but were understood by them to be opinions and not actual facts. Fikes v. Furst, 2003-NMSC-033, 134 N.M. 602, 81 P.3d 545.

13-1009. Wrongful act: Defined.

(A) [To support a claim for defamation, the defendant must have acted with malice when defendant published the communication.

Defendant acted with malice if the publication was made by defendant with knowledge that it was false or with a reckless disregard for whether it was false or not. Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

In order for you to find such knowledge of falsity or reckless disregard for whether it was false, the evidence must be clear and convincing. "Clear and convincing evidence" is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.]

(B) [To support a claim for defamation, the defendant must have been negligent when defendant published the communication. The defendant must have negligently failed to check on the truth or falsity of the communication prior to publication.

The term "negligent" may relate either to an act or a failure to act.

An act, to be "negligent," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to the reputation of another and which such a person, in the exercise of ordinary care, would not do.

A failure to act, to be "negligent," must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to the reputation of another.]

USE NOTE

The plaintiff must prove that the defendant acted wrongfully if the plaintiff is to succeed in a defamation action. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 1997, 41 L. Ed. 2d 789 (1974). The two standards of conduct applied in New Mexico are "malice" and "negligence". *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982). If the plaintiff is a public official or a public figure, the plaintiff must prove malice as defined by the United States Supreme Court. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S.

130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). In such cases, the instruction contained in alternative (A) is to be given. Other plaintiffs must prove negligence. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 480 (1982). Alternative (B) is the appropriate instruction in such cases.

Whether a plaintiff is a public figure or public official who must prove malice is a question of law for the court to resolve. *See Marchiondo v. Brown*, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982). Thus, the court resolves the issue of the status of the plaintiff before submitting the case to the jury and then submits the appropriate instruction from the alternatives presented in UJI 13-1009.

Committee comment. — There cannot be no-fault defamation. The United States Supreme Court has ruled that public officials and public figures must establish malice in order to succeed in a defamation action. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (public official); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (public figure). As to private plaintiffs, "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual". Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). The New Mexico supreme court has chosen the negligence standard: "[I]n cases involving non-public defamation plaintiffs . [i]n accord with Gertz, we adopt the ordinary negligence standard as a measure of proof necessary to establish liability for compensation for actual injury." Marchiondo v. Brown, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). The judge and not the jury determines the status of the plaintiff and the corresponding burden the plaintiff bears to show that defendant's conduct was wrongful:

[A] plaintiff's status as either a public official, public figure, or private person is relevant in determining the standard by which an aggrieved party's proof of damages must be measured. The question of whether one is a "public figure" or a "private person" is a question of law....

Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 291, 648 P.2d 321, 330 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982).

The "malice" that public officials and public figures must establish is not mere ill will or personal hatred of the plaintiff by the defendant. Compare Colbert v. Journal Publishing Co., 19 N.M. 156, 142 P. 146 (1914) (common law definition of malice applied in early defamation action). The applicable definition was established by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (" 'actual malice' - that is, with knowledge of falsity or with reckless disregard of whether it was false or not"). This instruction incorporates that language. The remainder of the language in the second paragraph fleshes out the meaning of malice. The phrases are derived from St. Amant v. Thompson, 390 U.S. 727, 730-31, 88 S. Ct. 766, 19 L. Ed. 2d 820 (1968).

In New York Times Co. v. Sullivan, 376 U.S. 254, 285-86, 84 S. Ct. 766, 19 L. Ed. 2d 820 (1964), the supreme court declared that, when the plaintiff must prove malice, the proof must be made with "convincing clarity". In New Mexico, that phrase has become equated with the "clear and convincing" evidence standard of the burden of proof which formerly was found in UJI Civ. 10.17 (Repl. 1981). This instruction incorporates the standard definition of "clear and convincing evidence" because with regard to this element of a defamation action the plaintiff's burden of proof increases from a "preponderance" [now "greater weight"] of the evidence to "clear and convincing" evidence.

In cases involving neither a public official nor a public figure, the plaintiff need not prove actual malice. It is sufficient that the plaintiff demonstrate that the defendant was negligent. Marchiondo v. Brown, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). As does the actual malice requirement, the negligence requirement focuses on the conduct of the defendant in failing to ascertain the truth or falsity of the communication prior to publication. There are other places in which the issue whether the defendant failed to exercise reasonable care might arise. The Restatement of Torts (Second) § 580B, comment b (1977) identifies four such additional areas:

(1) Negligence in publishing the communication as for example where the defendant did not intend to communicate his written views, but negligently allowed a third person to read them.

This issue is adequately addressed in the text of UJI 13-1003, which requires intentional or negligent publication.

(2) Negligence in failing to recognize that a communication not defamatory on its face was made so by extrinsic facts not known to the defendant.

Negligence here does not go to the search for truth or falsity, but rather to the issue of whether the defendant who published the false communication was negligent in failing to investigate the facts which made the statement defamatory.

The bracketed fourth paragraph of UJI 13-1007 deals with this issue.

The Restatement notes that the common law rule does not require that the plaintiff prove negligence as to this aspect of the case; instead, the general rule is that for purposes of this requirement, any violation, even a non-negligent one, can lead to liability. Restatement (Second) of Torts § 580B, comment d (1977). The drafters of the Restatement do not declare that states must impose a negligence requirement as to this issue; they merely offer the opinion that "[t]he logic of the holding in Gertz would seem to apply . . . as well and to require that there be at least negligence." Id. Absent direction from the New Mexico Supreme Court to impose a negligence requirement in situations where defamatory meaning is based only on extrinsic facts, UJI 13-1009 follows the common law rule.

(3) Negligence in composing the communication; for example, a typographical error, a slip of the tongue or the use of words with more than one meaning.

The committee is of the opinion that this issue is subsumed under the requirement that negligence or malice must be shown to have been the cause of the false statement and, thus, is encompassed within UJI 13-1009. If the statement is false only because of a typographical error, UJI 13-1009 requires that the plaintiff prove that the falsity was caused by the failure of the defendant to exercise reasonable care to check the draft of the communication to assure that it reflected the truth.

(4) Negligence in regard to the reference to the plaintiff; for example, where the defendant intended to refer to one person but was reasonably understood to have referred to the plaintiff.

The drafters of the Restatement speculate that the "logic of the holding in Gertz" might require that plaintiff prove not only that it was reasonable for the recipient of the communication to believe that it referred to plaintiff, but also that it was unreasonable for the defendant to have used words that permitted that inference. Restatement (Second) of Torts § 580B, comment d (1977). New Mexico law does not contain such a negligence requirement and the relevant New Mexico instruction continues to permit a finding that the communication was "concerning the plaintiff" even if the defendant did not act unreasonably in permitting the recipient of the communication to reach that conclusion. UJI 13-1005.

In sum, a private plaintiff must always prove at least negligence on the part of the defendant in failing to determine that the communication was false and in permitting the publication at all, but need not always establish negligent failure to realize that the communication was defamatory or negligence in creating the erroneous but reasonable belief that the plaintiff was the subject of the communication. These instructions reflect the current New Mexico law rather than the opinions expressed in the Restatement.

ANNOTATIONS

Unanticipated interception of writing by third person. — Publication, or negligent communication, does not occur where the writing is sent only to the person defamed and a third person intercepts and reads it before it reaches the person defamed. Chico v. Frazier, 106 N.M. 773, 750 P.2d 473 (Ct. App. 1988).

13-1010. Actual injury and compensatory damages.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for the actual injury caused by the defamatory communication.

Plaintiff claims and has the burden of proving that the defamatory communication caused one or more of the following injuries:

[(1) Loss of business profits] [;] [and]

[(2) Loss of salary] [;] [and]

[(3) Loss of the sale of plaintiff's stock] [;] [and]

[(4) Out-of-pocket expenses for _____] [;] [and]

[(5) Harm to plaintiff's good name and character among [his] [her] friends, neighbors and acquaintances] [;] [and]

[(6) Harm to plaintiff's good standing in the community] [;] [and]

[(7) Personal humiliation] [;] [and]

[(8) Mental anguish and suffering] [;] [and]

[(9) _____]

The cause of an injury is that which in a natural and continuous sequence unbroken by an independent intervening cause produces that injury, and without which the injury would not have occurred. It need not be the only cause, nor the last, nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which, in combination with it, causes the injury.

In determining the amount of damages, you may only award money to compensate for the above-listed actual injuries proved by the plaintiff to have been suffered by [him] [her]. It is not necessary for plaintiff to present evidence which assigns an actual dollar value to the injuries. In determining compensation for plaintiff's actual injuries, if any, you should follow your conscience as impartial jurors, using calm and reasonable judgment and being fair to all parties.

USE NOTE

This instruction states the measure for determining compensatory damages in all defamation actions. It encompasses only those elements of actual damages, both general compensatory damages and special damages, which are proven at trial. The instruction omits reference to presumed damages because of the uncertainty engendered by recent decisions concerning when, if ever, New Mexico can and will permit recovery for presumed, but unproven, compensatory damages. *See* Committee Comment. The court should modify this instruction to include an award of presumed damages only if it is convinced that under the facts presented, New Mexico would permit an award of presumed damages in circumstances in which the United States Supreme Court would permit such an award.

The listed types of actual damages are illustrative only. The court should tailor this portion of the instruction to the instruction tendered by the plaintiff at trial.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — The appropriate measure of compensatory damages in defamation actions is still evolving. In the past, New Mexico authorized an award of damages which could be "presumed to have resulted from" the defamatory communication. *See* UJI Civ. 10.19 (Repl. 1980). In 1973, however, the United States Supreme Court held that even when a private plaintiff sued for defamation, "the States may not permit recovery of presumed . damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of truth [because] the States have no substantial interest in securing . . . gratuitous awards of money damages far in excess of any actual injury". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). The New Mexico Supreme Court adopted this approach, limiting awards of compensatory damages to actual damages in accordance with the decision in *Gertz. Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). In 1984, a divided United States Supreme Court held that a state could allow recovery of presumed damages by a private plaintiff so long as the subject of the defamation did not involve a matter of "public concern". *Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). The opinion permits but does not compel states to allow awards of presumed damages in such cases.

The New Mexico Supreme Court has not yet determined whether New Mexico will return to the former law authorizing presumed damages in cases involving a private plaintiff and defamatory statements not of public concern. This instruction reflects the law in *Gertz* and *Marchiondo*. It is not intended to foreclose debate concerning the law of presumed damages New Mexico might hereafter adopt in light of the *Dun & Bradstreet* decision.

This instruction limits awards of compensatory damages to "actual injury" suffered by the plaintiff. The phrase has been partially defined by the United States Supreme Court, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and the New Mexico Supreme Court has adopted the description used in *Gertz*. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982).

We need not define "actual injury", as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). [Revised, effective March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in Item (5) of the second paragraph and in the first sentence of the last paragraph.

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The word "proximately" was deleted before the word "cause" in the first and second paragraphs and the word "proximate" has been deleted from the next to last paragraph of this instruction. The last paragraph of the committee comment has also been deleted.

Recovery by private defamation plaintiffs is limited to actual damages. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982).

Private defamation plaintiff must plead and prove special damages in order to recover them. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982).

Special damages encompass only pecuniary loss pleaded and proved with specificity. Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981).

Verdict for plaintiff need not award damages. — Rule 13-1002 and this rule, read together, establish a two-step process under which the jury first determines whether the defendant is liable for defamation and then decides the amount of damages to be awarded. The jury instructions do not require a plaintiff to prove that her injuries have a monetary value as part of her case. Therefore, a verdict for the plaintiff but awarding the plaintiff no damages is not, as a matter of law, a verdict for the defendant. Cowan v. Powell, 115 N.M. 603, 856 P.2d 251 (Ct. App. 1993).

13-1011. Punitive damages.

If you find that plaintiff should recover actual damages, and if you further find clear and convincing evidence that the publication of the communication by defendant was made with knowledge of its falsity or with a reckless disregard for whether it was false or not, then you may award punitive damages.

Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must

be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

Clear and convincing evidence is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the actual damages and injury and not disproportionate to the circumstances.

USE NOTE

The requirement that clear and convincing evidence must support a verdict for punitive damages and the explanation of that standard of proof should be given here even if it was given in UJI 13-1009 in order to assure that the jury focuses on the enhanced burden of proof that must be met if punitive damages are to be awarded.

Committee comment. — This instruction imposes the requirement of proof of knowledge of falsity or reckless disregard for truth or falsity in all cases in which punitive damages are sought. Current New Mexico law compels this standard. Marchiondo v. Brown, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). However, Marchiondo relied upon its interpretation of Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) as requiring such a standard in all cases. 98 N.M. at 402, 649 P.2d at 470. The United States Supreme Court has recently distinguished Gertz and now permits states to award punitive damages to private plaintiffs who are the subject of defamation on a matter not of public concern even in the absence of malice as defined in Gertz. Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). New Mexico has not yet decided whether it will take advantage of the opportunity provided by the decision in Dun & Bradstreet to modify the existing law of New Mexico. This instruction mirrors the existing New Mexico law.

The instruction includes a statement that malice must be proven by clear and convincing evidence. The United States Supreme Court mandates that this standard of proof of malice be met. New York Times Co. v. Sullivan, 376 U.S. 254, 285-286, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The definition of "clear and convincing" evidence is that previously used in other civil actions, UJI Civ. 10.17 (Repl. 1981), and now given in UJI 13-1009 when plaintiff must show malice in order to establish a prima facie case.

ANNOTATIONS

Punitive damages not recoverable absent actual malice. — Punitive damages are not recoverable in actions by private persons against a media defendant if the defendant was merely negligent in failing to ascertain the falsity of the defamatory communication, and in the absence of proof of actual malice. Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981).

What damages available. — The law restricts compensation to actual and special damages. Punitive damages are recoverable only if there is proof that the publication was made with actual malice (knowledge of falsity or reckless disregard of the truth). Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Intoxication of automobile driver as basis for awarding punitive damages, 33 A.L.R.5th 303.

13-1012. Qualified privilege: Abuse of qualified privilege.

A communication is normally privileged when it consists of a good faith publication in the discharge of a public or private duty. There exists in the law a qualified privilege for communications such as the communication involved in this action. Consequently, for defendant to be liable to plaintiff, plaintiff must prove that defendant abused the privilege. Defendant abused the privilege if one of the following occurred:

[Defendant knew the statement was false] [or]

[Defendant acted with reckless disregard for the truth or falsity of the statement] [or]

[Defendant published the communication for an improper purpose] [or]

[Defendant published the communication to a person to whom it was not reasonably necessary to publish it in order to accomplish the proper purpose for which the communication was made] [or]

[Defendant published the communication when it was not reasonably necessary to do so to accomplish the proper purpose for which the communication was made] [or]

[Defendant did not believe, or did not have reasonable cause to believe, that the communication was true] [or]

[....]

USE NOTE

The trial judge decides as a matter of law whether a qualified privilege exists: "The question whether an occasion gives rise to a qualified privilege is one for the court as an issue of law". Stewart v. Ging, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958). If the judge decides that a qualified privilege exists, "the question whether it was abused . is ordinarily for the jury". Id. at 274-275, 327 P.2d at 336. However, "where but one conclusion can be drawn from the the evidence", the court may determine as a matter of law that the privilege has been abused or that it constitutes a defense to the action. Id. at 275, 327 P.2d at 337; Mahona-Jojanto, Inc. v. Bank of N.M., 79 N.M. 293, 295, 442 P.2d 783, 785 (1968). Thus, this instruction is to be given only when the court concludes as a matter of law that the facts give rise to a qualified privilege, and further concludes that there is a question of fact concerning whether the privilege has been abused.

The judge should select only those bracketed statements which are relevant to the evidence presented at trial. The listed occasions for finding an abuse of privilege are not intended to be exclusive. If appropriate, the court might conclude that additional or alternative grounds for proving abuse of privilege should be presented to the jury.

Committee comment. — The first sentence of this instruction, defining generally the circumstances giving rise to a qualified privilege, is derived from Bookout v. Griffin, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982) and Zuniga v. Sears, Roebuck & Co., 100 N.M. 414, 417, 671 P.2d 662, 665 (Ct. App.), cert. denied, 100 N.M. 439, 671 P.2d 1150 (1983). In these cases, the courts have omitted language found in an earlier case which defined the privilege as "one consisting of a good-faith publication in the discharge of a public or private duty when the same is legally or morally motivated". Mahona-Jojanto, Inc. v. Bank of N.M., 79 N.M. 293, 295-296, 442 P.2d 783, 785-786 (1968) (emphasis added). This instruction follows the lead of the current cases by omitting the general references to legal and moral motives. Instead, the instruction lists with specificity the circumstances and motives which, when present, would constitute an abuse of privilege.

The court determines as a matter of law that a qualified privilege exists. Stewart v. Ging, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958). This instruction informs the jury of the existence of the qualified privilege and assigns the burden of proof to the plaintiff to demonstrate that the privilege has been abused and thus is inapplicable. See Zuniga v. Sears, Roebuck & Co., 100 N.M. 414, 418, 671 P.2d 662, 666 (Ct. App.), cert. denied, 100 N.M. 439, 671 P.2d 1150 (1983) (defendant with qualified privilege entitled to judgment because "[p]laintiff has raised no factual issue that [defendant] abused the privilege"); Sokolay v. Edlin, 65 N.J. Super. 112, 124-25, 167 A.2d 211, 217-218 (App. Div. 1961).

The first two listed grounds for overcoming a qualified privilege describe conduct which is malicious as defined by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Proof of this form of malice is sufficient to overcome a qualified privilege. Restatement (Second) of Torts § 600 (1977).

The third, fourth and fifth listed grounds which would constitute an abuse of privilege are derived from longstanding New Mexico precedent, Mahona-Jojanta, Inc. v. Bank of N.M., 79 N.M. 293, 442 P.2d 783 (1968), the continuing validity of which has not been questioned.

The final specific ground is derived from the same precedent and has been reaffirmed in dictum in more recent decisions. E.g., Bookout v. Griffin, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982) ("The privilege is abused if a person said to be privileged lacks the belief, or reasonable grounds to believe, the truth of the alleged defamation"). New Mexico courts may reconsider this issue. Negligence, at least, must be proven in all defamation cases. Gertz v. Robert Welch, Inc., 418 U.S. 322, 347-348, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). The plaintiff, therefore, will necessarily have proven that the defendant lacked reasonable grounds to believe that communication was true as part of the plaintiff's prima facie case. See UJI 13-1009. If the same proof of negligence always overcame a qualified privilege, the doctrine of qualified privilege would be moot; defendant need rely on a qualified privilege only if plaintiff has proven a prima facie case, but the proof of negligence in the prima facie case would also serve to negate the qualified privilege. See Sack, Libel, Slander and Related Problems, p. 442 (1980).

Many states have reconsidered the proof necessary to overcome qualified privilege and have concluded that proof of malice rather than proof of negligence is required to demonstrate abuse of privilege. See, e.g., Rogozinski v. Airstream, 377 A.2d 807 (N.J. 1977); Jacron Sales Co., Inc. v. Sindorf, 350 A.2d 807 (N.J. 1977); Jacron Sales Co., Inc. v. Sindorf, 350 A.2d 688 (Md. 1976). This is the position taken in the Restatement of Torts. Restatement (Second) of Torts §§ 600 and 601 (1977). In contrast, at least one state has declined to change its existing law, and continues to provide that proof of negligence is sufficient to overcome qualified privilege. Banas v. Matthews International Corp., 502 A.2d 637 (Pa. Super. 1985). In the absence of contrary precedent, this instruction follows Bookout. [As revised, November 1, 1991.]

ANNOTATIONS

Slander of title. — Where the defendant and the plaintiff each sought to use a water well that was located on federal land and associated water rights; the defendant sent letters to the Bureau of Land Management and the Office of the State Engineer which disparaged the plaintiff’s entitlement to use the well and associated water rights; the ownership of the well and the status of water rights associated with the well were unclear, the defendant’s letters were conditionally privileged because the information affected substantial public and private interests and was of service in addressing those public and private interests. Gregory Rockhouse Ranch, LLC v. Glenn’s Water Well Service, Inc., 2008-NMCA-101, ____ N.M. ____, ____ P.3d ____, cert. denied, 2008-NMCERT-____.

Nature of communication. — Intra-corporate communication, although not subject to an absolute privilege, is possibly subject to a qualified privilege. Hagebak v. Stone, 2003-NMCA-007, 133 N.M. 75, 61 P.3d 201.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Libel and slander: reports of pleadings as within privilege for reports of judicial proceedings, 20 A.L.R.4th 576.

13-1013. Defense of truthfulness.

[Truth is a defense to this action.

To establish the defense of truth, defendant must prove that the statement was substantially true, which means that the statement was true in all material particulars.]

USE NOTE

This instruction informs the jury that the defendant has the burden of proving truth as a defense to a defamation action. It is contradictory to UJI 13-1006 which assigns to the plaintiff the burden of proving falsity as part of plaintiff's prima facie case. This instruction is used instead of UJI 13-1006 when the judge determines that the plaintiff is a private figure who is suing a media defendant for publication of defamatory matter not of public concern. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). When this instruction is given in lieu of UJI 13-1006, the court should modify UJI 13-1002(B), (C) and (D) to reflect the placement of the burden of proof of falsity upon the defendant.

The trial judge should determine whether a matter is one of private or public concern, just as the judge must determine whether a plaintiff is a public official or public figure as a matter of law. See Marchiondo v. Brown, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982). Criteria for determining when the communication is a matter of public concern are contained in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 2947, 86 L. Ed. 2d 593 (1985).

Committee comment. — In New Mexico, the common law rule has been that truth is an affirmative defense to a defamation action which the defendant has the burden of pleading and proving. Eslinger v. Henderson, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969); Franklin v. Blank, 86 N.M. 585, 588, 525 P.2d 945, 948 (Ct. App. 1974). The United States Supreme Court has displaced the common law rule in many instances and requires that plaintiff bear the burden of proof of falsity when the plaintiff is a public official, Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), or a public figure. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 1563, 89 L. Ed. 2d 783 (1986). Where the plaintiff is a private figure, but the alleged defamation involves a matter of public concern, the plaintiff also must establish that the defamatory publication is false. Id.

The United States Supreme Court has not yet mandated that states impose the burden of proof of falsity upon private figure plaintiffs who assert that they were defamed in a communication which is not a matter of public concern. In such cases, therefore, New

Mexico's common law rule has not been displaced. The defendant bears the burden of proof of falsity. This instruction rather than UJI 13-1006 is proper.

13-1014. Damages; mitigation - *No instruction submitted.*

No instruction submitted.

Committee comment. — Previous uniform jury instructions contained an instruction authorizing the jury to consider several specific factors in determining whether to mitigate the amount of damages that would otherwise be awarded in a defamation action. UJI Civ. 10.22 (Repl. 1980). There is no New Mexico precedent authorizing or compelling the use of such an instruction. Id. Committee Comment. The committee is of the opinion that such an instruction is no longer necessary. Several of the factors listed in the previous instruction focused on the defendant's reliance on a source of information. These are now an integral part of the determination of whether defendant acted wrongfully and is thus subject to any liability to the plaintiff. UJI 13-1009. To repeat them as factors that could lead to mitigation of otherwise appropriate damages would unduly concentrate the jury's attention on those factors.

In addition, the previous instruction listed apologies or retractions by the defendant as well as the prior bad reputation of the defendant as factors that might mitigate damages. UJI Civ. 10.22 (5) and (7) (Repl. 1980). These issues are relevant to the determination of the amount of actual damages suffered by the plaintiff to his reputation and thus are now an integral part of the initial determination of damages. Because presumed damages are no longer authorized, see UJI 13-1010, there is no need to ask the jury to reduce the amount of damages otherwise recoverable because of these factors.

APPENDICES

APPENDIX 1. Chart Of Plaintiff's Prima Facie Case.

In drafting the jury instructions for defamation actions the committee had to distinguish those issues in the plaintiff's prima facie case which the trial judge would decide from those which the jury would decide. Set out below is the committee's effort to summarize the issues of a defamation case. Those issues set out in boxes normally are issues for the jury to decide. The issues set out without boxes are for the judge to decide. The trial judge can, of course, rule on any issue normally reserved for the jury when as a matter of law there is no genuine issue of material fact for the jury to resolve.

The falsity issue is set out in a dashed box to remind the judge and counsel that while truth or falsity is for the jury to decide, it is sometime plaintiff's burden and sometime defendant's burden.

Defamation — Prima Facie Case

Appendix 2. Defamation: Public Official v. Media.

Plaintiff is a candidate for a second term as United States senator from New Mexico. The Clovis Daily Rag prints a news story which states the following:

Senator Jehosaphatt may have received $20,000 from the Excelsior National Bank in exchange for obtaining for the bank its charter as a national banking corporation. Senator Jehosaphatt's personal checking account in a Santa Fe bank reflects that six (6) months before the bank was awarded its charter, Senator Jehosaphatt's account showed a deposit of $20,000. When questioned about the deposit, the senator stated that he often deposited large sums of money in his personal checking account from his private investments and that this must have been the proceeds from the sale of a private asset. Although no private asset could be found which Senator Jehosaphatt sold near the date of the deposit, it is known that Senator Jehosaphatt and George Jacobson, President of the Excelsior National Bank, have been longtime friends and political associates, and that Senator Jehosaphatt is the owner of 20,000 shares of the bank's capital stock.

Senator Jehosaphatt was not reelected in his bid for a second term. Following a recount of the ballots which confirmed Senator Jehosaphatt's loss to his opponent in the general election, the senator sued the local newspaper for $2,000,000 in damages, claiming loss of reputation, loss of standing in the community and loss of his salary as a United States senator for the term for which he was defeated.

A suggested set of the libel and slander instructions, in recommended sequence, in outline form, illustrates the format as follows:

INSTRUCTIONS

13-1001. Defamation: Defined.

Defamation is a wrongful injury to a person's reputation.

13-1002. Defamation action: Prima facie case; general statement of the elements.

(A) The plaintiff claims that the following communication was defamatory and entitles the plaintiff to recover damages:

Senator Jehosaphatt may have received $20,000 from the Excelsior National Bank in exchange for obtaining for the bank its charter as a national banking corporation. Senator Jehosaphatt's personal checking account in a Santa Fe bank reflects that six (6) months before the bank was awarded its charter, Senator Jehosaphatt's account showed a deposit of $20,000. When questioned about the deposit the senator stated that he often deposited large sums of money in his personal checking account from his private investments and that this must have been the proceeds from the sale of a private asset. Although no private asset could be found which Senator Jehosaphatt sold near the date of the deposit, it is

known that Senator Jehosaphatt and George Jacobson, President of the Excelsior National Bank, have been longtime friends and political associates, and that Senator Jehosaphatt is the owner of 20,000 shares of the bank's capital stock.

(B) To establish the claim of defamation on the part of defendant, the plaintiff has the burden of proving each of the following contentions:

(1) The communication contains a statement of fact; and

(2) The statement of fact was false; and

(3) The communication was defamatory; and

(4) The persons receiving the communication understood it to be defamatory; and

(5) The defendant acted with malice; and

(6) The communication caused actual injury to plaintiff's reputation.

(C) The defendant denies the contentions of the plaintiff.

(D) Related to the claims, plaintiff contends and has the burden of proving that he is entitled to punitive damages. To be entitled to punitive damages plaintiff must prove that the publication of the communication by defendant was made with knowledge of falsity or reckless disregard for whether it was false or not. This contention is denied by defendant.

(E) After considering the evidence and these instructions as a whole, you are to determine the following questions:

(1) Did the communication contain a statement of fact?

(2) Was the communication false?

(3) Was the communication defamatory?

(4) Did the people receiving the communication understand it to be defamatory?

(5) Did the defendant act with malice?

(6) Did the communication cause actual injury to plaintiff's reputation? If you decide that the answer to any of these questions is "No", you shall return a verdict for the defendant and against the plaintiff. If you decide that the answer to

each of the questions presented is "Yes", then you shall determine the amount of money that will compensate plaintiff for the injuries and damages in accordance with the instructions which follow, and shall return a verdict for the plaintiff in the amount you determine.

13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.

It is a general rule in civil cases that a party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence. To prove by the greater weight of the evidence means to establish that something is more likely true than not true. When I say, in these instructions, that the party has the burden of proof on a claim of defamation, I mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient. An exception to the general rule is that on the claims of malice and entitlement to punitive damages a higher degree of proof is required. On these claims plaintiff has the burden of proving his claims by clear and convincing evidence.

13-1004. Statement of fact: Fact defined; opinion contrasted.

To support a claim for defamation, the communication by defendant must contain a statement of fact.

In contrast, statements of opinion alone cannot give rise to a finding of defamation.

However, an opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact. In deciding whether the communication is or contains a statement of fact, you should consider the following:

(A) The entirety of the communication and the context in which the communication was made; and

(B) Whether reasonable persons would be likely to understand the communication to be a statement of the defendant's opinion or a statement of fact.

13-1006. Falsity: defined.

To support a claim for defamation, the communication must be false. One or more statements of fact in the communication must be false in a material way. Insignificant inaccuracies of expression are not sufficient.

13-1007. Defamatory communication: defined.

To support a claim for defamation, a communication must be defamatory.

Defamatory communications are those which tend to expose a person to contempt, to harm the person's reputation, or to discourage others from associating or dealing with him.

In deciding whether the communication was defamatory, you must consider its plain and obvious meaning.

In determining whether the communication was defamatory, you may consider whether there are other facts in evidence known to the person to whom the communication was published which, when taken into consideration with the communication, gave it a defamatory meaning.

13-1008. Defamatory meaning understood.

To support a claim for defamation, the defamatory meaning of the communication must be understood by the person to whom it was communicated.

The defamatory meaning of a communication is that which the recipient reasonably understands it was intended to express. It is what the recipient of the communication reasonably understood the meaning to be that controls, not what the defendant may have intended to convey.

13-1009. Wrongful act: defined.

To support a claim for defamation, the defendant must have acted with malice when defendant published the communication.

Defendant acted with malice if the publication was made by defendant with knowledge that it was false or with a reckless disregard for whether it was false or not. Reckless conduct is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

In order for you to find such knowledge of falsity or reckless disregard for whether it was false, the evidence must be clear and convincing. "Clear and convincing evidence" is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

13-1801. Liability must be determined before damages.

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

13-1010. Actual injury and compensatory damages.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for the actual injury caused by the defamatory communication.

Plaintiff claims and has the burden of proving that the defamatory communication caused one or more of the following injuries:

(1) Loss of salary; and

(2) Out of pocket expenses for moving; and

(3) Injury to plaintiff's good name and character among his friends, constituents, neighbors and acquaintances; and

(4) Injury to plaintiff's good standing in the community; and

(5) Personal humiliation; and

(6) Mental anguish and suffering.

The cause of an injury is that which in a natural and continuous sequence unbroken by an independent intervening cause produces that injury, and without which the injury would not have occurred. It need not be the only cause, nor the last, nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which, in combination with it, causes the injury. In determining the amount of damages, you may only award money to compensate for the above listed actual injuries proved by the plaintiff to have been suffered by him. It is not necessary for plaintiff to present evidence which assigns an actual dollar value to the injuries.

In determining compensation for plaintiff's actual injuries, if any, you should follow your conscience as impartial jurors, using calm and reasonable judgment and being fair to all parties.

13-1011. Punitive damages.

If you find that plaintiff should recover actual damages, and if you further find clear and convincing evidence that the publication of the communication by defendant was made with knowledge of its falsity or with a reckless disregard for whether it was false or not, then you may award punitive damages.

Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

Clear and convincing evidence is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the actual damages and injury and not disproportionate to the circumstances.

13-307. Rules of evidence.

The evidence which you are to consider in this case consists of the testimony of the witnesses and the exhibits admitted into evidence by the court and any facts admitted or agreed to by counsel. The production of evidence in court is governed by the rules of law. From time to time it has been my duty, as judge, to rule on the evidence; you must not concern yourselves with the reasons for these rulings. You should not consider what would or would not have been the answers to the questions which the court ruled could not be answered.

13-2004. Witness impeached.

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.

If you believe that any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness only such credit as you may think it deserves.

13-2001. Performance of your duties.

Faithful performance by you of your duties is vital to the administration of justice.

13-2002. Duty to follow instructions.

The law of this case is contained in these instructions and it is your duty to follow them. You must consider these instructions as a whole, not picking out one instruction or parts thereof, and disregarding others.

13-2003. Jury sole judges of witnesses.

You alone are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account the witness' ability and opportunity to observe, memory, manner while testifying, any interest, bias or prejudice the witness may have and the reasonableness of the testimony, considered in light of all the evidence in the case.

13-1903. Jury duty to consult.

In deliberating on this case, it is your duty, as the jurors, to consult with one another and to decide the case only after an impartial consideration of the evidence. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Remember that you are not partisans but judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

13-2005. Jury sole judges of facts.

You are the sole judges of all disputed questions of fact in this case. It is your duty to determine the true facts from the evidence produced here in open court. Your verdict should not be based on speculation, guess or conjecture.

You are to apply the law, as stated in these instructions, to the facts as you find them and, in this way, decide the case. Neither sympathy nor prejudice should influence your verdict.

13-2006. All jurors to participate.

The jury acts as a body. Therefore, on every question which the jury must answer it is necessary that all jurors participate regardless of the vote on another question. Before a question can be answered, at least five of you must agree upon the answer; however, the same five need not agree upon each answer.

13-2007. Closing arguments.

After these instructions on the law governing this case, the lawyers may make closing arguments, or statements, on the evidence and the law. These summaries can be of considerable assistance to you in arriving at your decision and you

should listen carefully. You may give them such weight as you think proper. However, neither these final discussions nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in these instructions.

13-2008. No damages unless liability.

You are not to discuss damages unless you have first determined that there is liability.

13-2009. Verdict of _____.

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.

When as many as five of you have agreed upon a verdict, your foreperson must sign the appropriate form and you will all then return to open court.

13-2201. Verdict for plaintiff; single parties.

We find for the plaintiff in the sum of $_____

13-2202. Verdict for defendant; single parties.

We find for the defendant.

_____

Foreperson

[As amended, effective November 1, 1991; March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The word "proximately" was deleted before the word "cause" in the first and second paragraphs of the sample instruction for 13-1010 NMRA and the word "proximate" has been deleted from the next to last paragraph of the sample instruction for UJI 13-1010 NMRA.

CHAPTER 11
Medical Negligence

Introduction

The instructions in this chapter address the basic elements of a medical negligence (malpractice) action against health care providers in any field of practice, *e.g.,* doctors of medicine, doctors of osteopathy, dentists, podiatrists, or chiropractors. While the term "doctor" is used in reference to all practitioners, health care providers should be referenced by specific designation where "doctor" is inappropriate. These instructions also apply to medical negligence actions against a hospital or other health care facility.

This chapter is designed to contain all the instructions necessary to instruct a jury on the basic elements of liability in a medical negligence case. Other general instructions as well as damage instructions should be combined with these instructions. UJI 13-1125 and 13-1126 provide the special interrogatories regarding future and past medical care and benefits called for by Sections 41-5-6 and 41-5-7 of the Medical Malpractice Act.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, rewrote the introduction.

13-1101. Duty of doctor or other health care provider.

In [treating] [operating upon] [making a diagnosis of] [caring for] a patient,

_____ *(name of defendant)* is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified [doctors] [_____ s *(other health care provider)*] practicing under similar circumstances, giving due consideration to the locality involved. A [doctor] [_____ *(other health care provider)*] who fails to do so is negligent.

[The only way in which you may decide whether the [doctors] [_____ s *(other health care provider)*] in this case possessed and applied the knowledge and used the skill and care which the law required of [him] [her] is from evidence presented in this trial by [doctors] [_____ s *(other health care provider)*] testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.]

USE NOTE

The name of the defendant should be inserted in the first blank. In the other blanks, the type of health care provider, such as doctor, nurse, or chiropractor, should be inserted. Bracketed language should be chosen as appropriate. The bracketed final paragraph should be omitted in those cases in which the court determines that expert testimony is not required and negligence can be determined by resort to common knowledge ordinarily possessed by the average person.

This instruction sets forth the general standard of care applicable to a medical professional. Where the defendant held himself or herself out as a specialist, UJI 13-1102 should be used instead of this instruction.

[As amended, effective January 1, 1987; November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — This chapter was revised in 1997 because, in the Committee's view, there had been sufficient development of the law and sufficient experience with the existing instructions to justify overall revisions to update and improve the medical malpractice instructions generally. Substantial comment from the bar was considered in revising these instructions.

The revised medical negligence instructions make a number of basic changes from the prior instructions covering the same subject. These basic changes include:

1. The terms "doctor," "physician," and "defendant" were used interchangeably throughout the prior instructions. A single term "doctor" has been substituted for simplicity and uniformity. Similarly, "plaintiff," "person," and "patient" as used in the prior instructions have been replaced with the single term "patient." If the existence of a physician-patient relationship is an issue for jury determination and the court is concerned that reference to the parties as "doctor" and "patient" may be misleading to the jury, the court has the power pursuant to NMRA 1-051(D) to modify this and other instructions to refer to the parties as "plaintiff" and "defendant," by their proper names, or in other appropriate terms.

2. The term "malpractice" is no longer used. This term adds nothing to a jury's understanding of either a physician's responsibilities or a patient's rights. On the other hand, labeling this area of negligence with a term such as "malpractice" injects an element which carries with it the preconceptions of those who read or hear it. Hence, it has been eliminated. The change in no way alters the applicable standard of care which, as the instruction makes clear, in most cases is a professional standard defined by expert witnesses.

3. Reference to reasonably well-qualified practitioners in "the same field of medicine" as the defendant, previously included in the statement of the standard of care, has been eliminated. The phrase was included in the prior instruction to make clear that a physician is to be judged by the standard of care that exists in that physician's field of practice such as medicine, chiropractic medicine, or osteopathy. It was not intended to

define the kind of physician who may testify as an expert in a malpractice case. That is not a jury question but one for the trial court, which must rule on whether an expert witness is qualified to testify in a case. *See* NMRA 11-702. In practice, however, the phrase was used in argument and often considered by the jury to mean that a physician could be judged only by the testimony of another physician practicing in the same specialty. This is contrary to New Mexico law. *See Vigil v. Miners Colfax Med. Ctr.,* 117 N.M. 665, 670, 875 P.2d 1096, 1101 (Ct. App.), *cert. denied sub nom. Vigil v. Tiku,* 117 N.M. 744, 877 P.2d 44 (1994); *Blauwkamp v. University of N.M. Hosp.,* 114 N.M. 228, 233, 836 P.2d 1249, 1254 (Ct. App.), *cert. denied,* 114 N.M. 82, 835 P.2d 80 (1992). Additionally, in many areas of medicine, physicians from different fields of medicine perform essentially the same procedures using the same standard of practice. Consequently, to include the phrase "the same field of medicine" places an issue before the jury that does not exist under the law. To the extent any differences between the field of practice of a qualified expert and that of the defendant go to the weight of the expert's testimony, another uniform instruction informs the jury that it is their prerogative to determine the weight to be given to the testimony of an expert witness. *See* UJI Civ. 13-213.

4. While this chapter of the Uniform Jury Instructions is intended to be complete with respect to the basic elements of liability, other instructions from the general negligence chapter may be applied in the medical negligence area as the law evolves and the circumstances make it appropriate.

5. The final paragraph is included in brackets to make it clear that expert testimony is not required if the jury can decide the matter based on its common knowledge without the need for medical or scientific expertise.

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the instruction and in the Use Note.

The 1997 amendment, effective August 15, 1997, in the first paragraph, substituted "a patient" for "the defendant", substituted the blank for the name of the defendant for "the defendant doctor (or other health care provider(s) by specific designation)", substituted "[doctors] [_____ s (other health care provider)]" for "doctors (or other health care provider(s) by specific designation) of the same field of medicine (or practice) as that of the defendant", and rewrote the last sentence which read "A failure to do so would be a form of negligence that is called malpractice"; in the second paragraph, substituted "[doctors] [_____ s (other health care provider)] in this case" for "defendant", inserted the blank following "doctors", and substituted "provider" for "provider(s) by specific designation"; and rewrote the Use Note.

"Malpractice" is departure from recognized standards of medical practice in the community. Smith v. Klebanoff, 84 N.M. 50, 499 P.2d 368 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Recovery for "loss of chance." — New Mexico recognizes the doctrine of "lost chance," i.e., that a patient can recover in a medical malpractice action for negligence that results in the loss of a chance for a better outcome; however, to prevail on such a theory, a patient must prove all the elements of negligence, including causation, and specifically must prove that there was indeed a window of time during which action might have produced the superior outcome. Alberts v. Schultz, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279.

Law reviews. — For note, "The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance - *Alberts v. Schultz,*" see 30 N.M.L. Rev. 387 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 159, 201, 202 and 262.

75A Am. Jur. 2d Trial §§ 1190, 1226; 75B Am. Jur. 2d Trial § 1662.

Homicide: liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 100 A.L.R.2d 769.

Instruction as to exercise or use of injured member, 99 A.L.R.3d 901.

Modern status of "locality rule" in malpractice action against physician who is not a specialist, 99 A.L.R.3d 1133.

Administering or prescribing drugs for weight control, 1 A.L.R.4th 236.

Physician's liability for causing patient to become addicted to drugs, 16 A.L.R.4th 999.

Medical malpractice: instrument breaking in course of surgery or treatment, 20 A.L.R.4th 1179.

Physician's negligence in conducting or reporting physical examination as rendering him liable to third person relying thereon, 24 A.L.R.4th 1310.

Applicability of res ipsa loquitur in case of multiple medical defendants - modern status, 67 A.L.R.4th 544.

Liability of osteopath for medical malpractice, 73 A.L.R.4th 24.

"Dual capacity doctrine" as basis for employee's recovery for medical malpractice from company medical personnel, 73 A.L.R.4th 115.

Liability for medical malpractice in connection with performance of circumcision, 75 A.L.R.4th 710.

Liability for dental malpractice in provision or fitting of dentures, 77 A.L.R.4th 222.

Liability of chiropractors and other drugless practitioners for medical malpractice, 77 A.L.R.4th 273.

Liability of hospital, physician, or other medical personnel for death or injury to child caused by improper postdelivery diagnosis, care, and representations, 2 A.L.R.5th 811.

Homicide: liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 50 A.L.R.5th 467.

II. CONSIDERATION OF LOCALITY.

Consideration of locality by fact finder. — Under this instruction (former UJI 11.1), due consideration must be given by the fact finder to the locality involved and the ways, if any, in which it differs from the locality about which the expert testifies, but this is merely one factor for the fact finder to consider. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589, aff'd in part and rev'd in part, 90 N.M. 764, 568 P.2d 600 (Ct. App. 1976).

III. TESTIMONY BY EXPERT WITNESSES.

Instruction inappropriate for specialists. — The rationale underlying UJI 13-1102 is that a specialist is expected to have a certain base of knowledge in common with general practitioners, plus additional knowledge in the area of specialty, and is therefore held to a higher standard than a general practitioner. Thus, defendants who hold themselves out as medical specialists should be held to a specialist standard of care and receive UJI 13-1102 and not this instruction. Vigil v. Miners Colfax Medical Ctr., 117 N.M. 665, 875 P.2d 1096 (Ct. App. 1994).

Expert testimony provides standards owed by physician to patient. — Evidence of the standard of knowledge, skill and care owed by a physician to his patient can be provided by expert testimony of the knowledge, skill and care ordinarily used by reasonably well-qualified doctors of the same field of medicine practicing under similar circumstances, and this includes testimony from doctors from the same or other localities. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589, aff'd in part and rev'd in part, 90 N.M. 764, 568 P.2d 600 (Ct. App. 1976).

Use of expert medical testimony should be employed when the trial court reasonably decides that it is necessary to properly inform the jurors on the issues, and this includes establishing the standard of care, treatment and information by which the actions of the physician are to be judged, the manner in which he measures up to the

standard and whether his alleged acts were the proximate cause of the injuries involved. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978).

Expert testimony of standard of care. — Testimony of several doctors, that the diagnosis of abdominal injuries was taught in medical schools for many, many years, and was of long standing, that the method of diagnosis did not vary from town to town in New Mexico, and that diagnostic tests and examinations would be the same in any community in New Mexico, shows that the doctors gave due consideration to the locality involved, and they were qualified to testify whether defendant followed the standard of care and skill required of physicians in examining, diagnosing and treating a patient suffering from blunt trauma to the abdomen to determine whether an intraabdominal injury was present. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

When expert testimony unnecessary. — Where negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required. Since manipulation of the spine which resulted in four fractured ribs is not a condition peculiarly within the knowledge of medical men, it is not necessary for an expert witness to testify concerning whether or not defendant used the necessary skill and care, in view of the injuries suffered and the testimony regarding the origin. Mascarenas v. Gonzales, 83 N.M. 749, 497 P.2d 751 (Ct. App. 1972).

13-1102. Duty of specialist.

_____ *(name of defendant),* who held [himself] [herself] out as a specialist in _____ *(area of specialty),* having undertaken to [treat] [operate on] [make diagnosis of] [care for] a patient in this specialized field, is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified specialists practicing under similar circumstances, giving due consideration to the locality involved. A doctor who fails to do so is negligent.

[The degree of knowledge, skill, and care required of a specialist is usually higher than that required of a non-specialist, but it is never lower. Specialists are responsible for a certain base of knowledge in common with general practitioners, as well as additional knowledge in the field of their specialty.]

[The only way in which you may decide whether the doctor in this case possessed and applied the knowledge and used the skill and care which the law required of [him] [her] is from evidence presented in this trial by doctors testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.]

USE NOTE

This is the standard of care instruction applicable to a specialist. UJI 13-1101 sets forth the duty of a non-specialist general practitioner. The name of the defendant should be inserted in the first blank in the first paragraph. The area of specialty should be inserted in the second blank in the first paragraph. Bracketed language should be chosen as appropriate. The bracketed middle paragraph should be omitted unless the court determines that the issues in the case require that the jury be instructed regarding a medical specialist's responsibility for basic general knowledge in areas outside the specific area of specialty. The bracketed final paragraph should be omitted in those cases in which the court determines that expert testimony is not required and negligence can be determined by resort to common knowledge ordinarily possessed by the average person.

[As amended, effective January 1, 1987; November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — The same changes made in the general instruction on standard of care have been made in this instruction. *See* UJI 13-1101, committee comment. In addition, the suggestions made by the Court of Appeals in *Vigil v. Miners Colfax Medical Center,* 117 N.M. 665, 875 P.2d 1096 (Ct. App.), *cert. denied,* 117 N.M. 744, 877 P.2d 44 (1994), are incorporated in the first and second paragraphs of the instruction. The second paragraph is intended to address the sort of situation posed by *Vigil - i.e.,* where a specialist is practicing in an area common to specialists and general practitioners and the argument might be made that the specialist, while subject to a higher standard of care in the area unique to his or her specialty, need not meet the level of skill required of a general practitioner in an area outside the specialty. Because not every malpractice claim against a specialist involves such a fact pattern, however, and because the additional language might raise a false issue where the question of a specialist's responsibility for basic general knowledge is not a part of the case, the paragraph has been bracketed for use only where the court deems it appropriate.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

The 1997 amendment, effective August 15, 1997, in the first paragraph, substituted the blank for the name of the defendant and "who held" for "The defendant, holding", substituted "a patient" for "the plaintiff", substituted "is under" for "was under", deleted "in the same field of medicine" following "specialists" near the end of the first sentence, and rewrote the last sentence which read "A failure to do so would be a form of negligence that is called malpractice"; added the second paragraph; substituted "doctor in this case" for "defendant" in the last paragraph; and rewrote the Use Note.

Specialists held to higher standard of care. — The rationale underlying this instruction is that a specialist is expected to have a certain base of knowledge in common with general practitioners, plus additional knowledge in the area of specialty,

and is therefore held to a higher standard than a general practitioner. Thus, defendants who hold themselves out as medical specialists should be held to a specialist standard of care and receive this jury instruction, not UJI 13-1101. Vigil v. Miners Colfax Medical Ctr., 117 N.M. 665, 875 P.2d 1096 (Ct. App. 1994).

"Malpractice" is departure from recognized standards of medical practice in the community. Smith v. Klebanoff, 84 N.M. 50, 499 P.2d 368 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers, § 226.

Instruction as to exercise or use of injured member, 99 A.L.R.3d 901.

Administering or prescribing drugs for weight control, 1 A.L.R.4th 236.

Standard of care owed to patient by medical specialist as determined by local, "like community," state, national, or other standards, 18 A.L.R.4th 603.

70 C.J.S. Physicians and Surgeons § 41.

13-1103. Duty to inform patient of need for another doctor.

If a treating doctor knows, or should know, that a doctor with other qualifications is needed for the patient to receive proper treatment, it is the duty of the treating doctor to tell the patient.

USE NOTE

This instruction should be given in conjunction with either UJI 13-1101 or 13-1102 when evidence is presented in support of plaintiff's claim of negligent failure to refer the patient to another health care provider.

[As amended, effective January 1, 1987.]

Committee comment. — The duty stated in this instruction is one application of the doctor's duty of communication to the patient about all aspects of the patient's medical condition and treatment. A doctor breaches this duty by failing to inform the patient that the patient's condition requires treatment which is available from specialists. Rahn v. United States, 222 F. Supp. 775 (S.D. Ga. 1963). [As revised, effective November 1, 1991.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians, Surgeons and Other Healers § 138.

13-1104A. Informed consent.

A doctor has a duty to obtain the patient's informed consent [, or the patient's representative's informed consent,] to [treatment] [an operation]. For consent to be valid, it must be based upon information which a reasonably prudent patient would need to know in deciding whether to undergo the [treatment] [operation].

USE NOTE

This instruction should be given where the patient claims lack of informed consent. *See* UJI 13-1109A NMRA for an instruction relating to lack of consent to the treatment rendered.

UJI 13-1104B NMRA must be given with this instruction. UJI 13-1104C NMRA should be given with this instruction where appropriate. Where the patient is a minor or is incapacitated, the bracketed reference to the patient's representative should be included in the instruction.

UJI 13-1116A and 13-1116B NMRA address the element of causation that is a necessary part of a claim of lack of informed consent. One of those instructions should be given with this instruction.

[Adopted effective January 1, 1987; UJI 13-1104C SCRA 1986; as amended November 1, 1991; as amended and recompiled effective August 15, 1997; approved, effective February 24, 1998; as amended by Supreme Court Order No. 08-8300-33, effective November 24, 2008.]

Committee comment. — The three instructions relating to a physician's duty to inform, evidence of compliance with that duty, and the duty to obtain informed consent, UJI 13-1104A, 13-1104B, and 13-1104C, have been rearranged so that they are presented in a more logical order. No substantive change is intended.

The New Mexico Supreme Court first discussed a doctor's duty of disclosure and the cause of action for its breach that has come to be called an action for "lack of informed consent" in *Woods v. Brumlop,* 71 N.M. 221, 377 P.2d 520 (1962). The cause of action is discussed extensively in *Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

The 1997 amendment, effective August 15, 1997, recompiled this instruction, which was formerly UJI 13-1104C, inserted "[, or the patient's representative's informed consent,]", substituted "prudent patient" for "prudent person", and rewrote the Use Note.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-33, effective November 24, 2008, in the third paragraph of the Use Note, changed "element of proximate causation" to "element of causation".

"Legal consent" means actual or express consent according to law. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978).

Failure to keep decedent's wife informed. — Jury instruction which described the duty of the physician to communicate information to "the patient or the patient's representative" did not create an independent cause of action against the physician for failing to keep decedent's wife informed of his condition. Turpie v. Southwest Cardiology Assocs., 1998-NMCA-042, 124 N.M. 787, 955 P.2d 716.

Informed consent and consent as element of battery distinguished. See Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 363 to 366.

Consent as condition of right to perform surgical operations, 76 A.L.R. 562, 139 A.L.R. 1370.

Liability of physician or surgeon for extending operation or treatment beyond that expressly authorized, 56 A.L.R.2d 695.

Physician's duty to inform patient of nature and hazards of radiation or x-ray treatments under the doctrine of informed consent, 69 A.L.R.3d 1223.

Malpractice: physician's duty, under informed consent doctrine, to obtain patient's consent to treatment in pregnancy or childbirth cases, 89 A.L.R.4th 799.

70 C.J.S. Physicians and Surgeons § 64.

13-1104B. Duty to inform.

In treating [his] [her] patient, a doctor is under the duty to communicate to the patient [, or to the patient's representative when the patient is a minor or is incapacitated,] that information which a reasonably prudent patient under similar circumstances would need to know about:

1. the patient's condition; [and]

2. the alternatives for treatment; [and]

3. the inherent and potential hazards of the proposed treatment; [and]

4. the likely result if the condition remains untreated.

The duty to inform does not require a doctor to discuss with [his] [her] patient every risk of proposed treatment no matter how small or remote. [A doctor has no duty to discuss risks which the doctor can reasonably expect to be obvious or known to the patient.]

[There is no duty to inform where reasonably well-qualified doctors, acting under similar circumstances, would reasonably conclude that informing the patient of the [condition] [inherent and potential hazards of the proposed (treatment) (operation)] would seriously endanger the patient's life or health.]

USE NOTE

This instruction should be given where there is an issue of the doctor's failure to give necessary information to the patient, including cases in which the patient alleges lack of informed consent. Where the patient is a minor or is incapacitated, the bracketed reference to the patient's representative should be included in the first paragraph. Depending on the way(s) in which the information conveyed by the doctor is alleged to be deficient, the appropriate bracketed subparts of the first paragraph should be selected.

The bracketed sentence in the second paragraph should not be used unless the jury could find that the information which the patient contends was not disclosed is information which the patient already knew or is a matter of common understanding.

The bracketed third paragraph is given only where the defendant contends and the jury could find that disclosure of a risk to the patient would endanger the patient's life or health.

Where the claim is lack of informed consent, UJI 13-1104A is to be given with this instruction.

[UJI 13-1104A SCRA 1986; as amended, effective January 1, 1987; November 1, 1991; as recompiled and amended effective August 15, 1997; February 24, 1998.]

Committee comment. — Compensable harm may be caused by the breach of the duty to inform without "informed consent" being at issue under UJI 13-1104A. For example, a doctor may negligently fail to tell a patient the nature of the patient's condition, *see* annotation at 49 A.L.R.3d 501, or the side effects of a proposed treatment that would require immediate attention, without regard to any decision to be made by the patient consenting to treatment.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

The 1997 amendment, effective August 15, 1997, recompiled this instruction, which was formerly UJI 13-1104A, inserted "or to the" and "when a patient is a minor or incapacitated" in the introductory paragraph, substituted "prudent patient" for "prudent person" in the introductory paragraph, made a gender neutral change, and rewrote the Use Note.

The 1998 amendment, effective February 24, 1998, inserted "under similar circumstances" in the introductory paragraph.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Malpractice: failure of physician to notify patient of unfavorable diagnosis or test, 49 A.L.R.3d 501.

13-1104C. Duty to inform; evidence.

What is customarily disclosed by reasonably well-qualified doctors practicing under similar circumstances is evidence of the information which ought to be communicated to the patient [or patient's representative]. However, what ought to be disclosed to a patient shall be determined by you in accordance with the standard of what a reasonably prudent patient would regard as material to [his] [her] decision.

USE NOTE

This instruction should be given where there is an issue of the doctor's failure to give necessary information to the patient, *see* UJI 13-1104B, including informed consent cases, and there has been expert testimony as to what information is customarily disclosed. Where the patient is a minor or is incapacitated, the bracketed reference to the patient's representative should be included in the instruction. If the trial court determines that expert testimony is required to establish the standard of care for disclosure, this instruction should not be given.

[Adopted effective January 1, 1987; UJI 13-1104B SCRA 1986; as amended, effective November 1, 1991; as amended and recompiled effective August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — Generally, the standard for disclosure is determined by the information which a reasonably prudent patient would want to have, rather than by the customary practice among medical professionals. *See Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978). Nevertheless, there may be cases in which the court determines that expert testimony is not only helpful but necessary to the jury in establishing the standard of care to be followed in disclosing the risks of a particular treatment or operation. *See id.*

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, recompiled this instruction, which was formerly UJI 13-1104C, substituted "practicing" for "of the same field of medicine as that of the defendant", inserted "[or patient's representative]", substituted "prudent patient" for "prudent person", and rewrote the Use Note.

13-1105. Consent.

Consent may be express or implied. Consent is express when written or spoken. Consent is implied when the conduct of the [patient] [patient's representative] or the failure of the [patient] [patient's representative] to object would lead a reasonable person to believe that the [patient] [patient's representative] had consented.

USE NOTE

This instruction is to be given if there is an issue as to whether consent was given. The appropriate choice - "patient" or "patient's representative" - should be made from the bracketed terms.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — Treatment without consent is tortious. *See Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978). This instruction addresses the manner in which a patient manifests consent. *See also* Sections 24-10-1 and 24-10-2 NMSA 1978, regarding minors.

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, substituted "express" for "expressed" near the beginning and inserted "[patient's representative]" throughout, and rewrote the Use Note.

"Legal consent" means actual or express consent according to law. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978).

Informed consent and consent as element of battery distinguished. See Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 363 to 366.

Consent as condition of right to perform surgical operations, 76 A.L.R. 562, 139 A.L.R. 1370.

Liability of physician or surgeon for extending operation or treatment beyond that expressly authorized, 56 A.L.R.2d 695.

Physician's duty to inform patient of nature and hazards of radiation or x-ray treatments under the doctrine of informed consent, 69 A.L.R.3d 1223.

Malpractice: physician's duty, under informed consent doctrine, to obtain patient's consent to treatment in pregnancy or childbirth cases, 89 A.L.R.4th 799.

13-1105A. Consent no excuse for negligent treatment.

The fact that a doctor communicates the inherent and potential hazards of a proposed [procedure] [treatment] does not necessarily mean that those hazards, should they arise, are not the result of negligence in performing the proposed [procedure] [treatment].

The fact that a patient expressly or impliedly consents to a proposed [procedure] [treatment] does not mean that the patient consents to the negligent performance of that [procedure] [treatment] and therefore does not prevent you from considering whether the [procedure] [treatment] was negligently performed.

The fact that a patient consents to an adequately performed [procedure] [treatment] does not excuse the doctor from negligence in choosing an unnecessary or contraindicated [procedure] [treatment].

USE NOTE

Only the appropriate paragraph(s), if any, of this instruction should be given, depending on the case. Bracketed language should be selected as appropriate.

[Adopted, effective August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — This instruction is intended to clarify whether, by consenting to treatment, the patient has consented to any negligence that might occur as a part of that treatment. The Committee believes that, in the interest of avoiding any possibility of jury confusion, an instruction of this nature should be available for use in circumstances in which the trial court considers the instruction appropriate.

13-1106. Consent; not required in emergency before surgery.

Consent is not required when the patient [or patient's representative] is unable to give consent and an immediate [operation] [treatment] is necessary for life or health.

USE NOTE

None

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — The rule expressed in this instruction was recognized in *Woods v. Brumlop,* 71 N.M. 221, 377 P.2d 520 (1962).

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, inserted "or" preceding "patient's representative" and deleted the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 183 to 186, 191.

13-1107. Consent; not required in emergency during surgery.

Consent is not required when the patient [or patient's representative] is unable to give consent during the course of [an operation] [treatment] and an emergency arises requiring an immediate change in the [operation] [treatment] necessary for life or health.

USE NOTE

None

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — The general rule is set forth in 56 A.L.R.2d 695.

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, inserted "or" preceding "patient's representative" and deleted the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 363 to 366.

70 C.J.S. Physicians and Surgeons §§ 48, 64.

13-1108. Consent; competency.

When required, consent must be obtained at a time when the person giving consent is able to understand what [he] [she] is doing.

USE NOTE

Withdrawn

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — Even where consent is manifest in the words or conduct of the patient, the patient may challenge his competency to consent. *Demers v. Gerety,* 85 N.M. 641, 515 P.2d 645 (1973), *rev'd on other grounds,* 86 N.M. 141, 520 P.2d 869, on remand, 87 N.M. 52, 529 P.2d 278 (Ct. App.), *cert. denied,* 87 N.M. 47, 529 P.2d 273 (1974). Competency to consent is presumed; the patient carries the burden of persuasion where competency is challenged. See *Grannum v. Berard,* 422 P.2d 812, 25 A.L.R.3d 1434 (Wash. 1967).

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, deleted "from a patient [patient's authorized representative]" following "obtained" a substituted "when the person giving consent is" for "when that person is", and deleted the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Medical practitioner's liability for treatment given child without parent's consent, 67 A.L.R.4th 511.

13-1109A. Failure to obtain consent.

Every adult of sound mind has a right to determine what shall be done with [his] [her] own body. A doctor who [performs an operation upon] [medically treats] [examines or touches] a patient without the patient's prior consent commits a legal wrong for which [he] [she] is liable in damages. [It is also legally wrong to [perform an operation upon] [medically treat] [examine or touch] one part of the body when the patient's consent was limited to another part of the body.]

USE NOTE

This instruction states a general rule applicable to claims that the patient did not give consent to what was done, either because the patient gave no consent or because the procedure performed was substantially different from the one authorized. The bracketed final sentence is applicable where it is claimed that the patient gave consent limited to one part of the body and another body part was treated. UJI 13-1109B should be given with this instruction where the claim is that an unauthorized procedure was performed. UJI 13-1109C should be given with this instruction where appropriate.

[As amended, effective November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — The term "battery" has been eliminated from this instruction. "Battery" as a term of art is not meaningful to a jury. It is only important for the jury to know that it is legally wrong not to obtain a patient's consent.

In *Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978), the Supreme Court drew a distinction between cases involving allegations of lack of informed consent and cases where the patient contends that he or she did not agree to the particular treatment rendered. Where the only issue is whether the patient consented to what actually was done, expert testimony relating to informed consent is not relevant; the jury is not called upon to evaluate what the doctor should have told the patient but rather what in fact was communicated between the patient and the doctor.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

The 1997 amendment, effective August 15, 1997, substituted "Failure to obtain" for "Battery; no" in the instruction heading, substituted "legal wrong" for "battery" and "also legally wrong" for "a battery", deleted "upon" preceding "one part", and rewrote the Use Note.

13-1109B. Battery; validity of consent.

For a consent to be valid, the patient [or the person giving consent on [his] [her] behalf] must know and agree to the specific [treatment] [operation] [procedure] which the doctor performs.

USE NOTE

This instruction should be given with UJI 13-1109A where the claim is that the patient did not consent to the specific procedure performed.

[As amended, effective November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

The 1997 amendment, effective August 15, 1997, deleted "Battery" from the beginning of the instruction heading, inserted "[treatment]" and made a minor stylistic change, and rewrote the Use Note.

13-1109C. Lack of consent; damages.

A patient need not prove that [he] [she] was physically harmed by the [operation] [treatment] [examination or touching] [procedure] to recover damages resulting from the doctor's failure to obtain the patient's consent. Damages may be awarded solely because the doctor's action was not consented to.

USE NOTE

This instruction should be given with UJI 13-1109A where the patient seeks to recover for an unconsented to touching without proof of resulting physical harm. An appropriate element of damages should be added to the general damage instruction, UJI 13-1802.

[As amended, effective November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — See *Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978); *see also* Restatement (Second) of Torts § 18 (1965).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

The 1997 amendment, effective August 15, 1997, substituted "Lack of consent" for "Battery" in the instruction heading, substituted "A patient" for "To recover damages for battery the patient", inserted "[treatment] [examination or touching]" and "to recover damages resulting from the doctor's failure to obtain the patient's consent", substituted "because the doctor's action was not consented to" for "for the unauthorized touching", made minor stylistic changes, and rewrote the Use Note.

13-1110. Duty of patient.

Every patient has a duty to exercise ordinary care for the patient's own health and safety. A patient who fails to do so is negligent.

USE NOTE

This instruction should be given if there is an issue as to the patient's comparative fault, *e.g.*, by failing to follow the doctor's instructions, as a cause of the claimed injury.

UJI 13-1601 and 13-1603 NMRA (negligence and ordinary care) should be given with this instruction.

[As amended, effective January 1, 1987; November 1, 1991; August 15, 1997; approved, effective February 24, 1998; as amended by Supreme Court Order No. 08-8300-33, effective November 24, 2008.]

Committee commentary. — The principles of comparative fault apply in medical negligence cases as in other negligence cases. This instruction is intended to apply where there is evidence that the patient failed to follow reasonable medical advice or was otherwise comparatively negligent. *See* Chapter 22 for special verdict forms through which the jury can apportion fault between the physician and the patient or others whose fault may have contributed to the patient's injury.

[Amended by Supreme Court Order No. 08-8300-33, effective November 24, 2008.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

The 1997 amendment, effective August 15, 1997, rewrote the last sentence which read: "The patient's failure to exercise ordinary care to follow the doctor's reasonable medical advice is negligence", and rewrote the Use Note.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-33, effective November 24, 2008, in the Use Note, changed "as a proximate cause of the claimed injury" to "as a cause of the claimed injury".

Following contrary instructions of medical attendant. — Following the directions of a hospital attendant which are contrary to the instructions of a surgeon raises a factual issue as to a patient's negligence. Robinson v. Memorial Gen. Hosp., 99 N.M. 60, 653 P.2d 891 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians and Surgeons §§ 302 to 304.

Patient's failure to return, as directed, for examination or treatment as contributory negligence, 100 A.L.R.3d 723.

Administering or prescribing drugs for weight control, 1 A.L.R.4th 236.

Patient's failure to reveal medical history to physician as contributory negligence or assumption of risk in defense of malpractice action, 33 A.L.R.4th 790.

70 C.J.S. Physicians and Surgeons §§ 51, 64.

13-1111. Alternative methods.

Where there is more than one medically accepted method of [diagnosis] [treatment] [or] [care], it is not negligent for a _____ to select any of the accepted methods.

USE NOTE

"Doctor", "hospital" or other type of health care provider should be inserted into the blank in this instruction, depending on the case.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, inserted "[or] [care]" and made a related stylistic change, substituted "negligent" for "malpractice", substituted the blank for "doctor", and rewrote the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability, 10 A.L.R.4th 1243.

13-1112. Health care provider not guarantor; poor results not breach of duty.

A _____ does not guarantee a good medical result.

[An unintended incident of treatment] [A poor medical result] is not, in itself, evidence of any wrongdoing by the _____. Instead, the patient must prove that the [poor medical result] [unintended incident of treatment] was caused by the _____'s negligence.

USE NOTE

"Doctor", "hospital" or other type of health care provider should be inserted into each of the blanks in this instruction, depending on the case.

The first sentence should be given in every case involving a claim of medical negligence, unless the jury could find that there was a promise of a particular medical result. The second sentence should be given in every medical negligence case.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — A bad result is not, of itself, evidence of malpractice. *Cervantes v. Forbis,* 73 N.M. 445, 389 P.2d 210 (1964). With respect to warranties of particular results, *see Toppino v. Herhahn*, 100 N.M. 585, 673 P.2d 1318 (Ct. App.), *rev'd on other grounds,* 100 N.M. 564, 673 P.2d 1297 (1983).

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, substituted "Health care provider" for "Doctor" in the instruction heading, substituted the blanks for "doctor" in two places, added the second sentence in the last paragraph, and rewrote the Use Note.

Recovery for "loss of chance." — New Mexico recognizes the doctrine of "lost chance," i.e., that a patient can recover in a medical malpractice action for negligence that results in the loss of a chance for a better outcome; however, to prevail on such a theory, a patient must prove all the elements of negligence, including causation, and specifically must prove that there was indeed a window of time during which action might have produced the superior outcome. Alberts v. Schultz, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279.

Law reviews. — For note, "The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance - *Alberts v. Schultz,*" see 30 N.M.L. Rev. 387 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 161 to 163, 266.

Recovery, and measure and element of damages, in action against dentist for breach of contract to achieve particular result or cure, 11 A.L.R.4th 748.

13-1113. Withdrawn.

Committee comment. — Instruction withdrawn. *See Dunleavy v. Miller,* 116 N.M. 353, 862 P.2d 1212 (1993).

Withdrawals. — Pursuant to a court order dated August 15, 1997, this instruction, relating to care required in a sudden medical emergency, is withdrawn provisionally effective August 15, 1997, approved, February 24, 1998.

13-1114. Liability of doctor for negligence of others.

A doctor is liable for the negligence of an assistant, nurse, doctor, technician or other person if:

1. the doctor has the right to control the manner in which the details of the particular activity giving rise to the injury are performed; and

2. the particular activity giving rise to the injury is being performed under the immediate and direct supervision of the doctor.

A doctor is not liable for the negligence of another where the doctor's only right is to make mere suggestions as to the particular activity being performed in cooperation with such other person.

USE NOTE

This instruction is to be given in cases where the doctor is claimed to be vicariously liable for the negligence of one who is not a general employee of the doctor. In cases where the doctor is claimed to be the general employer of the negligent person, the instructions contained in Chapter 4 would be applicable.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee comment. — This instruction applies the doctrine of borrowed servant to medical negligence cases. *See Dessauer v. Memorial Gen. Hosp.,* 96 N.M. 92, 628 P.2d 337 (Ct. App. 1991).

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, substituted "is performed" for "are performed" near the end of Subparagraph 1.

Instruction's heading misleading. — The heading for this instruction, "captain of ship doctrine", is inappropriate and misleading because the contents of the instruction do not contain this special agency rule. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 286 et seq.

13-1115. Termination of physician-patient relation; abandonment.

A doctor's duty to a patient who is in need of care continues until the doctor has withdrawn from the case. A doctor cannot abandon the patient who is in need of continuing care. A doctor can withdraw by giving the patient reasonable notice under the circumstances.

USE NOTE

This instruction should be given in conjunction with either UJI 13-1101 or 13-1102 when evidence is presented in support of plaintiff's claim that the doctor abandoned his care without giving reasonable notice under the circumstances.

[As amended, effective January 1, 1987.]

Committee comment. — Because the patient-physician relationship is consensual, a physician has a right to withdraw from the patient's case provided he gives the patient reasonable notice to secure other medical attention. Skodje v. Hardy, 288 P.2d 471 (Wash. 1955). A physician cannot terminate the relationship simply by staying away.

13-1116A. Causation; failure to inform; condition treated.

A doctor who fails in [his] [her] duty to communicate [alternatives for treatment] [inherent and potential hazards] is liable for harm to the patient resulting from the [treatment] [operation] if a reasonably prudent patient [or patient's representative] under similar circumstances would not have consented to the [treatment] [operation] had [he] [she] known of the [alternatives for treatment] [inherent and potential hazards].

USE NOTE

Either UJI 13-1116A or 13-1116B NMRA should be given in every action based upon a lack of informed consent. The instruction appropriate to the case should be selected.

UJI 13-1116A and 13-1116B do not replace UJI 13-308 NMRA. In many cases, the general instruction on causation will still be appropriate.

[As amended, effective November 1, 1991; August 15, 1997; February 24, 1998; March 1, 2005.]

Committee comment. — An objective approach to proximate causation in informed consent cases was adopted in *Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

The 1997 amendment, effective August 15, 1997, substituted "prudent patient [or patient's representative]" for "prudent person".

The 1998 amendment, effective February 24, 1998, inserted "under similar circumstances" near the middle of the instructions.

The March 1, 2005 amendment was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI

Civil. “Proximate cause” has been replaced with “causation” in the catchline and Use Note.

13-1116B. Causation; failure to inform; condition not treated.

A doctor who fails in [his] [her] duty to communicate the [condition] [likely result if the condition remains untreated] is liable for harm which results to the patient from the untreated condition if a reasonably prudent patient [or patient's representative] under similar circumstances would have acted upon the information to avoid the harm.

USE NOTE

See Use Note, UJI 13-1116A NMRA.

[As amended, effective November 1, 1991; August 15, 1997; February 24, 1998; March 1, 2005.]

Committee comment. — *See* Committee Comment, UJI 13-1116A.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

The 1997 amendment, effective August 15, 1997, substituted "prudent patient [or patient's representative]" for "prudent person".

The 1998 amendment, effective February 24, 1998, inserted "under similar circumstances" near the end of the instructions.

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. "Proximate cause" has been replaced with "causation" in the catchline.

13-1117. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order, UJI 13-117 NMRA, relating to proximate cause, failure to warn, was withdrawn effective January 1, 1987.

13-1118. Circumstantial evidence of medical negligence ("Res ipsa loquitur").

To prove negligence, the patient need not prove specifically what _____[1] did or failed to do that was negligent.

The patient may prove _____'s[1] negligence by proving each of the following propositions:

1. that the injury or damage to the patient was proximately caused by _____ *(name of the instrumentality or occurrence)* which was _____'s[1] responsibility to manage and control; and

2. that the event causing the injury or damage to the patient was of a kind which does not ordinarily occur in the absence of negligence on the part of the _____[1] in control of [the instrumentality] or [that portion of the procedure].

[Propositions (1) and (2) must be proved by the testimony of a doctor testifying as an expert.]

If you find that each of these propositions has been proved, then you may, but are not required to, find that _____[1] was negligent.

If, on the other hand, you find that either one of these propositions has not been proved or, if you find, notwithstanding the proof of these propositions, that _____[1] used ordinary care for the safety of others in [his] [her] control and management of the _____ *(name of instrumentality or occurrence)* then the evidence would not support a finding of negligence.

FOOTNOTE

1. Insert the name of the party against whom the claim is asserted.

USE NOTE

The names of the various individuals and the name or description of the instrumentality or occurrence should be inserted in the appropriate blanks. Care should be used that the correct names are placed in the various blanks.

What was previously labeled res ipsa loquitur is applicable in a medical negligence action. The fact that there is other evidence of the specific cause of the injury does not preclude the use of this instruction. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). Exclusive control by the defendant, of the instrumentality or circumstance at issue is not a prerequisite for its use. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863

(1994), *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994). As a factual matter, two or more persons may conceivably share responsibility of the management of the object, activity, or circumstances at issue. Expert testimony is not necessary where propositions 1 or 2 are within the common knowledge of a lay person.

[Approved, effective August 1, 1999.]

Committee comment. — Res ipsa loquitur is an appropriate instruction in a medical negligence case. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). The circumstantial evidence of medical negligence instruction has been drafted in response and is phrased in lay terms. All arcane, magic and "sacred" language, including even "res ipsa", have been eliminated. Res ipsa is a rule of circumstantial negligence and therefore has been characterized as such.

Mireles, and *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994), indicates that exclusive control of the instrumentality or circumstances giving rise to the injury is not a prerequisite for utilizing this instruction. Consequently the exclusivity requirement has been eliminated and the requirement of management and control is substituted in its place.

Under this instruction, a number of different persons might have different responsibilities as to the same patient, but if two or more physicians have the responsibility for managing one facet of an operative procedure, *i.e.*, the padding of an eye or an elbow or even share in that control, then there is no reason under the existing case law and the principles of *Bartlett* [*Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982)] and Section 41-3A-1 NMSA 1978 why the doctrine of res ipsa does not apply in those instances to both physicians.

ANNOTATIONS

Compiler's notes. — This instruction had been previously reserved for future instruction pertaining to circumstantial evidence of medical negligence.

13-1119. Recompiled.

ANNOTATIONS

Recompilations. — Instruction 13-1119, relating to duty of hospital; patient care was recompiled as UJI 13-1119A, effective September 27, 1999.

13-1119A. Duty of hospital; patient care.

In _____ *(insert description of conduct in question)*, a hospital is under a duty to use ordinary care to avoid or prevent what a

reasonably prudent person would foresee as an unreasonable risk of injury to another. A hospital that fails to do so is negligent. "Ordinary care" is that care which a reasonably prudent person would use in the conduct of the person's own affairs. What constitutes ordinary care varies with the nature of what is being done. As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

In _____ *(insert description of conduct in question)*, a hospital is under a duty to possess and apply the knowledge and to use the skill and care ordinarily used in reasonably well-operated hospitals under similar circumstances, giving due consideration to the locality involved. A hospital that fails to do so is negligent. The only way in which you may decide whether the hospital in this case possessed and applied the knowledge and used the skill and care which the law required of it is from evidence presented in this trial by _____ *(insert appropriate category, e.g., hospital administrators, doctors, nurses, or other health care providers)* testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

USE NOTE

This instruction sets forth the duty of a hospital in providing patient care and describes how the hospital's compliance with that duty is assessed. It consists of two optional paragraphs. The first paragraph relates to conduct which can be evaluated by the jury without the aid of expert testimony, whereas the second concerns conduct which can be evaluated only in light of the testimony of expert witnesses. The trial court must determine which paragraph is applicable to the hospital conduct in question, depending on the particulars of the case. Different kinds of hospital conduct may be at issue in a single case, requiring both paragraphs to be given. *See* Committee Comment. The conduct in question, such as "providing equipment appropriate for use in treating patients" or "developing protocols for the proper administration of certain medications", should be inserted in the blank at the beginning of the appropriate paragraph.

Where a more specific instruction from another chapter of these Uniform Jury Instructions is applicable to a claim against a hospital *(see, in particular, the premises liability instructions contained in Chapter 13)*, the specific instruction with any appropriate modifications, rather than the more general instruction contained in this chapter, should be given. In cases of hospital liability for negligence in the credentialling of staff physicians, *see Diaz v. Feil*, 118 N.M. 385, 881 P.2d 745 (Ct. App. 1994).

The bracketed final paragraph should be omitted in those cases in which the court determines that expert testimony is not required and negligence can be determined by resort to common knowledge ordinarily possessed by the average person.

[13-1119 NMRA; as amended, effective August 15, 1997; as amended and recompiled, effective September 27, 1999.]

Committee comment. — While there is a single standard of ordinary care that a hospital must meet in order to avoid negligence liability in providing medical care to its patients, the type of testimony required to establish a breach of the hospital's duty of care differs depending on the kind of conduct that is alleged to constitute a breach. Where the matter is potentially susceptible to the common knowledge of the jury, expert testimony is not necessary to establish that the hospital's conduct was negligent. Where the issue is not within the common knowledge of the jurors, but rather lies within the purview of specialized knowledge, expert testimony is required. This principle, which applies in cases involving negligence claims against individual health care practitioners, *see* UJI 13-1101, Committee Comment, is equally applicable to claims of hospital negligence.

Distinguishing claims that need not be established by expert testimony from those that must is a task to be accomplished by the trial judge on a case by case basis. In the absence of developed New Mexico authority, cases from other jurisdictions can provide guidance. *Compare, e.g., Gould v. New York City Health & Hospitals Corp.*, 490 N.Y.S.2d 87 (Sup. Ct. 1985) (where hospital rule required bedrails to be erected for patients over 50 years of age, expert testimony was not needed to support claim that violation of rule was negligent), and *Smith v. North Fulton Med. Ctr.*, 408 S.E.2d 468 (Ga. Ct. App. 1991) (claim of negligence based on failure to raise bedrails in accordance with written nursing assessment did not require expert testimony), with *Robinson v. Medical Ctr. of Cent. Ga.*, 456 S.E.2d 254 (Ga. Ct. App. 1995) (claim that hospital was negligent in particular case by failing to raise patient's bedrails required support from expert witness), and *Sexton v. St. Paul Fire & Marine Ins. Co.*, 631 S.W.2d 270 (Ark. 1982) (claim of negligence in failing to place restraint vest on patient required evaluation of professional judgment applied to patient's circumstances and hence could not be established without expert testimony).

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, deleted "defendant" preceding "hospital" in the second paragraph and rewrote the Use Note.

The 1999 amendment, effective September 27, 1999, recompiled Instruction 13-1119 as 13-1119A; rewrote the rule, added the definition of "ordinary care" in the first paragraph; in the Use Note, rewrote the first paragraph and added the first sentencein the second paragraph; and substituted the present committee comment for the committee comment which formerly read "The standards which govern the conduct of the doctor, *see* UJI 13-1101, also provide the framework for the duty of the hospital. In some cases the court, in its discretion, may believe that the definition of ordinary care, *see* UJI 13-1603, would also be helpful to the jury's understanding of this duty".

13-1119B. Duty of hospital; granting staff privileges.

In determining whether a [physician] [_____ *(other practitioner)*] should be permitted to exercise clinical privileges as a member of the hospital staff, a hospital has a duty to exercise reasonable diligence in obtaining and acting upon information concerning the competence of [applicants to] [members of] its staff. A hospital that [grants clinical privileges to] [permits the continued exercise of clinical privileges by] an individual, when the hospital knew or reasonably should have known that the individual was not qualified to exercise those privileges with reasonable skill, is negligent.

USE NOTE

This instruction should be given where the evidence supports a claim that the hospital was negligent in granting or failing to restrict the clinical privileges of an incompetent practitioner who, in exercising those privileges, injured a patient. The appropriate bracketed language should be given. The trial court must determine whether a breach of the hospital's duty can only be established by expert testimony in the particular case at issue. The instruction should be supplemented accordingly. *See* Committee Comment.

[Approved, effective September 27, 1999.]

Committee comment. — This instruction embodies the theory of hospital liability generally known as corporate negligence, which arises when the hospital has failed to take reasonable steps to determine the qualifications or competency of a practitioner to whom it has granted clinical privileges. If the practitioner injures a patient through negligence, the hospital may be directly liable to the patient for its own negligence in allowing the injurious situation to arise. This theory is discussed in *Diaz v. Feil*, 118 N.M. 385, 881 P.2d 745 (Ct. App. 1994). *See also Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, 124 N.M. 549, 953 P.2d 722 (applying corporate negligence theory to hospital's selection of contract therapist).

The pertinent inquiry under a claim of corporate negligence "focuses on the procedures for the granting and renewal of staff privileges." *Diaz v. Feil*, 118 N.M. at 390, 881 P.2d at 750 (quoting *Pedroza v. Bryant*, 677 P.2d 166, 171-72 (Wash. 1984)). "In order to make a prima facie showing that a hospital negligently granted hospital staff privileges to a physician, or negligently retained a staff member, a plaintiff must establish that the hospital negligently failed to screen the competency of the individual, or that it negligently retained a staff member after it knew or should have known of matters involving the general competency of such individual. . . . [The hospital] would have to have had prior notice as to the treating physician's lack of competency before it could be held liable in either granting or continuing hospital staff privileges." *Diaz v. Feil*, 118 N.M. at 390, 881 P.2d at 750 (citations omitted).

New Mexico law has not specifically addressed whether expert testimony is necessary to establish a breach of the duty described in this instruction. Consistent with the approach taken in UJI 13-1119A, the trial court should determine the need for expert

testimony based on the kind of conduct that is alleged to constitute a breach of the duty. For instance, a case in which the hospital entirely failed to inquire about, or utterly ignored, the existence of prior malpractice judgments against the physician presents a situation that could likely be evaluated by a lay jury under ordinary negligence standards. *Cf. Eckhardt*, 1998-NMCA-017, Para. 43 (evidence that hospital knew of practitioner's substance abuse problem and lack of recent clinical experience). On the other hand, a case in which the hospital relied on the medical judgments of physicians on its credentials committee, who recommended granting an application for clinical privileges after reviewing materials in the applicant's file, might require expert testimony on the question whether the committee reasonably should have known of deficiencies in the applicant's competency based on the materials reviewed. *Cf. id.* (evidence that, "under the required standard of care, [the hospital's] Credentials Committee should have obtained more objective information" and more complete information regarding practitioner's fitness to serve as therapist). The trial court should supplement this instruction with language defining "reasonable diligence" either in terms of the diligence that would be exercised by a reasonably prudent person in the circumstances, or in terms of the diligence that would ordinarily be exercised in a reasonably well-run hospital as established by expert testimony. *Cf.* UJI 13-1119A.

13-1120. Recompiled.

ANNOTATIONS

Recompilations. — Instruction 13-1120, relating to hospital acts through employees was recompiled as UJI 13-1120A, effective September 27, 1999.

13-1120A. Hospital vicarious liability; employees.

A hospital is responsible for injuries proximately resulting from the negligence of its employees, such as _____ *(insert appropriate terms)* [occurring within the scope of their employment].

USE NOTE

This instruction should be given when the plaintiff claims that a hospital is vicariously liable for the negligence of an employee. The name of the employee or the proper job description, such as nurses, orderlies, technicians, etc., should be inserted in the blank.

The bracketed language should be used if there is an issue regarding whether the employee was acting within his or her scope of employment. In such a case UJI 13-407, which defines scope of employment, should be given with this instruction.

[13-1120 NMRA; as amended, effective January 1, 1987; August 15, 1997; as recompiled and amended, effective September 27, 1999.]

Committee comment. — Principles of agency law, as expressed in Chapter 4, govern a hospital's liability for the acts of its employees. *See Dessauer v. Memorial Gen. Hosp.*, 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, substituted " *(insert appropriate term)*" for "[nurses, orderlies, technicians, etc.]" and rewrote the Use Note.

The 1999 amendment, effective September 27, 1999, recompiled Instruction 13-1120 as 13-1120A; rewrote the rule pertaining to a hospital being responsible for injuries proximately resulting from the negligence of its employees; in Use Note, in the first paragraph, added the first sentence and deleted the second sentence; in the second paragraph, substituted "The bracketed language should be used if there is and issue regarding whether the employee was acting within his or her scope of employment. In such a case UJI 13-407, which defines scope of employment, should be given with this instruction" for "The bracketed language should be used if there is an issue regarding the scope of employment. If so, UJI 13-407 should also be given".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Hospitals and Asylums § 14 et seq.

13-1120B. Hospital vicarious liability; non-employees.

A hospital is responsible for injuries proximately resulting from the negligence of health care providers who are not hospital employees, such as in _____[1], if the hospital, through its conduct, created the appearance that it was the provider of these services to the public.

FOOTNOTE

1. Insert description of the applicable department, such as in "a full-service emergency room".

USE NOTE

This instruction should be given when the plaintiff claims that a hospital is vicariously liable for the negligent conduct of a non-employee practitioner providing hospital-based patient care. If the court determines that the hospital is liable as a matter of law for the acts of a non-employee practitioner, then UJI 13-405 should be used in place of this instruction.

[Approved, effective September 27, 1999.]

Committee comment. — A hospital is liable for the negligence of independent contractors who provide patient care in the hospital, such as emergency room

physicians, if they are the hospital's apparent or ostensible agents. *See Houghland v. Grant*, 119 N.M. 422, 891 P.2d 563 (Ct. App. 1995) (discussing factors from which jury could conclude that hospital created reasonable belief that emergency room physician was hospital's employee or agent including the use of non-employee doctors to further the hospital's business of providing services directly to the public and the choice of the doctor being controlled by the hospital and not the patient). Although *Houghland* arose in the context of a full service emergency room, the instruction could be applicable to other services provided by the hospital.

13-1121. Hospital liability; loaned servant exception.

A hospital is not responsible for acts or omissions of its employees where [a doctor] [or] [an operating surgeon] has assumed the exclusive right to control and supervise the activity of _____ *(hospital nurses, assistants, attendants, etc.)* [during the course of an operation] [during specific treatment under the immediate and direct control and supervision of the doctor]. It is for you to determine whether the [doctor] [surgeon] assumed the exclusive right to control the employee or whether the right of control over the employee was shared with the hospital.

[As amended, effective August 15, 1997.]

Committee comment. — *Cf.* UJI 13-1114. The last sentence has been added to this instruction to clarify that the jury must determine who had the right to control the employee at issue.

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, inserted "[or]" and added the last sentence, and deleted the Use Note.

Law reviews. — For annual review of New Mexico law relating to torts, see 13 N.M.L. Rev. 473 (1983).

13-1122. Hospital liability where orders followed.

The hospital is not liable when following the orders of the doctor unless the hospital knew or in the exercise of ordinary care should have known that the orders of the doctor were in error and failed to call the error to the doctor's attention.

[As amended, effective January 1, 1987; August 15, 1997.]

Committee comment. — The situation defined by this instruction is simply a specific application of the duty of the hospital and its employees to use ordinary care required by the circumstances. See UJI 13-1119 [now UJI 13-1119A].

ANNOTATIONS

The 1997 amendment, effective August 15, 1997, deleted the Use Note.

13-1123. Withdrawn.

Committee comment. — This instruction is unnecessary as it is covered under revised UJI 13-1112, which applies both to hospitals and to physicians.

Withdrawals. — Pursuant to a court order dated August 15, 1997, this instruction, providing that the hospital is not a guarantor and a poor result is not a breach of duty, is withdrawn provisionally effective August 15, 1997, approved February 24, 1998.

13-1124. Withdrawn.

Committee comment. — This instruction is unnecessary as it is covered under revised UJI 13-1111, which applies both to hospitals and to physicians.

Withdrawals. — Pursuant to a court order dated August 15, 1997, this instruction, relating to accepted alternative methods of care, is withdrawn provisionally effective August 15, 1997, approved, February 24, 1998.

13-1125. Special Interrogatory No. 1 - Future medical care and benefits.

If your verdict is for the plaintiff, do you find that plaintiff is in need of future medical care and related benefits?

Answer [Yes _____] [No _____]

_____
Foreperson

USE NOTE

This interrogatory should only be given where evidence has been presented to the jury of future medical expenses.

[As amended, effective November 1, 1991.]

Committee comment. — See Section 41-5-7 NMSA 1978.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-1126. Special Interrogatory No. 2 - Past medical care and related benefits.

What do you find was the value or cost of past medical care and related benefits received by the plaintiff?

Answer $_____

_____
Foreperson

USE NOTE

This interrogatory is only to be used when the jury renders a verdict in excess of $600,000.

[As amended, effective July 21, 2000.]

Committee comment. — See Section 41-5-6 NMSA 1978.

ANNOTATIONS

The 2000 amendment, effective July 21, 2000, substituted "$600,000" for "$500,000" in the Use Note.

Appendix to Chapter 11.

Appendix: Sample liability of a doctor for negligence and for performance of a procedure without consent.

FACTS

After two years of experiencing lower back and sciatic pain, Norma Richards consulted Dr. Louis Paul, an orthopedic surgeon. Dr. Paul diagnosed a herniated disc at L4-L5 and recommended its removal. Ms. Richards signed a consent form permitting the removal of the disc at L4-L5. The consent outlined bleeding and infection as two of the "ordinary complications" that often accompany disc surgery.

During surgery, Dr. Paul used a posterior approach to Ms. Richards' disc. Dr. Paul not only removed that portion of that disc that had herniated out and pressed on her spinal cord, but also proceeded deeper into the disc with his rongeur until he went through the entire thickness of the disc and emerged on the anterior or stomach side of

Ms. Richards' spinal column. Dr. Paul continued to remove chunks of what he thought was Ms. Richards' disc. However, he was now taking large chunks of Ms. Richards' iliac artery and iliac vein which lay on the underside of her spinal column. Ms. Richards rapidly began to lose blood pressure and ultimately her pulse. Dr. Paul subsequently guessed what had happened and called a vascular surgeon to assist him. Ms. Richards was turned over on her back, a laparotomy was performed, and her iliac artery and vein were ultimately repaired.

Ms. Richards subsequently brought suit against Dr. Paul.

INSTRUCTIONS

The instructions set forth below represent one way in which the instructions in a medical negligence case could be presented to the jury. There are other, equally acceptable, ways to arrange these instructions, provided the general design of the "302" series of instructions (UJI 13-302A through 13-302F) for the presentation of claims, defenses, and issues is followed. The goal is clarity. To that end some of the preliminary instructions have been split and their paragraphs paired with other instructions which address the same issue. The UJI numerical sequence has been disregarded and the logic of the instructions has been the guide in their sequencing. The terms "Plaintiff" and "Defendant" have been eliminated and the names of the parties inserted in their stead. Minor changes in wording have been made where they aid intelligibility without changing the meaning of the instruction. Finally, although it may be a convenient practice to submit individual instructions on separate pages during the process of settling instructions, modern word processing capabilities should make it possible to provide the jury with an integrated set of instructions contained on a few pages rather than fragmenting the instructions and giving the jurors numerous sheets of paper with a single instruction on each. This example is formatted accordingly. (Note: instruction references in the left margin are for the convenience of the reader in understanding this example and should not be included in a set of instructions sent to the jury.)

UJI 13-301

The time has now come to give you final instructions that will guide your deliberations as the sole judges of the facts of this case.

First, I will summarize the issues between the parties. Second, I will state the rules of law governing this case.

UJI 13-2002

The law of this case is contained in these instructions and it is your duty to follow them. You must consider these instructions as a whole, not picking out one instruction, or parts thereof, and disregarding others.

UJI 13-2005

You are to apply the law, as stated in these instructions, to the facts as you find them and, in this way, decide the case.

Neither sympathy nor prejudice should influence your verdict.

UJI 13-2001

Faithful performance by you of your duties is vital to the administration of justice.

UJI 13-301

Please pay close attention to these instructions. I will read them only once, but the written instructions will be given to you to take to the jury room.

UJI 13-302A

In this civil action Norma Richards is seeking compensation from Dr. Louis Paul for damages which Ms. Richards claims were caused by negligence and by performance of surgery on her without her consent.

UJI 13-302B

To establish her claim of negligence against Dr. Paul, Ms. Richards has the burden of proving that Dr. Paul failed to use the skill and care required of him in performing her back surgery, by going too far into the disc space of Ms. Richards' back, coming out on the other side of the disc, and unknowingly cutting Ms. Richards' iliac artery and vein which lay immediately beneath her spinal column.

UJI 13-302C

Dr. Paul denies Ms. Richards' contentions. Dr. Paul contends that Ms. Richards' injuries were ordinary complications of disc surgery that occurred without negligence.

UJI 13-1102

Dr. Paul held himself out as a specialist in orthopedics. Having undertaken to operate on Norma Richards in this specialized field, Dr. Paul had a duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified specialists practicing under similar circumstances, giving due consideration to the locality involved. If Dr. Paul failed to do so, he was negligent.

The only way in which you may decide whether Dr. Paul possessed and applied the knowledge and used the skill and care which the law required of him

is from evidence presented in this trial by doctors testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

UJI 13-1105A

The fact that a doctor communicates the inherent and potential hazards of a proposed procedure does not necessarily mean that those hazards, should they arise, are not the result of negligence in performing the proposed procedure.

The fact that a patient expressly or impliedly consents to a proposed procedure does not mean that the patient consents to the negligent performance of that procedure and therefore does not prevent you from considering whether the procedure was negligently performed.

UJI 13-1112

A doctor does not guarantee a good medical result. An unintended incident of treatment is not, in itself, evidence of any wrongdoing by the doctor. Instead, the patient must prove that the unintended incident of treatment was caused by the doctor's negligence.

UJI 13-302B

To establish Dr. Paul performed surgery on her without her consent, Norma Richards has the burden of proving that Dr. Paul performed a laporotomy on her without first obtaining her consent.

UJI 13-302C

Dr. Paul admits performing the laparotomy without obtaining Ms. Richards' consent. However, Dr. Paul says that the laparotomy was an emergency procedure for which no consent was necessary.

UJI 13-302D

To establish a defense to Ms. Richards' claim of lack of consent, Dr. Paul has the burden of proving that an emergency existed.

UJI 13-1109A

Every adult of sound mind has a right to determine what shall be done with her own body. A doctor who performs an operation upon a patient without the patient's prior consent commits a legal wrong for which the doctor is liable in damages. It is also legally wrong to perform an operation upon one part of the body when the patient's consent was limited to another part of the body.

UJI 13-1107

Consent is not required when the patient is unable to give consent during the course of an operation and an emergency arises requiring an immediate change in the operation or treatment necessary for life or health.

UJI 13-302B

Ms. Richards has the burden of proving that any negligent or wrongful conduct on the part of Dr. Paul was a cause of her injury and damages.

UJI 13-305

An [act] [or] [omission] [or] [_____ (*condition*)] is a "cause" of [injury] [harm] [_____ (*other*)] if [unbroken by an independent intervening cause,] it contributes to bringing about the [injury] [harm] [_____ (*other*)] [and if injury would not have occurred without it]. It need not be the only explanation for the [injury] [harm] [_____ (*other*)], nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause", the [act] [or] [omission] [or] [_____ (*condition*)], nonetheless, must be reasonably connected as a significant link to the [injury] [harm].

UJI 13-304

Ms. Richards has the burden of proving every essential element of her claims by the greater weight of the evidence. Similarly, Dr. Paul has the burden of proving the existence of an emergency by the greater weight of the evidence.

To prove by the greater weight of the evidence means to prove that something is more likely true than not true. When these instructions state that Norma Richards has the burden of proof, or Dr. Paul has the burden of proof, on a particular issue, they mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient.

UJI 13-1801

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

UJI 13-213

The rules of evidence do not ordinarily permit a witness to testify as to an opinion or conclusion.

However, a witness who is qualified as an expert in a subject may be permitted to state an opinion as to that subject. After considering the reasons stated for an opinion, you should give it such weight as it deserves. You may reject an opinion entirely if you conclude it is unsound.

UJI 13-307

The evidence which you are to consider in this case consists of the testimony of the witnesses and the exhibits admitted into evidence by the court and any facts admitted or agreed to by counsel and any facts which the court instructs you to accept as true.

The production of evidence in court is governed by rules of law. From time to time it has been the court's duty to rule on the evidence. You must not concern yourselves with the reasons for these rulings. You should not consider what would or would not have been the answers to the questions which the court ruled could not be answered.

UJI 13-2003

You alone are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account the witness' ability and opportunity to observe, the witness' memory, the witness' manner while testifying, any interest, bias or prejudice that the witness may have and the reasonableness of the witness' testimony, considered in light of all the evidence of the case.

UJI 13-2004

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.

If you believe that any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness only such credit as you may think it deserves.

UJI 13-2005

You are the sole judges of all disputed questions of fact in this case. It is your duty to determine the true facts from the evidence produced here in open court. Your verdict should not be based on speculation, guess or conjecture.

UJI 13-302F

After considering the evidence and these instructions as a whole, the questions presented for you to answer on the special verdict form on the claim of Dr. Paul's negligence are as follows:

1. Was Dr. Paul negligent in cutting Ms. Richards' iliac vein and artery?

2. Was any negligence of Dr. Paul a cause of Norma Richards' injuries and damages?

If you answer "No" to either of these questions on the special verdict form you shall return the special verdict for Dr. Paul and against Norma Richards on the claim of negligence.

If, on the other hand, you answer "Yes" to both of these questions, you shall determine the amount of money that will compensate Norma Richards for her injury and damages. You will also answer the other questions required of you on the special verdict form which I will hand to you at the conclusion of these instructions.

After considering the evidence and these instructions as a whole, the question presented for you to answer on the special verdict form on the claim of lack of consent for surgery is as follows:

1. Was Dr. Paul required to obtain Norma Richards' consent before performing the laparotomy upon her?

If you answer "No" to that question on the special verdict form you shall return the special verdict for Dr. Paul and against Norma Richards on the claim of lack of consent for surgery.

If, on the other hand, you answer "Yes," you shall determine the amount of money that will compensate Ms. Richards for the injury and damages caused by the unconsented to procedures.

UJI 13-2008

You are not to discuss damages unless you have first determined that there is liability.

UJI 13-1802

If you decide Dr. Paul was negligent, you must determine the amount of money which will fairly compensate Norma Richards for any of the following damages proved by her to have resulted from Dr. Paul's negligence.

UJI 13-1803, to 13-1807 and 13-1825

1. The value of lost earnings and the present cash value of earning capacity reasonably certain to be lost in the future.

2. The reasonable expense of necessary medical care, treatment, and services received.

3. The reasonable value of necessary nonmedical expenses and services which have been required as a result of the injury.

4. The nature, extent and duration of the injury.

5. The pain and suffering experienced and which will be experienced in the future as a result of the injury.

You must also determine whether as a result of Dr. Paul's negligence, Ms. Richards will need future medical care and related benefits.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

Sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiff with fairness to both parties.

UJI 13-1821

As to loss of future earning ability, you may consider that some persons work all their lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.

UJI 13-1822

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages by making allowance for the fact that any award you might make would, if properly invested, earn interest. You should,

therefore, allow a reasonable discount for the earning power of such money and arrive at the present cash value of the total future damages, if any.

Damages for any future pain and suffering are not to be so reduced.

UJI 13-2006

The jury acts as a body. Therefore, on every question which the jury must answer it is necessary that all jurors participate regardless of the vote on another question. Before a question can be answered, at least ten of you must agree upon the answer; however, the same ten need not agree upon each answer.

UJI 13-2007

After you hear these instructions on the law governing this case, the lawyers may make closing arguments, or statements, on the evidence and the law. These summaries can be of considerable assistance to you in arriving at your decision and you should listen carefully. You may give them such weight as you think proper. However, neither these final discussions nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in these instructions.

UJI 13-2009

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.

When as many as ten of you have agreed upon a verdict, your foreperson must sign the appropriate form and you will all then return to open court.

SPECIAL VERDICT FORM

Part I - Negligence

UJI 13-2220

On the questions submitted on the claim of Dr. Paul's negligence, the jury finds as follows:

Question No. 1: Was Dr. Paul negligent in cutting Ms. Richards' iliac vein and artery?

Answer _____ (Yes or No)

If the answer to Question No. 1 is "No", your verdict is for the defendant and against the plaintiff on the claim of negligence. You are not to answer further questions in Part I. Proceed to Part II.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2.

Question No. 2: Was any negligence of Dr. Paul a cause of Norma Richards' injury and damages?

Answer _____ (Yes or No)

If the answer to Question No. 2 is "No", your verdict is for the defendant and against the plaintiff on the claim of negligence. You are not to answer further questions in Part I. Proceed to Part II.

If the answer to Question No. 2 is "Yes", you are to answer Questions 3 and 4, then proceed to Part II.

Question No. 3: In accordance with the damage instructions given by the court, we find the total amount of damages (excepting any future medical care and related benefits) suffered by Norma Richards as a result of Dr. Paul's negligence to be $_____.

UJI 13-1125

Question No. 4: Do you find that plaintiff Norma Richards is in need of future medical care and related benefits?

Answer _____ (Yes or No) Part II - Lack of Consent

On the question submitted on the claim of Dr. Paul's failure to obtain consent before performing surgery, the jury finds as follows:

Question No. 5: Was Dr. Paul required to obtain Norma Richards' consent before performing the laparotomy upon her?

Answer _____ (Yes or No)

If the answer to Question No. 5 is "No", your verdict is for the defendant and against the plaintiff on this claim. Do not answer any further questions. Your foreperson must sign this special verdict, and you will return to open court.

If the answer to Question No. 5 is "Yes", you are to answer Question No. 6. Your foreperson must then sign this special verdict, and you will return to open court.

Question No. 6: In accordance with the damages instructions given by the court, we find the total amount of damages suffered by Norma Richards as a result of Dr. Louis Paul performing surgery without her consent to be $_____.

When as many as ten of you have agreed upon each of your answers, your foreperson must sign this special verdict, and you will return to open court.

_____

Foreperson

[As amended, effective March 1, 2005.]

ANNOTATIONS

The March 1, 2005 amendment of this sample instruction was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The examples for UJI 13-213, 13-301, 13-302A, 13-302B, 13-302C, 13-302F and 13-305 have been revised to be consistent with the March 1, 2005 amendment of those instructions. *See* the compiler's notes following amended instructions for a description of the March 1, 2005 revisions.

CHAPTER 12
Motor Vehicles

Introduction

These instructions are applicable to the operation of vehicles on public roads as well as on private property. See Button v. Metz, 66 N.M. 485, 349 P.2d 1047 (1960); 62 A.L.R.2d 288.

Since these instructions are not all-inclusive, the chapters on agency, statutes and ordinances and tort law generally should be considered.

[As amended, effective January 1, 1987.]

13-1201. Duty of operator using highway.

It is the duty of every operator of a vehicle to exercise ordinary care, at all times, to prevent an accident.

USE NOTE

This instruction should be used with UJI 13-1202 and 13-1203, if applicable, and should be followed by UJI 13-1601 and 13-1603.

[As amended, effective January 1, 1987.]

Committee commentary. — This instruction defines the common-law duty of persons operating vehicles - motor or otherwise.

ANNOTATIONS

Library references. — 61A C.J.S. Motor Vehicles §§ 532, 537, 539 to 542, 545 to 550.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1021.

Duty of motor vehicle driver approaching place where children are playing or gathered, 30 A.L.R.2d 5.

Driver's failure to maintain proper distance from motor vehicle ahead, 85 A.L.R.2d 613.

61A C.J.S. Motor Vehicles §§ 532, 537, 539 to 542, 545 to 550.

Maintaining a proper lookout involves a duty to observe matters in plain sight. Sheraden v. Black, 107 N.M. 76, 752 P.2d 791 (Ct. App. 1988).

13-1202. Duty of lookout and control.

It is the duty of every operator of a vehicle, at all times, [to keep a proper lookout] [and] [to maintain proper control of [his] [her] vehicle] so as to avoid placing the operator or others in danger and to prevent an accident.

USE NOTE

If the "proper lookout" phrase is used, then UJI 13-1201 and 13-1203 should be used.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — It is the driver's duty to exercise ordinary care to see what is to be seen. Lopez v. Maes, 81 N.M. 693, 699, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970). At pages 700 and 701, the court makes specific reference to UJI 13-1202 and 13-1203, the same as UJI 13-902 and 13-903, respectively, in the first edition. See also Butcher v. Safeway Stores, 78 N.M. 593, 435 P.2d 212 (Ct. App. 1967); Martinez v. City of Albuquerque, 84 N.M. 189, 500 P.2d 1312 (Ct. App. 1972); and Dahl v. Turner, 80 N.M. 564, 458 P.2d 816, 39 A.L.R.3d 207 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

Library references. — 61A C.J.S. Motor Vehicles §§ 554, 555.

Proper lookout requires observance of objects in plain sight. — Where plaintiff, in daylight, with an unobstructed view, and with "no reason" why he did not see the protruding manhole, collided with it, plaintiff failed to keep a proper lookout by failing to see what was in plain sight. Martinez v. City of Albuquerque, 84 N.M. 189, 500 P.2d 1312 (Ct. App. 1972).

Duty to observe matters in plain sight. — Maintaining a proper lookout involves a duty to observe matters in plain sight. Sheraden v. Black, 107 N.M. 76, 752 P.2d 791 (Ct. App. 1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Automobiles and Highway Traffic §§ 354, 355.

When automobile is under control, 28 A.L.R. 952.

Duty of motor vehicle driver approaching place where children are playing or gathered, 30 A.L.R.2d 5.

61A C.J.S. Motor Vehicles §§ 554, 555.

13-1203. Proper lookout; definition.

The duty to keep a proper lookout requires more than merely looking. It also requires a person to actually see what is in plain sight or is obviously apparent to one under like or similar circumstances.

Further, with respect to that which is not in plain sight or readily apparent, a person is required to appreciate and realize what is reasonably indicated by that which is in plain sight.

USE NOTE

This instruction is not limited in its application to motor vehicle cases. See Mac Tyres, Inc. v. Vigil, 92 N.M. 446, 589 P.2d 1037 (1979). In a vehicle case, this instruction should be used with UJI 13-1201 and 13-1202.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Proper lookout requires observance of objects in plain sight. — Where plaintiff, in daylight, with an unobstructed view, and with "no reason" why he did not see the protruding manhole, collided with it, plaintiff failed to keep a proper lookout by failing to see what was in plain sight. Martinez v. City of Albuquerque, 84 N.M. 189, 500 P.2d 1312 (Ct. App. 1972).

Court may refuse instruction on proper lookout. — Evidence that lead car suddenly stopped in the middle of a block and turned without signaling, that plaintiff's middle car also stopped suddenly and that almost immediately thereafter defendant's car hit plaintiff's vehicle, along with testimony that when defendant saw the brake lights on plaintiff's car, he applied his brakes and tried to change traffic lanes, was insufficient to support plaintiff's proffered instruction on proper lookout, and the instruction was properly refused. Sandoval v. Cortez, 88 N.M. 170, 538 P.2d 1192 (Ct. App. 1975).

This instruction is not limited to motor vehicle cases. See Mac Tyres, Inc. v. Vigil, 92 N.M. 446, 589 P.2d 1037 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Automobiles and Highway Traffic § 1 et seq.

Duty of motor vehicle driver approaching place where children are playing or gathered, 30 A.L.R.2d 5.

61A C.J.S. Motor Vehicles § 554.

13-1204. Right-of-way at intersection; no traffic controls.

It is the duty of every driver of a vehicle to exercise ordinary care in approaching, entering and driving through an intersection.

Approaching an intersection from different highways or streets, drivers have the following right-of-way:

(1) The driver on the left must yield when the vehicle on the right is either in the intersection or so near to the intersection that there is danger of collision;

(2) The driver on the right must yield when the vehicle on the left will enter the intersection and pass beyond the driver's line of travel, if the driver on the right exercises ordinary care in approaching and entering the intersection.

Failure to yield the right-of-way at an intersection is negligence.

USE NOTE

This instruction is not to be used where traffic at an intersection is controlled by signs, devices or lights, and the instructions found in Chapter 15 are applicable.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — This instruction reflects New Mexico's adoption, in light of the construction of 64-18-27, 1953 Comp. [repealed, Laws 1978, ch. 35, § 554; see now 66-7-328 NMSA 1978] and Moore v. Kujath, 225 Minn. 107, 29 N.W.2d 883, 175 A.L.R. 1007 (1947), of the "interval of time and distance" rule, which states, "[the car on the left] having entered the intersection at such interval of time and distance as to safely cross ahead of the vehicle approaching from the east, had its driver been exercising due care, the statute secured to him the prior use of the intersection". See Brizal v. Vigil, 65 N.M. 267, 335 P.2d 1065 (1959).

One may be liable for negligent acts occurring after entering the intersection even though favored at the time of entry. Miller v. Marsh, 53 N.M. 5, 201 P.2d 341 (1948).

Right-of-way is a relative right which does not justify action likely to cause an accident. See Schoen v. Schroeder, 53 N.M. 1, 200 P.2d 1021 (1948).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

Library references. — 61A C.J.S. Motor Vehicles §§ 547, 548, 553, 556.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1024.

Liability for accident arising from failure of motorist to give signal for left turn at intersection as against motor vehicle proceeding in same direction, 39 A.L.R.2d 15.

Liability for accident arising from failure of motorist to give signal for left turn at intersection, as against oncoming or intersecting motor vehicle, 39 A.L.R.2d 65.

Liability for accident arising from failure of motorist to give signal for left turn between intersections, 39 A.L.R.2d 103.

Duty and liability of vehicle drivers approaching intersection of one-way street with other street, 62 A.L.R.2d 275.

61A C.J.S. Motor Vehicles §§ 548, 556.

13-1205. Right-of-way not absolute.

A person having the right-of-way must nevertheless use ordinary care in exercising the right-of-way so as to avoid injury to [himself] [herself] or to others.

USE NOTE

This instruction is to be used when UJI 13-1204 is given and there is an issue concerning the exercise of ordinary care by the party on the right.

[As amended, effective January 1, 1987; November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

13-1206. Right to assume driver will obey the law.

A driver has the right to assume that other drivers will obey the law unless the driver sees, or by the exercise of ordinary care should have seen, that the driver of the other vehicle will not obey the law or is unable to avoid a collision.

[As amended, effective January 1, 1987.]

Committee comment. — Drivers of vehicles have the right to assume that other drivers will obey the law. See Williams v. Cobb, 90 N.M. 638, 567 P.2d 487 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), and Barbieri v. Jennings, 90 N.M. 83, 559 P.2d 1210 (Ct. App. 1976), cert. denied, 90 N.M. 7, 558 P.2d 619 (1977).

ANNOTATIONS

Instruction held not reversible error. — It is not reversible error not to give the following instruction: "You are instructed that travelers using the public highways and streets have the right to assume that other travelers will exercise reasonable care and caution to avoid placing the lives or safety of others in peril and will obey applicable traffic regulations and rules of the road. A motorist is not bound to anticipate negligence or gross negligence on the part of another motorist, in the absence of anything to indicate otherwise, and the care and diligence of a motorist is to be measured in view of the assumption that other motorists will not drive in a negligent or grossly negligent manner. But this assumption does not apply where a motorist sees, or in the exercise of ordinary care and prudence should see, that another motorist will not obey the traffic rules or regulations". Kinney v. Luther, 97 N.M. 475, 641 P.2d 506 (1982).

13-1207. Duty of passenger.

A passenger has a duty to use ordinary care for [his] [her] own safety. A passenger may not sit idly by and permit [himself] [herself] to be driven carelessly, to [his] [her] injury, where there are dangers which are known or which reasonably should be known to [him] [her].

If you find that circumstances existed in this case which would cause a passenger, exercising ordinary care for [his] [her] own safety, to keep a lookout or warn the driver, and that the plaintiff failed to do so, then such failure is negligence.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — This instruction was approved in Trujillo v. Chavez, 76 N.M. 703, 417 P.2d 893 (1966), and Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

Library references. — 61A C.J.S. Motor Vehicles §§ 533, 543, 556.

This instruction was justified where plaintiff-passenger traveled accident route daily and was aware of the heavy traffic. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977) (decided under former instruction).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Automobiles and Highway Traffic § 239; 8 Am. Jur. 2d Automobiles and Highway Traffic §§ 528 to 531, 543.

Motor vehicle passenger's contributory negligence or assumption of risk where accident resulted from driver's drowsiness, physical defect or illness, 1 A.L.R.4th 556.

61A C.J.S. Motor Vehicles §§ 543, 556.

13-1208. Joint enterprise; imputation of negligence.

A joint enterprise existed between passenger and driver if these two elements were present:

(1) a common purpose in the use of a vehicle; and

(2) the right in each to share in the control of the vehicle.

As to the second element, the question for you to decide is whether there was a right in each to share in the control of the car rather than the actual exercise of such right of control.

If you find that there was a joint enterprise, then any negligence of the driver is the negligence of the plaintiff, but, if you do not find a joint enterprise, the negligence of the driver is not the negligence of the passenger.

USE NOTE

This instruction should identify the passenger and driver in their respective positions as parties to the action.

[As amended, effective January 1, 1987.]

Committee comment. — The basic case on this issue is Silva v. Waldie, 42 N.M. 514, 82 P.2d 282 (1938). See also Pavlos v. Albuquerque Nat'l Bank, 82 N.M. 759, 487 P.2d 187, 56 A.L.R.3d 558 (Ct. App. 1971).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic §§ 674, 679 to 681.

Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence, 21 A.L.R.4th 459.

61A C.J.S. Motor Vehicles § 530.

13-1209. Negligence of driver not attributable to passenger.

Negligence on the part of the driver of the vehicle in which plaintiff was a passenger cannot be charged to plaintiff.

USE NOTE

This instruction is not to be used where an issue exists as to the plaintiff's right of control over the driver.

[As amended, effective January 1, 1987.]

Committee comment. — This instruction is not intended to absolve the passenger of negligence but only to avoid imputation of the negligence of the driver to him. See Ford v. Etheridge, 71 N.M. 204, 377 P.2d 386 (1962); Mills v. Southwest Bldrs., Inc., 70 N.M. 407, 374 P.2d 289 (1962); Perini v. Perini, 64 N.M. 79, 324 P.2d 779 (1958); Silva v. Waldie, 42 N.M. 514, 82 P.2d 282 (1938); and Archuleta v. Johnston, 83 N.M. 380, 492 P.2d 997 (Ct. App.), cert. denied, 83 N.M. 379, 492 P.2d 996 (1971).

ANNOTATIONS

Library references. — 65A C.J.S. Negligence §§ 168, 298.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence, 21 A.L.R.4th 459.

61A C.J.S. Motor Vehicles § 543.

13-1210. Family purpose doctrine.

If you find that the motor vehicle operated by _____ *(driver)* [was made available by _____ *(head of household)* to _____ *(driver)* for any purpose on this occasion] [or] [was furnished by _____ *(head of household)* to family members of the household, including _____ *(driver),* for general use] [and that _____ *(driver)* was a family member of _____ *(head of household)* household], then _____ *(head of household)* is liable for damages proximately caused by negligent operation of the vehicle by _____ *(driver).*

USE NOTE

The parties should fill in the blanks to personalize this instruction as much as possible. The appropriate brackets should be used where supported by the evidence. Either the first or second bracketed material, or both, may be used where appropriate. Each forms an independent basis for application of the family purpose doctrine and it may not be necessary to use both brackets in every case. The last bracket should be used in any case where the driver's status as a member of the household is a jury issue.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — The New Mexico Supreme Court has considered the family purpose doctrine in several cases including the following: State Farm Mut. Auto Ins. Co. v. Duran, 93 N.M. 489, 601 P.2d 722 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); Peters v. LeDoux, 83 N.M. 307, 491 P.2d 524 (1971); Pavlos v. Albuquerque Nat'l Bank, 82 N.M. 759, 487 P.2d 187, 56 A.L.R.3d 558 (Ct. App. 1971); Cortez v. Martinez, 79 N.M. 506, 445 P.2d 383 (1968); Lopez v. Barreras, 77 N.M. 52, 419 P.2d 251 (1966).

The New Mexico Supreme Court decision in Madrid v. Shryock, 106 N.M. 467, 745 P.2d 375 (1987) set forth public policy considerations in the application of the Family Purpose Doctrine. While not overruling any of the previous cases on Family Purpose, see State Farm Mut. Auto Ins. Co. v. Duran, 93 N.M. 489, 601 P.2d 722 (Ct. App. 1979); Burkhart v. Corn, 59 N.M. 343, 284 P.2d 226 (1955); Peters v. LeDoux, 83 N.M. 307, 491 P.2d 524 (1971); the Court rejected the traditional agency theory of liability.

A head of household, however, is not necessarily liable for the negligence of a minor child when the vehicle is owned and maintained by the minor child.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, rewrote the instruction to the extent that a detailed comparison would be impracticable.

Library references. — 61A C.J.S. Motor Vehicles §§ 530, 531, 551.

Family purpose doctrine inapplicable. — The family purpose doctrine was inapplicable as a matter of law where the son maintained the vehicle and no one exercised control or had right of control over the vehicle except the son, even though the father cosigned the note to secure financing for the purchase of the vehicle and was named on the registration certificate. Madrid v. Shryock, 106 N.M. 467, 745 P.2d 375 (1987).

The mere facts that the son lived in the family home and that a family member was a passenger in the vehicle at the time of the accident are insufficient to establish a "family purpose." Madrid v. Shryock, 106 N.M. 467, 745 P.2d 375 (1987).

The family purpose doctrine was inapplicable where the driver was insured and was therefore not "financially irresponsible," and where plaintiff failed to establish that the driver's husband furnished the vehicle to the driver or otherwise had sufficient control over it and the defendants were not living together at the time of the accident. Hermosillo v. Leadingham, 2000-NMCA-096, 129 N.M. 721, 13 P.3d 79.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of donor of motor vehicle for injuries resulting from owner's operation, 22 A.L.R.4th 738.

13-1211. Pedestrians; crossing at other than crosswalks - *No instruction drafted*.

No instruction drafted.

Committee comment. — Instructions found in Chapter 15 should be used where applicable.

ANNOTATIONS

Library references. — 61A C.J.S. Motor Vehicles §§ 533, 542, 556.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Automobiles and Highway Traffic § 1024.

Admissibility of evidence of habit, customary behavior or reputation as to care of pedestrian on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 A.L.R.3d 1293.

Failure to comply with statute regulating travel by pedestrian along highway as affecting right to recovery, 45 A.L.R.3d 658.

Who is "pedestrian" entitled to rights and subject to duties provided by traffic regulations or judicially stated, 35 A.L.R.4th 1117.

61A C.J.S. Motor Vehicles §§ 543, 556.

13-1212. Emergency vehicles - *No instruction drafted*.

No instruction drafted.

Committee comment. — Instructions found in Chapter 15 should be used where applicable.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Automobiles and Highway Traffic §§ 357, 358.

61A C.J.S. Motor Vehicles §§ 530, 532, 533, 535, 536, 556.

13-1213. Motor vehicles; railroad crossings - *No instruction drafted*.

No instruction drafted.

Committee comment. — Instructions found in Chapter 15 should be used where applicable.

CHAPTER 13
Owners and Occupiers of Land; Tort Liability

Introduction

This chapter contains instructions for use in cases involving tort liability for injury or damage occurring on lands under the ownership, occupancy or control of persons other than the claimant. Instructions applicable to slip and fall cases are included in this chapter, as well as jury instructions applicable to suits against a municipality arising out of damages due to a defect in a street or sidewalk.

General instructions on tort law applicable to such cases are found in other portions of this book and, when applicable, should be used in connection with the instructions contained in this chapter.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Landowner's strict liability limited to use of explosives. — New Mexico does not recognize the theory of a landowner's strict liability except in cases where his activity involves the use of explosives. Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability for injuries in connection with revolving door on nonresidential premises, 93 A.L.R.3d 132.

Liability of motel operator for injury or death of guest or privy resulting from condition in plumbing or bathroom of room or suite, 93 A.L.R.3d 253.

13-1301. Trespasser; definition.

A trespasser is a person who enters or remains upon the premises of another without the [express] [or] [implied] permission of the [owner] [occupant] of the premises.

[A person who is on the premises of another with the permission of the [owner] [occupant] is a trespasser to the extent the person goes outside the area in which the [owner] [occupant] might reasonably expect the person to be.]

[A person who is on the premises of another with the permission of the [owner] [occupant] is a trespasser to the extent the person uses the premises in a manner different from that which the [owner] [occupant] might reasonably expect.]

USE NOTE

This instruction is to be used if there is an issue as to whether the plaintiff was a trespasser. The bracketed sections should be selected as applicable to the evidence presented at trial.

[As amended, effective January 1, 1987; March 1, 1996.]

Committee comment. — For a discussion of New Mexico's analysis of premises liability claims depending on whether the plaintiff was a trespasser or a visitor, *see Ford v. Board of County Commissioners,* 118 N.M. 134, 879 P.2d 766 (1994).

ANNOTATIONS

The 1996 amendment, effective March 1, 1996, rewrote the instruction, which read: "A trespasser is a person who goes upon the premises of another without permission or invitation", and added the second sentence in the Use Note.

Areas reasonably expected to be used. — The parking lot adjacent to defendant's bar would be an area defendant might reasonably expect plaintiff to use. Valdez v. Warner, 106 N.M. 305, 742 P.2d 517 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 Am. Jur. 2d Premises Liability §§ 114 to 117.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 A.L.R.4th 294.

87 C.J.S. Trespass § 1.

13-1302. Visitor; definition.

A visitor is a person who enters or remains upon the premises with the [express] [or] [implied] permission of the [owner] [occupant] of the premises.

USE NOTE

This instruction is to be used if there is an issue as to whether the plaintiff was a visitor. The bracketed terms should be selected as applicable to the evidence presented at trial.

[As amended, effective January 1, 1987; March 1, 1996.]

Committee comment. — In *Ford v. Board of County Commissioners,* 118 N.M. 134, 879 P.2d 766 (1994), the Supreme Court eliminated the distinction, for purposes of defining the landowner's duty of care, between licensees and business visitors or invitees while retaining a different standard for the duty owed to trespassers. The Court referred to both licensees and business visitors as "visitors" and held that a duty of ordinary care applied to them.

ANNOTATIONS

The 1996 amendment, effective March 1, 1996, substituted "visitor" for "licensee" in the instruction heading and at the beginning, inserted "[express] [or] [implied]" and "of the premises", and deleted the former last two sentences which read: "Such permission or invitation may be expressed or implied. A social guest is a licensee", and rewrote the Use Note.

Ordinary negligence principles govern. — UJI 13-1309 is modified to read: "An owner owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor." Ordinary principles of negligence will govern a landowner's conduct as to a licensee and invitee. Thus in determining reasonable care, the status of the entrant may be considered as a factor, but will no longer be the determinative factor in assessing the landowner's or occupier's liability. Ford v. Board of County Comm'rs, 118 N.M. 134, 879 P.2d 766 (1994).

No duty owed motorcyclist who has right to use trails. — Where a traveler has a right to ride a motorcycle over the trails on a landowner's property, the landowner has no duty to maintain the trails and has no duty to warn of dangerous trail conditions not created by the landowner. Moore v. Burn Constr. Co., 98 N.M. 190, 646 P.2d 1254 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 Am. Jur. 2d Premises Liability §§ 108 to 113.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 A.L.R.4th 294.

65A C.J.S. Negligence §§ 281, 287.

13-1303. Withdrawn.

Committee comment. — The category of business visitor or invitee is no longer used in defining the landowner's duty under the New Mexico law of premises liability. *See* UJI 13-1302, Committee Comment.

Withdrawals. — Pursuant to a court order dated January 22, 1996, this instruction, relating to business visitors and business invitees, is withdrawn effective March 1, 1996.

13-1304. Status of party not an issue.

In this case, the plaintiff was a [trespasser] [visitor].

USE NOTE

This instruction is to be used if the status of the plaintiff is not an issue. If used, the appropriate definition contained in UJI 13-1301 or 13-1302 should follow.

[As amended, effective January 1, 1987; March 1, 1996.]

ANNOTATIONS

The 1996 amendment, effective March 1, 1996, substituted "[visitor]" for "[licensee] [business visitor]", and substituted "plaintiff" for "party" and deleted a reference to UJI 13-1303 in the Use Note.

13-1305. Duty to trespasser; artificial condition on premises.

If the [owner] [occupant] creates or maintains an artificial condition on the land, then [he] [she] has a duty to a trespasser to use ordinary care to warn of the condition and of the risk involved if:

(1) The condition involves an unreasonable risk of death or bodily harm to persons coming onto the land;

(2) [He] [She] knows or reasonably should know [that there are constant intrusions by persons in the dangerous area] [that there are persons on the land in dangerous proximity to the condition]; and

(3) [He] [She] has reason to believe that the trespasser will not discover the condition or realize the risk involved.

The [owner] [occupant] owes no duty to make [his] [her] land safe for a trespasser, unless and until [he] [she] knows or reasonably should know that the trespasser is on [his] [her] land.

USE NOTE

The bracketed language should be used as appropriate.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — In *Ford v. Board of County Commissioners,* 118 N.M. 134, 139 n.4, 879 P.2d 766, 771 n.4 (1994), the Supreme Court affirmed that the duty of care owed to a trespasser is as set forth in UJI 13-1305 to 13-1307. [As revised, effective March 1, 1996.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Trespassers will be maintained as a separate classification, however, the distinction between licensees and invitees is eliminated. Ford v. Board of County Comm'rs, 118 N.M. 134, 879 P.2d 766 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Landlord's liability for injury or death due to defects in exterior steps or stairs used in common by tenants, 67 A.L.R.3d 490.

Landlord's liability for injury or death caused by defective condition of interior steps or stairways used in common by tenants, 67 A.L.R.3d 587.

Landlord's liability for injury or death due to defects in outside walks, drives or grounds used in common by tenants, 68 A.L.R.3d 382.

Liability of governmental unit or private owner or occupant of land abutting highway for injuries or damages sustained when motorist strikes tree or stump on abutting land, 100 A.L.R.3d 510.

52 C.J.S. Landlord and Tenant §§ 417(9), 443.

13-1306. Duty to trespasser; activity of owner.

If the owner is engaged in activities on [his] [her] land, [he] [she] has a duty to use ordinary care to avoid injury to a trespasser, if:

(1) The activity involves an unreasonable risk of death or great bodily harm to persons coming onto the land;

(2) [He] [She] knows or should reasonably know that [there are constant intrusions by trespassers onto the area in which the activity is permitted] [there are trespassers on the land in dangerous proximity to the activity]; and

(3) [He] [She] has reason to believe that the trespasser will not realize the risk of harm involved.

[If the activity involves a controllable force, the owner has a duty either to use reasonable care to control the force to avoid injury or to give adequate warning.] The [owner] [occupant] of the land has no duty to regulate [his] [her] activities so as to avoid injury to a trespasser, unless and until [he] [she] knows or should know that the trespasser is on [his] [her] land.

USE NOTE

The bracketed language should be included as appropriate.

[As amended, effective January 1, 1987; November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Owner's responsibility for action of security guard. — Where security guard was carrying a loaded weapon, if plaintiff was found to have trespasser status, and if the

elements of this instruction were present, then owner would owe him a duty to use ordinary care to avoid his injury. Savinsky v. Bromley Group, Ltd., 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

Duty to trespasser not applicable when cooperating in stakeout. — Absent some factual issue that property owner knew of potential injury to trespassers when he cooperated with a police stakeout designed to catch them, the legal doctrines of duty to trespassers were not applicable and did not defeat summary judgment for owner. Cordova v. City of Albuquerque, 86 N.M. 697, 526 P.2d 1290 (Ct. App. 1974).

As to duty of railroad to trespasser crossing tracks between cars, see Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 Am. Jur. 2d Premises Liability §§ 183 to 207.

Liability to trespasser or bare licensee as affected by distinction between active and passive negligence, 49 A.L.R. 778, 156 A.L.R. 1226.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 A.L.R.5th 550.

65 C.J.S. Negligence § 63(7); 65A C.J.S. Negligence § 287.

13-1307. Duty to trespasser; natural conditions.

An [owner] [occupant] of land has no liability to a trespasser injured on [his] [her] land from a natural condition of that land.

USE NOTE

This instruction may be applicable when there is a question of fact as to whether the trespasser was injured by a natural or an artificial condition.

[As amended, effective January 1, 1987; November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 A.L.R.4th 294.

13-1308. Withdrawn.

Committee comment. — The category of licensee is no longer used in defining the landowner's duty under the New Mexico law of premises liability. *See* UJI 13-1302, Committee Comment. The single standard of care applicable to persons formerly categorized as either licensees or business visitors is set forth in UJI 13-1309.

Withdrawals. — Pursuant to a court order dated January 22, 1996, this instruction, relating to duty to licensee, is withdrawn effective March 1, 1996.

13-1309. Duty to visitor.

An [owner] [occupant] owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor [, whether or not a dangerous condition is obvious].

USE NOTE

This instruction is to be used to define the duty of care owed to a visitor. It applies in all cases in which a visitor claims to have been injured as a result of an unreasonably dangerous condition of the premises, including those in which the condition was open and obvious. In cases involving open and obvious dangers, the bracketed portion of the instruction should be given; in other cases it should be omitted. If the court concludes that the plaintiff's negligence in encountering a known or obviously dangerous condition was unforeseeable as a matter of law, however, an instruction imposing a duty of care on the owner/occupier of the premises should not be given.

For an instruction specifically applicable to typical slip and fall cases, see UJI 13-1318. For a supplemental instruction applicable to cases in which a visitor has been injured by the conduct of a third person, see UJI 13-1320. UJI 13-1601 (negligence) and 13-1603 (ordinary care) should be given with this instruction.

Where the case involves an issue of the plaintiff's alleged comparative fault, an appropriate instruction regarding the plaintiff's duty should also be given, such as UJI 13-1604 (ordinary care for own safety) or a modified version of UJI 13-1202 and 13-1203 (proper lookout).

[As amended, effective January 1, 1987; March 1, 1996.]

Committee comment. — A landowner owes visitors (formerly categorized as either licensees or business visitors) a uniform duty of ordinary care to protect the visitor against conditions that foreseeably pose an unreasonable risk of injury. *Ford v. Board of County Comm'rs,* 118 N.M. 134, 879 P.2d 766 (1994). This duty applies even where a dangerous condition is known to the visitor or is open and obvious, because in the exercise of ordinary care a landowner must generally anticipate some degree of negligence on the part of others encountering even a known or obvious danger. *Klopp v. Wackenhut Corp.,* 113 N.M. 153, 157, 824 P.2d 293, 297 (1992). There may be circumstances, however, in which a visitor's own negligence, resulting in injury from an

obviously dangerous condition, is unforeseeable. *See id.* at 158, 824 P.2d at 298. Because no duty exists if the landowner lacks reason to know that an obviously dangerous condition poses an unreasonable risk of injury to a visitor, this instruction should not be given if the trial court determines that the negligence of the visitor was unforeseeable as a matter of law. *Id.* at 158-59, 824 P.2d at 298-99. Generally in a case involving injury from an obviously dangerous condition where the plaintiff may have been contributorily negligent, it is for counsel in argument to address how legal concepts of unreasonable risk, foreseeability, and ordinary care apply to the evidence at hand. *See id.* at 159, 824 P.2d at 299.

ANNOTATIONS

The 1996 amendment, effective March 1, 1996, rewrote the instruction heading, which read: "Duty to business visitor (invitee) arising from a condition of the premises", deleted "business" preceding "visitor" in two places, and added "whether or not a dangerous condition is obvious", and rewrote the Use Note.

Jury instruction modified. — This jury instruction is modified to read: "An owner owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor." Ordinary principles of negligence will govern a landowner's conduct as to a licensee and invitee. Thus in determining reasonable care, the status of the entrant may be considered as a factor, but will no longer be the determinative factor in assessing the landowner's or occupier's liability. Ford v. Board of County Comm'rs, 118 N.M. 134, 879 P.2d 766 (1994).

Whether duty described in this instruction was performed presents a question of fact to be determined by the fact finder. Aitken v. Starr, 99 N.M. 598, 661 P.2d 498 (Ct. App. 1983).

Owner's duty to protect patrons and relationship to third parties. — Rather than hold the bar owner fully liable for damages, the jury should be given an instruction regarding the owner's duty to protect patrons and how that duty relates to conduct of third persons. The owner's negligent failure to protect patrons from foreseeable harm may be compared by the jury to the conduct of the third party, thus, making the bar owner responsible only for his percentage of fault. Reichert v. Atler, 117 N.M. 623, 875 P.2d 379 (1994).

No duty owed motorcyclist who has right to use trails. — Where a traveler has a right to ride a motorcycle over the trails on a landowner's property, the landowner has no duty to maintain the trails and has no duty to warn of dangerous trail conditions not created by the landowner. Moore v. Burn Constr. Co., 98 N.M. 190, 646 P.2d 1254 (Ct. App. 1982).

Business had duty, under lease, to safely maintain and illuminate parking lot. — See Gillin v. Carrows Restaurants, Inc., 118 N.M. 120, 879 P.2d 121 (Ct. App. 1994).

Law reviews. — For note, "Personal Injury Law - Comparative Negligence and the Obvious Danger Rule: *Klopp v. Wackenhut Corp.,*" see 23 N.M.L. Rev. 225 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 Am. Jur. 2d Premises Liability §§ 136 to 158.

Liability of owner or occupant of premises for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 14 A.L.R.4th 913.

Liability of theater owner or operator for injury to or death of patron resulting from lighting conditions on premises, 19 A.L.R.4th 1110.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 A.L.R.4th 294.

Tort liability for window washer's injury or death, 69 A.L.R.4th 207.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 A.L.R.4th 127.

Liability of proprietor of store, business, or place of amusement, for injury to one using baby stroller, shopping cart, or the like, furnished by defendant, 42 A.L.R.5th 159.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 54 A.L.R.5th 513.

65 C.J.S. Negligence § 63(45); 65A C.J.S. Negligence § 287.

13-1310. Withdrawn.

Committee comment. — Former UJI 13-1310, which applied to cases involving injuries resulting from known or obviously dangerous conditions of the premises, was disapproved in *Klopp v. Wackenhut Corp.,* 113 N.M. 153, 824 P.2d 293 (1992), and has been withdrawn. *See* UJI 13-1309 for an instruction applicable to such cases.

Withdrawals. — Pursuant to a court order dated January 22, 1996, this instruction, relating to duty to visitor in relation to a known or obvious danger, is withdrawn effective March 1, 1996.

13-1311. Withdrawn.

Committee comment. — This instruction formerly limited the landowner's duty where a licensee or business visitor went outside the portion of the premises or departed from the manner of use for which permission was granted. The concept embodied in this instruction has been included in the definition of trespasser in UJI 13-1301.

Withdrawals. — Pursuant to a court order dated January 22, 1996, this instruction, relating to limitations on the duty to visitors, is withdrawn effective March 1, 1996.

13-1312. Trespassing children (attractive nuisance).

An [owner] [occupant] has a duty to prevent injury to a trespassing child resulting from _____ *(describe structure or artificial condition)* artificial condition of the land if:

(1) The place where the condition is maintained is one upon which the [owner] [occupant] knows or has reason to know that children are likely to trespass;

(2) The condition is one which involves an unreasonable risk of injury to trespassing children and the [owner] [occupant] knows or has reason to know of such risk; and

(3) The child because of [his] [her] youth does not discover the condition or realize the risk involved by intermeddling with it or coming into the area made dangerous by it.

In such a case, the [owner] [occupant] has a duty to exercise ordinary care, considering the youth of the child, to prevent injury to the child.

USE NOTE

This instruction may be used when the injured trespasser is a child.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — A line of New Mexico cases recognizes and applies the attractive nuisance doctrine. For a discussion of the elements of the doctrine and its relation to ordinary negligence principles, see Latimer v. City of Clovis, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972). See also Restatement (Second) of Torts § 339 (1965), from which the foregoing instruction is adapted.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in Item (3).

Defendant's negligence must proximately cause injury or death. — Although plaintiff charged that defendant, United States, was negligent in not maintaining a fence along banks of the irrigation canal, where a fence at some time in the past had been erected, and in not having guard rails along the sides of a bridge, there was nothing whatever in the evidence to connect the death of her two children with the failure of the defendant so to do, nor was it known where, why and how the children entered, fell or

were pushed into the water and plaintiff failed to prove negligence as the proximate cause of the children's deaths. Foster v. United States, 183 F. Supp. 524 (D.N.M. 1959), aff'd, 280 F.2d 431 (10th Cir. 1960).

Dangerous instrumentality doctrine is similar to the attractive nuisance doctrine. Where the plaintiff is not a child, neither doctrine is applicable. Moore v. Burn Constr. Co., 98 N.M. 190, 646 P.2d 1254 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 Am. Jur. 2d Premises Liability §§ 270 to 389.

Duty of land owner to erect fence or other device to deter trespassing children from entering property of third person on which dangerous condition exists, 39 A.L.R.2d 1452.

65A C.J.S. Negligence §§ 273, 281.

13-1313. Leased premises; latent defect.

If a landlord knows about an existing defect on the premises which is not readily apparent or knows facts and circumstances which would indicate that there is such a defect, then the landlord must tell the tenant about the defect at the time of renting the premises or before the tenant moves in. However, a landlord need not warn the tenant against a defect which is obvious.

USE NOTE

This instruction is not appropriate when the accident occurs on that part of the premises reserved for use by all or other tenants, such as hallways or stairs. In such instance, use UJI 13-1315.

[As amended, effective January 1, 1987.]

Committee comment. — New Mexico has special statutory provisions as to the duty of a landlord.

See NMSA 1978, §§ 47-8-1 to 47-8-51.

ANNOTATIONS

Compiler's notes. — The duty and its limits, expressed in the foregoing instruction, have been noted in Barham v. Baca, 80 N.M. 502, 458 P.2d 228 (1969); Mitchell v. C & H Transp. Co., 90 N.M. 471, 565 P.2d 342 (1977); Torres v. Piggly Wiggly Shop Rite Foods, Inc., 93 N.M. 408, 600 P.2d 1198 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Modern status of rule requiring actual knowledge of latent defect in leased premises as prerequisite to landlord's liability for injury resulting therefrom, 88 A.L.R.2d 586.

Modern status of landlord's tort liability for injury or death of tenant or third person caused by dangerous conditions of premises, 64 A.L.R.3d 339.

52 C.J.S. Landlord and Tenant § 443(21).

13-1314. Landlord's duty regarding repairs.

A landlord who undertakes to make improvements or repairs upon leased premises is under a duty to use ordinary care in carrying out the work [even if the landlord was not under an obligation to make the improvements or repairs].

USE NOTE

The bracketed material is to be used when appropriate under the evidence.

[As amended, effective January 1, 1987.]

Committee comment. — An owner's duty to make repairs to leased premises is controlled by the New Mexico Uniform Owner-Resident Relations Act, NMSA 1978, Section 47-8-1 et seq. The instruction is applicable in all cases where the landlord performs repairs or undertakes improvements.

See Strong v. Shaw, 96 N.M. 281, 629 P.2d 784 (Ct. App. 1981).

ANNOTATIONS

Instruction properly submitted. — In a negligence action against a store owner, the trial court properly submitted this rule to the jury because the landowner's contractual obligation to repair and maintain a parking lot area included the ramp area where the plaintiff's fall occurred. Woolwine v. Furr's, Inc., 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).

In a negligence action against a store owner, there was no error in the trial court's submission of an instruction under this rule permitting the jury to compare the alleged negligence of the plaintiff, the store operator, and the landowner. Woolwine v. Furr's, Inc., 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 568.

Liability of landlord for damage to tenant's goods through negligence in making repairs, 15 A.L.R. 971, 150 A.L.R. 1373.

51C C.J.S. Landlord and Tenant §§ 366(1) to 366(3), 368(5); 52 C.J.S. Landlord and Tenant § 417(3).

13-1315. Place reserved for common use.

A landlord must use ordinary care to keep the _____ *(stairs, hallway or other common premises)* in a safe condition for the purposes for which the _____ *(stairs, hallway or other common premises)* were intended.

USE NOTE

This instruction should be used where the injury occurs in a portion of the building reserved for common use.

The blanks must be properly completed.

[As amended, effective January 1, 1987.]

Committee comment. — See Judge Hernandez's special concurrence in Mercer v. Flats, 91 N.M. 677, 579 P.2d 803 (Ct. App. 1978), for a discussion of a landlord's duty to provide fire extinguishers in common areas. See NMSA 1978 § 47-8-20(A)(3) as to residential landlords.

13-1316. Duty where property abuts sidewalk.

The [owner] [occupant] of property abutting a public sidewalk is under a duty to exercise ordinary care not to create an unsafe condition which would interfere with the customary and regular use of the sidewalk.

[As amended, effective January 1, 1987.]

Committee comment. — Concerning owner's duty, as well as obligation of pedestrian to be observant, see Giese v. Mountain States Tel. & Tel. Co., 71 N.M. 70, 376 P.2d 24 (1962).

By implication, the rule expressed in the foregoing instruction received approval in Lommori v. Milner Hotels, Inc., 63 N.M. 342, 319 P.2d 949 (1957).

Reference should also be made to provisions of statutes and ordinances which may be applicable. It would seem this instruction would be equally applicable to property not abutting a public sidewalk.

ANNOTATIONS

Landowner has no duty to maintain a public road. See Moore v. Burn Constr. Co., 98 N.M. 190, 646 P.2d 1254 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62A Am. Jur. 2d Premises Liability §§ 646, 651.

63 C.J.S. Municipal Corporations § 781 et seq.; 65A C.J.S. Negligence § 275.

13-1317. Sidewalks and streets; duty of city.

A city has a duty to use ordinary care to maintain [streets] [sidewalks] in a safe condition.

[As amended, effective January 1, 1987.]

Committee comment. — A city is liable for its failure to use ordinary care in the maintenance of its streets and sidewalks, irrespective of actual or constructive notice. Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App. 1981). See also NMSA 1978, § 41-4-11.

In order to impose liability on a municipality for failure to maintain a street or sidewalk or for failure to provide traffic signals, it must be shown that the municipality's failure created a dangerous condition. Blackburn v. State, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982). See also Rickerson v. State, 94 N.M. 473, 612 P.2d 703 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980).

ANNOTATIONS

Landowner has no duty to maintain a public road. See Moore v. Burn Constr. Co., 98 N.M. 190, 646 P.2d 1254 (Ct. App. 1982).

Negligent maintenance of street. — A municipality is liable for damages for negligent maintenance of any existing street. Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Violation of duty establishes liability. — A violation of the duty stated in this instruction establishes municipal liability, irrespective of actual or constructive notice. Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Law reviews. — For annual review of New Mexico law relating to torts, see 13 N.M.L. Rev. 473 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, School and State Tort Liability § 133.

Liability of abutting owner or occupant for condition of sidewalk, 88 A.L.R.2d 331.

63 C.J.S. Municipal Corporations § 944.

13-1318. Slip and fall.

An [owner] [occupant] owes a visitor the duty to exercise ordinary care to keep the premises safe for the visitor's use. [This duty applies whether or not a dangerous condition is obvious.] [In performing this duty, the [owner] [occupant] is charged with knowledge of any condition on the premises [of which the [owner] [occupant] would have had knowledge had [he] [she] [it] made a reasonable inspection of the premises] [or] [which was caused by the [owner] [occupant] or [his] [her] [its] employees].]

USE NOTE

This instruction should be used in slip and fall cases involving visitors. The bracketed second sentence should be given where the case involves a dangerous condition that was open and obvious. The appropriate bracketed language in the third sentence should be given if there is evidence that the defendant failed to make a reasonable inspection of the premises that would have revealed the dangerous condition or if the condition was caused by the defendant or an employee of the defendant. UJI 13-1601 (negligence) and UJI 13-1603 (ordinary care) should be given with this instruction. *Ford v. Board of County Comm'rs,* 118 N.M. 134, 879 P.2d 766 (1994).

[As amended, effective January 1, 1987; November 1, 1991; March 1, 1996.]

Committee comment. — This instruction applies the general rule of ordinary care expressed in UJI 13-1309 to typical "slip and fall" cases involving a visitor (or, in former parlance, a licensee or business invitee).

The former version of this instruction, which suggested that the duty to exercise ordinary care could always be satisfied by warning the plaintiff of a dangerous condition and which invoked outmoded concepts of contributory negligence, has been revised in light of *Klopp v. Wackenhut Corp.,* 113 N.M. 153, 824 P.2d 293 (1992). This instruction, accompanied by basic instructions defining negligence and ordinary care, provides a basis for counsel to argue the application of the law to the facts of a particular case. *Cf. Klopp,* 113 N.M. at 159, 824 P.2d at 299.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make reference gender neutral.

The 1996 amendment, effective March 1, 1996, deleted "business visitor; dangerous condition not created by proprietor" from the instruction heading, and rewrote the instruction and the Use Note.

Slip and fall. — Where plaintiff tripped and fell over a city water meter in an alley, the court erred in refusing to give the basic slip and fall instruction together with UJI 13-1317 NMRA that states the general duty of a city to maintain its alleys in a safe condition, because the slip and fall instruction includes the elements that a city has a duty to maintain alleys in a safe condition whether or not a dangerous condition is obvious and whether or not the city has notice of any condition that it would have discovered upon reasonable inspection. Benavidez v. City of Gallup, 2007-NMSC-026, 141 N.M. 808, 161 P.3d 853.

Reconciliation of former and current instructions. — Trial court did not err in instructing jury that "the owner of the premises is not the insurer of the safety of visitors," although that language had been deleted from the current UJI before the case came to trial; the deletion was prudential in nature, and did not reflect a change in New Mexico law, moreover, the trial court had the responsibility to balance former and current versions of the UJI, since the case had been originally filed prior to the amendment of the UJI. Brooks v. K-Mart Corp., 1998-NMSC-028, 125 N.M. 537, 964 P.2d 98.

"Unreasonably dangerous" condition. — If people who are likely to encounter a condition are expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably dangerous because the likelihood of harm is slight. Proctor v. Waxler, 84 N.M. 361, 503 P.2d 644 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 Am. Jur. 2d Premises Liability §§ 37, 144.

Modern status of rules requiring showing of notice of proprietor of transitory interior condition allegedly causing plaintiff's fall, 85 A.L.R.3d 1000.

Liability of theater owner or operator for injury to or death of patron resulting from lighting conditions on premises, 19 A.L.R.4th 1110.

Liability of owner of store, office or similar place of business to invitee falling on tracked-in water or snow, 20 A.L.R.4th 438.

Liability of operator of grocery store to invitee slipping on spilled liquid or semiliquid substance, 24 A.L.R.4th 696.

Comparative negligence, contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 A.L.R.5th 589.

65 C.J.S. Negligence §§ 90, 281.

13-1319. Withdrawn.

Committee comment. — Former UJIs 13-1318 and 13-1319 have been combined into a revised UJI 13-1318 applicable to slip and fall cases.

Withdrawals. — Pursuant to a court order dated January 22, 1996, this instruction, relating to slip and fall of a business visitor when the dangerous condition is caused or actually known by the proprietor, is withdrawn effective March 1, 1996.

13-1320. Duty to visitor; acts of third persons.

If an [owner] [occupant] breaches the duty to use ordinary care to keep the premises safe for use by a visitor, resulting in injury to the visitor from the acts of a third person, the [owner's] [occupant's] breach of duty is to be compared with the conduct of the third person who actually caused the injury to the visitor [, as well as with the visitor's own fault,] in order to determine the [owner's] [occupant's] proportionate degree of fault. The [owner's] [occupant's] duty to protect visitors arises from a foreseeable risk that a third person will injure a visitor and, as the risk of danger increases, the amount of care to be exercised by the [owner] [occupant] also increases. Therefore, the proportionate fault of the [owner] [occupant] is not necessarily reduced by the increasingly wrongful conduct of the third person.

USE NOTE

This instruction is to be used in conjunction with UJI 13-1309 in cases in which a visitor is injured by the conduct of a third person which must be compared to the negligence of the defendant. The bracketed language referring to the visitor's own fault is to be given if the court determines that a jury question exits regarding the visitor's comparative fault.

[Adopted, effective March 1, 1996.]

Committee comment. — A landowner has a duty to exercise ordinary care to protect a visitor against harm resulting from the foreseeable conduct of a third party, whether that conduct is innocent, negligent, intentionally tortious, or criminal. *Reichert v. Atler,* 117 N.M. 623, 875 P.2d 379 (1994). Under New Mexico's system of comparative fault, the landowner's negligent failure to protect visitors from foreseeable harm may be compared to the conduct of the third party. *Id.* This instruction allows the jury to consider the importance of the owner's duty to protect visitors and to weigh the failure to perform that duty against the conduct of the third party, while avoiding the possibility that the landowner could shift a disproportionate share of responsibility to a third party whose intentional wrongful conduct was the direct cause of the plaintiff's injury.

CHAPTER 14
Products Liability

Introduction

The principles of strict liability in tort as approved by the American Law Institute and particularly § 402A of the Restatement (Second) of Torts gained wide acceptance beginning with *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962). In New Mexico, the court of appeals considered, without adoption, the elements of strict liability under § 402A in *Schrib v. Seidenberg*, 80 N.M. 573, 458 P.2d 825 (Ct. App. 1969) and then the tenth circuit approved a federal district court's prediction of New Mexico's adoption of § 402A. *Moomey v. Massey Ferguson, Inc.*, 429 F.2d 1184 (10th Cir. 1970). The Supreme Court of New Mexico, which already had begun the erosion of privity concepts in products cases in *Steinberg v. Coda Roberson Constr. Co.*, 79 N.M. 123, 440 P.2d 798 (1968), rejected a court of appeals holding that adoption of strict liability was up to the legislature and approved § 402A in *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972). Reliance upon the Restatement in *Stang v. Hertz Corp.*, *supra*, provides further guidance as to the scope and nature of strict liability in New Mexico, and the committee has relied heavily upon the comments to the Restatement in drafting instructions for this chapter.

The instructions of this chapter are worded solely in terms of personal injury; however, under either a negligence or strict liability theory, recovery may be had for damage to property. *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 494 P.2d 178 (Ct. App. 1971) (strict liability) and *Steinberg v. Coda Roberson Constr. Co.*, *supra*, (negligence). Where property loss is economic loss as a result of injury to the product itself (repair or replacement costs, business interruption, loss of use) courts have disagreed whether tort theories state a cause of action. The federal courts have predicted that such economic loss is not recoverable in strict liability. *Colonial Park Country Club v. Joan of Arc*, 746 P.2d 1425 (10th Cir. 1984). The Court of Appeals has held that between parties in a commercial setting when there is no large disparity in bargaining power, damages for economic losses may only be recovered in contract. *Utah International Inc., v. Caterpillar Tractor Co.*, 108 N.M. 539, 775 P.2d 741 (Ct. App. 1989), *cert. denied*, 108 N.M. 354, 772 P.2d 884 (1989). The New Mexico Supreme Court has not passed on this issue.

No definition of a "supplier" is provided under UJI 13-1402. The omission is intentional. *Stang v. Hertz Corp.*, *supra*, suggests a wide scope of application for strict liability in tort and the law, with respect to persons liable under this theory, is in a state of development. See discussion in 2 Frumer and Friedman, Products Liability § 16A(4)(b) (1976). It was felt that any definition of this term might restrict future application of the doctrine where this was not warranted by the principles of *Stang v. Hertz Corp.*, *supra*.

For the reasons that it included no definition of "supplier," the committee has attempted no definition of "product." "Product" seems naturally to equate with "goods" as defined by 55-2-105(1) NMSA 1978; however, courts have applied the principles of products liability to nonmovable structures under both negligence and strict liability theories. *Steinberg v. Coda Roberson Constr. Co.*, *supra*. Use of the word "product" is not intended to prevent the application of these instructions to injuries caused by defects in nonmovable structures. The difficulty of application of strict liability in some cases is illustrated by the two appellate opinions in *Begay v. Livingston*, 99 N.M. 359, 658 P.2d 434 (Ct. App. 1981), *rev'd*, 98 N.M. 712, 652 P.2d 734 (1982), the Supreme Court holding that motel operators are not strictly liable for defects in fixtures and furnishings of motel rooms. While the holdings differ, the two opinions illustrate that application of the doctrine in any particular case turns upon an analysis of the principles which underlie the creation of strict liability in tort, as expressed in *Stang v. Hertz Corp.*, *supra*. See also *Lay v. Vip's Big Boy Restaurant, Inc.*, 89 N.M. 155, 548 P.2d 117 (Ct. App. 1976), and *Ruiz v. Southern Pac. Co.*, 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

Strict liability applies to the theory of "crashworthiness" or "second collision" alleging that a faulty design or manufacture of an automobile or aircraft enhanced the injury a person otherwise received. *See Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 902 P.2d 54 (1995) (overruling *Duran v. GMC*, 101 N.M. 742, 688 P.2d 779 (Ct. App. 1983), *cert. quashed*, 101 N.M. 555, 685 P.2d 963 (1984)).

Stang v. Hertz Corp., *supra*, and the Uniform Commercial Code, as enacted in New Mexico, create parallel but independent bodies of product liability law. One is an action in tort; the other, implied warranty, is an action in contract. See discussion in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). Plaintiffs may proceed under both theories. No election is required. *Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983). The products liability action created by the Uniform Commercial Code will most frequently be used in commercial cases, and most claimants with personal injury actions will elect to proceed in negligence and strict liability in tort. Because this chapter is designed for cases of personal injury or physical property damage (even though the instructions are usable in a commercial damage case), instructions in negligence and strict liability predominate. However, for use in personal injury or commercial cases, the committee has included instructions on breach of warranties.

[Adopted, effective November 1, 1991; as amended, January 1, 1997.]

ANNOTATIONS

Asbestosis not compensable under strict liability. — By analogy to silicosis, asbestosis is an occupational disease, contracted gradually in the course of employment, and not a physical harm compensable under the doctrine of strict liability in tort. Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007 (D.N.M. 1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Successor products liability: form of business organization of successor or predecessor as affecting successor liability, 32 A.L.R.4th 196.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability, 41 A.L.R.4th 9.

13-1401. Issues; complaint; answer; burden of proof - *No instruction drafted*.

No instruction drafted.

Committee comment. — The statement of issues, burden of proof and formula for verdict in UJI 13-302 are designed to accommodate products liability cases. If sufficient evidence supports each theory, a claimant may alternatively state his products liability claim in negligence, strict liability and breach of warranty. 52 A.L.R.3d 101; Kirkland v. GMC, 521 P.2d 1353 (Okla. 1974); Fabian v. E.W. Bliss Co., 582 F.2d 1257 (10th Cir. 1978). Election of remedies is not a substantive principle available to defendant. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983); Buhler v. Marrujo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

ANNOTATIONS

Instruction (former UJI Civ. 14.1) supported by evidence. See Salinas v. John Deere Co., 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984).

13-1402. Duty of the supplier.

The supplier of a product has a duty to use ordinary care to avoid a foreseeable risk of injury caused by a condition of the product or manner in which it is used. This duty is owed [to persons who can reasonably be expected to use the product] [and] [to persons who can reasonably be expected to be in the vicinity during the use of the product.]

[The supplier's duty to use ordinary care continues after the product has left [his] [her] [its] possession. A supplier who later learns, or in the exercise of ordinary care should know, of a risk of injury caused by a condition of the product or manner in which it could be used must then use ordinary care to avoid the risk.]

USE NOTE

This instruction must be given in any products liability case in which the court submits negligence as a theory of liability. The instruction ordinarily will be followed by UJI 13-1403 and UJI 13-1404, defining the duty of all product suppliers. The bracketed

second paragraph shall be given only where an issue is presented concerning a supplier's failure to act to prevent injury after selling the product and learning of a risk.

[As amended, effective November 1, 1991.]

Committee comment. — All persons supplying a product owe the duty of ordinary care. The duty stated by this instruction and the supplier's duty under strict liability in tort are imposed upon the entity responsible for the act of supplying the product. If the supplier is a corporation, the corporation is regarded as the "supplier" within the meaning of this instruction. Corporate employees are not liable, absent negligent conduct on their part independent of a corporate failure to provide a product which satisfies the duty of ordinary care or is free from unreasonable risk of injury. See Restatement (Second) of Torts § 388, comment c (1966).

In contrast to strict products liability under UJI 13-1406, the duty of ordinary care does not depend upon the supplier's regular engagement in the business of supplying chattels and applies even to the gratuitous, isolated bailment. Restatement (Second) of Torts §§ 388-390, "Rules applicable to all suppliers". However, these instructions are drafted for the usual complaint against a defendant who is regularly engaged in the business of making, distributing, retailing, leasing or selling products. In an appropriate case, the negligence instructions of this chapter can be modified to cover the gratuitous bailor. UJI 13-1402 and 13-1403 would be given without modification and UJI 13-1404 would be modified so that the first sentence reads: "Ordinary care is that care which a reasonably prudent man would use in the circumstances". "Reasonably prudent man" would also be substituted for "reasonably prudent supplier" in the last sentence of UJI 13-1404. If a product is not supplied to satisfy a business purpose of the gratuitous bailor, the gratuitous bailor has no duty to inspect and the bailor's duty to warn extends only to risks of injury known to the bailor. See Restatement (Second) of Torts § 388, comment n and § 392, comment a.

UJI 13-1402 states the basic duty. Subsequent instructions in this chapter refine this duty under particular conditions and circumstances. Instructions defining obligations of warning, design and inspection are not all-inclusive. This chapter does not contain instructions for all conceivable applications of the basic duty stated in UJI 13-1402. For example, instructions have not been drafted to fit the situation described in Restatement (Second) of Torts §§ 389 and 390. There are cases in which the plaintiff will have the argument that a particular product was so unsafe for the use for which it was likely to be put that the supplier could not reasonably assume that a warning would be adequate to protect the user. In such a case, UJI 13-1402 and 13-1419 can be used and plaintiff's specific theory of liability should be stated in UJI 13-1401. Cases falling within the circumstances of Restatement (Second) of Torts § 389, such as Zamora v. J. Korber & Co., 59 N.M. 33, 278 P.2d 569 (1955), are also embraced by the general duty stated by this instruction but will require special instructions and a specification of the issue in UJI 13-1401.

The supplier's duty of ordinary care is not bounded by contractual concepts of privity. Steinberg v. Coda Roberson Constr. Co., 79 N.M. 123, 440 P.2d 798, 799 (1968). The duty is owed to all who may be foreseeably endangered by a failure to exercise ordinary care, Baker v. Fryar, 77 N.M. 257, 259-61, 421 P.2d 784, 786-7 (1966), including a bystander who is not a user of the product. While § 402A of the Restatement (Second) of Torts originally took a neutral position towards application of strict liability to persons other than user, the decided trend of the cases adopting the doctrine has been toward inclusion of bystanders. See Elmore v. American Motors Corp., 75 Cal. Rptr. 652, 451 P.2d 84 (1969) (cited without adoption or rejection in Stang v. Hertz Corp., 83 N.M. 730, 733, 497 P.2d 732, 735, 52 A.L.R.3d 112 (1972)).

The continuing duty of the supplier is merely one application of negligence law. When a product supplier learns of a defect after supplying the product, the supplier must use reasonable prudence to protect those exposed to the risk created by the defect. See 1 Frumer and Friedman, Products Liability § 8.02 (1976). Ordinary care is all that is required. Given that standard, the fact finder determines what should have been done under the circumstances - product recall, warning, etc. [As revised, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral in the first sentence of the second paragraph.

Continuing duty. — A product supplier has a continuing duty of ordinary care to avoid a risk of injury if it knows or should know that such risk is caused by the supplier's product, and that duty may carry over to risks shown discovered through technological developments after the manufacture and sale of the product. Couch v. Astec Indus., Inc., 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

Duty of supplier of raw material used for manufacture of product. — A supplier of raw material which is not inherently defective or dangerous at the time it leaves the manufacturer's control, and which is used in the manufacture or making of another product, does not owe a duty to an ultimate consumer to issue a warning concerning the suitability or safety of the finished product; any duty to warn rests upon the manufacturer of the product. Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 909 P.2d 1 (Ct. App. 1995).

A supplier of an inert raw material has no duty to foresee all the dangers which may result from the subsequent manufacture by a third party of a product which incorporates such raw material together with other substances into a finished product. Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 909 P.2d 1 (Ct. App. 1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: toxic shock syndrome, 59 A.L.R.4th 50.

Products liability: polyvinyl chloride, 59 A.L.R.4th 129.

Products liability: mascara and other eye cosmetics, 63 A.L.R.4th 105.

Live animal as "product" for purposes of strict products liability, 63 A.L.R.4th 127.

Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.

Strict products liability: recovery for damage to product alone, 72 A.L.R.4th 12.

Products liability: motor vehicle exhaust systems, 72 A.L.R.4th 62.

Products liability: industrial refrigeration equipment, 72 A.L.R.4th 90.

Products liability: scaffolds and scaffolding equipment, 74 A.L.R.4th 904.

Products liability: tractors, 75 A.L.R.4th 312.

Products liability: general recreational equipment, 77 A.L.R.4th 1121.

Products liability: mechanical amusement rides and devices, 77 A.L.R.4th 1152.

Products liability: lubricating products and systems, 80 A.L.R.4th 972.

Products liability: application of strict liability doctrine to seller of used product, 9 A.L.R.5th 1.

Products liability: lighters and lighter fluid, 14 A.L.R.5th 47.

The government-contractor defense to state products-liability claims, 53 A.L.R.5th 535.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 54 A.L.R.5th 1.

Federal pre-emption of state common-law products liability claims pertaining to drugs, medical devices, and other health-related items, 98 A.L.R. Fed. 124.

13-1403. Foreseeable risk of injury; misuse.

The supplier has the duty to consider foreseeable risks of injury. This duty is limited to use of the product for a purpose or in a manner which could reasonably be foreseen.

Where an injury is caused by a [risk] [or] [misuse of the product] which was not reasonably foreseeable to the supplier, [he] [she] [it] is not liable.

USE NOTE

This instruction will ordinarily be given in every products liability case. (There are cases where giving the instruction would create a false issue.) It is given immediately following UJI 13-1402 if a negligence theory is submitted and immediately following UJI 13-1406 if the only theory submitted is strict liability in tort.

The product misuse doctrine is a rule that the supplier is responsible for risks arising from foreseeable uses. A plaintiff must prove that the claimed injury results from a foreseeable use of the product. However, the bracketed phrase "misuse of the product" is only used in cases where product misuse has become an issue and is supported by sufficient evidence.

[As amended, effective November 1, 1991.]

Committee comment. — As with any negligence action, in products liability cases founded upon negligence, foreseeability of the risk of injury is an essential element and restricts the scope of an actor's liability. See UJI 13-1402, committee comment; Kelly v. Montoya, 81 N.M. 591, 593, 470 P.2d 563, 565 (Ct. App. 1970).

Because the supplier's duty is to consider foreseeable risks of injury, the jury may find the supplier liable for an injury which results from an unintended use of the product, if the use is one which, nonetheless, should have been anticipated. Restatement (Second) of Torts § 388; First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 81-82, 537 P.2d 682, 689-690 (Ct. App. 1975); Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943 (Mo. App. 1970); Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill App. 2d 315, 229 N.E.2d 684 (1967), aff'd, 42 Ill. 2d 339, 247 N.E.2d 401 (1969). There are cases where the use to which the product is put is so unintended and unforeseeable that the case should be taken from the jury. Van de Valde v. Volvo of America Corp., 106 N.M. 457, 744 P.2d 930 (Ct. App. 1987) (use of a tire restraining strap to secure luggage on a roof luggage rack).

Thus, these instructions reject the contention that a manufacturer of an automobile has no duty to consider risks of injury associated with vehicle collision simply because the intended purpose of an automobile does not include its participation in collisions. In the "crashworthiness" cases, as in any other case, the manufacturer's liability is circumscribed by foreseeable use. Since involvement in accidents is reasonably foreseeable, a duty exists to consider this risk in design of the vehicle. Compare Larsen v. GMC, 391 F.2d 495, 502 (8th Cir. 1968) with Evans v. GMC, 359 F.2d 822, 825 (7th Cir.), cert. denied, 385 U.S. 836, 17 L. Ed. 2d 70, 87 S. Ct. 83 (1966), overruled Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

Treaties and cases in the products liability field contain lengthy discussions of "misuse." Some cases treat misuse as an affirmative defense. The misuse doctrine is simply one application of the established principle than an actor is liable for the foreseeable results of the actor's conduct. If a product is handled in a way which cannot be reasonably anticipated by the supplier and such handling is a cause of the plaintiff's injury, the supplier is relieved of liability because the nature and character of the injury is unforeseeable. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (S. Ct. Miss. 1966), cert. denied, 386 U.S. 912, 87 S. Ct. 860, 17 L. Ed. 2d 784 (1967); Van de Valde v. Volvo of America Corp., 101 N.M. 457, 744 P.2d 930 (Ct. App. 1987). Where product mishandling is supportable by the evidence, the bracketed phrase "misuse of the product" may be used in place of the broader "risk," as being more descriptive of defendant's argument. In an appropriate case both bracketed phrases may be used.

Because foreseeability of the risk should be the jury's focus in "misuse" cases, rather than a user's culpability, these instructions do not treat mishandling as an affirmative defense to be proved by the defendant under UJI 13-1427.

As the language of this instruction provides, the foresight required for liability is foresight of the use of the product which gives rise to an unreasonable risk of injury. If the use and risk are foreseeable, plaintiff need not prove that the particular harm was foreseen. Newman v. Utility Trailer & Equip. Co., 278 Ore. 395, 564 P.2d, 676-7 (1977).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to render a reference gender neutral in the first sentence.

Law reviews. — For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico", see 11 N.M.L. Rev. 359 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: sufficiency of evidence to support product misuse defense in actions concerning ladders and scaffolds, 59 A.L.R.4th 73.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning weapons and ammunition, 59 A.L.R.4th 102.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning electrical generation and transmission equipment, 55 A.L.R.4th 1010.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning lawnmowers, 55 A.L.R.4th 1062.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion, 58 A.L.R.4th 7.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning paint, cleaners, or other chemicals, 58 A.L.R.4th 76.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning gas and electric appliances, 58 A.L.R.4th 131.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning bottles, cans, storage tanks, or other containers, 58 A.L.R.4th 160.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning agricultural implements and equipments, 60 A.L.R.4th 678.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning building components and materials, 61 A.L.R.4th 156.

Products liability: "fireman's rule" as defense, 62 A.L.R.4th 727.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning automobiles, boats, aircraft, and other vehicles, 63 A.L.R.4th 18.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning commercial or industrial equipment and machinery, 64 A.L.R.4th 10.

Products liability: product misuse defense, 65 A.L.R.4th 263.

Products liability: recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect, 50 A.L.R.5th 275.

13-1404. Ordinary care.

Ordinary care is that care which a reasonably prudent supplier would use in the conduct of [his] [her] [its] business. What constitutes ordinary care varies with the likelihood of an injury occurring and the seriousness of the harm which could reasonably be expected. As the danger that should be foreseen increases, so the amount of care required also increases.

The question in this case is whether, considering all of the circumstances, the risk of injury was foreseeable to, and would have been avoided by, a reasonably prudent supplier.

USE NOTE

This instruction must be given in every products liability case in which the court submits negligence as a theory of liability and is to immediately follow UJI 13-1402 and 13-1403.

[As amended, effective November 1, 1991.]

Committee comment. — In a negligence action, liability is approached from the standpoint of the standard of care which would be used by the reasonably prudent person in the shoes of the defendant supplier. Steinberg v. Coda Roberson Constr. Co., 79 N.M. 123, 124, 440 P.2d 798, 799 (1968).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first sentence of the first paragraph.

13-1405. Ordinary care; evidence.

What is customarily done by those engaged in the supplier's business is evidence of ordinary care. However, what ought to be done is fixed by a standard of ordinary care, whether it is usually complied with or not.

Compliance with [industry [customs] [standards] [codes] [rules__ [or] [governmental [rules] [standards] [codes__ is evidence of ordinary care, but it is not conclusive.

USE NOTE

In a negligence action, this instruction should be given when the court has admitted evidence of compliance with industry practices or customs or with governmental rules or standards. UJI 13-1408, a comparable instruction applicable to an action in strict liability, should also be given where the plaintiff is proceeding on both theories of liability. This instruction is to be given following UJI 13-1404.

Where the plaintiff is proceeding on a negligence per se theory based on violation of a governmental requirement, UJI 13-1421 should be given. If that is the plaintiff's sole theory, this instruction should not be given because compliance with a custom or practice does not excuse violation of a governmental requirement. Where the plaintiff's claims are based both on violation of a governmental standard and on other grounds, UJIs 13-1405, 13-1408, and 13-1421 may all be given. In such a case the court may conclude that it would be beneficial to give a special instruction limiting the applicability of evidence that the defendant complied with industry practice to the claims not based on violation of the governmental standard.

[As amended, effective January 1, 1997.]

Committee comment. — Evidence of custom and usage has long been recognized as relevant to a jury determination of ordinary care. The leading case is *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 23 S. Ct. 622, 47 L. Ed. 905 (1903). In *Lopez v. Heesen*, 69

N.M. 206, 365 P.2d 448 (1961), the supreme court recognized the admissibility of such evidence in a products liability action. 69 N.M. at 214, 365 P.2d at 453. *See also Fabian v. E.W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978). Before evidence of a particular practice or usage is permitted, a proper foundation must be laid, demonstrating that the practice or usage is generally accepted and followed by a significant portion of the supplier's industry. Likewise, voluntary standards, codes or rules may constitute relevant evidence. The leading case on the use of standards, codes or rules is *McComish v. Desoi*, 42 N.J. 274, 200 A.2d 116 (1964). See also annotations at 58 A.L.R.3d 148; 50 A.L.R.2d 16; 29 Am. Jur. 2d, Evidence §§ 884-893 [see now 31A Am. Jur. 2d Expert and Opinion Evidence].

The language "or governmental [rules] [standards] [codes]" was added to make clear that compliance with governmental standards such as those established by the National Highway Transportation Safety Administration or the Federal Aviation Administration is not dispositive on the issue of ordinary care. *See Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 902 P.2d 54 (1995). This instruction does not change existing New Mexico law which, in certain circumstances, allows a claim of negligence *per se* for violation of industry or governmental standards, codes or rules. *See Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985) (violation of a legislatively authorized or adopted regulation is negligence *per se*); *but see Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 734 P.2d 1258 (1987) (violations of federal Occupational Safety and Health Acts do not constitute negligence *per se*). Custom will not excuse violation of a mandatory governmental standard set, *e.g.*, by statute or regulation, and evidence of custom is not admissible to show an industry practice in conflict with the mandatory standard. *Apodaca v. Miller*, 79 N.M. 160, 441 P.2d 200 (1968); *Sanchez v. J. Barron Rice, Inc.*, 77 N.M. 717, 427 P.2d 240 (1967).

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, rewrote the second paragraph of the instruction; and in the Use Note, in the first paragraph, substituted "should" for "must" and inserted "compliance with" and "or with governmental rules or standards" in the first sentence, rewrote the second sentence and deleted the former third sentence, and substituted "is to" for "shall" in the last sentence, and rewrote the second paragraph.

Law reviews. — For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico", see 11 N.M.L. Rev. 359 (1981).

13-1406. Strict products liability; care not an issue.

Under the “products liability” claim, a supplier in the business of putting a product on the market is liable for harm caused by an unreasonable risk of injury resulting from a condition of the product or from a manner of its use. Such a risk makes the product defective. This rule applies even though all possible care has been used by the supplier in putting the product on the market.

The liability of the supplier is [to persons whom the supplier can reasonably expect to use the product] [and] [to persons whom the supplier can reasonably expect to be in the vicinity during the use of the product].

USE NOTE

This is the basic instruction defining strict products liability and, together with UJI 13-1407, must be used in every strict products liability case based upon Restatement (Second) of Torts § 402A. For bystander injury, use the second bracketed phrase.

[Adopted by Supreme Court Order No. 09-8300-011, effective May 15, 2009.]

Committee comment. — The New Mexico Supreme Court's rationale for adopting strict products liability in tort for any supplier in the business of putting the product on the market is the risk distribution approach taken in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) and *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972).

The language of strict products liability, taken from Restatement (Second) of Torts § 402A, has less than the universal application which these instructions are intended to have for strict products liability relating to production flaw defects, unsafe design or formulation, warning inadequacies, safety options and products which are unavoidably unsafe, with a risk of harm not justified by usefulness or desirability of the product.

Since certain commercial promotions or other transactions do not involve "the business of selling" a product, the committee chose "business of putting the product on the market." *Cf. Stang*, 83 N.M. at 733-34, 497 P.2d 735-36 (holding that, so long as a bailor is in the business of leasing, he will be held to the same standard as a retailer). Likewise, "supplier" was preferred over "seller."

"Defective condition" is a phrase most applicable to the production flaw. "Risk of injury" was introduced by the committee as a complementary phrase, giving the instructions clearer universal application. For the reasons commented upon under UJI 13-1407, the committee chose a reasonably prudent person standard of "unreasonable risk of injury," rather than the Restatement user-oriented standard of danger "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *See* Restatement (Second) of Torts § 402A, comment i.

[Adopted by Supreme Court Order No. 09-8300-011, effective May 15, 2009.]

ANNOTATIONS

Article must be unreasonably dangerous. — In order to invoke the doctrine of strict liability, it must be shown that the article was in an unreasonably dangerous condition. Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007 (D.N.M. 1971).

And negligence limited to issue of causation. — In a products liability case, where defendant alleged plaintiff's negligence not as an affirmative defense but rather as a denial of causation, the trial court's instruction that the jury should find for the defendant either if plaintiff had not proved his case or if defendant had proved that plaintiff drove negligently was reversible error since defendant's defense should only have prevailed if plaintiff's negligent driving had caused the accident; but the court's instruction allowed the defendant to prevail regardless of the cause of the accident. When the issue is causation in that either plaintiff's conduct or the product defect caused the injuries, questions of negligence are irrelevant. Bendorf v. Volkswagenwerk Aktiengesellschaft, 88 N.M. 355, 540 P.2d 835 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Liability of supplier of defective product. — If defendant car wash was found to be the supplier of a defective product that caused injury to plaintiff, car wash could be held strictly liable for the product manufactured and installed at the car wash by codefendant. Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (Ct. App. 1987).

Instruction supported by evidence. See Salinas v. John Deere Co., 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984).

Law reviews. — For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico", see 11 N.M.L. Rev. 359 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Applicability of doctrine of strict liability in tort to injury resulting from x-ray radiation, 16 A.L.R.4th 1300.

Bystander recovery for emotional distress at witnessing another's injury under strict products liability or breach of warranty, 31 A.L.R.4th 162.

Products liability: electricity, 60 A.L.R.4th 732.

Products liability: overhead garage doors and openers, 61 A.L.R.4th 94.

Products liability: building and construction lumber, 61 A.L.R.4th 121.

Products liability: scaffolds and scaffolding equipment, 74 A.L.R.4th 904.

Products liability: bicycles and accessories, 76 A.L.R.4th 117.

Products liability: exercise and related equipment, 76 A.L.R.4th 145.

Products liability: trampolines and similar devices, 76 A.L.R.4th 171.

Products liability: competitive sports equipment, 76 A.L.R.4th 201.

Products liability: skiing equipment, 76 A.L.R.4th 256.

13-1407. Strict products liability; unreasonable risk of injury.

An unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable. This means that a product does not present an unreasonable risk of injury simply because it is possible to be harmed by it.

[The design of a product need not necessarily adopt features which represent the ultimate in safety. You should consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive.]

Under products liability law, you are not to consider the reasonableness of acts or omissions of the supplier. You are to look at the product itself and consider only the risks of harm from its condition or from the manner of its use at the time of the injury. [The question for you is whether the product was defective, even though the supplier could not have known of such risks at the time of supplying the product.]

USE NOTE

This is the basic instruction defining "unreasonable risk of injury" and, except where misrepresentation is the only theory of recovery, must be used in every set of strict products liability instructions in lieu of "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics".

The bracketed paragraph two shall be given only if plaintiff contends that the product's design presents an unreasonable risk of injury.

The bracketed sentence in paragraph three shall always be given if plaintiff contends that the product when supplied, contained a production flaw which was a cause of injury. As discussed under the last paragraph of the committee comment below, the trial judge will determine, based upon developing law, whether the final sentence of this instruction is also applicable to products cases alleging inadequate design or warning.

[As amended, effective March 1, 2005.]

Committee comment. — Criteria for determining whether a risk of injury is unreasonable have not been provided in the instruction because the committee feels this falls within the unique domain of advocacy under the circumstances of proof in each case. Design, formulation, warning, safety device and unavoidably unsafe product cases present greater latitude for argument than does the production flaw which the

reasonably prudent person would generally be expected to find unacceptable when known. In his article, "The Nature of Strict Tort Liability for Products", 44 Miss. L.J. 825, 837-38 (1973), Professor Wade suggests seven risk-benefit criteria: (1) the usefulness and desirability of the product (see UJI 13-1419); (2) the availability of other and safer products to meet the same need (see UJI 13-1408); (3) the likelihood of injury and its probable seriousness, i.e., "risk" (see UJI 13-1407); (4) the obviousness of the danger (see UJI 13-1412 and 13-1415); (5) common knowledge and normal public expectation of the danger (particularly for established products) (see UJI 13-1403, 13-1406 and 13-1418); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings) (see UJI 13-1403, 13-1415 and 13-1418) and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive (see UJI 13-1407). Reyes v. Wyeth Labs., 498 F.2d 1264, 1274 (5th Cir.), cert. denied, 419 U.S. 1096, 95 S. Ct. 687, 42 L. Ed. 2d 688 (1974).

The "unreasonably dangerous" test and other negligence vestiges of strict products liability have come under attack. In Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973), following Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972), the court held that the additional element of "unreasonable danger" is not a valid part of the concept of strict liability in tort. The Supreme Court of New Mexico has noted that a single definitional concept should be used and separate proof of defectiveness and unreasonable danger is not required. Rudisaile v. Hawk Aviation, Inc., 92 N.M. 575, 577, 592 P.2d 175, 177 (1979). The New Jersey superior court would instruct that the supplier is liable if the product was unsafe and the plaintiff was a reasonably foreseeable user. California would instruct that the supplier is liable to a person injured while using a product in an intended way as a result of a "defect" in the product.

The committee, however, is in sympathy with the approach that "[a] product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of the trial outweighed the benefit of the way the product was so designed and marketed". P. Keeton, Product Liability and the Meaning of a Defect, 5 St. Mary's L.J. 30, 37-8 (1973) (original emphasis). Dean Keeton maintains there is no way to avoid a risk-benefit calculation in products liability cases. Id. at 39. The way to remedy the problem inherent in foreseeability is to supply knowledge as a matter of law, even if the defect was scientifically unknowable at the time of manufacture, and to allow the jury to decide if the ordinary person would have put the product on the market as designed. 48 Tex. L. Rev. 398, 403-4 (1970).

Keyed to the rationale of the Supreme Court of Oregon, the committee chose a prudent person standard of "unreasonable risk of injury" rather than the user-oriented language of Restatement (Second) of Torts § 402A, comment i (1966), discussed in Rudisaile v. Hawk Aviation, Inc., supra.

"To elucidate this point further, we feel that the two standards are the same because a seller acting reasonably would be selling the same product which a reasonable

consumer believes he is purchasing". That is to say, a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it. The foreseeable uses to which a product could be put would be the same in the minds of both the seller and the buyer unless one of the parties was not acting reasonably. The advantage of describing a dangerous defect in the manner of Wade and Keeton is that it preserves the use of familiar terms and thought processes with which courts, lawyers and jurors customarily deal.

"While apparently judging the seller's conduct, the test set out above would actually be a characterization of the product by a jury. If the manufacturer was not acting reasonably in selling the product, knowing of the risks involved, then the product would be dangerously defective when sold and the manufacturer would be subject to liability". Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033, 1037 (1974).

The supplier of a product which is defective by reason of a latent production flaw is universally held liable under strict products liability notwithstanding the fact that by inspection, testing, X-ray or any other means known to science at the time the product was placed on the market, it was not possible to know of the unreasonable risk of injury. Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972) (rented tire defective because of impact damage which was not discoverable by normal inspection procedures). While it may be an illogical inconsistency to hold that an unreasonably dangerous design or inadequate warning can give rise to strict products liability based only on what the supplier could reasonably know at the time the product was placed on the market, the New Mexico Supreme Court has not yet addressed this issue in a design or warning case. The last bracketed sentence of this instruction will always be applicable to the production flaw case. In design and warning cases the trial judge will have to decide this issue applying the principles of Stang v. Hertz Corp., supra, until a decision is made by the supreme court. [As revised, effective November 1, 1991.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The word "proximately" was deleted before the word "cause" in the last paragraph of the Use Note.

Law reviews. — For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico," see 11 N.M.L. Rev. 359 (1981).

Absence of backup warning devise on tractor trailer. — An allegation of strict products liability, that tractor and trailer were individually unreasonably dangerous as manufactured without a backup warning device, demonstrate a genuine issue of

material fact requiring resolution by a jury. Fernandez v. Ford Motor Co., 118 N.M. 100, 879 P.2d 101 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Applicability of doctrine of strict liability in tort to injury resulting from x-ray radiation, 16 A.L.R.4th 1300.

Products liability: admissibility of experimental or test evidence to disprove defect in motor vehicle, 64 A.L.R.4th 125.

Products liability: defective motor vehicle air bag systems, 39 A.L.R.5th 267.

Products liability: cigarettes and other tobacco products, 36 A.L.R.5th 541.

Federal pre-emption of state common-law products liability claims pertaining to motor vehicles, 97 A.L.R. Fed. 853.

Federal pre-emption of state common-law products liability claims pertaining to tobacco products, 97 A.L.R. Fed. 890.

13-1408. Strict liability; evidence.

Under the "products liability" claim, what is customarily done by those engaged in the supplier's business is evidence of whether a risk of injury would be acceptable to a reasonably prudent person. However, the acceptability of a risk of injury is determined by the conduct of a reasonably prudent person having full knowledge of the risk, whether such conduct is usually followed or not.

Compliance with [industry [customs] [standards] [codes] [rules__ [or] [governmental [rules] [standards] [codes__ is evidence of the acceptability of the risk, but it is not conclusive.

USE NOTE

In a strict liability action, this instruction should be given when the court has admitted evidence of compliance with industry practices or customs or with governmental rules or standards. UJI 13-1405 is a comparable instruction applicable to an action in negligence. *See* UJI 13-1405, Use Note. This instruction is to be given following UJI 13-1407.

[As amended, effective January 1, 1997.]

Committee comment. — The trial judge and counsel are cautioned that UJI 13-1405 and 13-1408 do not establish rules of admissibility. The admissibility of voluntary codes, standards and practices is measured by the Rules of Evidence and the judge must consider objections of relevancy, authenticity, prejudice, confusion, waste of time, etc. Ordinarily, standards will be authenticated and introduced through expert witnesses.

Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276, 287 (1978); *Grammer v. Kohlhaas Tank & Equip. Co.*, 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979). *See also* UJI 13-1405, committee comment.

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, rewrote the second paragraph of the instruction; and in the use note, in the first paragraph, substituted "should" for "must" and inserted "compliance with" and "or with governmental rules or standards" in the first sentence, rewrote the second and third sentences, and substituted "is to" for "shall" in the last sentence, and deleted the former second paragraph relating to evidence of custom if liability is based exclusively on statutory violation.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 A.L.R.4th 346.

13-1409. Strict products liability; misrepresentation - *No instruction drafted*.

No instruction drafted.

Committee comment. — The New Mexico Supreme Court has not ruled on § 402B of Restatement (Second) of Torts and the products liability theory there stated. Until such time as the supreme court does consider this issue, the trial judge must decide whichever doctrine will be applied.

In the event the trial judge decides to instruct on this theory, the following instruction may provide guidance:

Under the "products liability" claim, a supplier in the business of putting a product on the market may be liable for a misrepresentation of the product's _____ *([Condition] [character] [quality] or other proper description)*.

An unreasonable risk of injury is presented by an untrue misrepresentation by advertising, labels or otherwise, made to that class of persons who can reasonably be expected to use the product. The supplier is liable for harm proximately caused by a misrepresentation justifiably relied upon.

This rule applies even though the misrepresentation was innocently made and all possible care has been used by the supplier in publishing his advertising, labels or other representations. The liability of the supplier is to persons whom the supplier can reasonably expect to use the product.

13-1410. Particular duties of the manufacturer.

The manufacturer of a product must use ordinary care in:

(1) [formulating] [designing] the product;

(2) making the product;

(3) [inspecting] [testing] the product; and

(4) packaging the product.

[A manufacturer need not necessarily design into the product or adopt features which represent the ultimate in safety. You should consider a manufacturer's ability to eliminate a danger without seriously impairing the usefulness of the product or without making it unduly expensive.] Ordinary care requires a product that is reasonably safe for foreseeable use in light of all the circumstances.

In [designing] [testing] [packaging] a product, the manufacturer has the duty to possess and apply the knowledge available to reasonably prudent manufacturers.

USE NOTE

This instruction is to be given in a negligence action where the defendant supplier is the manufacturer of the product or may be regarded by the jury as manufacturer under UJI 13-1411. The proper brackets should be selected, depending upon the aspect of the manufacturing process which is in issue in the case. If a step in the manufacturing and distributing process is not involved in the lawsuit, it should be eliminated from the instruction. This instruction must not be given if plaintiff's case is based solely upon strict liability.

The bracketed sentences in the second paragraph shall be given only if plaintiff contends that the product was negligently designed.

Committee comment. — In cases involving negligent design, the jury's focus should be upon features of the design which make a product allegedly dangerous for any reasonably foreseeable use. The manufacturer is permitted to consider factors other than safety, for example, feasibility, in designing the product. Gates v. Ford Motor Co., 494 F.2d 458, 460 (10th Cir. 1974); Blohm v. Cardwell Mfg. Co., 380 F.2d 341, 344 (10th Cir. 1967). Whether in negligence or strict liability, allegations involving product design do not always present jury issues. Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977); Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974); Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270 (10th Cir. 1967).

Ordinary care requires that a supplier, engaged in the manufacture of a product, possess sufficient technical knowledge to make reasonably accurate judgments

concerning product design, manufacture, packaging and testing. At a minimum, the defendant should possess the technical knowledge known to other responsible manufacturers of the product, and he is constructively charged with such knowledge. Restatement (Second) of Torts § 395, comment g (1966).

In a negligence action, as distinguished from an action based upon strict liability in tort, the manufacturer's obligation to possess and apply available knowledge relates to that which is "knowable" at the time of manufacture and sale of the product. See, generally, the discussion of "knowledge" as a condition of liability which appears in Ross v. Phillip Morris & Co., 328 F.2d 3 (8th Cir. 1964).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: equipment and devices directly relating to passengers' standing or seating safety in land carriers, 35 A.L.R.4th 1050.

Products liability: sudden or unexpected acceleration of motor vehicle, 66 A.L.R.4th 20.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from the administration, 66 A.L.R.4th 83.

13-1411. Supplier regarded as manufacturer.

Under a claim of failure to use ordinary care, a supplier who permits a product to be sold as [his] [her] [its] own is subject to the duties of a manufacturer, even though the product was, in fact, made by someone else.

A supplier permits a product to be sold as [his] [her] [its] own if [he] [she] [it] labels or markets it in such a way that the purchaser is reasonably led to believe that the supplier made the product or had the product made to [his] [her] [its] specifications.

USE NOTE

This instruction shall be given where an issue exists concerning the status of a defendant who has distributed the product but did not make it. For the purpose of applying the particular duties of the manufacturer contained in UJI 13-1410, the plaintiff is contending that the defendant has held itself out as the manufacturer. This instruction must not be given if plaintiff's case is based solely upon strict liability.

[As amended, effective November 1, 1991.]

Committee comment. — The duties of the manufacturer are applied to suppliers who either appear to be the maker of a product or appear to have had a product manufactured for them. Restatement (Second) of Torts § 400 (1966). The factors for

consideration are analogous to those which determine an agent's apparent authority. Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973). Under strict liability in tort, all in the chain of distribution of the product share with the manufacturer liability for a product presenting an unreasonable risk of injury. Restatement (Second) of Torts § 402A, comment f. Thus, provided [he] [she] [it] is in the chain of distribution, the supplier's "status" with respect to manufacture of the product is irrelevant. [As revised, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make language gender neutral throughout the instruction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Primary liability of private chain franchisor for injury or death caused by franchise premises or equipment, 59 A.L.R.4th 1142.

13-1412. Obvious or known danger; design and safety device.

The supplier is not relieved of a duty to use ordinary care [to design the product to avoid a risk] [or] [to adopt a safety device] simply because the risk is obvious or may be known to the user. The supplier must use ordinary care [to design the product to avoid the risk] [or] [to adopt a safety device] if the supplier could reasonably expect that the user will fail to protect [himself] [herself] or others, despite awareness of the danger.

In connection with the claim under "products liability," a product may present an unreasonable risk of injury even though the risk is obvious or may be known to the user. An obvious risk of injury is unacceptable and must be avoided by [product design] [or] [the adoption of a suitable safety device] where a reasonably prudent supplier having full knowledge of the risk would expect that the user will fail to protect [himself] [herself] or others, despite awareness of the danger.

USE NOTE

This instruction shall be given where a submissible issue is the adequacy of product design and defendant contends that the risk of injury associated with the design is obvious. This instruction must not be given where the sole theory of liability in the case is failure to warn. In a warning case, obviousness of the risk eliminates a duty to warn against the danger.

The first paragraph shall be given in the negligence action; the second paragraph applies to strict liability in tort. Where both theories apply, the entire instruction shall be read, and court and counsel should determine whether the negligence and strict liability portions should be read together or separated to avoid close repetition of similar

language. Appropriate bracketed language shall be selected, depending upon the nature of plaintiff's design allegation.

[As amended, effective November 1, 1991.]

Committee comment. — While obviousness of a danger eliminates a duty to warn of that danger (UJI 13-1415, bracketed third paragraph), it does not eliminate the duty to use ordinary care in the design and manufacture of a product. In the design of a product, a supplier may be required by ordinary care to consider and guard against an obvious danger.

The same principle applies in strict liability cases, where the focus is the acceptability of a particular risk of injury. The issue is whether the overall plan or design makes the product unreasonably dangerous. Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934, 938 (1977); Rindlisbaker v. Wilson, 95 Idaho 752, 519 P.2d 421, 427 (1974). With increasing frequency, products liability cases are predicated upon the supplier's failure to adopt a plan or design which incorporates features to reduce or eliminate obvious hazards. An example is the cases dealing with products sold without safety devices. E.g., Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970). The supreme court's adoption of the principle of this instruction is implicit in its decisions in Proctor v. Waxler, 84 N.M. 361, 503 P.2d 644 (1972) and Villanueva v. Nowlin, 77 N.M. 174, 420 P.2d 764 (1966). In the first case, the court recognizes that no duty exists to warn of obvious dangers. 77 N.M. at 176, 420 P.2d at 766. In the second, the court holds that ordinary care may require some action, apart from warning, to protect against obvious hazards. 84 N.M. at 363-4, 503 P.2d at 646-7.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of manufacturer or seller for injury caused by drug or medicine sold, 79 A.L.R.2d 301.

Products liability: mechanical or chain saw or components thereof, 22 A.L.R.4th 206.

Products liability: modern status of rule that there is no liability or patent or obvious dangers, 35 A.L.R.4th 861.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury, 75 A.L.R.4th 443.

Products liability: contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury, 75 A.L.R.4th 538.

Burden of proving feasibility of alternative safe design in products liability action based on defective design, 78 A.L.R.4th 154.

13-1413. Manufacturer and lessor; duty to inspect; imputed knowledge.

A [manufacturer of a product] [lessor regularly engaged in leasing a product] must use ordinary care to inspect the product for conditions which will expose users [bystanders] to risk of injury and is charged with knowledge of that which a reasonable inspection would disclose.

USE NOTE

This instruction shall be given only if an issue exists concerning the necessity for, and adequacy of, inspection of the product and competent evidence has been presented to support a contention that a failure to inspect proximately caused plaintiff's injury. The instruction shall not be given unless the defendant supplier is either the manufacturer or a lessor of the product. For other suppliers, the duty to inspect is stated in UJI 13-1414.

Use of the appropriate brackets depends upon the identity of the defendant as manufacturer or lessor; bracketed "bystander" should be used where plaintiff was injured, but not while using the product.

Committee comment. — The lessor of a chattel for immediate use and the manufacturer of a chattel are regarded as having the duty of inspection of a product before turning it over to the consumer. Restatement (Second) of Torts § 395, comment h and § 408, comment a (1965). No precise statement can be made of the minuteness of the inspection required. This varies with the circumstances and the degree of danger involved. Thus, the only acceptable definition is the requirement of ordinary care.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Primary liability of private chain franchisor for injury or death caused by franchise premises or equipment, 59 A.L.R.4th 1142.

Commercial renter's negligence liability for customer's personal injuries, 57 A.L.R.4th 1186.

13-1414. Supplier who is not the manufacturer; no duty to inspect.

A supplier who did not make a product and has not permitted it to be sold as the supplier's own is ordinarily under no obligation to inspect it for conditions which expose users [bystanders] to risk of injury. However, a supplier who has knowledge which would lead a reasonably prudent person to undertake an

inspection of the product before selling it is charged with knowledge of that which a reasonable inspection would disclose.

USE NOTE

This instruction is to be given where a nonmanufacturer is the defendant (retailer, wholesaler), and the defendant's failure to discover and warn against a defect in the product after information has come to light sufficient to alert the reasonably prudent person is a submissible issue. This instruction is not to be given if the defendant is the manufacturer or lessor of the product.

[As amended, effective November 1, 1991.]

Committee comment. — There is a clear distinction between the liability of a manufacturer and that of a seller of goods made by another. Restatement (Second) of Torts §§ 401 and 402 (1965). Absent some knowledge or reason to know that a product presents an unreasonable risk of injury, the law imposes no obligation on the seller to inspect for hidden defects. Restatement (Second) of Torts § 402, comment d.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first sentence of the instruction and in the first sentence of the Use Note.

13-1415. Duty of the supplier; warning.

The supplier must use ordinary care to warn of a risk of injury. However, there is no duty to warn of a risk unknown to the supplier, unless, by the use of ordinary care, the supplier should have known of the risk.

Under plaintiff's claim of "products liability", a product presents an unreasonable risk of injury if put on the market without warning of a risk which could be avoided by the giving of an adequate warning.

[The supplier has no duty to warn of risks which [he] [she] [it] can reasonably expect to be obvious or known to foreseeable users of the product.]

USE NOTE

This instruction must be given where the supplier's failure to warn of a risk of injury is a submissible issue.

The first paragraph shall be given in a negligence case. The second paragraph shall be given in a strict liability case. Where both theories are submitted, both paragraphs shall be given.

The bracketed third paragraph is used only if there is sufficient evidence to support a jury's determination that the risk of injury involved was one which a supplier could reasonably expect to be obvious to foreseeable users.

[As amended, effective November 1, 1991.]

Committee comment. — Product suppliers have a duty to warn of nonobvious dangers associated with a product's use. Restatement (Second) of Torts § 388 (1965); Villanueva v. Nowlin, 77 N.M. 174, 175-176, 420 P.2d 764, 765 (1966). See also Fabian v. E.W. Bliss Co., 582 F.2d 1257 (10th Cir. 1978); Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977) and Garrett v. Nissen Corp., 84 N.M. 16, 498 P.2d 1359 (1972). No attempt has been made in this chapter to define an obvious danger. It is believed that the concept of obviousness is one which is understandable to, and can be applied by, jurors without further definition and that any attempt to provide more specific guidelines would simply be confusing. Similarly, there is no duty to warn a product user of risks of which he has actual knowledge. Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

The duty to warn is further restricted by the concept of foreseeability. UJI 13-1403. A remote, unforeseeable risk of injury does not give rise to a duty to warn. First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975); Standhart v. Flintkote Co., 84 N.M. 796, 508 P.2d 1283 (1973); Van de Valde v. Volvo of America Corp., 101 N.M. 457, 744 P.2d 930 (Ct. App. 1987). As stated in the committee comment to UJI 13-1403, because the focus is foreseeable risk of injury, the duty to warn is not limited to risk of injury arising from the use intended by the supplier. A risk of injury which arises from an anticipatable, but unintended, use of the product gives rise to a duty to warn. Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83-4 (4th Cir. 1962).

Failure to warn is a theory under strict products liability. In the language of Restatement (Second) of Torts § 402A, a product sold without an adequate warning of danger from a particular condition or use of the product is "defective;" in the language of these instructions, the product presents an "unreasonable risk of injury." Cf. First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 85, 537 P.2d 682, 693 (Ct. App. 1975); Schrib v. Seidenberg, 80 N.M. 573, 577-8, 458 P.2d 825, 829-30 (Ct. App. 1969). [As revised, effective November 1, 1991.]

ANNOTATIONS

Manufacturer's duty to warn of specific nature and extent of danger. — A claim that there is no duty to warn based on the user's general knowledge of the danger of a product mistakes the danger involved and, thus, the warning that is required. The manufacturer's duty is to warn of the specific nature and extent of the danger. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Rationale for knowledgeable user exception contained in this section is that knowledge of the danger is equivalent to prior notice; that no one needs notice of that

which he already knows. Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

"Knowledge" in radiation treatment cases means actual knowledge of the nature and extent of the danger of excessive radiation. Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: overhead garage doors and openers, 61 A.L.R.4th 94.

Products liability: bicycles and accessories, 76 A.L.R.4th 117.

Products liability: exercise and related equipment, 76 A.L.R.4th 145.

Products liability: trampolines and similar devices, 76 A.L.R.4th 171.

Presumption or inference, in products liability action based on failure to warn, that user of product would have heeded an adequate warning had one been given, 38 A.L.R.5th 683.

Construction and application of learned-intermediary doctrine, 57 A.L.R.5th 1.

13-1416. Duty of the supplier; directions for use.

The supplier must use ordinary care to provide directions for use of the product to avoid a risk of injury caused by a foreseeable manner of use.

Under plaintiff's claim of "products liability", a product presents an unreasonable risk of injury if put on the market without directions for use to avoid a risk of injury caused by a foreseeable manner of use.

[The supplier has no duty to provide directions when [he] [she] [it] can reasonably expect that the safe and proper use will be obvious or known to foreseeable users of the product.]

USE NOTE

This instruction must be given where the supplier's failure to provide adequate directions for use of the product is a submissible issue.

The first paragraph shall be given in a negligence case. The second paragraph shall be given in a strict liability case. Where both theories are submitted, both paragraphs shall be given. If only strict liability is submitted, drop from the second paragraph the introductory phrase "Under plaintiff's claim of 'products liability.' "

The bracketed third paragraph is used only if there is sufficient evidence to support a jury determination that proper use of the product is obvious without directions.

[As amended, effective November 1, 1991.]

Committee comment. — The duty of ordinary care may require the supplier to provide information which is more aptly described as instructional. Dillard and Hart, "Product Liability: Directions for Use and Duty to Warn," 41 Va. L. Rev. 145 (1955); McClanahan v. California Spray Corp., 194 Va. 842, 75 S.E.2d 712 (1953); 1 Frumer and Friedman, Products Liability § 8.05(1) (1976). Absent necessary directions for use, a product presents an "unreasonable risk of injury" under strict products liability.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the last paragraph of the instruction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: mechanical or chain saw or components thereof, 22 A.L.R.4th 206.

Products liability: trampolines and similar devices, 76 A.L.R.4th 171.

13-1417. Warning or directions; means of communication.

To satisfy the duty [to warn] [to give directions for use], [a warning] [directions for use] must be communicated by a means which can reasonably be expected to reach [persons using the product] [and] [persons in the vicinity during the use of the product].

USE NOTE

This instruction is to be given where the adequacy of the means chosen by a supplier to communicate a warning or directions for use is a submissible jury issue. Where inadequacy of the manner of communication of a warning is not a theory of plaintiff's case or is not supported by competent evidence, this instruction shall not be given. Specifically, this instruction shall not be given if the plaintiff was a bystander under circumstances which would have made it impossible for the supplier to communicate a warning by any reasonable means.

The appropriate bracketed language should be selected depending upon whether plaintiff claims failure to warn of a risk of injury or failure to give directions for use of a product. In a few cases both may apply, and the instruction will have to be modified to include both warnings and directions. The proper bracketed material should be selected depending upon whether the injured party was a user or a bystander.

Committee comment. — More often than not, a product is used by someone other than its purchaser. An issue frequently litigated in products liability cases is the sufficiency of the means selected by the supplier for communicating a warning or directions for use. Restatement (Second) of Torts 388, comment n (1965). Adequacy of the means selected depends upon the circumstances of the case, and no definitive guidelines can be given. Many factors are to be considered: (1) the purpose for which the product is supplied; (2) the seriousness and likelihood of harm if the user of the product does not receive the warning; (3) the feasibility of communicating the warning directly to the user instead of relying upon a third person to pass the warning on; (4) the nature and extent of the burden and expense imposed upon the supplier by requiring that a warning be communicated directly to the user and (5) the supplier's knowledge of the reliability of the person to whom the warning is in fact given. Cf. First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975).

There are circumstances in which a supplier's communication of a warning to his immediate vendee is sufficient as a matter of law or, as a matter of law, direct warning to the plaintiff is not possible or feasible. In such cases, the issue framed by this instruction must be taken from the jury. Hines v. St. Joseph's Hosp., 86 N.M. 763, 765, 527 P.2d 1075 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974); Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983); Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983). Where a supplier has neither the right nor the means of controlling the format of final distribution and packaging of the product, he is entitled to rely upon his immediate vendee to communicate the warning; and he satisfies his duty by warning the vendee. See First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 85, 537 P.2d 682, 693 (Ct. App. 1975). The most frequently cited examples of this limitation upon the duty to warn are prescription drugs and products sold to others for further processing and packaging. Hill v. Wilmington Chem. Corp., 279 Minn. 336, 156 N.W.2d 898 (1968). However, there are circumstances involving the distribution of drugs, where evidence exists of sufficient retention of control by the supplier to justify submitting to the factfinder the adequacy of the means of communication which the supplier utilized. Davis v. Wyeth Labs., Inc., 399 F.2d 121 (9th Cir. 1968). [Revised, effective November 1, 1991.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of learned-intermediary doctrine, 57 A.L.R.5th 1.

13-1418. Warning or directions; adequacy.

To satisfy the duty [to warn] [to give directions for use], [a warning] [directions for use] must be adequate. To be adequate, [a warning] [directions for use] must have certain characteristics:

(1) It must be in a form that can reasonably be expected to catch the attention of the reasonably foreseeable user of the product;

(2) It must be understandable to the reasonably foreseeable user of the product; and

(3) It must disclose the nature and extent of the danger. In this regard, there must be specified any harmful consequence which a reasonably foreseeable user would not understand from a general warning of the product's danger [or] [from a simple directive to use or not to use the product for a certain purpose or in a certain way].

USE NOTE

This instruction is to be given only if there is a jury issue as to the adequacy of a warning or directions for use communicated by a supplier. If no warning has been given by the supplier and jury issues are limited to whether a foreseeable risk of injury necessitated a warning, this instruction shall not be given.

The appropriate bracketed words are to be selected in the introductory paragraph depending upon whether the adequacy of a warning or directions for use is involved. In some cases, the adequacy of both warnings and directions may be an issue and, then, the introductory paragraph will have to be slightly modified to accommodate both warnings and directions. The bracketed language in Paragraph (3) should be given where the factual controversy over adequacy of a warning revolves around simple, directive language.

Committee comment. — Adequacy of warning is a frequently litigated issue. Richards v. Upjohn Co., 95 N.M. 675, 625 P.2d 1192 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980). See discussion and cases, 53 A.L.R.3d 239. It is ordinarily, but not always, an issue of fact. Michael v. Warner/Chilcott, 91 N.M. 651, 579 P.2d 183 (Ct. App. 1978). New Mexico appellate courts have cited with approval the elements contained in Restatement (Second) of Torts § 388 (1965). Garrett v. Nissen Corp., 84 N.M. 16, 21, 498 P.2d 1359, 1364 (1972); Villanueva v. Nowlin, 77 N.M. 174, 175-6, 420 P.2d 764, 765 (1966). Of particular value in the formulation of this instruction have been the principles and reasoning of Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962) and Tampa Drug Co. v. Wait, 103 So. 2d 603, 75 A.L.R.2d 765 (Fla. 1958). These are leading cases cited and discussed with approval by the court of appeals in First Nat'l Bank v. Nor-Am Agrl. Prods., Inc., 88 N.M. 74, 84, 537 P.2d 682, 692 (Ct. App. 1975).

Directive language may not serve its purpose unless it includes some indication of the hazard involved with nonobservance. For example, a sign warning, "Keep Off the Grass", is not sufficient to alert a reasonable person that the grass is infested with deadly snakes. See Post v. American Cleaning Equip. Co., 437 S.W.2d 516 (Ky. 1968).

ANNOTATIONS

Manufacturer's duty to warn of specific nature and extent of danger. — A claim that there is no duty to warn based on the user's general knowledge of the danger of a product mistakes the danger involved and, thus, the warning that is required. The manufacturer's duty is to warn of the specific nature and extent of the danger. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Unavoidably unsafe product is neither defective nor unreasonably dangerous if warning is "proper." — See Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Discussion of adequacy of warning. — See Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: mechanical or chain saw or components thereof, 22 A.L.R.4th 206.

Products liability: failure to provide product warning or instruction in foreign language or to use universally accepted pictographs or symbols, 27 A.L.R.5th 697.

13-1419. Unavoidably unsafe products.

There are some products which, even when properly prepared and labeled, cannot be made safe for their intended and ordinary use. Because of the nature of ingredients or natural characteristics of the products, use of these products involves substantial risk of injury, and some users will necessarily be harmed. Such products are said to be unavoidably unsafe.

Unless the product unreasonably exposes users to risk of injury, there is no liability for supplying an unavoidably unsafe product. Whether users are unreasonably exposed to risk of injury turns upon a balancing of the dangers and benefits resulting from the product's use.

Where exposure to risk of injury from use of an unavoidably unsafe product is unreasonable [and the supplier knows or in the use of ordinary care should know of the risk of injury involved], the supplier is liable for physical harm proximately caused by the product's use. The supplier's liability extends [to persons who can reasonably be expected to use the product] [and] [to persons who can reasonably be expected to be in the vicinity during the use of the product].

USE NOTE

This instruction must be given only in cases in which the generic condition of the product gives rise to the risk of injury, for example, certain chemicals and drugs. The risk arises from the nature of the product and not from inadequacies of design, manufacture or labeling. It shall be used *only* where the plaintiff presents sufficient evidence that the product's hazardous characteristics are of such magnitude that the

product should not have been put in the channels of commerce. Applicability of the instruction is further limited by the requirement that the injury result from an intended use of the product. The bracketed phrase "and the supplier knows or in the use of ordinary care should know of the risk of injury involved" shall be used only if plaintiff's claim is in negligence.

Committee comment. — Under both negligence and strict liability, the law recognizes a potential liability for the formulation of a product. As negligence, this appears in Restatement (Second) of Torts § 389, "Chattel Unlikely to be Made Safe for Use" (1965). A supplier is liable for distributing a product which is entirely unsafe for the primary use for which it is sold, irrespective of the warnings which may accompany it. See the specially concurring opinion of Hernandez, J. Michael v. Warner/Chilcott, 91 N.M. 651, 657-58, 579 P.2d 183, 189-90 (Ct. App. 1978). For example, an explosive mixture of kerosene and gasoline, sold for use in kerosene lamps, can never be safe for that purpose. A warning will not relieve the supplier of responsibility. Under strict liability, as expressed in Restatement (Second) of Torts § 402A, the concept of a supplier's liability for unavoidably unsafe products is explained in the negative. An unavoidably unsafe product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous if the product is useful and the risk is reasonable. Restatement (Second) of Torts § 402A, comment k. The committee has combined both the negligence and strict liability expressions of this principle in a single instruction. Whether a risk is reasonable is a question for the jury, balancing the benefits and hazards of the product.

As stated in the directions for use, this theory of liability is applicable only where the hazard arises from an intended use of the product. Where injury is the result of foreseeable misuse of the product, liability turns upon duties of warning, testing and design.

ANNOTATIONS

Unavoidably unsafe product is neither defective nor unreasonably dangerous if warning is "proper." Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

When instruction properly given. — Irrespective of which party tenders the evidence, this instruction is properly given when there is evidence: (1) that a product cannot be made safe for its intended and ordinary use even when properly prepared and labeled; (2) that use of the product involves a medically recognizable risk of injury; and (3) that the injury complained of results from the intended use of the product. Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Jury to balance benefits and risks. — Under this instruction, the jury must determine whether the benefits outweigh the risks in using the product, in order to decide if the product unreasonably exposes the user to a risk of injury. Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Carrier's "public duty" exception to absolute or strict liability arising out of carriage of hazardous substances, 31 A.L.R.4th 658.

Products liability: building and construction lumber, 61 A.L.R.4th 121.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 A.L.R.4th 346.

Products liability: what is an "unavoidably unsafe" product, 70 A.L.R.4th 16.

13-1420. Res ipsa loquitur.

Plaintiff relies in part upon the doctrine of "res ipsa loquitur" which is a Latin phrase and means "the thing speaks for itself." Plaintiff relies upon this doctrine to prove that the claimed defective condition of the product existed at the time the product was supplied by defendant [and that the defective condition was the result of a failure to use ordinary care]. In order for the jury to find that plaintiff has proved [this] [these] element[s] of [his] [her] claim by reliance upon "res ipsa loquitur", plaintiff has the burden of proving:

1. that a defective condition existed at the time [he] [she] used the product;

2. the reasonable probability that the condition of the product was not substantially changed after it left the defendant's possession[; and]

[3. that the defect is of a kind which usually does not exist unless the supplier of the product has failed to use ordinary care].

If you find that plaintiff has proved [this] [these] proposition[s], then the law permits you to infer that the defective condition of the product existed at the time the product was supplied by defendant [and that the defect arose because of the supplier's failure to use ordinary care].

If, on the other hand, you find that plaintiff has not proved [this] [these] proposition[s], or if you find, notwithstanding such proof, that the product was not supplied in a defective condition [or that defendant used ordinary care], then plaintiff cannot prove [this] [these] element[s] of [his] [her] claim by reliance upon "res ipsa loquitur".

USE NOTE

The bracketed material is applicable only to a negligence action and shall not be given if the sole theory of plaintiff's case is strict liability.

This instruction is to be used where plaintiff's claim of products liability, on either a negligence or strict liability theory, rests upon the existence of a flaw in, or contamination of, the product. It has no application where the product was made as intended by the manufacturer, and liability is based solely upon contentions of inadequate warning or design. The instruction must not be given unless the court first determines, as a matter of law, that circumstantial evidence or expert testimony is of sufficient probative value to permit the jury to find that the condition of the product was not substantially changed or altered after the product left the supplier's hands. This determination involves consideration of the nature of the product (i.e., sealed container), nature of the alleged defect, lapse of time between manufacture and sale of the product and the accident, nature of intermediate handling and use of the product, nature of the accident and any other pertinent factors.

[As amended, effective November 1, 1991.]

Committee comment. — In a products liability case, the doctrine of "res ipsa loquitur" is not available to prove the defect itself. This must be established by direct or circumstantial evidence. Grammer v. Kohlhaas Tank & Equip. Co., 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979); Springer Corp. v. Dallas & Mavis Forwarding Co., 90 N.M. 58, 559 P.2d 846, 848 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); Montoya v. GMC, 88 N.M. 583, 585, 544 P.2d 723, 725 (Ct. App. 1975); Goodman v. Brock, 83 N.M. 789, 791-2, 498 P.2d 676, 678-9 (1972); State Farm Fire & Cas. Co. v. Miller Metal Co., 83 N.M. 516, 518, 494 P.2d 178, 180 (Ct. App. 1971), cert. quashed, 83 N.M. 740, 497 P.2d 742 (1972); Carter Farms Co. v. Hoffman-La Roche, Inc., 83 N.M. 383, 385, 492 P.2d 1000, 1002 (Ct. App. 1971). While inference of a defect from circumstantial evidence seems, in practical effect, to produce the same result as "res ipsa loquitur", theoretically there is a difference. Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N.M. 43, 46, 278 P.2d 575, 577 (1955). Both avenues of proof establish, prima facie, a required element of plaintiff's case; however, "res ipsa loquitur" is said to give rise to a rebuttable presumption. In Tafoya v. Coca-Cola Bottling Co., supra, the supreme court approved use of "res ipsa loquitur", under defined circumstances, to create a presumption of certain elements of the plaintiff's case, namely, proof that contamination was introduced at the time of manufacture and was a result of failure to use ordinary care. These are the elements contained with the drafted instruction. The committee has avoided use of the word "presumption" because of the belief that it is confusing to the average juror.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Applicability of res ipsa loquitur in case of multiple, nonmedical defendants - modern status, 59 A.L.R.4th 201.

13-1421. Liability per se; statute or ordinance.

There was in force, at the time the product was _____ (made, leased or sold), a [statute] [ordinance] which provided that: _____ _____ (*NOTE: Here quote or paraphrase the applicable statute or ordinance.*)

If defendant conducted [himself] [herself] in violation of this [statute] [ordinance], such conduct created an unreasonable risk of injury for which defendant is liable for damages caused to plaintiff by the violation [unless you further find that the violation was excusable or justifiable].

[To legally justify or excuse a violation, the violator has the burden of showing that [he] [she] did that which a reasonably prudent supplier would have done, acting under similar circumstances, in desiring to obey the law].

USE NOTE

This instruction must be given only where there is a submissible issue concerning plaintiff's contention that a product was made or supplied in violation of a statute or ordinance. The court must make a preliminary determination of the applicability of the statute or ordinance relied upon by the plaintiff. Applicability depends upon the purpose of the legislation. The court must find that the statute or ordinance was enacted for the benefit or protection of the plaintiff, or for the benefit or protection of a class of the public to which the plaintiff belongs, and that it establishes a duty upon the defendant. If the statute or ordinance was enacted to give protection against a particular hazard or form of harm, it is applicable only if the plaintiff's injury could be found to have been caused by the hazard which the statute intended to prevent.

Where this instruction is given, the applicable part of the statute or ordinance in question must be quoted or paraphrased.

The bracketed language referring to excuse or justification of the violation and the bracketed third paragraph should not be given unless the court holds, as a matter of law, that there is sufficient evidence of excuse or justification for the issue to go to the jury. Absent such evidence, the "liability per se" rule applies, and the defendant supplier is liable for damages caused by the violation.

This instruction contains the element of causation, without definition, and should be accompanied by UJI 13-1424 NMRA.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — Committee comments to Chapter 15, Statutes and Ordinances, are applicable. The conditions for application of this instruction, stated under Directions for Use, are generally accepted prerequisites to submission of liability per se. Restatement (Second) of Torts § 286 (1965); Burran v. Dambold, 422 F.2d 133 (10th Cir. 1970); Nunneley v. Edgar Hotel, 36 Cal. 2d 493, 225 P.2d 497 (1950).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

The 2005 amendment, effective March 1, 2005, deleted "proximately" following "damages" and preceding "caused" in the second paragraph of the instruction and the next to last paragraph of the Directions for Use. The 2005 amendment also substituted "causation" for "proximate cause" in the last paragraph of the Directions for Use.

Evidence. — As stated under the directions for use and committee comment to UJI 13-1405, evidence of custom will not excuse violation of a standard created by applicable statute or ordinance and should not, therefore, be admitted in a case controlled by this instruction. Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 427 P.2d 240 (1967).

13-1422. Changed or altered product.

In order for a supplier [a particular supplier who was in the chain of marketing the product] to be liable, the injury must have been caused by a condition of the product which was not substantially changed from the condition in which the [particular] supplier placed the product on the market or in which the supplier could have reasonably expected it to be used.

For substantial change in the product to relieve a supplier of liability, the change itself must be a cause of the harm done.

USE NOTE

This instruction must be given only where an issue has been raised concerning subsequent change or alteration of the product and sufficient evidence has been introduced to permit a finding that the change or alteration was a cause of the plaintiff's injury. The bracketed language should be selected where more than one supplier is involved.

Where substantial change or alteration of the product is a submissible issue, UJI 13-1401 should be expanded to reflect that the plaintiff has the burden of proving that the defect relied upon was present when the product was originally sold or leased. For example, by changing the first sentence of Paragraph C of UJI 13-1401 to read:

Plaintiff claims that defendant is subject to products liability for an unreasonable risk of harm arising when the product was [sold] [leased]. Plaintiff claims that the risk was caused by the product's condition at that time or a reasonably anticipatable manner of use and that this risk was a cause of plaintiff's injury and resulting damages.

[As amended, effective March 1, 2005.]

Committee comment. — Under either negligence or strict liability theory, the plaintiff must prove that the product has reached him without substantial change in the condition in which it was supplied. Springer Corp. v. Dallas & Mavis Forwarding Co., 90 N.M. 58, 559 P.2d 846, 847 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); State Farm Fire & Cas. Co. v. Miller Metal Co., 83 N.M. 516, 518, 494 P.2d 178, 180 (Ct. App. 1971); Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N.M. 43, 47-8, 278 P.2d 575, 578 (1955); Restatement (Second) of Torts § 402A(1)(b) (1965). This element is ordinarily presented to the jury in the posture of an alleged alteration or change in the condition of the product and this is the format of the instruction.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendment deleted "proximate" preceding "cause" in the last sentence of the quote from UJI 13-1401 NMRA in the Use Note.

Manufacturer liability for foreseeable modifications. — A manufacturer or seller of a product may be strictly liable for injuries caused by a product that has been substantially changed or altered since the time of its manufacture if the changes or alternations are reasonably foreseeable. Chairez v James Hamilton Constr. Co., 2009-NMCA-093, __ N.M. __, __ P.3d __.

Foreseeability of modifications to manufactured product. — Where a rock crusher was manufactured with a solid metal protective shield covering a flywheel; rock jams were common and maintenance of the crusher was required; the feed box of the crusher was difficult to access to clear jams and to maintain the crusher; the purchaser of the rock crusher modified the crusher by removing the protective shield covering the flywheel and adding a step next to the flywheel to make it easier to clear jams and to perform maintenance; and the decedent was injured by the flywheel as the decedent knelt on the step to clear a jam, the modifications were not foreseeable as a matter of law. Chairez v James Hamilton Constr. Co., 2009-NMCA-093, __ N.M. __, __ P.3d __.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of products liability statute precluding or limiting recovery where product has been altered or modified after leaving hands of manufacturer or seller, 41 A.L.R.4th 47.

Products liability: injury caused by product as a result of being tampered with, 67 A.L.R.4th 964.

13-1423. Strict products liability; component part.

"Products liability" applies to the supplier of [a component part] [material intended for further processing] which causes injury if, when added to or

incorporated into the finished product, the [component part] [material] is substantially unchanged or is in a condition in which it could have been reasonably expected to be used.

For substantial change in the [component part] [material] to relieve a supplier of liability, the change itself must be a cause of the harm done.

USE NOTE

This instruction must be used only where a defendant is a supplier of a component of the final product or a product which undergoes further processing and sufficient evidence has been introduced to permit a finding that substantial change in the component is a cause of the plaintiff's injury. The appropriate bracketed language should be selected.

As with the issue covered by UJI 13-1422, the issue submitted by this instruction may require expansion of UJI 13-1401. *See* UJI 13-1422, Use Note.

[As amended, effective March 1, 2005.]

Committee comment. — Restatement (Second) of Torts § 402A took no position on the application of strict liability in tort to suppliers of component parts and products sold for further processing. Restatement (Second) of Torts § 402A, comments p and q. The Restatement predicts that where no change occurs in the component itself, but it is merely incorporated into something larger, strict liability will carry through to the ultimate consumer. This prediction was proved accurate. *First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 86, 537 P.2d 682, 694 (Ct. App. 1975). The comments under UJI 13-1422 are applicable here; proof that the component has reached the consumer in substantially the same condition as that in which it was supplied is an element of plaintiff's case. *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276, 282-3 (1978). Here again, however, the element comes to the jury's attention in the context of a claim of change or further processing, as a cause of plaintiff's injury. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments deleted "proximately" preceding "cause" in the first paragraph, "proximate" preceding cause in the second paragraph and "proximate" preceding "cause" in the first paragraph of the Use Note.

Duty of supplier of raw material used for manufacture of product. — A supplier of raw material which is not inherently defective or dangerous at the time it leaves the

manufacturer's control, and which is used in the manufacture or making of another product, does not owe a duty to an ultimate consumer to issue a warning concerning the suitability or safety of the finished product; any duty to warn rests upon the manufacturer of the product. Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 909 P.2d 1 (Ct. App. 1995).

A supplier of an inert raw material has no duty to foresee all the dangers which may result from the subsequent manufacture by a third party of a product which incorporates such raw material together with other substances into a finished product. Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 909 P.2d 1 (Ct. App. 1995).

Law reviews. — For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico," see 11 N.M.L. Rev. 359 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: overhead garage doors and openers, 61 A.L.R.4th 94.

13-1424. Causation; independent intervening cause.

The cause of an injury is that which, in a natural and continuous sequence [unbroken by any independent intervening cause], contributes to bringing about the injury and without which the injury would not have occurred. [It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause, acting at the same time, which, in combination with it, causes the injury.]

["Independent intervening cause" is that which interrupts the natural sequence of events which could reasonably be expected to result from the condition in which a product was sold or from a foreseeable manner of use. An independent intervening cause unforeseeably turns aside the course of events and produces a result which could not reasonably have been expected.]

USE NOTE

The phrase in the first brackets and the bracketed second paragraph will be used only if there is sufficient evidence of an independent intervening cause.

The phrase in the last brackets of the first paragraph should be used only when there is evidence of a concurring or contributing cause.

The applicable portions of this instruction must be used in all products liability cases. In an appropriate case, this instruction will be followed by UJI 13-1425 or 13-1426 NMRA, or both.

[As amended, effective March 1, 2005.]

Committee comment. — With the exception of proximate cause in warning cases, treated separately under UJI 13-1425, the general tort law definition of proximate cause is applicable in products liability cases. The first paragraph of this instruction is UJI 13-308 and the comment to that instruction is applicable.

"Independent intervening cause" is one application of the principles of proximate cause. Kelly v. Montoya, 81 N.M. 591, 594-6, 470 P.2d 563, 566-8 (Ct. App. 1970); Baker v. Fryar, 77 N.M. 257, 260-2, 421 P.2d 784, 786-8 (1966); Thompson v. Anderman, 59 N.M. 400, 411-2, 285 P.2d 507, 514 (1955). While "independent intervening cause" is an argument generally raised by the defense, it is not an affirmative defense and it should be given as a companion instruction to proximate cause. The committee has, therefore, included "independent intervening cause" as a separate bracketed paragraph to the basic definition. In products cases, the issue frequently involves a defense contention that the conduct of the original purchaser (i.e., a parent, employer, etc.) was a major contributing factor to the accident and interrupted the natural sequence of events flowing from defendant's conduct. In cases of injury to bystanders, the contention may center upon conduct of the product's user. Also, the issue may arise in connection with UJI 13-1422 and 13-1423 and evidence that modifications or alterations in the product have materially changed the nature and magnitude of the risk of injury presented by the product's original condition or design.

Court and counsel may feel that a party's argument on "independent intervening cause" should be spelled out in the instructions and not left solely to verbal explanation by the attorneys. A party's theory of "independent intervening cause" can be inserted in UJI 13-1401, though it should not be identified as a "defense" which must be proved by defendant.

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendment deleted "proximate" preceding "cause" and substituted "contributes to bringing about" for "produces" in the first sentence to be consistent with the March 1, 2005 amendment of UJI 13-305 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: "fireman's rule" as defense, 62 A.L.R.4th 727.

13-1425. Warning or directions; causation.

If, in light of all the circumstances of this case, [an adequate warning] [adequate directions for use] would have been noticed and acted upon to guard against the danger, a failure to give [an adequate warning] [adequate directions for use] is a cause of injury.

USE NOTE

This instruction must be given in all products liability cases, whether founded upon negligence or strict liability, where failure to warn is a submissible jury issue. The instruction is to be given immediately following UJI 13-1424 NMRA. Where failure to warn or product misrepresentation are not submissible jury issues, UJI 13-1424 is the only instruction to be given on causation.

[As amended, effective March 1, 2005.]

Committee comment. — Whether presented in negligence or strict liability, products liability based upon failure to provide an adequate warning presents special problems of causation. The jury is required to evaluate the contribution, if any, which an inadequate warning made to the plaintiff's injury. The traditional causation definition does not adequately focus this issue and, therefore, the committee has drafted this separate instruction on causation in warning cases.

Other courts have dealt with the causation issue in a variety of ways. In *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972), causation in warning cases is resolved by reference to the principle that where warning is given, the seller may reasonably assume that it will be read and heeded. A corollary of that presumption is the presumption that the plaintiff would have read and heeded a warning which the jury determines should have been provided. The presumption of causation, used in *Technical Chemical Co. v. Jacobs*, *supra*, does not conclude argument on this element of plaintiff's case. Because the presumption may be invalid, the supplier is permitted to defeat proximate cause by producing evidence that, because of some circumstance, improper use of the product would have occurred regardless of a warning. Without limiting the possibilities, this could include evidence that the user was blind, illiterate, intoxicated at the time of the use or irresponsible or lax in judgment. *Cunningham v. Charles Pfizer & Co., Inc.*, 532 P.2d 1377, 1381-82, 94 A.L.R.3d 739 (Okla. 1974); *Technical Chem. Co. v. Jacobs*, *supra*.

A related but separate issue is whether the product's purchaser or user should be permitted to testify as to what would have been done had a warning been provided. Such testimony can be regarded as objectionable on the grounds that it is both speculative and self-serving. *Drackett Prods. Co. v. Blue*, 152 So.2d 463 (Fla. 1963). Dicta in several New Mexico appellate decisions suggest that the question is proper. *Demers v. Gerety*, 85 N.M. 641, 651, 515 P.2d 645, 655 (Ct. App. 1973), *rev'd on other grounds*, 86 N.M. 141, 520 P.2d 869, *on remand,* 87 N.M. 52, 529 P.2d 278 (Ct. App.), *cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974); *Woods v. Brumlop*, 71 N.M. 221, 229, 377 P.2d 520, 525 (1962). Advocates of a presumption of causation in warning cases argue that if such a presumption is used then plaintiffs will not be faced with the necessity of offering self-serving testimony as to what would have been done had an adequate warning been provided.

Recognizing that this position leaves unresolved difficult evidentiary issues, the committee has determined that a presumption of causation should not be included in UJI 13-1425 NMRA until the Supreme Court of New Mexico has passed on the question raised by *Technical Chemical Co. v. Jacobs*, *supra*, and other comparable cases. The committee has simply stated a rule of proximate cause, without reference to the burden of proof, which focuses the jury's attention on that evidence which will assist the jury in determining whether an adequate warning would have been heeded. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendment substituted "causation" for "proximate cause" in the catchline, deleted "proximate" preceding "cause" in the instruction and substituted "causation" for "proximate cause" at the end of the Use Note.

13-1426. Strict products liability; misrepresentation; causation.

No instruction drafted.

Committee comment. — The New Mexico Supreme Court has not ruled on § 402B of Restatement (Second) of Torts and the products liability theory there stated. Until such time as the Supreme Court does consider this issue, the trial judge must decide whatever doctrine will be applied.

In the event the trial judge decides to instruct on this theory, the following instruction may provide guidance:

A misrepresentation is a cause of an injury if it substantially influenced the decision to purchase or use a product, and the harm results from the fact which is misrepresented. Reliance upon a misrepresentation need not necessarily be that of the person injured. The necessary reliance exists if a purchaser is substantially influenced to buy the product because of the misrepresentation and passes the product on to a person who is in fact injured, but is ignorant of the misrepresentation. There is no cause between an injury and a misrepresentation if the fact which is misrepresented is unknown to the product's purchaser and users or there is indifference to the representation.

Causation is taken to be proved in the absence of evidence that a misrepresentation was unknown to or ignored by the product's purchaser and users or that the harm resulted from a condition or character of the product which was not misrepresented. The supplier has the burden of proving that, in light of all the

circumstances of this case, a misrepresentation did not substantially influence the purchase or use of the product.

A misrepresentation is not a cause without which the plaintiff's injury would not have occurred unless the plaintiff, or someone who gave the plaintiff the product to use, was induced by the representation to purchase or use the product. There is a second element to causation in a misrepresentation case. The injury must result from the quality, condition or character, which was misrepresented. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil.

13-1427. Comparative negligence defense.

[A user of a product] [a person in the vicinity during the use of a product] has a duty to use ordinary care to avoid a foreseeable risk of injury caused by the condition of the product or a manner in which it is used. Ordinary care is that care exercised by a reasonably prudent person and varies with the nature of what is being done. As the danger that should reasonably be foreseen increases, the amount of care required also increases.

USE NOTE

This instruction will be given in every products liability case where there is sufficient evidence that negligence of the plaintiff was a cause of injury. It applies regardless of the theories of liability used.

[As amended, effective March 1, 2005.]

Committee comment. — Prior to the adoption of comparative negligence in Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), only a limited form of contributory negligence constituted a defense to an action in strict liability in tort. A plaintiff's recovery was barred by the intentional and unreasonable exposure to a known risk, the contributory negligence which lawyers have traditionally known as "assumption of risk." Other forms of contributory negligence, including the plaintiff's negligent failure to discover a product defect, were not a defense. Rudisaile v. Hawk Aviation, Inc., 92 N.M. 575, 592 P.2d 175 (1979).

Since the adoption of comparative negligence and the principle that each person is responsible for his or her conduct contributing to an injury, New Mexico courts have

seen no reason to exclude products liability cases from the operation of comparative fault. Scott v. Rizzo, supra, expressly reserved the question of whether comparative negligence would apply in cases of strict liability in tort and, if so, the scope of the contributory negligence defense; in Marchese v. Warner Communications, Inc., 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983), cert. denied, 100 N.M. 259, 669 P.2d 735 (1983), the New Mexico Court of Appeals decided the issue holding that a plaintiff's conventional contributory negligence is a defense in strict liability actions and reduces the plaintiff's damages in proportion to the plaintiff's fault. See also, Jaramillo v.Fisher Controls Co., Inc., 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985), cert. denied, 102 N.M. 613, 698 P.2d 886 (1985). The use of the broad term "products liability claims" in both Marchese v. Warner Communications, Inc., supra, and Jaramillo v. Fisher Controls Co., Inc., supra, supports the conclusion that comparative fault principles apply with equal force to any theory of liability for a product related injury, whether negligence, strict liability in tort or breach of warranty. [Revised, effective November 1, 1991.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendment deleted "proximate" preceding "cause" in the Use Note.

13-1428. Creation and breach of express warranty.

A supplier's [description] [statement of fact] about [goods] [a product] which [he] [she] [it] sells, creates a warranty that the [goods] [product] will conform to the [description] [statement of fact], if,

(1) the supplier communicated the [description] [statement of fact] under circumstances which make it fair to regard it as part of the contract, and

(2) the [description] [statement of fact] is of a kind which would influence the buyer's decision to buy the [goods] [product].

[A warranty is not created by sales talk which a reasonably prudent buyer would interpret as merely a salesperson's recommendation or opinion.]

[A sample or model of the [goods] [product] may be used to create a warranty that the [goods] [product] will conform to the sample or model.]

A supplier breaches an express warranty if the [goods] [product] do not conform to the supplier's [description] [statement of fact] of their condition or promised performance.

USE NOTE

The proof in a case will dictate the choice between "goods" and "product." Ordinarily "goods" will be used in a case involving only economic loss.

Only the bracketed second paragraph of this instruction shall be used where sufficient evidence has been introduced at trial to justify a jury's conclusion that the statements relied upon in creating an express warranty were merely "puffing". The third paragraph will be used where the warranty was allegedly created by exhibiting a sample or model of the product.

[As amended, effective November 1, 1991.]

Committee comment. — Beginning with this instruction, Chapter 14 states the elements of, and defenses to, actions for breach of express and implied warranties as codified in 55-2-313 to 55-2-318 NMSA 1978. The language of the statute, and consequently the language of the instructions, is the language of sales law. While breach of warranty instructions seem best suited for cases involving commercial loss, personal injury cases may involve breach of express warranties and actions for breach of the implied warranties contained in this chapter are clearly available to a plaintiff as additional theories of liability. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983).

Nonetheless, products which are sold in a defective condition and give rise to strict liability are products which, almost invariably, give rise to an action for breach of implied warranty. Most courts and commentators have been unable to state a rational distinction between the merchantability standard of 55-2-314 NMSA 1978 and the comparable standard in strict liability of § 402A of Restatement (Second) of Torts. See discussion in White and Summers, Uniform Commercial Code, § 9-7 (1972 ed.). While it is clear that the code remedies are available in the personal injury case, it is not clear that strict liability in tort is available to the plaintiff who has sustained purely economic loss, consisting of loss of bargain and consequential damage such as loss of profits. See the introduction to this chapter. Thus, it is contemplated that the breach of warranty instructions in this chapter will be the instructions ordinarily given in a case involving purely economic loss.

Section 55-2-313 NMSA 1978 uses the language "part of the basis of the bargain" to state the requirement that the statement or promise which creates a warranty must have been communicated at a time and under circumstances which justify a conclusion that the seller and buyer regarded the statement as contractual. As stated in the excellent discussion of express warranties in Vitro Corp. of Am. v. Texas Vitrified Supply Co., 71 N.M. 95, 376 P.2d 41 (1962), it is not necessary that the giving of a warranty be simultaneous with the sale. 71 N.M. at 104. This is similarly recognized by the code. Uniform Commercial Code, 1962 Official Text, § 2-313, comment 7 (1962). However, the statement relied upon must have been made under circumstances which justifiably infer reliance by the buyer. Stang v. Hertz Corp., 83 N.M. 217, 219, 490 P.2d 475 (Ct.

App. 1971), rev'd on other grounds, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972) (holding that insufficient evidence existed that a statement by lessor concerning "good tires" on a leased vehicle became part of the basis of the bargain).

The committee believes that the phrase "basis of the bargain" is awkward and has used instead the equivalent statement from Vitro Corp. of Am. v. Texas Vitrified Supply Co., supra. "It is enough if it is made under such circumstances as to warrant the inference that it enters into the contract as finally made." 71 N.M. at 104.

The language of the Uniform Commercial Code is poor language for jury consideration and, therefore, other words have been selected to express the matter. The phrase "statement of facts" was used in preference to "representation," as that phrase finds more acceptance in contract law than in tort law. However, the "statement of facts" is more than merely an opinion. It is intended that the phrase "statement of facts" is more of a "promise or affirmation of facts".

Section 55-2-313 NMSA 1978 carries forward the common-law recognition that not all statements made during negotiation of a contract can be fairly regarded as warranties. This is implicit in the definition of express warranty. In an appropriate case, the second paragraph of this instruction explicitly states that mere sales talk or puffing does not constitute contractual language. Uniform Commercial Code, 1962 Official Text, § 2-313, comment 8.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

When affirmations of facts deemed express warranties. — Affirmations of fact do not amount to express warranties unless they are part of the basis of the bargain. Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

Affirmation of fact consists of all of the language in the manufacturer's publication; the plaintiff cannot limit the express warranty issue to words taken out of context. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Where user unaware of manufacturer's warning, no express warranty. — Where a user is not aware of a manufacturer's warning and the warning does not enter into his decision to use the manufacturer's product, the affirmation is not part of any bargain and there is no express warranty. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

If affirmation of fact part of basis of bargain, no independent "reliance" requirement. — If there is an affirmation of fact which is a part of the basis of the bargain, there is no independent "reliance" requirement as to that affirmation of fact. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Any express warranty made with respect to surgeon would inure to patient's benefit on the basis that the surgeon is acting as the patient's agent in the use of a medical product. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

13-1429. Creation of implied warranty of merchantability.

[Unless excluded], a supplier who regularly deals in [goods] [products] of the kind that [he] [she] is selling or holds [himself] [herself] out as having special knowledge or skill concerning the [goods] [products], warrants that the [goods] [products] shall be merchantable. The warranty of merchantability is implied by law and exists independent of any statement made by the seller to the buyer.

[The warranty of merchantability is included in any sale or service of food or drink.]

USE NOTE

Unless the warranty has been excluded as a matter of law, applying the rules of 55-2-316 NMSA 1978, the first paragraph of this instruction shall be used in every case where plaintiff states a cause of action for breach of the implied warranty of merchantability. The bracketed second paragraph is to be given in a case involving the sale or service of food products or beverages.

[As amended, effective November 1, 1991.]

Committee comment. — The implied warranty of merchantability is given by sellers who are merchants. "Merchant" is defined in 55-2-104 NMSA 1978. UJI 13-1429 incorporates the definition of merchant in a statement of the creation of the implied warranty of merchantability. In contrast with the implied warranty of fitness for particular purpose, the implied warranty of merchantability does not require proof by the buyer of reliance on the particular skills or judgment of the seller. It arises from the nature of the holding out by the seller that he is a person who deals in goods of the kind being sold. Vitro Corp. of Am. v. Texas Vitrified Supply Co., 71 N.M. 95, 106, 376 P.2d 41 (1962).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first paragraph.

Products liability claim and implied warranty of merchantability claim may be identical. — In a personal injury case, a products liability claim and a claim concerning an implied warranty of merchantability may be identical. Both claims require a defect. Where the identical defect is relied on to support both theories of liability, both theories may be submitted to the jury. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: electricity, 60 A.L.R.4th 732.

13-1430. Breach of implied warranty of merchantability.

A supplier breaches the implied warranty of merchantability:

[1. If the goods sold would be rejected by someone knowledgeable in the trade for failure to meet the contract description]; [or]

[2. If goods sold in bulk are not of fair average quality for the type of goods described by the contract. The goods need not be the best quality but they must pass without objection in the trade]; [or]

[3. If the [goods] [products] are not fit for the ordinary purposes for which such [goods] [products] are used]; [or]

[4. If the goods do not run within variations permitted by the contract for the reason that there are wide differences in type, quality and quantity within delivered units and among all units involved]; [or]

[5. If the [goods] [products] are not adequately contained, packaged and labeled as required by the contract]; [or]

[6. If the [goods] [products] do not conform to the promises or statements made by the seller on the container or label]; [or]

[7. If the food or drink is unwholesome or unfit for human consumption].

USE NOTE

Select the bracketed material which fits the actual issues and evidence involved in the case. With this instruction, UJI 13-1429 must also be used. This list of items is not exclusive. Reference should be made to the Uniform Commercial Code 55-2-314 NMSA 1978 for further specifications.

[As amended by Supreme Court Order No. 08-8300-61, effective February 2, 2009.]

Committee comment. — The elements of merchantability used in this instruction are those set out in the statute, 55-2-314 NMSA 1978. It is unlikely that all elements will be involved in any single case, and the court and counsel must use great care in choosing those elements which are suitable under the evidence. Giving an element of breach of merchantability which is not applicable on the evidence presented by the plaintiff may interject a false issue in the case. Elements (1), (2) and (4) will ordinarily have application only in cases of commercial loss. Where these instructions are used in a

case involving personal injury, the elements of merchantability set out in (3), (5) and (6) may be applicable and "products" should be used for "goods".

The question which has received considerable discussion is whether, in a personal injury case, strict liability in tort and breach of the implied warranty of merchantability are comparable standards. It is felt by some that the standard of § 402A is narrower in that it pegs liability to an unreasonable risk of injury. White and Summers, Uniform Commercial Code, § 9-8 (1972 ed.). The committee does not share this view. While § 402A may be narrower in scope and eventually held to be inapplicable to cases involving solely economic loss, in the context of a personal injury action, there would seem to be little difference between the two standards as applied in the courts. It is precisely for this reason that the committee suggests use of the tort standard in personal injury cases and use of the merchantability standard in commercial cases. While both causes of action are available to the plaintiff, the use of two instructions and terminologies to define the same thing may well be confusing to the jury.

A review of New Mexico cases indicates that theories of implied warranty are predominantly used by lawyers in cases of commercial loss. Jesko v. Stauffer Chem. Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976); Standhardt v. Flintkote Co., 84 N.M. 796, 508 P.2d 1283 (1973); Vitro Corp. of Am. v. Texas Vitrified Supply Co., 71 N.M. 95, 376 P.2d 41 (1962).

Prior to the adoption of strict liability in tort, attorneys quite naturally turned to implied warranties at common law and as expressed in the code to express a cause of action which did not require proof of negligence. E.g. Phares v. Sandia Lumber Co., 62 N.M. 90, 305 P.2d 367 (1956). With the adoption of strict liability in tort by Stang v. Hertz Corp, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972), resort to the code was no longer necessary and, in fact, generally undesirable because of the availability of defenses. It is expected that the trend will continue with personal injury actions developing under the doctrine of strict liability in tort and commercial cases finding application through the warranties of the code.

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-61, effective February 2, 2009, deleted "[are defective and]" in item 3.

Products liability claim and implied warranty of merchantability claim may be identical. — In a personal injury case, a products liability claim and a claim concerning an implied warranty of merchantability may be identical. Both claims require a defect. Where the identical defect is relied on to support both theories of liability, both theories may be submitted to the jury. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Liability for breach without regard to privity of contract. — A defendant may be held liable for the breach of an implied warranty of merchantability under the UCC

without regard to privity of contract. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

13-1431. Creation of implied warranty of fitness for particular purpose.

If the seller has reason to know at the time the contract is made that the [goods] [products] are purchased for any particular purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable [goods] [products], there is an implied warranty that the [goods] [products] are fit for the purpose [unless the warranty is excluded]. The warranty is implied by law in the seller's and buyer's contract and may exist independent of anything said by the seller.

USE NOTE

This instruction shall be given where applicable on the evidence and plaintiff has proved a submissible case under 55-2-315 NMSA 1978. The bracketed material should be used where a submissible issue exists concerning exclusion of the implied warranty.

Committee comment. — Prior to the enactment of 55-2-315 NMSA 1978, the elements of the implied warranty of fitness for particular purpose were outlined in New Mexico cases. Vitro Corp. of Am. v. Texas Vitrified Supply Co., 71 N.M. 95, 376 P.2d 41 (1962); J.B. Colt Co. v. Gavin, 33 N.M. 169, 262 P. 529 (1927). As stated in comment 1 of the official comments to the Uniform Commercial Code, whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. The seller must have reason to realize the purpose intended for the goods or that the buyer is relying on the seller's skill or judgment but actual knowledge of the particular purpose is not required. In contrast to the action for breach of implied warranty of merchantability, actual reliance upon the seller is required to establish breach of the implied warranty of fitness for a particular purpose. See discussion of both implied warranties in Vitro Corp. of Am. v. Texas Vitrified Supply Co., 71 N.M. 95, 105-11, 376 P.2d 41 (1962).

ANNOTATIONS

Hospital's reliance on purchased prosthesis extends to surgeon. — Where a hospital purchases a prosthesis from a manufacturer and supplies that prosthesis to a surgeon for use, the warranty of fitness for a particular purpose does not require that the manufacturer have actual knowledge that the prosthesis will be implanted in a particular patient nor that the surgeon will rely on the manufacturer's skill or judgment. Evidence that the hospital purchased the prosthesis from the manufacturer for use as an implant is evidence of the hospital's reliance; the hospital's reliance extends to the surgeon, who is in the distributive chain. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

13-1432. Breach of implied warranty of fitness for particular purpose.

A supplier breaches the implied warranty of fitness for a particular purpose if the [goods] [products], though not defective, are unsuitable for the particular purpose for which they were purchased.

USE NOTE

This instruction shall be given in every case where the court submits an issue of breach of implied warranty of fitness for particular purpose. The instruction is to be given immediately following the instruction on creation of implied warranty of fitness for particular purpose, UJI 13-1431.

Committee comment. — The committee believes that it is important to point out to the jury that the product may have no defects and yet be unsuitable for a particular purpose; hence, the inclusion of the element that a defect-free product may breach the implied warranty of fitness for particular purpose. J.B. Colt Co. v. Gavin, 33 N.M. 169, 170, 262 P. 529 (1927).

ANNOTATIONS

Unlike products liability, implied warranty of fitness for particular purpose requires no defect. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

13-1433. Exclusion of implied warranties.

[Implied warranties do not exist if the seller has excluded them by understandable language which would alert the reasonably prudent buyer that warranties are excluded. Thus, if, in discussing the [goods] [products], the seller tells the buyer that the [goods] [products] are being sold "as is" or "with all faults," there is no implied warranty.]

[A supplier may exclude the implied warranty of merchantability, or any particular element of that warranty, by using understandable language which mentions merchantability.]

[General language is sufficient to exclude the implied warranty of fitness for particular purpose. For example, the warranty is excluded by a conspicuous statement that: "There are no warranties which extend beyond the description on the face of the document".]

[If a buyer of [goods] [products] is given an opportunity to examine the [goods] [products] before agreeing to buy and refuses to examine the [goods] [products], or if [he] [she] [it] conducts an examination, there is no implied

warranty with respect to defects which a reasonable examination should have revealed.]

USE NOTE

The appropriate bracketed paragraph will be selected depending upon the nature of the warranty claimed by the plaintiff and the type of exclusion relied upon by the defendant. The bracketed first paragraph is applicable to either the implied warranty of merchantability or implied warranty of fitness for a particular purpose. The bracketed second paragraph is applicable only to the exclusion of the implied warranty of merchantability. The bracketed third paragraph is applicable only to the exclusion of the implied warranty of fitness for a particular purpose. The bracketed fourth paragraph is applicable to either the implied warranty of merchantability or implied warranty of fitness for a particular purpose.

[As amended, effective November 1, 1991.]

Committee comment. — This instruction does not cover all circumstances of exclusion of warranties as set forth in 55-2-316 NMSA 1978. Thus, disclaimers of express warranties are possible under the Uniform Commercial Code, 55-2-316(1) NMSA 1978, but the committee has not drafted an instruction in accordance with that section. Court and counsel will have to draft an instruction where exclusion of an express warranty is a submissible issue. Similarly, the committee has not provided for an issue regarding exclusion of implied warranties by course of dealing or course of performance or usage of trade. Section 55-2-316(3)(c) NMSA 1978.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the last paragraph of the instruction.

CHAPTER 15
Statutes and Ordinances

Introduction

The instructions of this chapter are drafted to embody the statutes of the state and the ordinances of the various municipalities. The use of the instructions of this chapter will encompass hundreds of statutes and ordinances and avoid burdening this pamphlet with individual instructions on the particular statutes and ordinances. The instructions of this chapter will be used extensively in the large volume of motor vehicle lawsuits which flood the courts.

These instructions are applicable with reference to any party to a lawsuit and, in the proper case, also to minors, decedents or others on behalf of whom a lawsuit is brought by another.

Instructions on violations of a statute or ordinance should not be given unless the evidence is sufficient to raise a jury question and to support a finding that the violation actually occurred.

The first four instructions in this chapter require the trial lawyer to add, as a second paragraph of the instruction, the particular statute or ordinance which it is alleged was violated. Certainly there can be no error in quoting the statute or ordinance verbatim. However, it may be better practice, particularly when the statute or ordinance is complicated, technical or drafted in language not readily understood by the jury, to paraphrase the particular statute or ordinance in question, in order to aid the jury in understanding the matters in issue.

In many jurisdictions adopting uniform or pattern jury instructions, there are included separate instructions in motor vehicle cases on all of the various rules of the road, equipment requirements and matters of like nature. The New Mexico committee has determined that there is no justification in drafting individual instructions on the various statutes and ordinances that may be applicable and is confident that the trial attorneys, under the guidance of the trial court can and will effectively present the issues to the jury using the framework here provided.

Since the publication of the first edition of New Mexico Uniform Jury Instructions - Civil, instructions involving this chapter have been before the New Mexico appellate courts in the following cases: Garner v. Valley Sav. & Loan Ass'n, 91 N.M. 725, 580 P.2d 493 (Ct. App. 1978); Kight v. Butscher, 90 N.M. 386, 564 P.2d 189 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977); Archibeque v. Homrich, 87 N.M. 265, 531 P.2d 1238 (Ct. App.), rev'd on other grounds, 88 N.M. 527, 543 P.2d 820 (1975); May v. Baklini, 85 N.M. 150, 509 P.2d 1345 (Ct. App.), cert. denied, 85 N.M. 144, 509 P.2d 1339 (1973); Galvan v. City of Albuquerque, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973); LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972); Tafoya v. Whitson, 83 N.M. 23, 487 P.2d 1093 (Ct. App.), cert. denied, 83 N.M. 22, 487 P.2d 1092 (1971); Paddock v. Schuelke, 81 N.M. 759, 473 P.2d 373 (Ct. App. 1970); Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970); Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969); Tenorio v. Nolen, 80 N.M. 529, 458 P.2d 604 (Ct. App. 1969); Butcher v. Safeway Stores, 78 N.M. 593, 435 P.2d 212 (Ct. App. 1967).

13-1501. Violation of statute.

There [was a] [were] statute[s] in force in this state, at the time of the occurrence in question, which provided that:

(Quote or paraphrase the applicable part of the statute in question. If more than one statute is in question, list each statute separately)

If you find from the evidence that _____ *(party)* violated [this] [any one of these] statute[s], then _____'s conduct constitutes negligence as a matter of law, [unless you further find that such violation was excusable or justified].

[To legally justify or excuse a violation of a statute, the violator must sustain the burden of showing that [s]he did that which might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.]

USE NOTE

In order to facilitate the use of the instruction by the trial court instruction (13-1501) is to be used only when a statute is involved, whereas the companion instruction (13-1502) is to be used when an ordinance is involved.

The statute in question must have been enacted for the benefit or protection of the party or of a class of the public to which he belongs before the instruction is applicable. The last bracketed phrase of the third paragraph and the last paragraph are to be used when there is evidence of excuse or justification in the violation of the statute.

If the court finds that a regulation may be the basis for a claim of negligence per se, this instruction may be modified accordingly.

UJI 13-1503 should be used in addition to this instruction when there is an issue of proximate cause.

This instruction is applicable in all cases involving a statute.

The blank lines in the third paragraph of the instruction are to be completed by referring either to plaintiff, defendant or other pleading designation of the party or to the name of the party as may be applicable under the circumstances.

[As amended, effective November 1, 1991.]

Committee comment. — The violation of a statute which is enacted for the benefit or protection of the party claiming injury from the violator or enacted for the benefit or protection of a class of the public to which such person is a member is negligence per se. Hayes v. Hagemeier, 75 N.M. 70, 400 P.2d 945 (1963); Bouldin v. Sategna, 71 N.M. 329, 378 P.2d 370 (1963); Zamora v. J. Korber & Co., 59 N.M. 33, 278 P.2d 569 (1954). The same principle of law is applicable to the violation of a municipal ordinance. Jackson v. Southwestern Pub. Serv. Co., 66 N.M. 458, 349 P.2d 1029 (1960). This instruction will find its greatest utility in motor vehicle cases. A minor driver is held to the

same standard of an adult driver in motor vehicle cases. Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965).

Instructions are drafted for the benefit of the jury and not for the court or lawyer, and, therefore, terms such as "negligence per se" should be omitted, as such terms, rather than having any special meaning to the jury, are only confusing. However, the New Mexico law is specific that the violation of the statute which is enacted for the benefit or protection of the party claiming injury from the violator or for the benefit or protection of a class of the public to which such person is a member is negligence per se.

The test for negligence per se is the following: (1) there must be a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly; (2) the defendant must violate the statute; (3) the plaintiff must be in the class of persons sought to be protected by the statute and (4) the harm or injury to the plaintiff must generally be of the type of harm or injury the legislature, through the statute, sought to prevent. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

The legislature did not explicitly state whom it sought to protect in 64-18-8 and 64-18-16 NMSA, 1953 Comp. (similar provisions at 66-7-308 and 66-7-317 NMSA 1978); nevertheless, it is reasonable to assume that it was the motoring public in general, including passengers, and that the harm sought to be prevented was head-on collisions or sideswiping the opposite-moving traffic, since it is doubtful that the statute could have been intended by the legislature to apply to a one-car accident of unknown cause in which driver and passenger were killed (regardless of the fact that evidence showed the car crossed into the left-hand lane before its final plunge), and the district court properly refused to submit a negligence per se instruction based on these statutes to the jury. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975) (statutes repealed but legal theory still applicable).

It was not error for the trial court to instruct the jury in the language of 64-18-24 NMSA, 1953 Comp. (similar provision at 66-7-325 NMSA 1978), which requires the giving of a signal before stopping, decreasing speed or turning right or left from a public highway, where plaintiff motorist who had stopped his vehicle in time to avoid striking a nonsignaling vehicle was struck from rear by defendant; the court did not interject a false issue into the case in that the lead car's failure to signal went to the issue of proximate cause with respect to this lawsuit, and another instruction informed the jury that a statutory violation must have been the proximate cause. Sandoval v. Cortez, 88 N.M. 170, 538 P.2d 1192 (Ct. App. 1975) (specific statute repealed but not the legal principle).

The application of the doctrine of excuse or justification for violation of the statute is well recognized in New Mexico under proper circumstances. See Whitfield Tank Lines v. Navajo Freight Lines, 90 N.M. 454, 564 P.2d 1336 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977); Kight v. Butscher, 90 N.M. 386, 564 P.2d 189 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977); Tenorio v. Nolen, 80 N.M. 529, 458 P.2d 604 (Ct. App. 1969); Hayes v. Hagemeier, 75 N.M. 70, 400 P.2d 945 (1963).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, rewrote the instruction and Use Note to the extent that a detailed comparison would be impracticable.

Violation of statute enacted for benefit of the public is negligence per se. Equitable Gen. Ins. Co. v. Silva, 99 N.M. 371, 658 P.2d 446 (Ct. App. 1983).

Law reviews. — For note, "The New Case for the 'Seat Belt Defense' - *Norwest Bank New Mexico, NA v. Chrysler Corporation,*" see 30 N.M.L. Rev. 403 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Violation of governmental regulations as to conditions and facilities of swimming pools as affecting liability in negligence, 79 A.L.R.4th 461.

13-1502. Violation of ordinance.

There [was an] [were] ordinance[s] in force in the city of _____, at the time of the occurrence in question, which provided as follows:

(Quote or paraphrase the applicable part of the ordinance in question. If more than one ordinance is in question, list each ordinance separately.)

If you find from the evidence that defendant violated [any of these] [this] ordinance[s], then you are instructed that such conduct constituted negligence as a matter of law, [unless you further find that such violation was excusable or justified.]

[To legally justify or excuse a violation of the ordinance, the violator must sustain the burden of showing that [s]he did that which might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.]

USE NOTE

In the blank space in the first paragraph of the instruction, the name of the city in question needs to be added.

The second paragraph of this instruction will be a quotation or a paraphrase of the ordinance involved.

The last bracketed phrase of the third paragraph and the last paragraph are to be used when there is evidence of excuse or justification in the violation of the ordinance.

Identify the party, in the third paragraph, who may have violated the ordinance under the evidence presented by name or by pleading designation such as plaintiff, defendant, third party, etc.

In the first edition, UJI 13-1101 was drafted to cover both statute and ordinance violations. The second edition has created a separate instruction for ordinances and a separate instruction for statutes, simply to facilitate the use by the trial court in getting the instructions printed in advance.

The use note to UJI 13-1501 apply with equal force here.

[As amended, effective November 1, 1991.]

Committee comment. — It has been held in New Mexico that the violation of an ordinance may be justified or excused under certain circumstances. Jackson v. Southwestern Pub. Serv. Co., 66 N.M. 458, 349 P.2d 1029 (1960). See also committee comment to UJI 13-1503.

See the Committee Comment to UJI 13-1501.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, rewrote the instruction and added the third paragraph of the Use Note.

Uniform Building Code. — The Uniform Building Code does not explicitly or implicitly impose an obligation to retrofit the guardrail spacing in older apartment buildings that complied with the code edition in effect at the time of construction, but which no longer complies with the newest edition of the code, and does not support an instruction on negligence per se. Heath v. La Mariana Apartments, 2008-NMSC-017, 143 N.M. 657,180 P.3d 664.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence §§ 245, 246, 258, 270.

Violation of governmental regulations as to conditions and facilities of swimming pools as affecting liability in negligence, 79 A.L.R.4th 461.

65A C.J.S. Negligence §§ 252, 281.

13-1503. Violation of statute; causation.

Negligence resulting from a violation of a[n] [statute] [or] [ordinance] is no different in effect from that resulting from other acts or omissions constituting negligence. In each case the negligence is of no consequence unless it was a

cause of or contributed to, an injury found by you to have been suffered by the plaintiff.

USE NOTE

Where there are various claims of negligence arising from the same act or acts of a party, it may be proper to give this instruction immediately following one of the other instructions in this chapter.

The instruction will need to be modified and amended if it is the defendant contending that the plaintiff's damages were due to the plaintiff's violation of the statute or ordinance.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — To be actionable, the negligence resulting from the violation of a statute or ordinance must be a cause of the injury complained of and be so found by the jury. *Baca v. Board of County Comm'rs*, 76 N.M. 88, 412 P.2d 389 (1966); *Horrocks v. Rounds*, 70 N.M. 73, 370 P.2d 799 (1962); *Hartford Fire Ins. Co. v. Horne*, 65 N.M. 440, 338 P.2d 1067 (1959). [Revised, effective November 1, 1991; March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, rewrote the instruction to the extent that a detailed comparison would be impracticable.

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments substituted "causation" for "proximate cause" in the catchline and deleted "proximate" preceding "cause" in the last sentence of the instruction.

Use of instruction warranted. — There was sufficient evidence to justify or excuse violations of a municipal ordinance by plaintiff to warrant submission to the jury of an instruction on excuse and justification. Lamkin v. Garcia, 106 N.M. 60, 738 P.2d 932 (Ct. App. 1987).

Use of instruction not warranted. — Use of excuse and justification language in an instruction was not warranted, where the slipping of defendant's foot off her brake pedal before a collision did not constitute a force beyond anyone's control and ordinary prudence may have avoided the accident. Bachicha v. Lewis, 105 N.M. 726, 737 P.2d 85 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence §§ 78, 249 to 251.

65A C.J.S. Negligence §§ 252, 281.

13-1504. Presentation of statute or ordinance; no negligence per se.

There [was] [were] [a] [an] [statute][s] [ordinance][s] in force in this state at the time of the occurrence in question which provided as follows:

(Quote or paraphrase the applicable part of the statute in question. If more than one statute is in question, list each statute separately.)

USE NOTE

This instruction is to be used where a statute or ordinance is relevant to an issue in the case other than negligence per se, and the trial court determines that the language of the statute or ordinance should be brought to the attention of the jury.

[As amended, effective November 1, 1991.]

Committee comment. — It has been held in New Mexico that the violation of an ordinance may be justified or excused under certain circumstances. Jackson v. Southwestern Pub. Serv. Co., 66 N.M. 458, 349 P.2d 1029 (1960). See also committee comment to UJI 13-1503.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, rewrote this instruction and the Use Note to the extent that a detailed comparison would be impracticable.

Use of instruction warranted. — There was sufficient evidence to justify or excuse violations of a municipal ordinance by plaintiff to warrant submission to the jury of an instruction on excuse and justification. Lamkin v. Garcia, 106 N.M. 60, 738 P.2d 932 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence §§ 78, 249 to 251.

65A C.J.S. Negligence §§ 252, 281.

13-1505. Withdrawn.

ANNOTATIONS

Cross references. — See UJI 13-1503 for current instruction.

Withdrawals. — Pursuant to a court order dated February 24, 1998, this rule, relating to violation of law, is withdrawn effective immediately.

CHAPTER 16
Tort Law — Negligence

Introduction

It is the intent of this chapter to provide the court and bar with jury instructions typical of a tort case. It is not intended, however, to preclude the use of other instructions as may be necessary in any particular case. See Rules of Civil Procedure Paragraph F of Rule 1-051. It is important to note, however, that the instructions identified in Chapter 21 are not to be given to the jury. The instructions in Chapter 16 should be personalized in order to make them more meaningful to the jury, particularly by inserting the names of the parties and the locale.

General and special verdict forms for comparative negligence cases appear with other verdicts and special interrogatories in Chapter 22.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability for injuries in connection with revolving door on nonresidential premises, 93 A.L.R.3d 132.

Liability of motel operator for injury or death of guest or privy resulting from condition in plumbing or bathroom of room or suite, 93 A.L.R.3d 253.

Liability for automobile accident allegedly caused by driver's blackout, sudden unconsciousness, or the like, 93 A.L.R.3d 326.

Applicability of res ipsa loquitur doctrine in action for injury to patron of beauty salon, 93 A.L.R.3d 897.

13-1601. Negligence (of all persons); definition.

The term "negligence" may relate either to an act or a failure to act.

An act, to be "negligence", must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.

A failure to act, to be "negligence", must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to [himself] [herself] or to another.

USE NOTE

This is a basic instruction defining negligence and is to be used when negligence is an issue unless the term is specifically defined in a separate chapter, e.g., medical malpractice.

No separate definition is given of contributory negligence. The negligence of all parties whose negligence is to be compared - plaintiff, defendant, other parties or absent persons - is defined by this single instruction.

[As amended, effective November 1, 1991.]

Committee comment. — The definition of negligence as found in the Restatement, Torts § 284, from which this instruction was adopted, was approved, inter alia, in Cotter v. Novak, 57 N.M. 639, 261 P.2d 827 (1953); Krametbauer v. McDonald, 44 N.M. 473, 104 P.2d 900 (1940). It includes the indispensable element of foreseeability which is discussed in Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983); Valdez v. Gonzalez, 50 N.M. 281, 176 P.2d 173 (1946); and Reif v. Morrison, 44 N.M. 201, 100 P.2d 229 (1940).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the second and third paragraphs.

Negligence based on failure to act. — In order to find negligence for failure to act, there must be a duty to perform that act. Devlin v. Bowden, 97 N.M. 547, 641 P.2d 1094 (Ct. App. 1982), overruled on other grounds, Ruiz v. Garcia, 115 N.M. 269, 850 P.2d 972 (1993).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 1.

Insurer's tort liability for consequential or punitive damages for wrongful failure or refusal to defend insured, 20 A.L.R.4th 23.

Liability to real-property purchaser for negligent appraisal of property's value, 21 A.L.R.4th 867.

Liability to one struck by golf club, 63 A.L.R.4th 221.

Rescue doctrine: applicability and application of comparative negligence principles, 75 A.L.R.4th 875.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 A.L.R.4th 127.

Liability for negligence of ambulance attendants, emergency medical technicians and the like, rendering emergency medical care outside hospital, 16 A.L.R.5th 605.

Liability of school or school personnel in connection with suicide of student, 17 A.L.R.5th 179.

Recovery of damages for expense of medical monitoring to detect or prevent future disease or condition, 17 A.L.R.5th 327.

Liability of property owner for damages from spread of accidental fire originating on property, 17 A.L.R.5th 547.

Applicability of comparative negligence principles to intentional torts, 18 A.L.R.5th 525.

Title insurer's negligent failure to discover and disclose defect as basis for liability in tort, 19 A.L.R.5th 786.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 A.L.R.5th 550.

Liability of owner or operator of skating rink for injury to patron, 38 A.L.R.5th 107.

Res ispa loquitur in gas leak cases, 34 A.L.R.5th 1.

65 C.J.S. Negligence §§ 1(1) to 1(14).

13-1602. Withdrawn.

Committee comment. — With the adoption of comparative negligence and the directive that the jury find and compare the negligence of all who may have contributed to an injury, the label of "contributory negligence" has lost its significance. It may be confusing to label the negligence of the plaintiff as "contributory negligence" while referring to the contributing conduct of the defendant or others simply as "negligence".

The elimination of "contributory negligence" is further accomplished by changes in UJI 13-302. A defendant who asserts the contributory negligence of the plaintiff as a reduction of recoverable damages raises the defense of "plaintiff's negligence" rather than "plaintiff's contributory negligence".

Withdrawals. — Pursuant to a court order, UJI 13-602, relating to contributory negligence, is withdrawn effective October 1, 1984.

13-1603. Ordinary care.

"Ordinary care" is that care which a reasonably prudent person would use in the conduct of the person's own affairs. What constitutes "ordinary care" varies with the nature of what is being done.

As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

USE NOTE

This instruction should be used whenever the term "ordinary care" is used. A duty instruction, e.g., UJI 13-1604 or a duty instruction specifically covering the subject matter, must be used in conjunction with this instruction.

[As amended, effective November 1, 1991.]

Committee comment. — Ordinary care, due care and reasonable care are interchangeable terms. Archuleta v. Jacobs, 43 N.M. 425, 94 P.2d 706 (1939). Ordinary care is a relative term and depends upon the circumstances involved. Latimer v. City of Clovis, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972); Ferreira v. Sanchez, 79 N.M. 768, 449 P.2d 784 (1969); White v. City of Lovington, 78 N.M. 628, 435 P.2d 1010 (Ct. App. 1967); Archuleta v. Jacobs, 43 N.M. 425, 94 P.2d 706 (1939).

There are no "degrees" of care. The degree of care does not vary with the increase or diminution of danger. It continues to be "ordinary" in degree but the quantum of diligence to be used differs under different conditions. Ferreira v. Sanchez, 79 N.M. 768, 449 P.2d 784 (1969); Archuleta v. Jacobs, 43 N.M. 425, 94 P.2d 706 (1939).

The N.M. appellate courts have cited this definition in a number of cases. See, e.g., De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976); Hughes v. Walker, 78 N.M. 63, 428 P.2d 37 (1967).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first sentence.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For note, "Personal Injury Law - Comparative Negligence and the Obvious Danger Rule: Klopp v. Wackenhut Corp.," see 23 N.M.L. Rev. 225 (1993).

Instruction deemed not to alone cover ordinary care. — Former UJI Civ. 12.3 and 12.4 (now UJI 13-1604) are to be used in conjunction with this instruction, the definition of ordinary care. This instruction does not alone cover ordinary care because it is a definition, and application thereof to a party occurs through the use of former UJI Civ. 12.3 or 12.4 (now UJI 13-1604), as may be appropriate. De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Sudden emergency instruction discontinued. — Because the sudden emergency doctrine underlying UJI 13-1617 is unnecessary, potentially confusing to the jury, and conducive to overemphasizing one party's theory of the case, the sudden emergency instruction should no longer be used in instructing the jury in a negligence case. Dunleavy v. Miller, 116 N.M. 353, 862 P.2d 1212 (1993) (decided under former UJI 13-1617).

Sudden emergency doctrine is merely application of "reasonable person" standard to a situation in which a reasonable person cannot be expected to act with forethought or deliberation. Martinez v. Schmick, 90 N.M. 529, 565 P.2d 1046 (Ct. App.), cert. denied, 90 N.M. 529, 567 P.2d 486 (1977) (decided under former UJI 13-1617).

Effect of party's negligence on application of sudden emergency doctrine. — The fact that the party relying on this doctrine may have contributed by his negligence to causing the emergency does not preclude giving a sudden emergency instruction. It is ordinarily a question of fact for the jury whether the negligence of the party contributed to causing the emergency. If the jury finds such negligence, it does not apply the emergency doctrine; if it finds no such negligence, it goes on to apply the emergency doctrine. Martinez v. Schmick, 90 N.M. 529, 565 P.2d 1046 (Ct. App.), cert. denied, 90 N.M. 529, 567 P.2d 486 (1977) (decided under former UJI 13-1617).

Where there was evidence that the emergency was caused by the defendant's negligence, he could not take advantage of a sudden emergency instruction. Williams v. Cobb, 90 N.M. 638, 567 P.2d 487 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977) (decided under former UJI 13-1617).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 76.

Instructions on sudden emergency in motor vehicle cases, 80 A.L.R.2d 5.

Sudden emergency as exception to rule requiring motorist to maintain ability to stop within assured clear distance ahead, 75 A.L.R.3d 327.

Liability to real-property purchaser for negligent appraisal of property's value, 21 A.L.R.4th 867.

Modern status of sudden emergency doctrine, 10 A.L.R.5th 680.

65A C.J.S. Negligence § 289.

13-1604. Duty to use ordinary care.

Every person has a duty to exercise ordinary care for the safety of the person and the property of others.

[Every person also has a duty to exercise ordinary care for the person's own safety and the safety of [his] [her] property.]

USE NOTE

The bracketed material is to be used only when the party seeking recovery has been charged with lack of ordinary care.

This instruction must be used in those cases where the duty or duties in issue are not set forth in instructions specifically covering the subject matter.

[As amended, effective November 1, 1991.]

Committee comment. — This instruction is a consolidation of UJI Civ. 12.3 and 12.4 of the first edition. It was held reversible error to refuse to give UJI Civ. 12.3 in De La O v. Bimbo's Restaurant, 89 N.M. 800, 558 P.2d 69, cert. denied, 90 N.M. 7, 558 P.2d 619 (Ct. App. 1976). The court held that the definition of ordinary care (UJI 13-1603) does not exclusively "cover" the subject and must be accompanied by this instruction applying the definition.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the second paragraph.

Following instructions contrary to those of patient's doctor. — Following the directions of a hospital attendant which are contrary to the instructions of a surgeon raises a factual issue as to a patient's negligence. Robinson v. Memorial Gen. Hosp., 99 N.M. 60, 653 P.2d 891 (Ct. App. 1982).

Instruction applies other instructions. — Former UJI Civ. 12.3 and 12.4 (now combined in this instruction) are to be used in conjunction with former UJI Civ. 12.2 (now UJI 13-1603), the definition of ordinary care. Former UJI Civ. 12.2 (now UJI 13-1603) does not alone cover ordinary care because it is a definition, and application thereof to a party occurs through the use of former UJI Civ. 12.3 or 12.4 (this instruction), as may be appropriate. De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

And informs jury of plaintiff's duty of care. — Former UJI Civ. 13.1 (UJI 13-1602, now withdrawn), read with defendant's theories of contributory negligence, did not cover the elements of this instruction, since the contributory negligence instructions informed the jury that plaintiff might be contributively negligent but did not inform the jury that plaintiff had a duty to use ordinary care for his own safety, and the trial court's refusal to give this instruction amounted to reversible error because the jury was informed of defendant's duty but was not informed of plaintiff's duty. De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Breach of duty is a fact question. — Every person has a duty to exercise ordinary care for the safety of others; whether or not defendant breached those duties is a question of the reasonableness of its conduct, and thus a fact question. Knapp v. Fraternal Order of Eagles, 106 N.M. 11, 738 P.2d 129 (Ct. App. 1987).

Scope of careful and proper driving. — One may not under all conditions and circumstances drive at the maximum speed limit authorized by law and be free from negligence. The basic principle of careful and proper driving with respect to all vehicles is that one must drive at such speed that he has his vehicle under control at all times and can stop within a reasonable distance, should a dangerous condition be encountered. United States v. Byers, 225 F.2d 774 (10th Cir. 1955).

Duty of law enforcement officer. — A law enforcement officer has the duty in any activity actually undertaken to exercise for the safety of others that care ordinarily exercised by a reasonably prudent and qualified officer in light of the nature of what is being done. The jury should be so instructed as a modification of this instruction. Cross v. City of Clovis, 107 N.M. 251, 755 P.2d 589 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 76.

Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.

65A C.J.S. Negligence §§ 118(1) to 118(3), 287.

13-1605. Ordinary care of minor.

A person under 18 years of age is not necessarily held to the same standard of conduct as an adult. By the term "ordinary care" with respect to a minor, I mean that degree of care which a reasonably careful minor of the age, mental capacity

and experience of _____ *(plaintiff - defendant - decedent)* would use under circumstances similar to those shown by the evidence in this case.

USE NOTE

This instruction should be given when there is an issue as to the negligence of a minor seven (7) years of age or older unless the court finds that the minor has assumed the responsibility of an adult by engaging in certain activities such as driving a motor vehicle.

Committee comment. — See Committee Comment at UJI 13-1606.

When a minor assumes responsibilities of an adult for certain activities, such as operating a motor vehicle, the minor is required to act in accordance with the adult standard of conduct. Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965); cf. LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

In general, however, until a minor is mature enough to be capable of using the judgment of a reasonably prudent adult, the minor's conduct is not to be measured by the same standard, but by such judgment and experience as children of similar age, intelligence, experience and judgment under similar circumstances. Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507 (1955); Martinez v. C.R. Davis Contracting Co., 73 N.M. 474, 389 P.2d 597 (1964). [As revised, effective November 1, 1991.]

ANNOTATIONS

Question of child's negligence not susceptible of summary judgment. — Questions of negligence or contributory negligence on the part of children are not usually susceptible of summary judgment adjudication or of determination as a matter of law because the test is a subjective one which depends upon the particular child's age, mental capacity and experience. Phillips v. Smith, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974), overruled on other grounds, Baxter v. Gannaway, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

And only limited treatment as adult. — The court found no valid reason for extending the rule (that a minor operator of an automobile is held to the same standard as an adult) to the use of firearms, absent legislative control or direction. LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

Law reviews. — For note, "Tort Law - A Cause of Action for Negligent Horseplay: Yount v. Johnson," see 27 N.M.L. Rev. 661 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence §§ 88, 89.

Modern trends as to contributory negligence of children, 32 A.L.R.4th 56.

65A C.J.S. Negligence §§ 144 et seq., 216 to 218, 260.

13-1606. No negligence for child under seven.

You must not consider whether _____ *(plaintiff - defendant - decedent)* was negligent. A child under the age of seven (7) is incapable of negligence under the laws of New Mexico.

USE NOTE

This instruction may be given even though there is no claim specifically raised.

Committee comment. — In 1952, the state supreme court held as a matter of law that a five-year-old child could not be held contributorily negligent. Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952). New Mexico courts have since declared that a seven-year-old could be contributorily negligent. Marrujo v. Martinez, 65 N.M. 166, 334 P.2d 548 (1959); Latimer v. City of Clovis, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972); and that a seven-year-old child could be sued directly for negligence. Phillips v. Smith, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

ANNOTATIONS

Law reviews. — For note, "Torts - Negligence - Judicial Adoption of Comparative Negligence in New Mexico," see 11 N.M.L. Rev. 487 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 362.

Modern trends as to contributory negligence of children, 32 A.L.R.4th 56.

65A C.J.S. Negligence § 145.

13-1607. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and general and special verdict instructions, UJI 13-2218, 13-2219 and 13-2220.

Withdrawals. — Pursuant to a court order, UJI 13-1607 NMRA, relating to contributory negligence, parent, child, was withdrawn effective October 1, 1983.

13-1608. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert.

denied, 98 N.M. 336, 648 P.2d 794 (1982); and general and special verdict instructions, UJI 13-2218, 13-2219 and 13-2220.

Withdrawals. — Pursuant to a court order, UJI 13-1608 NMRA, relating to negligence of parent, was withdrawn effective October 1, 1984.

13-1609. Withdrawn.

Committee comment. — See Committee Comment to UJI 13-1601.

Withdrawals. — Pursuant to a court order, UJI 13-1609 NMRA, relating to contributory negligence, was withdrawn effective October 1, 1984.

13-1610. Negligence of parent not imputed to child.

If you find that the parent was negligent, any such negligence shall not be attributed to the child.

USE NOTE

This instruction is appropriate where the jury may erroneously charge the child with negligence of the parent.

Committee comment. — In case of injury only to a child, the parent's negligence is not imputed to the child who can recover in the child's own right. Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952); Montoya v. Winchell, 69 N.M. 177, 364 P.2d 1041 (1961). [As revised, effective November 1, 1991.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Negligence, § 470.

65A C.J.S. Negligence §§ 160, 208, 298.

13-1611. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and general and special verdict instructions, UJI 13-2218, 13-2219 and 13-2220.

Withdrawals. — Pursuant to a court order, UJI 13-1611 NMRA, relating to contributory negligence of sole beneficiary was withdrawn effective October 1, 1983.

13-1612. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and general and special verdict instructions, UJI 13-2218, 13-2219 and 13-2220.

Withdrawals. — Pursuant to a court order, UJI 13-1612 NMRA, relating to contributory negligence of one beneficiary was withdrawn effective October 1, 1983.

13-1613. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and general and special verdict instructions, UJI 13-2218, 13-2219 and 13-2220.

Withdrawals. — Pursuant to a court order, UJI 13-1613 NMRA, relating to contributory negligence of sole beneficiary under the common carrier death statute was withdrawn effective October 1, 1983.

13-1614. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and general and special verdict instructions, UJI 13-2218, 13-2219 and 13-2220.

Withdrawals. — Pursuant to a court order, UJI 13-1614 NMRA, relating to contributory negligence of one of several beneficiaries was withdrawn effective October 1, 1983.

ANNOTATIONS

13-1615. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

Withdrawals. — Pursuant to a court order, UJI 13-1615 NMRA, relating to comparative negligence was withdrawn effective October 1, 1983.

13-1616. Accident alone not negligence.

The mere happening of an accident is not evidence that any person was negligent. Neither the fact that damages are claimed due to the accident nor the fact that this lawsuit was filed is evidence of any negligence on the part of any person.

USE NOTE

This is a proper instruction in a tort case and covers the three factors that frequently influence a jury. The basic instruction can be modified and used in other cases.

Committee comment. — The New Mexico Supreme Court has recognized this basic rule in many cases. See, e.g., Anaya v. Tarradie, 70 N.M. 8, 369 P.2d 41 (1962); Zanolini v. Ferguson-Steere Motor Co., 58 N.M. 96, 265 P.2d 983 (1954).

13-1617. Withdrawn.

Committee comment. — The jury should not be instructed on sudden emergency in negligence cases; the standard of care is adequately stated in UJI 13-1603 (ordinary care in light of all the surrounding circumstances). *Dunleavy v. Miller,* 116 N.M. 353, 862 P.2d 1212 (1993).

Withdrawals. — Pursuant to a court order dated December 6, 1995, this instruction, relating to sudden emergency, is withdrawn effective for cases filed in the district courts on and after January 1, 1996.

13-1618. Act of God.

The defendant contends that the accident and the claimed damages resulted from an act of God. An act of God is an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature for which no human is responsible.

The defendant is not liable if you find that an act of God was the sole cause, and would have caused the accident and claimed damages regardless of whether the defendant was negligent. Defendant is liable, on the other hand, if you find that the accident and damages could have been avoided by defendant in the exercise of ordinary care under the circumstances of the act of nature.

USE NOTE

This instruction will be used only when the act of God may be found to be the sole cause. An act of God is not compared under the special verdict, as it is either a complete defense or not an issue in the case.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — In the case of Shephard v. Graham Bell Aviation Serv., Inc., 56 N.M. 293, 243 P.2d 603 (1952), the court pointed out the distinction between negligence concurring with an act of God and sole causation by an act of God.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the second sentence of the first paragraph.

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments deleted "proximate" preceding "cause" in the first sentence of the second paragraph of the instruction and in the first sentence of the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 16.

13-1619. Withdrawn.

Committee comment. — Definitions of conduct justifying recovery of punitive damages are contained in UJI 13-1827.

Withdrawals. — Pursuant to a court order, UJI 13-1619 NMRA, relating to malicious, willful or wanton misconduct, was withdrawn effective November 1, 1991.

ANNOTATIONS

13-1620. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and see Committee Comment to UJI 13-1619.

Withdrawals. — Pursuant to a court order, UJI 13-1620 NMRA, relating to contributory malicious, willful or wanton misconduct, was withdrawn effective October 1, 1983.

13-1621. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

Withdrawals. — Pursuant to a court order, UJI 13-1621 NMRA, relating to last clear chance, discoverable peril, escape impossible, was withdrawn effective October 1, 1983.

13-1622. Withdrawn.

Committee comment. — See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

Withdrawals. — Pursuant to a court order, UJI 13-1622 NMRA, relating to last clear chance, escape possible, was withdrawn effective October 1, 1983.

13-1623. Circumstantial evidence of negligence ("Res ipsa loquitur").

The plaintiff, in order to prove _____ *(insert name of person or entity)* was negligent, is not required to prove specifically what _____ *(insert name of person or entity)* did or failed to do that was negligent. In order for the jury to find _____ *(insert name of person or entity)* negligent, the plaintiff has the burden of proving each of the following propositions:

1. that the injury or damage to _____ was proximately caused by _____ *(insert name of instrumentality or occurrence)* which was _____'s *(insert name of person or entity)* responsibility to manage and control;

and

2. that the event causing the injury or damage to _____ *(insert name of person)* was of a kind which does not ordinarily occur in the absence of negligence on the part of _____ *(insert name of person or entity)* in control of _____ *(insert name of instrumentality or occurrence).*

If you find that _____ *(insert name of person)* proved each of these propositions, then you may, but are not required to, infer that _____ *(insert name of person or entity)* was negligent and that the injury or damage proximately resulted from such negligence.

If, on the other hand, you find that either one of these propositions has not been proved or, if you find, notwithstanding the proof of these propositions, that _____ *(insert name of person or entity)* used ordinary care for the safety of others in [his] [her] [its] control and management of the _____ *(insert name of instrumentality or occurrence)* then the evidence would not support a finding of negligence.

USE NOTE

The names of the various individuals and the name or description of the instrumentality or occurrence should be inserted in the appropriate blanks. Care should be used that the correct names are placed in the various blanks.

What was previously labeled *res ipsa loquitur* has been retitled "circumstantial evidence of negligence". The fact that there is other evidence of the specific cause of the injury does not preclude the use of this instruction. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). Exclusive control by the defendant, of the instrumentality or circumstance at issue is not a prerequisite for its use. *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994); *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). As a factual matter, two or more persons may conceivably share responsibility of the management of the object, activity, or circumstances at issue.

[As amended, effective November 1, 1991; August 1, 1999.]

Committee comment. — The circumstantial evidence of negligence instruction has been drafted in response and is phrased in lay terms. All arcane, magic and "sacred" language, including even "res ipsa," have been eliminated. *Res ipsa* is a rule of circumstantial negligence and therefore has been characterized as such.

Trujeque v. Service Merchandise Company, 117 N.M. 388, 872 P.2d 361 (1994) and *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994) indicate that exclusive control of the instrumentality or circumstances giving rise to the injury is not a prerequisite for utilizing this instruction. Consequently the exclusivity requirement has been eliminated and the requirement of management and control is substituted in its place.

The occurrence of an accident or event is not enough in itself. It must be of the kind which does not ordinarily occur in the absence of negligence on the part of the person in control of the instrumentality. *Martinez v. Teague*, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981); *Hisey v. Cashway Supermarkets, Inc.*, 77 N.M. 638, 426 P.2d 784 (1967).

The circumstantial evidence of negligence doctrine does not impose liability as a matter of law. It only avoids a directed verdict against the person proving the application of the doctrine. The jury may weigh the conflicting inferences and return a verdict in favor of the person against whom the doctrine has been proven even though there is no evidence offered by or on behalf of the person to rebut the inference of negligence. *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956); *McFall v. Shelley*, 70 N.M. 390, 374 P.2d 141 (1962); *Pack v. Read*, 77 N.M. 76, 419 P.2d 453 (1966); *Archibeque v. Horwich*, 88 N.M. 527, 543 P.2d 820 (1975); *Strong v. Shaw*, 96 N.M. 281, 629 P.2d 784 (Ct. App. 1980).

In New Mexico, a party using the circumstantial evidence of negligence doctrine is not required to establish compliance with ordinary care. *Chapin v. Rogers*, 80 N.M. 684, 459 P.2d 846 (Ct. App. 1969).

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral near the beginning and near the end of the instruction.

The 1999 amendment, effective August 1, 1999, substituted the doctrine of circumstantial evidence of negligence for the doctrine of "res ipsa loquitur" and eliminated the exclusivity requirement of the former doctrine substituting a requirement of management and control.

Mere happening of accident is not sufficient to support doctrine of res ipsa loquitur; there must be factual proof that plaintiff's injury was proximately caused by an instrumentality that was under the exclusive control of the defendant and that the incident that caused the injury was one which ordinarily would not have happened in the absence of negligence on the part of the person having control of the instrumentality. Trigg v. J.C. Penney Co., 307 F. Supp. 1092 (D.N.M. 1969).

And defendant may overcome inference of negligence. — Where defendant's evidence showed that the escalator whose sudden stop injured plaintiff was manufactured, installed and serviced by a certain company; that the defendant had nothing to do with the maintenance of the escalator other than turning it on in the morning, off in the evening, and turning it back on if the emergency button was accidentally pressed, that the city inspector had inspected the escalator a few months prior to, and after the accident, and that the escalator had been approved in all respects; that there was nothing wrong with the escalator; that there had been no malfunctions and that it was in good working order, even if the plaintiff had met the burden of proof needed to raise the doctrine of res ipsa loquitur, all of the inferences that would be raised thereby were overcome by the defendant. Trigg v. J.C. Penney Co., 307 F. Supp. 1092 (D.N.M. 1969).

A defendant may overcome the inference of negligence by showing that, prior to the damage, it had thoroughly inspected the device alleged to have caused the damage or that it was not negligent with respect to plaintiff's specific damage. Strong v. Shaw, 96 N.M. 281, 629 P.2d 784 (Ct. App. 1980).

Need for occurrence, injury and instrumentality. — This instruction anticipates a statement concerning the occurrence or event out of which the injury allegedly arose, as well as one concerning the instrumentality which proximately caused the injury. Waterman v. Ciesielski, 87 N.M. 25, 528 P.2d 884 (1974).

Sole function of res ipsa loquitur is to supply inferences from which some negligent conduct can be found, without finding what that negligence was. Strong v. Shaw, 96 N.M. 281, 629 P.2d 784 (Ct. App. 1980).

Facts leading to inference must be present. — For res ipsa loquitur to apply, there must be facts which lead to a reasonable and logical inference that the defendant was negligent. Martinez v. Teague, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981).

Expert testimony. — The foundation for an inference of negligence under res ipsa loquitur may be formed by expert testimony that a certain occurrence indicates the probability of negligence and does not depend solely on the common knowledge of the jury. Mireles v. Broderick, 117 N.M. 445, 872 P.2d 863 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Negligence §§ 477, 481, 521, 526.

Right of plaintiff in res ipsa loquitur to an instruction respecting inference by jury, 173 A.L.R. 880.

Error in instructions as to effect of res ipsa loquitur on the burden of proof as prejudicial, 29 A.L.R.2d 1390.

Liability of telephone company for injury by noise or electric charge transmitted over line, 99 A.L.R.3d 628.

Res ipsa loquitur as to cause of or liability for real-property fires, 21 A.L.R.4th 929.

Res ipsa loquitur in aviation accidents, 25 A.L.R.4th 1237.

Applicability of res ipsa loquitur in case of multiple, nonmedical defendants - modern status, 59 A.L.R.4th 201.

Applicability of res ipsa loquitur in case of multiple medical defendants - modern status, 67 A.L.R.4th 544.

Res ispa loquitur in gas leak cases, 34 A.L.R.5th 1.

Liability of owner or operator of business premises for injuries from electrically operated door, 44 A.L.R.5th 525.

65A C.J.S. Negligence §§ 220.2, 281.

II. EXCLUSIVE CONTROL AND MANAGEMENT.

Doctrine not applicable without exclusive control or management. — Where both plaintiff and defendant observed and knew what was being done to unload the crate whose movement caused plaintiff's accident, both participated in the activity, both were present when the crate moved on the skids and neither was in a better position to know what caused the movement, the doctrine of res ipsa loquitur did not apply. Waterman v. Ciesielski, 87 N.M. 25, 528 P.2d 884 (1974).

"Exclusive control" is not a rigid, inflexible term. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

But allegation of joint control deemed insufficient. — For res ipsa loquitur to apply, the control by the defendant must be exclusive, and an allegation of joint control is insufficient to invoke the doctrine of res ipsa loquitur. Fresquez v. Southwestern Indus. Contractors & Riggers, 89 N.M. 525, 554 P.2d 986 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Business' ownership of chairs establishes exclusive control. — A showing of ownership, management, and possession of a chair in a business establishment with

many invitees is sufficient to establish exclusive control. The fact that third parties may have access to the chair does not preclude the store from having exclusive control and management of the chair within the meaning of the doctrine of res ipsa loquitur, and does not preclude a reasonable inference that the establishment is responsible for a danger in its use. Trujeque v. Service Merchandise Co., 117 N.M. 388, 872 P.2d 361 (1994).

And agency principles may not be applicable to issue of control. — An instruction that, where a nonowner is driving and the owner is present in the car, a presumption exists that the driver is the agent of the owner has generally only been used by third parties against the driver and the driver's passenger, not between driver and passenger. Agency principles should not have been interjected into the issue of exclusive control in a wrongful death suit between driver's and passenger's administrators, which was tried on a res ipsa loquitur theory. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

Evidence insufficient to justify inference that defendant retained exclusive control and management. — See Livingston v. Begay, 98 N.M. 712, 652 P.2d 734 (1982).

III. ORDINARILY NO OCCURRENCE IN ABSENCE OF NEGLIGENCE.

Basis for recognition and justification of doctrine of res ipsa loquitur is the postulate that, under the common experience of mankind, an accident of the particular kind does not happen except through negligence, and the fact that ordinarily the cause of the injury is accessible to the defendant and inaccessible to the plaintiff. Waterman v. Ciesielski, 87 N.M. 25, 528 P.2d 884 (1974).

Where accident would have occurred in absence of negligence. — There was no showing that the escalator whose sudden stop injured plaintiff was within the exclusive control of the defendant, since the only reasonable conclusion to be drawn from the evidence was that a child pressed the emergency stop button at the top of the escalator, and furthermore, since a city ordinance required that such emergency stop buttons be in a conspicuous place on the escalator and anyone could push one of them causing the escalator to stop, the accident was not one that ordinarily would not have happened in the absence of negligence on the part of the defendant. Trigg v. J.C. Penney Co., 307 F. Supp. 1092 (D.N.M. 1969).

13-1624. Intentional torts; assault and battery - *No instruction submitted*.

No instruction submitted.

Committee comment. — The committee spent much time over a period of several months studying the matter of intentional torts.

Instructions were drafted on assault and battery with the thought of developing a separate chapter or at least a subchapter in this area.

It was finally concluded that there was insufficient New Mexico law on assault and battery to guide the committee on this subject and that too much reliance had been placed upon the law of other jurisdictions on assault and battery to include such instructions in this work.

13-1625. Fraud - *No instruction submitted*.

No instruction submitted.

Committee comment. — The Institute of Public Law drafted a proposed, complete set of instructions in this area but, after careful consideration, the committee determined that the matter of negligent misrepresentation was already covered in the chapter on contracts, as was the matter of fraudulent misrepresentation, and it was concluded that this would give the bench and bar adequate guidance in this area when the need for specialized instructions on fraud were needed. Therefore, the eighteen instructions drafted on this subject matter will not be published as there is insufficient litigation to justify such publication.

13-1626. Invasion of privacy - *No instruction submitted*.

No instruction submitted.

Committee comment. — The committee carefully studied and thoughtfully considered the drafts of jury instructions drafted by the Institute of Public Law on the law of invasion of privacy and thereafter concluded that there was neither enough New Mexico law nor sufficient cases in this area to merit the space needed for publication; and, therefore, the bench and bar will need to draft any particularized instructions needed on this subject matter when, and if, the occasion arises.

13-1627. Explosives; ultrahazardous activities; absolute liability.

When a person is engaged in the use of explosives, [he] [she] is liable for any damages proximately caused by that activity, including those damages resulting from concussion or vibration. This is true regardless of the amount of care used.

USE NOTE

1. This instruction applies to activities involving the actual use of explosives, including dynamite, nitroglycerine and like substances.

2. This instruction would not apply to the manufacture, storage or transportation of explosives, since liability based on those activities is predicated either on negligence or nuisance.

3. This instruction would not apply to firearms cases.

4. The theory may not apply where an independent contractor is performing a governmental function.

[As amended, effective November 1, 1991.]

Committee comment. — The rule of absolute liability stated in the foregoing instruction is proper under the facts of Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958). There are no New Mexico cases on ultrahazardous activities, other than blasting, and, therefore, the instruction is limited to blasting situations. Liability for damages resulting from the manufacture, storage or transportation of explosives requires proof of negligence of nuisance. 35 C.J.S. Explosives § 5.

See also the Restatement of Torts §§ 519 to 524 and 35 A.L.R.3d 1177.

In most jurisdictions, the defense of assumption of risk prevents recovery, even on the absolute liability theory, but assumption of risk as such generally is no longer a defense in New Mexico.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first sentence.

Library references. — 35 C.J.S. Explosives §§ 8, 11(1) et seq.

Doctrine of strict liability does not apply to impounded waters. Gutierrez v. Rio Rancho Estates, Inc., 93 N.M. 755, 605 P.2d 1154 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 111.

Absolute liability for damage or injury from explosion of stored explosives, 35 A.L.R.3d 1177.

65 C.J.S. Negligence § 66.

13-1628. Intentional infliction of emotional distress.

To recover for intentional infliction of emotional distress, _____ (name of plaintiff) must prove that:

(1) the conduct of _____ (name of defendant) was extreme and outrageous under the circumstances; and

(2) _____ (defendant) acted intentionally or recklessly; and

(3) as a result of the conduct of _____ (defendant), _____ (plaintiff) experienced severe emotional distress.

Extreme and outrageous conduct is that which goes beyond bounds of common decency and is atrocious and intolerable to the ordinary person. Emotional distress is "severe" if it is of such an intensity and duration that no ordinary person would be expected to tolerate it.

USE NOTE

This instruction is used where the plaintiff has pled as a separate cause of action and presented sufficient evidence of the defendant's intentional invasion of the plaintiff's right to freedom from severe emotional distress. The instruction does not apply where emotional distress is merely an additional element of damages recoverable under the measure of damages for a compensable personal injury.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order 08-8300-021, effective September 10, 2008.]

Committee comment. — An independent cause of action for intentional infliction of emotional distress was first discussed in Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972) and recognized in Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981). The elements of the cause of action and its scope are defined in the New Mexico cases in reliance upon § 46 of Restatement of Torts (2d). See also Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

Liability does not extend to mere insults, threats or annoyances. The emotional distress must be severe, not exaggerated. As with any cause of action, the trial judge, in the first instance, must determine whether plaintiff's evidence permits a jury to reasonably determine that defendant's conduct was extreme and reckless or intentional in nature. [Approved, effective November 1, 1991.]

Committee comment. — An independent cause of action for intentional infliction of emotional distress was first discussed in Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972) and recognized in Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981). The elements of the cause of action and its scope are defined in the New Mexico cases in reliance upon § 46 of Restatement of Torts (2d). See also Baldonado v. El Paso Natural Gas Co., 2008-NMSC-005, ¶ 28, 143 N.M. 288, 176 P.3d 277.

Liability is limited to extreme and outrageous conduct and does not extend to mere insults, threats or annoyances. Conduct that occurs in the context of a special relationship between the parties is more likely to be extreme and outrageous. Examples of such special relationships include employer-employee relationships, contractual relationships, and relationships created by state regulations imposing an obligation on one party or the other. Sometimes the extreme and outrageous nature of the conduct arises less from the conduct standing alone than from the abuse by the defendant of a

special relationship with the plaintiff. See Baldonado v. El Paso Natural Gas Co., 2008-NMSC-005, 143 N.M. 288, 176 P.3d 277. The emotional distress must be severe, not exaggerated. As with any cause of action, the trial judge, in the first instance, must determine whether plaintiff's evidence permits a jury to reasonably determine that defendant's conduct was extreme and reckless or intentional in nature. When reasonable persons may differ on that question, it is for the jury to decide, subject to the oversight of the court. Trujillo v. Northern Rio Arriba Elec. Coop., Inc., 2002-NMSC-004, ¶ 26, 131 N.M. 607, 41 P.3d 333.

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order 08-8300-021, effective September 10, 2008, deleted the citation to Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984) in the first paragraph; added the citation to Baldonado v. El Paso Natural Gas Co., 2008-NMSC-005, 143 N.M. 288, 176 P.3d 277 in the first and second paragraphs; added the provision that liability is limited to extreme and outrageous conduct in the first sentence of the second paragraph; added the second through the fourth sentences in the second paragraph; and added the last sentence and citation to Trujillo v. Northern Rio Arriba Elec. Coop, Inc., 2002-NMSC-004, 131 N.M. 606, 41 P.3d 333 in the second paragraph.

No outrageous behavior. — Where the harm suffered by plaintiff resulted from alleged actions of discrimination, discipline and discharge and not the manner in which the alleged wrongful actions were conducted, plaintiff failed to show that his employer's actions constituted outrageous behavior. Weise v. Washington Tru Solutions, LLC, 2008-NMCA-121, ____ N.M. ____, 192 P.3d 1244.

Sexual harassment of co-workers by employee. — Where employer received several reports of employee's sexual harassment of his co-workers, but took no action, there was sufficient cause for a finding of intentional emotional distress against plaintiff, so as to warrant punitive damages. Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

Law reviews. — For article, "Intentional Inflection of Emotional Distress between Spouses: New Mexico's Excessively High Threshold for Outrageous Conduct", see 33 N.M.L. Rev. 381 (2003).

13-1629. Negligent infliction of emotional distress to bystander.

To recover for negligent infliction of emotional distress, _____ *(plaintiff)* must prove that:

[(1) _____ *(plaintiff)* had a close family relationship with _____ *(victim)*;] and

[(2) as a result of seeing or perceiving the occurrence _____

(plaintiff) **suffered severe emotional distress;] and**

[(3) the occurrence resulted in physical injury or death to

_____

(victim)**].**

Emotional distress is "severe" if it is of such an intensity and duration that no ordinary person would be expected to tolerate it. [_____ *(plaintiff)* cannot recover for grief or sorrow normally attending the [death] [injury] of a family member.]

[Adopted, effective November 1, 1991.]

Committee comment. — In Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983), the Supreme Court recognized a cause of action for bystander recovery where proof is presented of four elements:

(1) existence of marital or intimate familial relationship between the victim and the plaintiff; (2) proof of severe shock to the plaintiff resulting from direct emotional impact caused by the contemporaneous sensory perception of the accident; (3) some physical manifestation of, or physical injury to the plaintiff resulting from, the emotional injury; and (4) proof that the accident resulted in physical injury or death to the victim.

In Folz v. State of New Mexico, 110 N.M. 457, 797 P.2d 246, (1990), the Supreme Court dispensed with the requirement of a physical manifestation of an emotional injury.

It is for the trial judge to determine, in the first instance, whether plaintiff's evidence is sufficient to bring the factual pattern of the case within the cause of action recognized by the Supreme Court in Ramirez v. Armstrong, supra. Folz v. State of New Mexico, supra. The Committee recognizes that cases will arise where the meaning and purpose of the Supreme Court's requirement of a "contemporaneous sensory perception" will require interpretation by the trial judge applying the public policy underlying the cause of action. [Approved, effective November 1, 1991.]

ANNOTATIONS

Contemporaneous sensory perception. — In considering whether there has been a "contemporaneous sensory perception," visual observance of the accident is merely one of the ways in which the required "sensory perception" may occur. The "sensory and contemporaneous observance" requirement should not be strictly limited to a visual observance of the accident. Instead, even though a party may not actually see the accident, he or she may perceive the event by other than visual means, such as hearing screams. Acosta v. Castle Constr., Inc., 117 N.M. 28, 868 P.2d 673 (Ct. App. 1994).

13-1630. Negligent infliction of emotional distress, generally.

No instruction drafted.

[Adopted, effective November 1, 1991.]

Committee comment. — In Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983), the New Mexico supreme court described the elements of a claim for emotional distress suffered by a bystander as a result of negligent injury to another. See UJI 13-1629. There may be other instances in which a purely emotional injury resulting from negligent conduct gives rise to a cause of action. See Restatement (Second) of Torts §§ 436 & 436A. New Mexico law is not sufficiently developed in this area to permit the drafting of a uniform jury instruction. The committee has reserved this instruction number and catch line in the event that developments in New Mexico law warrant the drafting of such an instruction in the future. [Approved, effective November 1, 1991.]

Negligent damage to property. — A plaintiff may not recover damages for emotional distress caused by negligent damage to property. Castillo v. City of Las Vegas, 2008-NMCA-141, 145 N.M. 205, 195 P.3d 870.

Direct victim theory rejected. — Under New Mexico's definition of the tort of negligent infliction of emotional distress, a plaintiff who suffers injury as a result of the defendant's negligence is not allowed to recover for emotional distress suffered as a result of witnessing the death of another in the same accident. Montoya v. Pearson, 2006-NMCA-097, 140 N.M. 243, 142 P.3d 11, cert. denied, 2006-NMCERT-008.

13-1631. Definition and elements of prima facie tort.

Plaintiff claims damages on the basis that defendant intended to cause plaintiff harm and succeeded in doing so. In order to recover damages from defendant on this claim, plaintiff must show:

1. That defendant intentionally [did some act] [failed to act];

2. That defendant intended that the [act] [failure to act] would cause harm to the plaintiff or that defendant knew with certainty that the [act] [failure to act] would cause harm to the plaintiff;

3. That the defendant's [act] [failure to act] was a cause of plaintiff's harm; and

4. That defendant's conduct was not justifiable under all the circumstances.

USE NOTE

This instruction should be given together with UJI 13-1631A where justification is offered by the defendant and put into issue.

[As amended, effective March 1, 2005.]

Committee comment. — The Supreme Court recognized the "prima facie tort" as part of New Mexico's common law in Schmitz v. Smentowski, 109 N.M. 386, 785 P.2d 726 (1990). In that decision, the Court viewed more favorably the "flexible" approach of the Restatement (Second) of Torts, Section 870 and the Missouri courts, see Porter v. Crawford & Co., 611 S.W.2d 265 (Mo. Ct. App. 1980) than the more restrictive approach characterized by the New York precedents. See Note, Prima Facie Tort, 11 Cumb. L. Rev. 113, 116-18 (1980). Thus, the Smentowski Court rejected such restrictions on the prima facie tort (1) as proof of "special damages", (2) "disinterested malevolence", or (3) that the conduct complained of not fit into any other tort category.

A count in prima facie tort may be pled in the alternative with other tort counts. At the close of the evidence, however, if plaintiff's proof is susceptible to submission under one of the traditional categories of tort, the action must be submitted to the jury on that cause and not under prima facie tort. Smentowski, 109 N.M. at 396.

It is not necessary in order to establish the prima facie tort that the defendant's motivation be solely to harm the plaintiff. Smentowski, 109 N.M. at 395. The plaintiff must show that the defendant acted with an intent to harm the plaintiff or with knowledge that its act would be certain to cause harm to the plaintiff. Smentowski, 109 N.M. at 395.

See Restatement (Second) of Torts Sections 871 and 871A for examples of particular types of harm which may result in liability under the prima facie tort. [Approved, effective November 1, 1991.]

ANNOTATIONS

The March 1, 2005 amendment was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments deleted "proximate" preceding "cause" in the paragraph designated as "3".

Factors considered. — To establish a prima facie tort, a plaintiff is not required to show that the sole motivation behind the defendant's act was an intent to harm; rather, an intent to harm may be shown where a defendant acts with certainty that injury will result. Under such circumstances, intent to harm must be balanced against (1) the nature and seriousness of the harm, (2) the interests advanced by defendant's conduct, (3) the means used by the defendant and (4) the defendant's motives. Ewing v. State Farm Mut. Auto. Ins. Co., 6 F. Supp. 2d 1281 (D.N.M. 1998).

13-1631A. Justification offered; balance of factors.

Defendant states that [he] [she] was justified in [acting] [failing to act] on the basis that _____ *(insert statement of justification).*

Defendant's justification must be balanced to determine if it outweighs any motive of defendant to injure plaintiff. In determining whether defendant's [act] [failure to act] was justifiable or not under the circumstances, you must weigh the following factors:

1. The nature and seriousness of the harm to the plaintiff;

2. The fairness or unfairness of the means used by the defendant;

3. Defendant's motive or motives; and

4. The value to defendant or to society in general of the interests advanced by the defendant's conduct.

USE NOTE

This instruction should be given with UJI 13-1631.

[Adopted, effective November 1, 1991.]

Committee comment. — The balancing factors set forth in this instruction are adopted from Schmitz v. Smentowski, 109 N.M. 386, 785 P.2d 726 (1990). See also Restatement (Second) of Torts Section 870, Comments f, g, h and i, discussing the various balancing factors.

13-1632. Negligent misrepresentations.

A party is liable for damages caused by his negligent and material misrepresentation.

A material misrepresentation is an untrue statement which a party intends the other party to rely on and upon which the other party did in fact rely.

A negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true.

USE NOTE

This instruction is to be used in those cases where the misrepresentation is not fraudulent in character. *See* UJI 13-1633 for fraudulent misrepresentation.

[As amended, effective March 1, 2005.]

Committee comment. — New Mexico has adopted the tort of negligent misrepresentation as defined in Section 552 of the *Restatement (Second) of Torts* (1977), which involves a number of elements that must be proved to establish the claim. *Stotlar v. Hester*, 92 N.M. 26, 582 P.2d 403 (Ct. App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978).

This instruction is designed to inform the jury of the basic elements of a negligent misrepresentation claim and to identify which of those elements are disputed in the case being tried. To avoid overburdening the jury, other elements are not included in the instruction unless they are actually at issue in the case.

Other potential elements are not even contained in the standard instruction. Negligent misrepresentation applies to situations in which the defendant "in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest," supplies incorrect information "for the guidance of others in their business transactions." *Id.* at 29, 582 P.2d at 406 (quoting *Restatement (Second) of Torts* § 552 (1977)). In addition, liability for negligent misrepresentation is limited to losses that were suffered "by the person or one of a limited group of persons for whose benefit and guidance [the defendant] intends to supply the information or knows that the recipient intends to supply it" and that resulted from reliance on the information "in a transaction that [the defendant] intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." *Id.* at 29, 582 P.2d at 406 (quoting *Restatement (Second) of Torts* § 552 (1977)). The instruction is drafted under the assumption that, in the ordinary case, the trial court will be able to determine as a matter of law whether the defendant supplied the information "in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest," whether the information was supplied for use in the kind of "business transactions" to which negligent misrepresentation would be pertinent, and whether the plaintiff, if a member of a group that received the information, was a member of a "limited" group within the meaning of the Restatement. In some instances, however, making these determinations may require the resolution of questions of fact by the jury. In such cases, the instruction should be supplemented or modified. *See generally* Restatement § 552 and comments thereto.

Additionally, cases may arise where it would be appropriate for the trial court to determine as a matter of law whether the transaction out of which the claimed injury arose was "substantially similar" to the transaction for which the information at issue was actually provided. *See, e.g.*, Restatement § 552 cmt. j, illus. 13-14. In such cases either the instruction would not be given at all (no substantial similarity) or the optional language in the instruction relating to substantially similar transactions would be omitted as not involving a jury issue.

With respect to the element of intent on the part of the defendant that the information at issue be received by the plaintiff individually or as a member of a group, it may be appropriate in some cases to supplement this instruction with a standard legal definition

of "intent," *i.e.*, substantial certainty that a particular consequence will occur. *See, e.g., California First Bank v. State*, 111 N.M. 64, 73 n.6, 802 P.2d 646, 655 n.6 (1990).

This instruction deals with misrepresentations resulting from negligence in the furnishing of false information or information which, while true as far as it goes, is incomplete in a material respect and therefore misleading. It is possible that a negligent misrepresentation claim may also arise from a failure to disclose any information. Until a standard instruction is adopted, it will be the responsibility of the trial court, with the assistance of counsel, to determine whether and how the jury should be instructed with respect to such a claim.

ANNOTATIONS

The 1996 amendment, effective for cases filed in the district courts on and after October 1, 1996, rewrote the instruction.

The 2005 amendment of the Committee Comment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendment deleted "proximate" preceding "cause" in the first sentence of the instruction.

Misrepresentation to plaintiff not required. — The first element of the uniform jury instruction on negligent misrepresentation does not require that the misrepresentation be made to the plaintiff. Healthsource, Inc. v. X-Ray Associates, 2005-NMCA-097, 138 N.M. 70, 116 P.3d 861, cert. denied, 2005-NMCERT-007.

Instruction's fourth element requires plaintiff to rely on the information in all events. Healthsource, Inc. v. X-Ray Associates, 2005-NMCA-097, 138 N.M. 70, 116 P.3d 861, cert. denied, 2005-NMCERT-007.

Attorney fees incurred defending lawsuit. — Since an insurance company incorrectly advised the plaintiff that the policy it bought covered on-the-job injuries and that it was not necessary to buy a separate worker's compensation policy, and since an employee of the plaintiff was discharged after filing a worker's compensation claim and sued the plaintiff for both worker's compensation and wrongful discharge, the court did not err in awarding as damages to the plaintiff, who sued the insurance company for negligent misrepresentation, the total amount of the plaintiff's attorney fees incurred in defending the employee's lawsuit, even though the plaintiff had defended against the employee's wrongful discharge claim by asserting that the employee had been fired for substandard performance. But for the misrepresentations, the plaintiff would have had worker's compensation coverage, and the employee would not have had to file her claim for worker's compensation and wrongful discharge. Charter Servs., Inc. v. Principal Mut. Life Ins. Co., 117 N.M. 82, 868 P.2d 1307 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Applicability of comparative negligence doctrine to actions based on negligent misrepresentation, 22 A.L.R.5th 464.

13-1633. Fraud.

A party is liable for damages proximately caused by [his] [her] fraudulent misrepresentation. To prove fraud, _____ *(party claiming fraud)* must prove:

First, a representation of fact was made which was not true;

Second, either the falsity of the representation was known to the party making it or the representation was recklessly made;

Third, the representation was made with the intent to deceive and to induce _____ *(party claiming fraud)* to rely on the representation; and

Fourth, _____ *(party claiming fraud)* did in fact rely on the representation.

Each of these elements must be proved by clear and convincing evidence.

USE NOTE

This instruction is to be used only in cases where the claim is for fraudulent misrepresentation. See UJI 13-1632 for cases where negligent misrepresentation claims are made.

[Adopted, effective November 1, 1991.]

ANNOTATIONS

This instruction enables party to recover damages proximately caused by fraud. Williams v. Stewart, 2005-NMCA-061, 137 N.M. 420, 112 P.3d 281, cert. denied, 2005-NMCERT-005.

Emotional distress damages are not recoverable as part of a fraud claim. Williams v. Stewart, 2005-NMCA-061, 137 N.M. 420, 112 P.3d 281, cert. denied, 2005-NMCERT-005.

Detrimental reliance. — Action for fraudulent misrepresentation was properly dismissed because the complaint did not allege that the developers detrimentally relied on the misrepresentations of the opponents of a shopping center. Saylor v. Valles, 2003-NMCA-037, 133 N.M. 432, 63 P.3d 1152.

Misrepresentations of law may be actionable when the parties occupy a fiduciary relationship, such as husband and wife, or where one party has a superior means of information; thus, the husband's statement to his wife that land acquired while the parties were married was not community property was actionable. Martinez v. Martinez, 2004-NMCA-007, 135 N.M. 11, 83 P.3d 298.

13-1634. Strict liability for nondelegable duty.

In this case _____ (*defendant*) employed _____ (*independent contractor*) to do work that was likely to create a substantial risk of physical harm to others. Therefore, _____ (*defendant*) is liable for any harm caused by the absence of reasonable precautions necessary to avoid the harm.

In determining whether reasonable precautions necessary to avoid the harm were absent, you should decide what precautions would have been taken by a reasonably prudent person having full knowledge of the risk.

USE NOTE

This instruction should be given whenever the court determines that there is a nondelegable duty arising from employing an independent contractor to do work that is specially, peculiarly or inherently dangerous. Before the court gives this instruction, it must decide as a matter of law that the work that the employer engaged the independent contractor to perform was likely to create a peculiar risk of harm to others unless reasonable precautions were taken. If the court determines that the conduct is abnormally dangerous (ultrahazardous), UJI 13-1627 should be given and not this instruction.

[As amended, effective March 1, 2005.]

Committee comment. — The liability of one who employs an independent contractor for harm resulting from work which creates a peculiar risk of harm to others is direct liability for the absence of reasonable precautions and not vicarious liability for the negligence of the independent contractor. *Saiz v. Belen School District*, 113 N.M. 387, 827 P.2d 102 (1992). Under the strict liability theory recognized in *Saiz*, the questions for the jury are solely "(1) what precautions would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed, and (2) whether the absence of a necessary precaution was a cause of injury." Id. at 396, 827 P.2d at 111. If reasonable precautions necessary to avoid the harm are not present, liability of the employer for harm caused is established, irrespective of the presence or absence of fault of the independent contractor.

The inquiry whether the absence of reasonable precautions created a peculiar risk of harm is to be made by the trial judge as a matter of law and creates a duty of the employer, akin to the liability of a supplier of a product under strict liability, to take

reasonably necessary precautions. *Saiz*, 113 N.M. at 399, 827 P.2d at 114 ("The doctrine with the proper fit is that of strict liability as developed in products liability cases."). As the *Saiz* Court stated: "The test of liability is the presence or absence of precautions that would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed; and liability is dependent on neither the lack of care taken by the contractor nor the lack of care taken by the employer to ensure that the contractor takes necessary precautions." *Id.* at 395, 827 P.2d at 110. Liability under this theory of nondelegable duty should be distinguished from the liability of a landowner for abnormally dangerous activities (ultrahazardous), which is absolute as opposed to the strict liability here. *Id.* at 397, 827 P.2d at 112; *see* UJI 13-1627 NMRA.

Under the strict liability claim, what is customarily done to protect against a peculiar risk of harm is evidence of the presence or absence of reasonable precaution; however, what should have been done by a person with full knowledge of the fact is a determination for the jury. The jury may be told the evidentiary value of customary precaution, similar to the instruction on the evidentiary value of custom in products liability actions. *See* UJI 13-408 NMRA.

Where there is liability, the employer is jointly and severally liable with any other parties who "fail[ed] to take precautions reasonably necessary to prevent injury to third persons arising from the peculiar risk." *Saiz*, 113 N.M. at 400, 827 P.2d at 115. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments deleted "proximate" preceding "cause" in the last sentence of the second paragraph of the instruction.

13-1635. Loss-of-a-chance injury; definition; burden of proof.

A party is liable for negligence resulting in another's lost chance for [a better outcome to] [survival from] a preexisting condition. This lost opportunity is an injury in itself. For _____ to recover on this claim a medical expert must have established that, as a result of _____'s negligence, _____ lost a measurable opportunity to avoid [loss of limb], [loss of life] [_____ *(other)*].

USE NOTE

This instruction should be given when plaintiff alleges that the defendant's negligence resulted in the lost opportunity to obtain a better outcome from a preexisting

condition. The instruction must be given with UJI 13-1802A which sets out the appropriate measure of damages for loss of a chance.

[Approved, effective March 20, 2000.]

Committee commentary. — New Mexico recognizes the loss of a chance as a theory of recovery. *See Baer v. Regents of University of California*, 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9; *Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279. The loss of a chance is the lost or diminished opportunity for a better outcome from a preexisting condition. The loss of a chance is not a new theory of recovery and may be established by proof of the customary elements required in any action for negligence: duty, breach, loss or damages, and causation. *See Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955). Both *Alberts v. Schultz* and *Baer v. Regents of University of California* arose in the context of medical negligence, but neither the Supreme Court nor the Court of Appeals specifically limited the loss of a chance to that context. The plaintiff bears the burden of proof on each element which, the Supreme Court noted in *Alberts v. Schultz*, "will almost always" require expert testimony. *Alberts v. Schultz*, 1999-NMSC-015, P 18, 126 N.M. at 812, 975 P.2d at 1284.

The evidence will determine whether the loss of a chance is plaintiff's only theory of recovery or should be submitted as an alternative where there is also proof that defendant's negligence caused the entire loss. Two exemplar sets of instructions are set out as appendices at the end of Chapter 16. These sample instructions illustrate two alternative methods for instructing the jury depending on the evidence.

ANNOTATIONS

Law reviews. — For note, "The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance - *Alberts v. Schultz,*" see 30 N.M.L. Rev. 387 (2000).

13-1636. Malicious abuse of process defined; general statement of elements.

To establish a claim of malicious abuse of process, _____ (*name of the plaintiff*) has the burden of proving each of the following contentions:

(1) In a judicial proceeding, _____ (*name of the defendant*) [misused the legal process] [actively participated in misusing the legal process];

(2) _____ (*name of the defendant*)'s primary motive in [misusing the legal process] [actively participating in misusing the legal process] was to accomplish an illegitimate end; and

(3) The conduct of _____ (*name of the defendant*) caused damages to _____ (*name of the plaintiff*).

USE NOTE

These are the basic elements of the tort of malicious abuse of process. Definitions for specific elements and for the terms used in this instruction follow and should be used, as appropriate, depending on the specific claim made.

Either UJI 13-1639 NMRA (probable cause) or UJI 13-1640 NMRA (procedural impropriety) should be used together with this instruction, depending on the claim.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — In *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 17, 124 N.M. 512, 953 P.2d 277, the New Mexico Supreme Court reformulated the torts of abuse of process and malicious prosecution into a single tort of malicious abuse of process. In *Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 204 P.3d 19, the Court refined the requisite elements of malicious abuse of process, removing the requirement that the defendant have initiated judicial proceedings against the plaintiff. In *Durham*, the Court also extended the definition of "judicial proceedings" for purposes of this tort to include arbitration proceedings as well as civil and criminal proceedings. Id. ¶ 30.

The plaintiff bears the burden of establishing the elements of the tort by a preponderance of the evidence. Clear and convincing proof is no longer required to establish a malicious abuse of process case. *Fleetwood Retail Corp. of New Mexico v. LeDoux*, 2007-NMSC-047, ¶ 30, 142 N.M. 150, 164 P.3d 31.

A malicious abuse of process claim may be raised in an independent action or as a claim or counterclaim in the action where the abuse of process occurred. *DeVaney*, 1998-NMSC-001, ¶ 24. Our Supreme Court distinguishes the procedures for instructing the jury on a counterclaim for malicious abuse of process based on the filing of a complaint without probable cause from those used when a claim or counterclaim for malicious abuse of process is based on a procedural impropriety in the use of legal process. *Fleetwood*, 2007-NMSC-047, ¶¶ 19-31. Different procedures are required because recovery by the original plaintiff on any claim in the original lawsuit is an absolute defense to a malicious abuse of process claim based on the filing of the complaint without probable cause. *Id*. ¶ 22. Any such counterclaim must be resolved against the original defendant (the plaintiff in the malicious abuse of process claim) as a matter of law. *Id*. ¶ 28. The same rule does not apply when the malicious abuse of process claim is based on a procedural irregularity or impropriety in the use of the legal process. *Id*. ¶ 31. These claims are properly resolved by the jury, regardless of which party prevails on the claims in the original complaint. *Id*.

The tort of malicious abuse of process is construed narrowly, in order to protect the right of access to the courts. *DeVaney*, 1998-NMSC-001, ¶ 19; *Valles v. Silverman*, 2004-NMCA-019, ¶ 16, 135 N.M. 91, 84 P.3d 1056.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1637. Malicious abuse of process; "judicial proceeding" defined.

A "judicial proceeding" can be a criminal prosecution, a civil lawsuit, or an arbitration proceeding. The [criminal prosecution] [civil lawsuit] [arbitration proceeding] [describe that proceeding naming the parties] at issue in this case is a "judicial proceeding."

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — *See Durham v. Guest*, 2009-NMSC-007, ¶¶ 30-35, 145 N.M. 694, 204 P.3d 19.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1638. Malicious abuse of process; "active participation" defined.

In this case, _____ (*name of the plaintiff*) has claimed that _____ (*name of the defendant*) actively participated in [bringing the judicial proceeding] [_____ (*describe the other legal process that the plaintiff claims was misused*)] against _____ (*name of the plaintiff*). A [person] [corporation] actively participates in [bringing a judicial proceeding] [_____ (*describe the legal process that the plaintiff claims was misused*)] if [his] [her] [its] conduct is the determining factor in the decision to [file the lawsuit] [_____ (*describe the other legal process the plaintiff claims was misused*)]. Merely providing encouragement, advice, or information is not enough.

USE NOTE

This instruction defining active participation should be used any time one or more of the defendants is not a party to the underlying criminal, civil, or arbitration proceeding in which the plaintiff's claim of malicious abuse of process arose.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — A non-litigant may be liable for malicious abuse of process if the non-litigant actively participated in the underlying lawsuit. *Valles v. Silverman*, 2004-NMCA-019, ¶¶ 15-17, 135 N.M. 91, 84 P.3d 1056. "Active participation" requires that the conduct of the defendant be the determining factor in the decision to file the lawsuit or in the decision to otherwise misuse the legal process. *Id*. ¶ 17. The non-litigant must have induced another to bring the proceeding or to otherwise misuse the legal process by, for example, urging or insisting that the proceeding be

brought, urging or insisting that a particular procedure be used, providing information to a party or a prosecutor, knowing it to be false, or funding a judicial proceeding or a legal procedure that otherwise would not have been pursued. *Id*. ¶¶ 16-17.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1639. Misuse of process; lack of probable cause.1

A misuse of the legal process occurs when a defendant [begins a judicial proceeding] [actively participates in beginning a judicial proceeding] without probable cause.

Probable cause is a reasonable belief, founded on known facts established after a reasonable pre-filing investigation, that the claims made could be established to the satisfaction of [a court or a jury] [an arbitrator].

Alternative 1 (*the court determines lack of probable cause*)

[This court has determined that the judicial proceeding _____ (*name the proceeding and the parties*) was brought without probable cause.][2]

Alternative 2 (*dispute of fact about the existence of probable cause*)

[It is your role to resolve the disputes of fact between the parties.[3] In this case, _____ (*name of the plaintiff*) says _____ (*describe the plaintiff's factual allegations*). _____ (*Name of the defendant*) denies what _____ (*name of the plaintiff*) says, and _____ (*name of the defendant*) says _____ (*describe the defendant's position*).

If you find that _____ (*name of the plaintiff*) has proved [his] [her] [its] version of the facts, then the judicial proceeding was brought without probable cause.]

USE NOTE

1. This instruction should be used when the misuse of process claimed is the filing of a complaint, thereby initiating a judicial proceeding, without probable cause. The term "judicial proceeding" includes civil lawsuits, criminal prosecutions, and arbitration proceedings.

2. If there is no genuine issue of material fact, the court should instruct the jury that the court has determined, as a matter of law, that the judicial proceeding was initiated without probable cause.

3. If there is a genuine issue of material fact, a special verdict form should be used. The special verdict form should ask the jury to make findings of fact, leaving the

decision to the court on whether the facts found by the jury constitute probable cause. The verdict form should also guide the jury on whether and when it should go on to consider the defendant's motive.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — When malicious abuse of process is based on the filing of a complaint without probable cause, the jury's role is to resolve any dispute of fact. The court decides, as a matter of law, based either upon undisputed facts or based upon the findings of the jury, whether the defendant had probable cause to file the complaint. *Fleetwood Retail Corp. of New Mexico v. LeDoux*, 2007-NMSC-047, ¶ 27, 142 N.M. 150, 164 P.3d 31. The definition of probable cause included in this instruction is taken from *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 22, 124 N.M. 512, 953 P.2d 277.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1639A. Misuse of process; procedural impropriety, defined.

Misuse of the legal process occurs when a defendant engages in some impropriety in the use of the legal process that suggests extortion, delay, harassment, or some other illegitimate end. The legal process may be misused either by the irregular use of a procedure, or by some other act by the defendant that indicates the wrongful use of judicial proceedings. In this case, _____ (*name of the plaintiff*) says _____ (*describe the irregularity or impropriety*). _____ (*Name of the defendant*) denies what _____ (*name of the plaintiff*) says, and _____ (*name of the defendant*) says _____ (*describe the defendant's position*).

USE NOTE

This instruction should be used when the misuse of process claimed is a procedural impropriety or irregularity, other than the filing of a complaint without probable cause.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — Whether a defendant engaged in some impropriety or irregularity in the use of the legal process, suggesting extortion, delay, harassment or some other illegitimate end, is generally to be determined by the jury. "A use of process is deemed to be irregular or improper if it (1) involves a procedural irregularity or a misuse of a procedural device, such as discovery, subpoenas or attachment, or (2) indicates the wrongful use of proceedings such as an extortion attempt." *Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 204 P.3d 19. A misuse of process based on a procedural impropriety or irregularity can precede the filing of a complaint so long as an action is subsequently filed, or it can come at any stage of a proceeding. *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 20, 124 N.M. 512, 953 P.2d 277.

Examples of culpable acts include the following: a demand for a collateral advantage prior to filing a complaint; a request for excessive damages contained in the complaint; attachment on property other than that involved in the litigation or in an excessive amount; oppressive conduct in connection with the arrest of a person or the seizure of property; excessive execution on a judgment; using the process to put pressure on the other to pay a different debt; taking or refraining from taking some other action; oppressive conduct in discovery; and the misuse of the subpoena power. *DeVaney*, 1998-NMSC-001, ¶¶ 20, 28.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1640. Malicious abuse of process; illegitimate motive.

[If the judicial proceeding was brought without probable cause] [If you find that _____ (*name of the defendant*) misused the legal process], you must consider whether _____ (*name of the defendant*)'s primary motive or purpose in [bringing the proceeding without probable cause] [actively participating in bringing the proceeding without probable cause] [_____ (*describe the other misuse or active participation in the misuse of the legal process*)] was to accomplish an illegitimate end. Acting with ill-will or spite toward the plaintiff is not enough to meet this requirement. _____ (*Name of the defendant*) must have [brought] [actively participated in bringing] [_____ (*describe the other misuse or active participation in the misuse of the legal process*)] the judicial proceeding primarily to accomplish a purpose for which the judicial proceeding was not designed.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — If a misuse of the legal process is established, either based on filing a complaint without probable cause or based on other impropriety or irregularity in the use of the legal process, then the jury must also decide whether the defendant's primary motive for misusing the legal process was to accomplish an illegitimate end. Proof that the defendant acted with ill-will or spite is not sufficient to meet this requirement. *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 29, 124 N.M. 512, 953 P.2d 277.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1640A. Malicious abuse of process; bifurcated trial; instructions prior to bifurcated claim of malicious abuse of process.

You have heard the evidence and returned a verdict for _____ (*name of the defendant/counter claimant*). You will now hear evidence regarding the claim of _____ (*name of the defendant/counter claimant*) that _____ (*name of the plaintiff/counter defendant*) maliciously abused the legal process by _____ (*describe conduct alleged to be malicious abuse of process*).

USE NOTE

This instruction should be used when the court bifurcates the claim of malicious abuse of process and the jury returns a verdict on all counts for the defendant/counter claimant in the underlying suit. It is designed to be used before the presentation of evidence on the malicious abuse of process claim.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1641. Definitions for liquor liability.

1. "Licensee" means a person licensed under the provisions of the Liquor Control Act and the agents or employees of the licensee.

2. "Intoxicated" means a person's mental and physical impairment as a result of using alcohol. As used in these instructions, such impairment must substantially reduce that person's ability to think and act.

3. "Minor", as used in these instructions, means a person under twenty-one years of age.

4. "Reckless" conduct is the intentional doing of an act with utter indifference to or conscious disregard for a person's [rights] [safety].

5. "Gross negligence" is an act or omission done without the exercise of even slight care under the circumstances.

USE NOTE

These definitions should be used in conjunction with the instructions governing liability for the sale, service, or provision of alcohol, UJI 13-1642 through UJI 13-1645.

[Approved, effective July 16, 2001.]

ANNOTATIONS

Cross references. — For Liquor Control Act, see 60-3A-1 NMSA 1978.

Effective dates. — Pursuant to a court order dated May 24, 2001, this instruction is effective July 16, 2001.

13-1642. Liquor licensee liability.

To establish the claim against defendant _____ (*name of licensee*) for violation of the New Mexico liquor control laws, plaintiff has the burden of proving the following elements:

[1. Defendant was a licensee;]

2. Defendant or defendant's [agent(s)] or [employee(s)] sold or served alcoholic beverages to _____ while [he] [she] was intoxicated;

3. Defendant or defendant's [agent(s)] or [employee(s)] knew from the circumstances and from what was reasonably apparent to defendant that the person [buying] or [receiving service] of the alcoholic beverages was intoxicated;

[4. Defendant or defendant's [agent(s)] or [employee(s)] acted with gross negligence or reckless disregard for the safety of the plaintiff.]

In addition, plaintiff has the burden of proving that plaintiff's damages were caused by defendant's sale or service of alcoholic beverages.

USE NOTE

This is the basic instruction for a licensee's violation of New Mexico's liquor control laws. The instruction should be given in conjunction with the appropriate definitions contained in UJI 13-1641 NMRA. The Committee recommends that the name of defendant or defendant's agent or employee be inserted into the instruction at the appropriate points. The bracketed element number one should only be given if the court determines there is a factual issue regarding the status of defendant as a licensee. The bracketed element number four should be given only when the plaintiff was the patron of the licensee.

[Approved, effective July 16, 2001; as amended, effective March 1, 2005.]

Committee comment. — The statute creating tort liability for the sale of alcoholic beverages, Section 41-11-1 NMSA 1978, limits liability for violation of the Liquor Control Act to the licensee. Section 41-11-1(D)(1) NMSA 1978 defines "licensee" as "a person licensed under the provisions of the Liquor Control Act and the agents or servants of the licensee". The legislature's definition of "licensee" evidences an intent to impose vicarious liability on an absent licensee for the acts and omissions of the licensee's agents and employees. The New Mexico Supreme Court has confirmed that a licensee's liability extends to the acts of agents and employees. *See Buffet v. Vargas*, 121 N.M. 507, 914 P.2d 1004 (1996).

Section 41-11-1 NMSA 1978 also specifically provides that a licensee may not be charged with "knowledge of previous acts by which a person becomes intoxicated at other locations unknown to the licensee". The trial court should address this provision of the statute as an evidentiary matter, rather than by way of instruction to the jury.

The Committee has been unable to resolve from the language of the Liquor Control Act or from appellate opinions the question whether the cause element requires a showing that the alcoholic beverages sold or served by defendant was a cause of plaintiff's

injuries or if it is sufficient to establish that the defendant served or sold alcoholic beverages and that the person's general intoxication was a cause of plaintiff's injuries and damages. Therefore, this issue will not be addressed specifically in the cause language until decided on a case by case basis.

Comparative fault principles apply to an action brought pursuant to Section 41-11-1 NMSA 1978. *Baxter v. Noce*, 107 N.M. 48, 51-52, 752 P.2d 240, 243-44 (1988); *Reichart v. Atler*, 117 N.M. 623, 626, 875 P.2d 379, 382 (1994). [Revised, effective March 1, 2005.]

ANNOTATIONS

Effective dates. — Pursuant to a court order dated May 24, 2001, this instruction is effective July 16, 2001.

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments deleted "proximate" preceding "cause" in the last paragraph of the instruction.

13-1643. Liability for hosts.

To establish the claim against defendant _____ *(name of host)*, plaintiff has the burden of proving the following elements:

1. Defendant recklessly provided alcoholic beverages to [a guest] [plaintiff] in a social setting while the [guest] [plaintiff] was intoxicated;

2. Plaintiff's damages were proximately caused by the [guest's] [his] [her] intoxication.

USE NOTE

This instruction should be given when the plaintiff claims injury resulting from the conduct of a person who became intoxicated in a private setting. The appropriate bracketed portion should be used depending on whether the plaintiff was also the social guest. The instruction should be given with the appropriate definitions from UJI 13-1636.

[Approved, effective July 16, 2001.]

Committee commentary. — Section 41-11-1(E) NMSA 1978 defines liability for a social host who provides alcoholic beverages to guests. The statute also allows the guest to recover damages in the appropriate circumstances. Section 41-11-1(E) NMSA 1978 also requires that the host provide the alcoholic beverages "gratuitously". If there

is a factual issue whether the host provided the alcoholic beverages gratuitously, then the court should instruct the jury appropriately.

ANNOTATIONS

Effective dates. — Pursuant to a court order dated May 24, 2001, this instruction is effective July 16, 2001.

13-1644. Liquor licensee liability for sale or service to a minor.

To establish a claim against defendant _____ *(name of licensee)* for the [sale or service of alcoholic beverages to a minor] [or] [a minor's consumption of alcoholic beverages on the defendant's premises], plaintiff has the burden of proving the following elements:

[1. Defendant was a licensee;]

2. [Defendant or defendant's [agent(s)] or [employee(s)] sold or served alcoholic beverages to a minor] [or] [the minor consumed alcoholic beverages on the defendant's premises];

3. Defendant or defendant's agents or employees knew or, as a reasonably prudent person, would have known, the person was a minor.

In addition, plaintiff has the burden of proving that plaintiff's damages were proximately caused by [defendant's sale or service of alcoholic beverages to the minor] [or] [the minor's consumption of alcoholic beverages on defendant's premises].

USE NOTE

This instruction should be given in those cases where a liquor licensee sold or served alcohol to a minor or the minor consumed alcoholic beverages on the licensee's premises. The bracketed element number one should be given only if the court determines there is a factual issue regarding the status of defendant as a licensee. The other bracketed portions of the instruction should be used as appropriate to the circumstances of the case. The committee recommends that the name of defendant or defendant's agent or employee be inserted into the instruction at the appropriate points.

[Approved, effective July 16, 2001.]

Committee commentary. — Section 41-11-1(F) and (G) NMSA 1978 create and define civil liability for the violation of Section 60-7B-1 NMSA 1978, sale or service of alcoholic beverages to a minor. Section 60-7B-1(D) NMSA 1978 provides a defense to the licensee or the licensee's agents or employees where a person other than a minor procures the sale or service of the alcoholic beverages given to the minor and where

the sale or service was procured as the result of actual or constructive misrepresentation leading to conceal the fact that the person is a minor and not legally entitled to be sold or served an alcoholic beverage.

ANNOTATIONS

Effective dates. — Pursuant to a court order dated May 24, 2001, this instruction is effective July 16, 2001.

13-1645. Third party liability for procuring alcoholic beverages for a minor.

To establish a claim against defendant _____ *(name of defendant)* for procuring alcoholic beverages for a minor, plaintiff has the burden of proving the following elements:

1. Defendant [procured] [or] [assisted a minor in procuring] the alcoholic beverages;

2. Defendant knew or, as a reasonably prudent person, would have known, the person was a minor.

In addition, plaintiff has the burden of proving that plaintiff's damages were proximately caused by defendant's acts in [procuring] [or] [assisting the minor in procuring] the alcoholic beverages.

USE NOTE

This instruction should be given in those cases where a third party procures for a minor or assists a minor in procuring alcoholic beverages. The bracketed portions of the instruction should be used as appropriate to the circumstances of the case.

[Approved, effective July 6, 2001.]

Committee commentary. — Section 41-11-1(F) and (G) NMSA 1978 create and define civil liability for the violation of Section 60-7B-1 NMSA 1978, selling or serving alcoholic beverages to a minor. It is also a violation of Section 60-7B-1(A) NMSA 1978 to procure for or to assist in the procuring of alcoholic beverages for a minor.

ANNOTATIONS

Effective dates. — Pursuant to a court order dated May 24, 2001, this instruction is effective July 16, 2001.

13-1646. Negligent entrustment of a motor vehicle.

To establish the claim of negligence in allowing _____ to [use] [drive] _____'s motor vehicle, _____ has the burden of proving the following contentions:

1. _____ was the owner or person in control of the vehicle that caused _____'s injuries;

2. _____ permitted _____ to operate the vehicle;

3. _____ knew or should have known that _____ was likely to use the vehicle in such a manner as to create an unreasonable risk of harm to others;

4. _____ was negligent in the operation of the motor vehicle; and

5. _____'s negligence was the cause of the injury to _____.

USE NOTE

This instruction should be used if the negligent entrustment doctrine is the basis of the plaintiff's claim against the defendant. The instruction is not applicable to a claim of negligent entrustment of real property. However, the instruction may apply to chattels other than automobiles. For example, it may apply to a claim for negligent entrustment of a firearm. The names identifying the owner or person in control of the vehicle, the negligent operator of the vehicle, and the person injured should be inserted as appropriate in the instruction.

[Approved, effective July 15, 2002; as amended, effective March 1, 2005.]

Committee commentary. — This instruction addresses what is often commonly called "negligent entrustment". "General principles of negligence are relevant to the determination of negligent entrustment". *McCarson v. Foreman*, 102 N.M. 151, 155, 692 P.2d 537, 541 (Ct. App. 1984). The theory of negligent entrustment is generally described by the *Restatement (Second) of Torts*: "It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others". *Restatement (Second) of Torts* § 308 at 100 (1965); *see also Douglas v. Hartford Ins. Co.*, 602 F.2d 934, 936 (10th Cir. 1989). The term "control" for purposes of this instruction, means a person has the ability to prevent the unsafe driver from driving the car.

New Mexico courts have explicitly recognized negligent entrustment claims in the context of automobiles. *Hermosillo v. Leadingham*, 129 N.M. 721, 13 P.3d 79 (Ct. App. 2000); *McCarson v. Foreman*, 102 N.M. at 155-56, 692 P.2d at 541-42; *DeMatteo v. Simmon*, 112 N.M. 112, 114, 812 P.2d 361, 363 (Ct. App. 1991); *Spencer v. Gamboa*, 102 N.M. 692, 693, 699 P.2d 623, 624 (Ct. App. 1985). Thus, New Mexico law recognizes that one who negligently entrusts a motor vehicle to an incompetent driver may be liable for injury to a third person caused by the driver's incompetence.

The New Mexico Supreme Court has rejected the application of negligent entrustment to real property leased by a non-possessory landlord. *See Gabaldon v. ERISA Mortgage Co.*, 128 N.M. 84, 990 P.2d 197 (1999). The extent to which the theory of negligent entrustment may apply to other chattels carrying a potential for risk, such as a firearm or other dangerous instrumentality is unresolved in New Mexico This instruction may be modified for use with chattels other than motor vehicles.

ANNOTATIONS

Effective dates. — Pursuant to a court order dated June 5, 2002, this instruction is effective July 15, 2002.

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments deleted "proximate" preceding "cause" in the paragraph designated "5".

13-1650. Spoliation of evidence.

_____ (*name of plaintiff*) says in this case that _____ (*name of defendant*) intentionally [disposed of, destroyed, mutilated or significantly altered] evidence relevant to a [potential lawsuit] [lawsuit]. In order to prove intentional spoliation of evidence, _____ (*plaintiff*) must prove each of the following:

1. There was [a lawsuit] [the potential for a lawsuit];

2. _____ (*defendant*) knew there was [a lawsuit] [the potential for a lawsuit];

3. _____ (*defendant*) disposed of, destroyed, mutilated or significantly altered potential evidence;

4. By its conduct _____'s (*defendant's*) sole intent was to disrupt or defeat a potential lawsuit;

5. The destruction or alteration of the evidence resulted in _____'s (*plaintiff's*) inability to prove [his] [her] case;

6. _____ (*plaintiff*) suffered damages as a result of the destruction or alteration.

USE NOTE

This instruction is to be used when the plaintiff brings a claim for intentional spoliation of evidence.

[Approved, effective March 21, 2005.]

Committee comment. — The elements of the tort of spoliation of evidence were discussed in *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 905 P.2d 185 (1995).

In *Torres v. El Paso Electric Co.,* 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386, the court discussed wrongful activity occurring prior to the filing of a complaint, and suggested that spoliation, "at least spoliation discovered prior to trial, should be tried in conjunction with the underlying claim, rather than in a bifurcated or separate trial". The court in *Torres* indicated that the tort seeks to remedy acts taken with the sole intent to maliciously defeat or disrupt a lawsuit. Practitioners should note that the trial court may independently impose sanctions for destruction of evidence ranging from dismissal, or imposition of liability to instructing the jury regarding an inference arising from spoliation. *See Segura v. K-Mart Corporation*, 2003-NMCA-013, 133 N.M. 192, 62 P.3d 283.

13-1651. Inference where evidence is lost, destroyed or altered.

_____ (*plaintiff or defendant*) says that evidence within the control of _____ (*other party*) was lost, destroyed or altered. If you find that this happened, without a reasonable explanation, you may, but are not required to, conclude that the lost, destroyed or altered evidence would be unfavorable to _____ (*other party*).

USE NOTE

This instruction may be given by the court when evidence in the control of one of the parties has been lost, destroyed or altered.

[Approved, effective March 21, 2005.]

Committee comment. — In determining whether to give this instruction or to provide a different remedy, trial courts should consider whether the loss, destruction or alteration was intentional, whether there was a reasonable possibility of a lawsuit involving this evidence, whether the party requesting the instruction acted with due diligence in preserving the evidence and whether the evidence would have been relevant to a

material issue in the case. *Torres v. El Paso Electric Co.*, 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386.

The court may also choose to impose other sanctions it considers appropriate under the circumstances. For the standards to be used for an appropriate sanction, *see Restaurant Management Company v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, 127 N.M. 708, 986 P.2d 504 and *Segura v. K-Mart Corporation*, 2003-NMCA-013, 133 N.M. 192, 62 P.3d 283.

APPENDICES

Appendix 1. Sample loss-of-chance; loss of consortium instruction.

Statement of facts

In *Baer v. Regents of University of California*, 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9, Helmut Baer was required to undergo periodic physical examinations as part of a regular employment practice. During his 1985 exam, chest x-rays revealed a lesion in the right lung. A little over one year later, the lesion was interpreted as benign, but the doctor recommended periodic exams and x-rays for the future. In July 1989, Baer was reexamined at his employer's facility by James Pederson, a physician's assistant. For the first time no chest x-rays were taken, and the physician's assistant offered Baer no medical advice concerning the lesion. A year later, Baer was independently diagnosed as having large cell carcinoma, and despite subsequent medical treatment, Baer died in October 1991. Assume, for the purposes of this exemplar, that Baer's widow filed a loss-of-consortium and a survival action against the employer, alleging the physician's assistant negligently failed to diagnose the cancerous nodule in her husband's lungs. Assuming, further, that plaintiff presented evidence that Baer more likely than not had cancer at the time of the exam by the physician's assistant and that the cancer would have been reasonably detectable by the omitted x-ray, the instructions to the jury may have been given as follows:

UJI 13-302A. Statement of theory for recovery and

UJI 13-302B. Statement of factual contentions of plaintiff, causation and burden of proof.

This lawsuit has been brought by plaintiff Jo Baer, individually and as the personal representative of the estate of Helmut Baer who is now deceased. Plaintiff seeks compensation from the defendant for damages that plaintiff claims were caused by negligence. To establish negligence on the part of defendant, the plaintiff has the burden of proving each of the following:

1. James Pederson omitted to take an x-ray of Helmut Baer in July 1989 during a regular physical examination conducted by Pederson as a physician's assistant in the employ of the Los Alamos National Laboratory.

2. By omitting the x-ray, Pederson failed to use the skill and care ordinarily used by reasonably well-qualified physicians' assistants practicing under similar circumstances, giving due consideration to the locality involved.

3. Helmut Baer more likely than not had cancer at the time of the exam by Pederson in July 1989.

4. Helmut Baer's cancer would have been reasonably detectable by the omitted x-ray.

5. Helmut Baer had a chance for a better outcome to his cancer had it been detected and treated in July 1989.

The plaintiff has the burden of proving, that the negligence of James Pederson was a cause of Helmut Baer's lost opportunity for a better outcome to his medical problem.

UJI 13-304. Burden of proof; greater weight of the evidence.

A party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence.

To prove by the greater weight of the evidence means to establish that something is more likely true than not true. When I say, in these instructions, that the plaintiff has the burden of proof on negligence or cause, I mean that you must be persuaded that what is sought to be proved is more probably true than not true.

UJI 13-405. Employer sued; no issue of employment, scope of employment or agency.

James Pederson was the employee of Los Alamos National Laboratory at the time of the occurrence. Therefore, Los Alamos National Laboratory is liable for any wrongful act or omission of Pederson.

UJI 13-1101. Duty of health care provider.

In performing a regular physical examination of an employee James Pederson was under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified physicians' assistants practicing under similar circumstances, giving due consideration to the locality involved. A physician's assistant who fails to do so is negligent.

The only way in which you may decide whether the physician's assistant in this case possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by health care providers testifying as expert witnesses. In deciding this question you must not use any personal knowledge of any of the jurors.

UJI 13-1635. Loss-of-a-chance injury; definition; burden of proof.

A party is liable for negligence resulting in another's lost chance for survival from a preexisting condition. This lost opportunity is an injury in itself. For plaintiff to recover on this claim a medical expert must establish that, as a result of James Pederson's negligence, Helmut Baer lost a measurable opportunity to survive his cancer.

UJI 13-1802. Measure of damages; general.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Jo Baer individually for her emotional distress due to Helmut Baer's lost chance for survival, and you must fix the amount of money which will reasonably and fairly compensate the estate of Helmut Baer for his lost chance for survival. You must consider each of the following elements of damages proved by the plaintiff to have resulted from the negligence as claimed:

A. For Jo Baer, individually, her emotional distress as spouse caused by the loss of the society, guidance, companionship and sexual relations enjoyed with the deceased. [*UJI 13-1810A. Loss of consortium*.]

B. For Jo Baer, as personal representative of the estate of Helmut Baer, deceased:

1. The pain and suffering experienced by the deceased between the time of injury and death [*UJI 13-1807. Pain and suffering. See also, UJI 13-1830. Wrongful death.*];

2. The reasonable expenses of necessary medical care and treatment and funeral and burial [*UJI 13-1804. Medical expense. See also, UJI 13-1830. Wrongful death*.];

3. The lost earnings, the lost earning capacity and the value of the lost household services of the deceased considering the deceased's age, earning capacity, health, habits, and life expectancy had he survived his cancer. In considering loss of earnings or earning capacity, deductions must be made for income taxes, social security taxes, other taxes, and personal living expenses of the deceased. The damages set forth in this paragraph are damages for the future loss of money and are paid in a lump sum. Therefore, a reasonable discount must be made for the future earning power of the damages awarded [*UJI 13-1803. Earnings. See also, UJI 13-1830. Wrongful death.*]; and

4. The value of the deceased's life apart from his earning capacity. [*See UJI 13-1830. Wrongful death.*]

Provided, however, for the loss of a chance under both claim A and claim B, while you must (1) first determine total damages for the loss under the elements listed above for each of the two claims, you then must (2) base your award on a percentage representing the lost opportunity to avoid each loss. The valuation of lost chances is

necessarily imprecise; the value of the loss may be established by fair approximations, by numbers or verbal descriptions, from which you may arrive at a percentage to apply to the total damages.

UJI 13-1802A. Measure of the loss of a chance.

Whether any of the elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

[As amended, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was prepared pursuant to a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The sample instructions in this instruction for UJI 13-302, 13-302B and 13-304 have been revised to be consistent with the March 1, 2005 revision of 13-302A, 13-302B and 13-304 NMRA. See the compiler's annotations following 13-302A, 13-302B and 13-304 NMRA instructions for a description of the March 1, 2005 revision of 13-302A, 13-302B and 13-304 NMRA.

APPENDIX 2. Sample loss of limb; loss-of-a-chance alternative.

Statement of facts

In *Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279, Alberts, who had a history of peripheral vascular disease, went to his primary care physician, Dr. Schultz, with symptoms including severe "rest pain" in his right foot, a sign of impending gangrene that could lead to amputation of the affected limb. At this visit of July 15, 1992, Dr. Schultz did not conduct a motor sensory examination and did not order an arteriogram, a diagnostic test that assists in evaluating the condition of blood vessels. Thirteen days later Alberts saw a vascular surgeon who, upon seeing the condition of the leg, sent Alberts to the hospital for an arteriogram followed by several procedures performed unsuccessfully. The leg was amputated below the knee. Alberts sued Dr. Schultz claiming he neglected to perform the appropriate examinations on his leg and failed to make a timely referral to a specialist, and that the thirteen-day delay resulted in the loss of the leg or, in the alternative, it decreased the probability that the leg could be saved. Assuming testimony to a reasonable degree of medical probability that the leg would have been saved or that, at the very least, the chances of saving the leg would have increased significantly with the timely grafting of other arteries that were suitable

candidates for bypass surgery, the instructions to the jury may have been given as follows:

UJI 13-302A. Statement of theory for recovery; and

UJI 13-302B. Statement of factual contentions of plaintiff, proximate cause and burden of proof.

In this civil action plaintiff Dee Alberts seeks compensation from the defendant Dr. Schultz for damages which plaintiff claims were proximately caused by negligence.

To establish the claim of negligence on the part of defendant, the plaintiff has the burden of proving each of the following contentions:

1. When Dee Alberts visited Dr. Schultz as his primary care physician on July 14, 1992, Dr. Schultz failed to perform appropriate motor and sensory exams of the leg and immediately refer Mr. Alberts to a specialist for an arteriogram that would have resulted in timely grafting of arteries available for bypass surgery.

2. By failing to perform the motor and sensory exams and to refer Dee Alberts to a specialist for an arteriogram, Dr. Schultz failed to use the skill and care ordinarily used by reasonably well-qualified doctors practicing under similar circumstances, giving due consideration to the locality involved.

3. Dee Alberts lost his leg by amputation below the knee because he did not have timely bypass surgery;

or, in the alternative:

The chances of saving the leg at the very least would have increased significantly with timely grafting.

Dee Alberts also contends, and has the burden of proving, that negligence of Dr. Schultz was a proximate cause either of 1) the loss of his leg or 2) the loss of a chance to save the leg.

UJI 13-304. Burden of proof; greater weight of the evidence.

It is a general rule in civil cases that a party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence.

To prove by the greater weight of the evidence means to establish that something is more likely true than not true. When I say, in these instructions, that the plaintiff has the burden of proof on negligence or proximate cause, I mean that you must be persuaded that what is sought to be proved is more probably true than not true.

UJI 13-1101. Duty of a doctor.

In caring for Dee Alberts as his primary care physician, Dr. Schultz was under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors practicing under similar circumstances, giving due consideration to the locality involved. A doctor who fails to do so is negligent.

The only was [way] in which you may decide whether Dr. Schultz in this case possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by doctors testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

UJI 13-1635. Loss-of-a-chance injury; definition; burden of proof.

A party is liable for negligence resulting in another's lost chance for a better outcome to a preexisting condition. This lost opportunity is an injury in itself. For Dee Alberts to recover on this claim a medical expert must have established that, as a result of Dr. Schultz's negligence, Dee Alberts lost a measurable opportunity to avoid loss of his leg.

UJI 13-1802. Measure of damages; general.

If you should decide in favor of the plaintiff on the question of liability (1) for the loss of his leg, or, if not for the loss of the leg, then (2) for the loss of a chance to save the leg, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence as claimed:

1. The value of lost earnings and the present cash value of earning capacity reasonably certain to be lost in the future. *[UJI 13-1803. Earnings.]*

2. The reasonable expense of necessary medical care, treatment and services received, including prosthetic devices, and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future. *[UJI 13-1804. Medical expenses.]*

3. The reasonable value of necessary nonmedical expenses which have been required as a result of loss of limb, and the present cash value of such nonmedical expenses reasonably certain to be required in the future. *[UJI 13-1805. Nonmedical expenses.]*

4. The nature, extent and duration of the injury, including disfigurement. *[UJI 13-1806. Nature, extent, duration.]*

5. The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the loss of limb.

The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiff with fairness to all parties to this action. *[UJI 13-1807. Pain and suffering.]*

Provided, however, for the loss of a chance for a better outcome to a medical problem, while you must (1) first determine total damages for the loss of limb under the above-listed elements, you then must (2) base your award on a percentage representing the lost opportunity to avoid loss of limb. The valuation of lost chances is necessarily imprecise; the value of the loss may be established by fair approximations, by numbers or verbal descriptions, from which you may arrive at a percentage to apply to the total damages. *[UJI 13-1802A. Measure of the loss of a chance.]*

Whether any of the elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages. *[UJI 13-1802. Measure of damages; general.]*

UJI 13-302F. The special verdict form questions presented for the jury to answer.

After considering the evidence and these instructions as a whole, the preliminary questions presented for you to answer on the special verdict form are as follows:

1. Was defendant negligent?

2. Was any negligence of defendant a proximate cause of plaintiff's loss of limb and damages?

3. Was any negligence of defendant a proximate cause of plaintiff's lost chance to avoid the loss of his limb, and resulting damages?

If you answer "No" to question 1 on the special verdict form you shall return the special verdict for the defendant and against the plaintiff. If, on the other hand, you answer "Yes" to question 1 you shall answer question 2.

If you answer "Yes" to question 2, you shall determine the amount of money that will compensate plaintiff for his loss of limb and damages. If you answer "No" to question 2, you shall answer question 3. If you answer "No" to both questions 2 and 3, you shall return the special verdict for the defendant. If you answer "Yes" to question 3, you shall determine the amount of money that will compensate plaintiff for his lost chance to avoid the loss of his limb.

After you determine the damages for loss of limb or, in the alternative, for loss of a chance, you will otherwise answer the questions required of you on the special verdict form which I will hand to you at the conclusion of these instructions.

[Approved, effective March 20, 2000.]

CHAPTER 17
Bad Faith

Introduction.

The last two decades have seen a steady development by New Mexico appellate courts of the common law action for bad faith by an insured against the insured's insurance company. The legislature has enacted statutes addressing the remedies available to an insured and comprehensive codes of behavior which create private causes of action. Quite naturally this judicial and statutory development of substantive law has increased the volume of civil actions and justified the drafting of pattern instructions for this lawsuit.

This new chapter of Uniform Jury Instructions - Civil is devoted exclusively to the bad faith claim against an insurance company. It includes the common law cause of action, UJI 13-1701 to 13-1704 NMRA as well as private actions under the Insurance Practices Act, UJI 13-1706 NMRA, and the Unfair Practices Act, UJI 13-1707 NMRA. The Chapter is self-contained with instructions on causation, affirmative defenses and damages. With the addition of instructions for Statement of Issues, Burden of Proof, Duties of Jurors and Verdict Forms, jury instructions for this case should be complete.

The Committee recognizes that the obligation of good faith may create causes of action for bad faith in contexts other than the relationship between an insurer and the policyholder; this chapter, however, is limited to the insurance contract relationship.

An insured's lawsuit against an insurer will generally give rise to a cause of action for breach of contract. Chapter 17 provides instructions only for the tort of bad faith and related private statutory actions. Instructions for breach of contract actions brought either by the insured or the insurer are to be drawn from Chapter 8, Contracts and UCC Sales. The absence of an instruction from this Chapter or Chapter 8 does not imply the unavailability of a claim or defense, merely that New Mexico case law is not sufficiently developed to justify the instruction.

[As amended, effective March 1, 2005.]

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI Civil Chapter 17, Introduction, relating to Uniform Commercial Code, is withdrawn,

and the above introduction is adopted, effective November 1, 1991. For present Uniform Commercial Code sales instructions, see UJI Civil Chapter 8.

The 2005 amendment, effective March 1, 2005, was prepared pursuant to a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendment substituted "causation" for "proximate cause" in the third paragraph.

13-1701. Duty of the insurance company.

A policy of insurance is a contract. There is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policyholder.

Fair dealing means to act honestly and in good faith in the performance of the contract. [The insurance company must give equal consideration to its own interests and the interests of the policyholder.]

USE NOTE

This instruction must be given in every action for bad faith. The bracketed final sentence is to be used in every case where the jury is instructed under UJI 13-1704, bad faith failure to settle and in any other case for which it is appropriate. See Committee Comment.

[Adopted, effective November 1, 1991.]

Committee comment. — The cause of action for bad faith arises from a breach of the obligation of good faith. The duty to use good faith is founded in an implied covenant in every insurance policy to deal honestly and fairly. Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., 102 N.M. 28, 690 P.2d 1022 (1984). The breach of the implied obligation creates a cause of action. State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974). Because the duty to use good faith derives from the contract of insurance, no cause of action exists in favor of a third party. Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976).

In Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., supra, and Jessen v. National Excess Insurance Company, 108 N.M. 625, 776 P.2d 1244 (1989), the Supreme Court stated that consideration of the interests of the insured is an element of the insurer's obligation. The Directions for Use provide that the insurer's obligation to consider the interests of the insured is applicable in every action for bad faith failure to settle. The obligation may apply in other contexts. For example, in Jessen the insured brought a first party claim against the insurer for failure to either pay or deny the claim within a reasonable period of time. In affirming a jury's verdict for the insured the Supreme Court stated: " . the evidence shows the insurer utterly failed to exercise the

care for the interests of the insured in denying or delaying payment on an insurance policy". Id. 108 N.M. at 628. Thus, the trial judge and counsel must consider in each case the availability of the bracketed final sentence of this instruction. The Committee determined that this decision should be made on a case to case basis to avoid implying that when determining the existence of coverage in first party claims an insurer must pay the claim regardless of the merit of the insured's argument under the terms of the policy. When a claim is promptly investigated, reasonably evaluated and insured timely notified of a denial for reasons which are not frivolous or unfounded, consideration of the "interests of the insured" does not require payment of the claim.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-1701, relating to the Uniform Commercial Code - statement of issues and burden of proof, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present Uniform Commercial Code sales instructions, see UJI Civil Chapter 8.

13-1702. Bad faith failure to pay a first party claim.

An insurance company acts in bad faith when it refuses to pay a claim of the policyholder for reasons which are frivolous or unfounded. An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.

[In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair [investigation] [evaluation] of the claim.]

[It may not unreasonably delay its notification to the policyholder that the claim will be paid or denied.]

[A failure to timely [investigate] [evaluate] [pay] a claim is a bad faith breach of the duty to act honestly and in good faith in the performance of the insurance contract.]

USE NOTE

The first paragraph of this instruction must be given in every first-party claim. The bracketed second, third and fourth paragraphs are to be given where the plaintiff's cause of action and the evidence would justify a jury verdict on the basis of unreasonable delay in investigation or payment of a first-party claim.

[Adopted, effective November 1, 1991.]

Committee comment. — Bad faith exists in the denial of an insured's first-party claim where the denial is "frivolous or unfounded." Chavez v. Chenoweth, 89 N.M. 423, 553

P.2d 703 (Ct. App. 1976). The insurer's action in denying coverage must rest upon a reasonable basis. Where payment of policy proceeds depends on an issue of law or fact that is "fairly debatable" the insurer is entitled to debate that issue. United Nuclear Corp. v. Allendale Mutual Insurance Co., 103 N.M. 480, 709 P.2d 649 (1985).

An insurer may not simply refuse to investigate the claim of the insured using a failure to verify the claim as a justification for denial of coverage. Jessen v. National Excess Insurance Company, 108 N.M. 625, 776 P.2d 1244 (1989). Unreasonable delay in payment of a just claim is, itself, bad faith. Travelers Ins. Co. v. Montoya, 90 N.M. 556, 566 P.2d 105 (Ct. App. 1977).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-1702, relating to the Uniform Commercial Code - statement of issues, counterclaim, and burden of proof, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present Uniform Commercial Code sales instructions, see UJI Civil Chapter 8.

Punitive damages instruction should be given in every common-law insurance-bad-faith case where the evidence supports a finding either in failure-to-pay cases, that the insurer failed or refused to pay a claim for reasons that were frivolous or unfounded, or in failure-to-settle cases, that the insurer's failure or refusal to settle was based on a dishonest or unfair balancing of interest. Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

13-1703. Bad faith failure to defend.

A liability insurance company has a duty to defend its insured against all claims which fall within the coverage of the insurance policy. A liability insurance company must act reasonably under the circumstances to conduct a timely investigation and fair evaluation of its duty to defend.

An insurance company acts in bad faith in refusing to defend a claim if the terms of the insurance policy do not provide a reasonable basis for the refusal.

USE NOTE

This instruction must be given in every cause of action for bad faith refusal to defend a claim against the insured.

[Adopted, effective November 1, 1991.]

Committee comment. — A liability insurer's duty to defend is contractual and depends upon the nature of the claim against the insured and the terms of coverage under the liability insurance policy. If there is no obligation to pay the claim against the insured,

there is no duty to defend. American Employer's Insurance Co. v. Crawford, 87 N.M. 375, 533 P.2d 1203 (1975). If there is coverage under the policy a good faith belief that there is no coverage is, in and of itself, not a defense to the bad faith claim. The jury's proper inquiry is whether the insurer used good faith - honesty and fair dealing - in resolving the company's duty to defend. The question, in each case is whether the company has a reasonable basis for its action under the terms of the policy. Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., 102 N.M. 28, 690 P.2d 1022 (1984). Subjective belief in the company's position is relevant to a determination of the bad faith claim but the jury's decision turns upon whether a reasonable basis exists for the refusal to defend. Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App. 1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972). While the trial court's determination of the coverage issue may be determinative of the bad faith claim, that claim is independent of coverage; it rests upon a failure to use good faith - honesty and fair dealing - in resolving the company's duty to defend. The question in each case is whether the company had a reasonable basis for its action under the terms of the policy. Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., 102 N.M. 28, 690 P.2d 1022 (1984).

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-1703, relating to meaning and effect of U.C.C. words and phrases, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present Uniform Commercial Code sales instructions, see UJI Civil Chapter 8.

Actual notice of a claim against the insured triggers the duty to defend even if the insured has not given notice of the claim to the insurer. Garcia v. Underwriters at Lloyd's London, 2007-NMCA-042, 141 N.M. 421, 156 P.3d 712, cert. granted, 2007-NMCERT-004.

Duty to defend. — The duty of an insurer to defend can arise from the allegations of the complaint or from known, but unpleaded, facts that bring the claim arguably within the scope of coverage. If the duty to defend does not arise from the complaint on its face, the duty may arise if the insurer is notified of factual contentions or if the insurer could have discovered the facts through reasonable investigation, implicating a duty to defend. Facts that are known, but unpleaded, may bring a claim within the policy coverage at a later stage in the litigation. Southwest Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co., 2006-NMCA-151, 140 N.M. 720, 148 P.3d 806.

Insurer's duty to investigate demands by insured to provide defense. — This instruction requires the insurer to conduct such inquiry as is reasonable under the circumstances and nothing in the instruction indicates that such inquiry is limited solely to the allegations set forth in a third-party complaint. G & G Servs., Inc. v. Agora Syndicate, Inc., 2000-NMCA-003, 128 N.M. 434, 993 P.2d 751.

13-1704. Bad faith failure to settle.

A liability insurance company has a duty to timely investigate and fairly evaluate the claim against its insured, and to accept reasonable settlement offers within policy limits.

An insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within policy limits is bad faith. If the company gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith.

USE NOTE

This instruction must be given in any cause of action based upon a bad faith failure to investigate, negotiate or settle liability claim against the insured.

[Adopted, effective November 1, 1991.]

Committee comment. — There is no cause of action in New Mexico for the negligent failure to settle a claim of liability against the insured. Liability is based upon a breach of the obligation of good faith implied in the insurance contract. Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., 102 N.M. 28, 690 P.2d 1022 (1984). In consideration of settlement, the insurer must honestly weigh the probabilities of an adverse judgment and give equal consideration to the interests of the insured. "To fulfill the duty of giving equal consideration of the interests of the insured and the insurer there must be a fair balancing of these interests." Lujan v. Gonzales, 84 N.M. 229, 234, 501 P.2d 673 (Ct. App. 1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972). Good faith consideration of settlement offers requires an adequate investigation of the claim against the insured. Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., supra.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-1704, relating to the Uniform Commercial Code - general instruction as to measure of damages, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present Uniform Commercial Code sales instructions, see UJI Civil Chapter 8.

Punitive damages instruction should be given in every common-law insurance-bad-faith case where the evidence supports a finding either in failure-to-pay cases, that the insurer failed or refused to pay a claim for reasons that were frivolous or unfounded, or in failure-to-settle cases, that the insurer's failure or refusal to settle was based on a dishonest or unfair balancing of interests. Sloan v. State Farm Mut. Auto. Ins. Co., 2004 NMSC-004, 135 N.M. 106, 85 P.3d 230.

13-1705. Evidence.

Under the "bad faith" claim, what is customarily done by those engaged in the insurance industry is evidence of whether the insurance company acted in good faith. However, the good faith of the insurance company is determined by the reasonableness of its conduct, whether such conduct is customary in the industry or not. Industry [customs] [standards] are evidence of good or bad faith, but they are not conclusive.

USE NOTE

This instruction should be given when the trial court allows evidence of industry custom or standards on the issue of the defendant's bad faith. The appropriate parenthetical is used depending on the nature of the evidence.

[Adopted, effective November 1, 1991.]

Committee comment. — While the honesty and subjective intentions of the insurer are an element of the jury's assessment of the bad faith claim, see UJI 13-1701, the ultimate determination depends upon an assessment of whether the company had a reasonable ground to believe the merit of its defense to the first party claim or the merit of its refusal to defend or settle a liability claim. This is an objective standard. Clifton v. State Farm Ins. Co., 86 N.M. 757, 527 P.2d 798 (1974) and Jessen v. National Excess Ins. Co., 108 N.M. 625, 776 P.2d 1244 (1989). Evidence of industry custom and practice may be helpful to a determination of this issue, but it is not controlling.

ANNOTATIONS

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-1705, relating to verdicts in U.C.C. cases, is withdrawn, and the above instruction is adopted, effective November 1, 1991. For present instructions relating to contract and Uniform Commercial Code cases, see UJI Civil Chapter 8.

13-1706. Violation of Insurance Practices Act.

There was in force in this state, at the time of the [claim handling] [transaction] in this case, a law prohibiting certain practices by insurance companies. Plaintiff contends that defendant engaged in the following prohibited practice[s]:

(Insert the applicable portions of Article 16 of the Insurance Code.)

If defendant engaged in [any one of these] [this] practice[s], it is liable to plaintiff for damages proximately caused by its conduct if it acted knowingly or engaged in the practice[s] with such frequency as to indicate that such conduct was its general business practice.

USE NOTE

Unfair insurance practices supported by substantial evidence are to be numbered and listed using the statutory language.

[Adopted, effective November 1, 1991.]

Committee comment. — Article 16 of the Insurance Code creates a private cause of action against an insurer or agent for violations of the Code. Russell v. Protective Ins. Co., 107 N.M. 9, 751 P.2d 693 (1988). The Code section most directly relevant to "bad faith" claims is Section 59A-16-20 defining unfair and deceptive claims practices. The statute allows recovery of "actual damages". Litigation costs must be awarded the prevailing party, plaintiff or defendant, unless the trial court otherwise directs. The trial court (not the jury) may also award attorney's fees to the prevailing party upon a finding that the claim was known to be groundless or the party charged with the violation has willfully engaged in the prohibited practice.

Current state decisions do not address the meaning of "general business practice". See Barboa v. Monumental General Ins. Co., No. CIV-87-0365-JB slip op. (D. N.M. Mar. 25, 1988). [Approved, effective November 1, 1991.]

13-1707. Violation of Unfair Practices Act.

There was in force in this state, at the time of the [dealings] [transaction] in this case, a law prohibiting a person selling insurance from engaging in unfair or deceptive trade practices. An unfair or deceptive trade practice is any false or misleading oral or written statement, visual description or other representation which tends to or does deceive or mislead the policyholder. A person who is deceived by an unfair or deceptive trade practice may recover damages proximately caused by the deception. Plaintiff contends that defendant engaged in the following prohibited practice[s]:

(Insert the unfair or deceptive trade practice.)

If defendant engaged in [any one of these] [this] practice[s], it is liable to plaintiff for damages proximately caused by its conduct.

USE NOTE

Unfair or deceptive trade practices are illustrated by Section 57-12-2, NMSA 1978; however, the practices listed are not exclusive. Where applicable, it is recommended that the statutory language be used.

[Adopted, effective November 1, 1991.]

Committee comment. — Where applicable, a plaintiff may pursue both the remedies under the Unfair Insurance Practices Act and the Unfair Practices Act. The Unfair Insurance Practices Act is not an exclusive statutory remedy for unfair insurance practices. State ex rel. Stratton v. Gurley Motor Co., 105 N.M. 803, 806, 737 P.2d 1180 (Ct. App.), cert. denied, 105 N.M. 781, 737 P.2d 893 (1987).

The two statutes provide different remedies. Under both the plaintiff may recover actual damages. However, the Unfair Practices Act also authorizes a treble award of damages upon a determination by "the trier of fact" that the defendant willfully engaged in the trade practice. The Committee has drafted no instruction for the treble damages remedy. Where the evidence would permit a finding of willful conduct, UJI 13-302E should be used to frame the contention of willful conduct as a related issue and special interrogatories or the special verdict form, Chapter 22, should be submitted to the jury on this issue. It remains in the discretion of the Court, as a matter of law, to impose treble damages justified by a finding of willful conduct. Section 57-12-10B, NMSA 1978. [Approved, effective November 1, 1991.]

ANNOTATIONS

Actual damages required — To obtain financial recovery under the Unfair Practices Act, the deceptive trade practice must have caused plaintiffs to suffer actual damages. Chavarria v. Fleetwood Retail Corp., 2005-NMCA-082, 137 N.M. 783, 115 P.3d 799, cert. granted, 2005-NMCERT-006.

13-1708. Breach of fiduciary duty - *No instruction drafted*.

No instruction drafted.

Committee comment. — While the relationship between insurer and insured imposes a fiduciary obligation on the insurer to deal with the insured in good faith in matters pertaining to performance of an insurance contract, no cause of action, apart from the action for bad faith, exists for the breach of this duty. Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976). The fiduciary obligation allows the award of punitive damages in insurance cases under a more relaxed standard. See UJI 13-1718; Romero v. Mervyn's, 109 N.M. 249, 255, 784 P.2d 992, 998 footnote 3 (1989).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Computation of net "loss" for which fidelity insurer is liable, 5 A.L.R.5th 132.

13-1709. Causation.

A cause of a loss is a factor which contributes to the loss and without which the loss would not have occurred. It need not be the only cause.

USE NOTE

This instruction must be given in every cause of action under Chapter 17.

[As amended, effective March 1, 2005.]

Committee comment. — At common law and under the statutory remedies of the Unfair Insurance Practices Act and the Unfair Practices Act, compensation is for the monetary losses actually caused by the prohibited conduct.

Conduct of the policyholder which violates the policyholder's obligation of honesty becomes a cause of the loss if the insurer acted in reliance upon such conduct. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was approved by a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendments substituted "causation" for "proximate cause" in the catchline, deleted "proximate" preceding "cause" in the instruction and committee comment.

13-1710. Affirmative defense; policyholder's dishonesty.

It is a duty of the holder of an insurance policy to deal honestly and fairly with the insurance company. Defendant contends that in [applying for insurance] [submitting a claim for insurance proceeds] [answering the insurance company's request for information] the plaintiff acted dishonestly and with the intention to deceive the defendant.

The Plaintiff may not recover under the "bad faith" claim if, with intent to deceive, [he] [she] dealt with the defendant dishonestly about a material fact. A material fact is one which a reasonably prudent insurer would regard as important in [issuing the policy] [evaluating the claim].

[Adopted, effective November 1, 1991.]

Committee comment. — The action for bad faith arises from breach of the implied covenant to deal honestly and fairly. UJI 13-1701. It is not an action grounded in negligence. Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., 102 N.M. 28, 690 P.2d 1022 (1984). The affirmative defense available to the insurer who has acted in bad faith or in violation of statutory obligations is the defense that the policyholder has acted dishonestly and unfairly in dealing with the company. The duty to deal fairly and honestly rests equally upon the insurer and the insured. Modisette v. Foundation

Reserve Ins. Co., 77 N.M. 661, 427 P.2d 21 (1967). This is a defense completely barring any recovery of compensatory and punitive damages. Such conduct vitiates the insurance policy. Jessen v. National Excess Insurance Co., 108 N.M. 625, 776 P.2d 1244 (1989).

The New Mexico Supreme Court has not determined whether actual reliance by the insurer upon the fraud or dishonesty of the insured is a required element of this affirmative defense. Thus, the Committee has taken no position on this issue. Relying upon the standard contractual language that concealment of fraud voids the policy, some courts have held that in defense of a breach of contract action proof of reliance is not required. See American Diver's Supply & Mfg. Corp. v. Boltz, 482 F.2d 795 (10th Cir. 1973). In the absence of a New Mexico appellate decision, the trial judge and counsel must predict whether reliance is a necessary element of the "dishonesty" defense raised by an insurer defending a bad faith cause of action. [Approved, effective November 1, 1991.]

13-1711. Affirmative defense; comparative fault - *No instruction drafted*.

No instruction drafted.

[Approved, effective November 1, 1991.]

Committee comment. — A material misrepresentation or dishonest conduct which is intended to deceive the insurance company will completely bar the insured's bad faith claim. UJI 13-1710. The action for bad faith arises from the equitable principles which give rise to the implied covenant of good faith and fair dealing. Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co., 102 N.M. 28, 690 P.2d 1022 (1984).

Where an insured has negligently failed to cooperate with an insurer's investigation or otherwise acted in a manner to support a defense of comparative fault, the New Mexico Supreme Court has not decided if a comparative fault instruction would be appropriate as a defense to a bad faith claim. See Jessen v. National Excess Ins. Co., 108 N.M. 625, 776 P.2d 1244, 1249 (1989). [Approved, effective November 1, 1991.]

13-1712. Compensatory damages; general.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have been proximately caused by the defendant's wrongful conduct as claimed:

(NOTE: Here insert the proper elements of damages using the instructions which immediately follow and any other proper elements applicable under the evidence.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTE

This instruction should be used in any cause of action under Chapter 17. The instructions which follow must be inserted where applicable under the evidence.

[Adopted, effective November 1, 1991.]

Committee comment. — The nature of the bad faith action determines the nature of the damages. Thus, where the action is for failure to pay policy proceeds, the primary loss is the amount recoverable under the policy, UJI 13-1713. Where the action is for failure to defend, the reasonable and necessary expenses incurred by the insured in conducting the defense are recoverable. UJI 13-1714. Lujan v. Gonzales, 84 N.M. 220, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972). [Approved, effective November 1, 1991.]

13-1713. Policy proceeds.

The amount payable by the insurance company under the terms of

_____

_____ ***(identify the particular policy or policy provision).***

USE NOTE

This element of damages must be included under UJI 13-1712 in every case where the plaintiff's claim is for bad faith failure to pay a first party claim, UJI 13-1702. The specific policy or policy provision at issue should be identified for the jury.

[Adopted, effective November 1, 1991.]

13-1714. Cost of defense.

The reasonable and necessary expenses of the plaintiff, including attorney fees, for defending the lawsuit against [him] [her].

USE NOTE

This element of damages must be included under UJI 13-1712 in every case where the plaintiff's claim is for bad faith failure to defend a liability claim, UJI 13-1703.

[Adopted, effective November 1, 1991.]

Committee comment. — Where an insurance company has acted in bad faith in refusing to defend a claim against its insured, the plaintiff is entitled to recover all reasonable and necessary costs of defense. Lujan v. Gonzales, 84 N.M. 220, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972).

13-1715. Indemnification.

The amount of any judgment against _____ *(plaintiff in this action)* in favor of _____ *(plaintiff in the other action).*

USE NOTE

This element of damages must be included under UJI 13-1712 in every case where the plaintiff's claim is for bad faith failure to defend or settle a liability claim against the insured and the defendant's conduct has proximately caused a judgment to be returned against the plaintiff. The name of the plaintiff and the plaintiff in the other action should be inserted in the blank to assist the jury's recognition of this damage element.

[Adopted, effective November 1, 1991.]

Committee comment. — The primary damage caused by the bad faith failure to settle a liability claim is the excess judgment rendered against the insured. An adverse judgment may also be the result of a bad faith failure to defend a liability claim. The damages are in the nature of indemnification for the insured's exposure and, under this element, are limited to the sum which the insured is obligated to pay individually over and above the recognized policy limits.

The plaintiff's recovery is for the amount of the judgment for which there is no insurance coverage agreed to by the defendant.

13-1716. Incidental and consequential loss.

The amount of any incidental or consequential loss to the plaintiff. Any damages found by you for this loss must be damages which the insurance company and the policyholder could reasonably have expected to be a consequence of the company's failure to perform its obligations under the insurance policy.

[Adopted, effective November 1, 1991.]

Committee comment. — The action for bad faith is in tort for the breach of an implied contractual obligation. The nature of the tort, arising from breach of contract, renders appropriate the limitation of recoverable damages to those reasonably contemplated by

the parties. State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 758, 527 P.2d 798 (1974). [Approved, effective November 1, 1991.]

13-1717. First party coverage; attorney fees - *No instruction drafted*.

No instruction drafted.

Committee comment. — In an action where the policyholder recovers on any type of first party coverage, the policyholder may be awarded reasonable attorney's fees. Section 39-2-1 NMSA 1978. This award is made by the trial court, not the jury, following the jury's verdict. To award attorney fees the trial judge, from the evidence presented at trial, must find that the insurer acted unreasonably in failing to pay the claim. See United Nuclear Corp. v. Allendale Mutual Ins. Co., 103 N.M. 480, 709 P.2d 649 (1985). [Approved, effective November 1, 1991.]

13-1718. Punitive damages.

If you find that plaintiff should recover compensatory damages for the bad faith actions of the insurance company, and you find that the conduct of the insurance company was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful or wanton, then you may award punitive damages.

["Reckless conduct" is the intentional doing of an act with utter indifference to the consequences.]

["Dishonest judgment" is a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured.]

["Malicious conduct" is the intentional doing of a wrongful act with knowledge that the act was wrongful.]

["Willful conduct" is the intentional doing of a wrongful act with knowledge that harm may result.]

["Wanton conduct" is the doing of an act with utter indifference to or conscious disregard for a person's rights.]

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice, taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the compensatory damages and injury.

USE NOTE

This instruction must ordinarily be given in every action under UJI 13-1702, 13-1703 and 13-1704 NMRA. The trial court may omit this instruction only in those circumstances in which the plaintiff fails to make a *prima facie* showing that the insurer's conduct exhibited a culpable mental state. Because this instruction is complete on the availability of punitive damages in insurance bad faith actions, UJI 13-1827 NMRA is unnecessary and should not be given in such cases.

[As amended, effective March 21, 2005.]

Committee comment. — Bad faith ordinarily will support an award of punitive damages. *See Sloan v. State Farm Mut. Automobile Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230; *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649, 654 (1985) and *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244, 1246 (1989). Where the insured has a cause of action under UJI 13-1707 NMRA for violation of the Unfair Practices Act the trial judge, upon a finding of willful engagement in the trade practice, may treble the actual damages awarded. Section 57-12-10 NMSA 1978. In the same action the insured may have a common law action for bad faith which requires instructing the jury on punitive damages. In the event of a trebling of damages by the trial judge and a verdict for punitive damages based upon the same conduct, the insured must elect between the two awards. To allow both statutory treble damages and punitive damages based upon the same conduct would be improper under the rule against duplication or double recovery. *Hale v. Basin Motor Company,* 110 N.M. 314, 795 P.2d 1006 (1990).

In *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989), the New Mexico Supreme Court considered whether an insurance company could be vicariously liable for the punitive damages recovered against an independent insurance adjuster which it had hired to investigate an accident. The court held that the independent contractor status of the adjuster did not relieve the insurer of liability. Id. 108 N.M. at 629, 776 P.2d at 1248. The court found the evidence in the case sufficient to support a finding of ratification, justifying an instruction under UJI 13-1826. The court further found sufficient evidence of an independent wrongful act by the insurer. However the court also considered that the duty of good faith dealing by parties to an insurance contract is a non-delegable duty, breach of which supports vicarious liability for punitive damages. The committee has not determined whether *Jessen* is a sufficient basis for instructing a jury that an insurer may be found vicariously liable for conduct of a third party justifying a recovery of punitive damages. Where an insurer has hired a third party to satisfy its contract obligations and the third party's conduct justifies an instruction on punitive damages, *Jessen* should be considered. [Revised, effective March 21, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 21, 2005, added in the middle of the first sentence "and you find that the conduct of the insurance company was in reckless

disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful or wanton" and added the definitions of "reckless conduct", "dishonest judgment", "malicious conduct", "wilfull conduct" and "wanton conduct". The 2005 amendment also revised the Use Note by adding "ordinarily" in the the first sentence and inserting the second sentence relating when this instruction may be omitted.

Application of instruction. — This instruction, authorizing the jury to award punitive damages, applies to common-law bad-faith actions, and not to violations of Article 16 of the Insurance Code. Hovet v. Allstate Ins. Co., 2004-NMSC-010, 135 N.M. 397, 89 P.3d 69.

Punitive damages instruction should be given in every common-law insurance-bad-faith case where the evidence supports a finding either in failure-to-pay cases, that the insurer failed or refused to pay a claim for reasons that were frivolous or unfounded, or in failure-to-settle cases, that the insurer's failure or refusal to settle was based on a dishonest or unfair balancing of interests. Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

Punitive damages instruction is warranted where a jury could conclude that the insurer may have exercised less than honest judgment or that it did not give equal consideration to its interests and that of the insured. Sloan v. State Farm Mut. Auto. Ins. Co., ____F.3d____(10th Cir. 2004).

Trial court has discretion to withhold punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages. Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

Where the trial court determines, based on the evidence marshaled at trial, that no reasonable jury could find the insurer's conduct to have manifested a culpable mental state, then the trial court may withhold the giving of a punitive-damages instruction. Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

CHAPTER 18
Damages

Introduction

Instructions on damages follow as a matter of course in all cases wherein an issue is submitted to a jury on the recovery of damages.

These instructions are arranged so that there are several groups of instructions. UJI 13-1801 should be used in all cases when the jury is instructed on damages. UJI 13-1802 is the general instruction on damages which will be used in all cases where the

measure of damages, as to both person and property, is for the determination of the jury. A separate instruction for wrongful death, UJI 13-1830, is complete in itself.

Trial counsel is charged with the duty of submitting to the court the damages instructions which are applicable under the circumstances of each case. The instructions are grouped by subject matter with the first group involving instructions on damages applicable in personal injury cases. The second grouping of damages instructions pertains to damage to property - both personal and real. The third group of instructions is assembled under the heading of miscellaneous matters. In this group are also included the instructions on punitive damages, contribution among joint tortfeasors and judgment over in case of vicarious liability. The last grouping is for wrongful death.

[As amended, effective November 1, 1991.]

13-1801. Liability must be determined before damages.

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

USE NOTE

This instruction should be given in every case where the jury is permitted to assess damages.

This instruction should precede all damages instructions.

Committee comment. — Experience has proven that the deliberations of a jury will be expedited if they clearly understand this rule of law.

In personal injury litigation, it is generally recognized that the jury favors the plaintiff from the outset of the case due to various reasons, the least of which is not sympathy. It is further recognized that the rule of law which states that the defendant is presumed innocent and that the burden of proof is upon the plaintiff, in actual practice before a jury is a myth. Therefore, it is the duty of the trial court to give clear admonitions to the jury in an attempt to give meaning to the rule of law.

This instruction has been cited in the following cases reported by the New Mexico appellate courts, to wit: Higgins v. Hermes, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); Webb v. Webb, 87 N.M. 353, 533 P.2d 586 (1975); Demers v. Gerety, 87 N.M. 52, 529 P.2d 278 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974); Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973); Tafoya v. Whitson,

83 N.M. 23, 487 P.2d 1093 (Ct. App.), cert. denied, 83 N.M. 22, 487 P.2d 1092 (1971); Clinard v. Southern Pac. Co., 82 N.M. 55, 475 P.2d 321 (1970); Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

This instruction, if properly understood, should speed the jury in their job and facilitate the administration of justice.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 177 et seq.

Liability and damages are separate aspects of verdict. — A verdict in a civil damage action has two separate aspects - liability and the amount of damages - and there is a broad distinction between the two. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

Failure to instruct constituting harmless error. — Where the trial court gave an instruction in accordance with UJI 13-1801 in a wrongful death and medical malpractice action, but failed to give an instruction based on UJI 13-2008 (no damages unless liability), the error was harmless, in view of the court's use of the similar language contained in UJI 13-1830 in charging the jury. Sutherlin v. Fenenga, 111 N.M. 767, 810 P.2d 353 (Ct. App. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial §§ 138 to 140.

Necessity of determination or showing of liability for punitive damages before discovery or reception of evidence of defendant's wealth, 32 A.L.R.4th 432.

88 C.J.S. Trial § 297.

Part A
Personal Injury Damages; Elements

13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed:

_____

_____.

**(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements*

***applicable under the proven facts and the particular law governing the specific circumstances.*)**

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, plaintiff was already impaired by a physical or emotional condition, plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact plaintiff may have been unusually susceptible to injury or likely to be harmed. The defendant is said to "take the plaintiff as he finds [him] [her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

Your verdict must be based upon proof and not upon speculation, guess or conjecture. Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

USE NOTE

This instruction is not complete in and of itself but this is the basic form of instruction to be utilized in all cases involving damages.

The pronoun will need to be changed in some instances. Likewise, the plural will need to be added in other instances when multiple parties are involved.

This instruction is not applicable in wrongful death cases. *See* UJI 13-1830.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — The attorney for the plaintiff, in submitting instructions to the court, is charged with the duty of supplying the necessary elements of damages to be placed in the blank.

A damages issue predicated on conjecture, guess, surmise or speculation should not be given to the jury. *Hebenstreit v. Atchison*, T. & S.F. Ry., 65 N.M. 301, 336 P.2d 1057 (1959). This instruction has been before the New Mexico appellate courts in the following cases: *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976); *Boulden v. Britton*, 86 N.M. 775, 527 P.2d 1087 (Ct. App. 1974), rev'd on other grounds, 87 N.M. 474, 535 P.2d 1325 (1975); *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 141, 520 P.2d 869 (1974); *Francis v. Johnson*, 81 N.M. 648, 471 P.2d 682 (Ct. App. 1970).

The bracketed language addresses what was formerly considered under UJI Civil 13-1808 which has been withdrawn. Former UJI Civil 13-1808 addressed the aggravation of preexisting condition and the situation in which a plaintiff has a completely asymptomatic condition or disease, the "egg shell plaintiff". When the evidence shows that the plaintiff was experiencing symptoms from a preexisting condition and the same has been aggravated as a result of the injury and the extent of the aggravation is proved, the bracketed portion of the instruction is proper. The New Mexico case of ***Hebenstreit v. Atchison*, T. & S.F. Ry., 65 N.M. 301, 336 P.2d 1057 (1959)**, cites cases from other jurisdictions and holds that in tort cases the plaintiff must prove the extent of aggravation of a preexisting condition with reasonable certainty, otherwise the issue should not go to the jury. ***See also Britton v. Boulden*, 87 N.M. 474, 535 P.2d 1325 (1975); *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct.App. 1974); *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 141, 520 P.2d 869 (1974)**. In order to get the issue to the jury, plaintiff must prove the aggravation by medical evidence.

New Mexico also recognizes "the eggshell Plaintiff" where the victim has an underlying condition, which increases the victim's susceptibility or pre-disposition to injury. *See Thomas v. Henson*, 102 N.M. 417, 424, 696 P.2d 1010, 1017 (Ct. App. 1984) rev'd on other grounds 102 N.M. 326, 695 P.2d 476 (1985); *City of Roswell v. Davenport*, 14 N.M. 91 (1907); *Boulden v. Britton*, 86 N.M. 775, 527 P.2d 1087 (Ct. App. 1974). It is important to instruct the jury on the rule which deems the injury and not the dormant condition, as the cause of Plaintiff's damages. *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962). [Revised, effective March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first paragraph.

The 2005 amendment, effective March 1, 2005, inserted "with preexisting conditions" in the catchline and all of the second paragraph except the first sentence. The last two paragraphs of the committee commentary were also added in 2005.

Library references. — 25A C.J.S. Damages §§ 181, 185.

Plaintiff must prove injuries and damages with reasonable certainty. — A party seeking to recover damages has the burden of proving the existence of injuries and resulting damage with reasonable certainty. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

Where an owner presented no evidence of actual loss in value or of increased costs resulting from the interference with his property through a wrongful lis pendens filing, the property owner's damages cannot be quantified this way, and the trial court did not abuse its discretion in awarding only nominal damages. Ruiz v. Varan, 110 N.M. 478, 797 P.2d 267 (1990).

Conjecture, guess, surmise or speculation is improper basis for award. — A valid judgment cannot be entered on a jury verdict which is neither specific nor definite as to the damages award. An award of damages predicated upon conjecture, guess, surmise or speculation is improper. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

Damages from agent's failure to procure fire insurance. — The correct measure of damages in an action against an insurance agent based on a claim of failure to procure fire insurance is the amount that would have been due under the policy which should have been obtained. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

Law reviews. — For article, "Loss", see 35 N.M.L. Rev. 375 (2005).

For article, "Examining the Spectrum of Noneconomic Harm: An Introduction", see 35 N.M.L. Rev. 391 (2005).

For article, "Making the System Work, Better: Improving the Process for Determination of Noneconomic Loss", see 35 N.M.L. Rev. 401 (2005).

For article, "The Value of Life and Loss of Enjoyment of Life Damages from an Economist's Perspective", see 35 N.M.L. Rev. 419 (2005).

For article, "I Think, Therefore I Am; I Feel, Therefore, I am Taxed: Descartes, Tort Reform, and the Civil Rights Tax relief Act", see 35 N.M.L. Rev. 429 (2005).

For article, "Panel Discussion: Translating Theory into Practice: The Valuation of Noneconomic Damages in Real Life", see 35 N.M.L. Rev. 449 (2005).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 346.

Measure and elements of damages in action against garageman based on failure to properly perform repair or service on motor vehicle, 1 A.L.R.4th 347.

Per diem or similar mathematical basis for fixing damages for pain and suffering, 3 A.L.R.4th 940.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 A.L.R.4th 891.

Excessiveness or adequacy of damages awarded for injuries to arms and hands, 12 A.L.R.4th 96.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sexual organs and processes, 13 A.L.R.4th 183.

Excessiveness or adequacy of damages awarded for injuries to legs and feet, 13 A.L.R.4th 212.

Extent of liability of seller of livestock infected with communicable disease, 14 A.L.R.4th 1096.

Excessiveness or adequacy of damages awarded for injuries to back, neck or spine, 15 A.L.R.4th 294.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, respiratory system, 15 A.L.R.4th 519.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries, 16 A.L.R.4th 238.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 16 A.L.R.4th 589.

Excessiveness or adequacy of damages awarded for injuries causing particular diseases or conditions, 16 A.L.R.4th 736.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sensory or speech organs and systems, 16 A.L.R.4th 1127.

Effect of anticipated inflation on damages for future losses - modern cases, 21 A.L.R.4th 21.

Business interruption, without physical damage, as actionable, 65 A.L.R.4th 1126.

Medical malpractice: measure and elements of damages in actions based on loss of chance, 81 A.L.R.4th 485.

Sufficiency of evidence to prove future medical expenses as result of injury to back, neck, or spine, 26 A.L.R.5th 401.

Propriety and prejudicial effect of attorney's "Golden Rule" argument to jury in federal civil case, 68 A.L.R. Fed. 333.

25A C.J.S. Damages § 179.

13-1802A. Measure of the loss of a chance.

Provided, however, for the loss of a chance for [a better outcome to a medical problem], [survival], [_____ *(other)*], while you must (1) first determine total damages for the [loss of limb], [loss of life], [_____ *(other)*] under the above-listed elements, you then must (2) base your award on a

percentage representing the lost opportunity to avoid [loss of limb], [loss of life], [_____ *(other)*]. The valuation of lost chances is necessarily imprecise; the value of the loss may be established by fair approximations, by numbers or verbal descriptions, from which you will arrive at a percentage to apply to the total damages.

USE NOTE

This instruction provides the measure of damages where plaintiff alleges defendant's negligence resulted in a lost opportunity to obtain a better outcome from a preexisting condition. When loss of a chance is an issue to be determined by the jury, this instruction must be included in the general measure of damages instruction, UJI 13-1802, following the listing of the elements of damages plaintiff is entitled to recover.

[Approved, effective March 20, 2000.]

Committee commentary. — New Mexico recognizes the loss of a chance as a theory of recovery. See *Baer v. Regents of University of California*, 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9; *Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279. Damages for loss of a chance are a percentage of plaintiff's total loss. Both *Baer v. Regents of University of California* and *Alberts v. Schultz* make clear that the valuation of loss of a chance is not a mathematical certainty. Rather, the value of the lost chance may be established by fair approximations based on the evidence. The form of the testimony on the value of the lost chance may be either numerically or verbally descriptive. What is important is not the verbal or numeric nature of the fair approximation by the testifying witnesses, but rather the underlying testimony and evidence supporting the fair approximations.

Two exemplar sets of instructions are set out as appendices at the end of Chapter 16. These sample instructions illustrate two alternative methods for instructing the jury depending on the evidence and provide examples of how the jury should be instructed on the measure of damages for the loss of a chance.

ANNOTATIONS

Law reviews. — For note, "The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance - *Alberts v. Schultz,*" see 30 N.M.L. Rev. 387 (2000).

13-1802B. Suit against original tortfeasor; divisibility of injuries not in dispute; medical treatment.

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

USE NOTES

This instruction, intended to be a part of UJI 13-1802 NMRA, is to be given in a successive tortfeasor case where the successive tortfeasor is not a party and the court determines that the tortfeasor responsible for the original injury is also liable for the additional harm caused by subsequent medical treatment for the original injury. If, however, an enhanced injury is so remote in time or likelihood that its foreseeability may not be presumed as a matter of law, the jury would be required to determine the forseeability of the injury before attributing the total damages to the original tortfeasor. *See* Lewis v. Samson, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972.

[Approved by Supreme Court Order 07-8300-36, effective February 1, 2008.]

ANNOTATIONS

Cross references. — For several liability, *see* 41-3A-1 NMSA 1978.

Successive torfeasor exception. — Where tortfeasor and other defendants were involved in a chain reaction automobile accident, the fact that there were multiple and separate collisions is not enough by itself to establish successive tortfeasor liability and the lapse of time between the various chain reaction impacts is not enough to deem the other defendants successive tortfeasors. Gulf Ins. Co. v. Cottone, 2006-NMCA-150, 140 N.M. 728, 148 P.3d 814.

Test for successive or concurrent tortfeasors. — Several factors are relevant in determining whether tortfeasors are successive or concurrent. These factors include: 1) the identity of time and place between the acts of alleged negligence; 2) the nature of the cause of action brought against each defendant; 3) the similarity or differences in the evidence relevant to the causes of action; 4) the nature of the duties allegedly breached by each defendant; and 5) the nature of the harm or damages caused by each defendant. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

Elements of successive tortfeasor liability. — Under successive tortfeasor liability theory, a plaintiff must prove that a first injury is caused by an original tortfeasor and that that injury then casually led to a second distinct injury, or a distinct enhancement of the first injury, caused by a successive tortfeasor. Payne v. Hall, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599.

Successive tortfeasors. — Government-owned hospital that misdiagnosed the decedent's condition first and another hospital that misdiagnosed it days later were successive tortfeasors where the hospitals' alleged negligence occurred days apart from one another and in different locations, the decedent's hantavirus symptoms were more severe when he presented himself to the second hospital than they were when he went to the government-owned hospital, and the duty owed by the hospitals differed because of the advanced state of the decedent's condition. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

Successive tortfeasor liability jury instruction. — Jury instruction that "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by the subsequent medical treatment, if any" properly set forth successive tortfeasor liability. Payne v. Hall, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599.

Burden of proof in subsequent medical negligence. — In claims against a subsequent medical tortfeasor the standard adopted in Lujan v. Healthsouth Rehabiltation Corp., 120 N.M. 422, 902 P.2d 1025 (1995) applies: the plaintiff must prove 1) that the successive tortfeasor's negligence resulted in injuries separate from and in addition to the injuries caused from the initial tort, and 2) the degree of enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent physician's negligence. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

13-1802C. Successive tortfeasor only defendant; no question for jury on divisibility of injuries.

In this case, the plaintiff says and has the burden of proving by the greater weight of the evidence that _____ (*one or more successive tortfeasors*) caused injuries that were separate and distinct from, or that caused a measurable worsening of, injuries the plaintiff received from _____ (*the original injury*).

In determining what damages, if any, were caused by _____ (*the successive tortfeasor or tortfeasors*), you should award the plaintiff compensation only for [the separate injury caused by _____ (*the successive tortfeasor or tortfeasors*)] [the measurable worsening of the plaintiff's condition caused by _____ (*the successive tortfeasor or tortfeasors*)] [harm that would have been avoided had _____ (*the successive tortfeasor or tortfeasors*) [not been negligent][acted within the standard of care]], but not for damages from _____ (*the first or original injury*).

USE NOTES

This instruction, intended to be a part of UJI 13-1802 NMRA, should be used when there is no disagreement, or the court determines as a matter of law, that the successive tortfeasor, if liable, caused a separate or causally distinct injury and where the suit is brought only against alleged successive tortfeasors. When there is no jury question regarding divisibility of injuries and there are potential original and successive tortfeasors present, the trial court should use UJI 13-1802D NMRA in place of this instruction. This instruction should not be used in those cases presenting only an issue of preexisting injury but not involving successive torts. In those cases, the general language of UJI 13-1802 and the separate instruction on preexisting condition, UJI 13-1808 NMRA, provide guidance to the jury.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as "successive tortfeasor" and "original injury," which likely have little meaning to the jury.

[Approved by Supreme Court Order 07-8300-36, effective February 1, 2008.]

Committee commentary. — The need to instruct the jury on successive tortfeasor principles arises when, as a result of a course of events set in motion by one tortfeasor, an intervening act or omission of another causes injury "which can be causally apportioned on the basis [of] distinct harms." Paragraph D of Section 41-3A-1 NMSA 1978. "Because successive-tortfeasor liability is an exception to the general rule of several liability among concurrent tortfeasors, the doctrine is limited to a `narrow class of cases', in which a plaintiff can show more than one distinct injury successively caused by more than one tortfeasor." Payne v. Hall, 2006-NMSC-029, ¶ 36, 139 N.M. 659, 137 P.3d 599. In those cases where the parties stipulate, or the court determines as a matter of law that any injury caused by the defendant is either separate or causally distinct from injuries caused by the original tortfeasor or rendered the original injuries measurably worse, then there is no need to instruct the jury on the divisibility of injuries or the placement of the burden of proving distinct or enhanced injuries. In such cases, the damages instructions should focus the jury's attention on the distinct or enhanced injuries caused by the defendant's act or omission.

Throughout the successive tortfeasor instructions, the committee elected to use the terms "successive tortfeasor" and "original tortfeasor" to distinguish between types of defendants, even though the terms are being applied to defendants before any determination that any of them are liable for causing any injury. While it may not be technically correct to employ such terms prior to a determination of liability, the terms are employed for convenience and should be replaced with the names of the parties in the final instructions given to the jury.

Cross references. — For several liability, *see* 41-3A-1 NMSA 1978.

ANNOTATIONS

Successive torfeasor exception. — Where tortfeasor and other defendants were involved in a chain reaction automobile accident, the fact that there were multiple and separate collisions is not enough by itself to establish successive tortfeasor liability and the lapse of time between the various chain reaction impacts is not enough to deem the other defendants successive tortfeasors. Gulf Ins. Co. v. Cottone, 2006-NMCA-150, 140 N.M. 728, 148 P.3d 814.

Burden of proof in subsequent medical negligence. — In claims against a subsequent medical tortfeasor the standard adopted in Lujan v. Healthsouth Rehabiltation Corp., 120 N.M. 422, 902 P.2d 1025 (1995) applies: the plaintiff must prove 1) that the successive tortfeasor's negligence resulted in injuries separate from and in addition to the injuries caused from the initial tort, and 2) the degree of

enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent physician's negligence. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

Test for successive or concurrent tortfeasors. — Several factors are relevant in determining whether tortfeasors are successive or concurrent. These factors include: 1) the identity of time and place between the acts of alleged negligence; 2) the nature of the cause of action brought against each defendant; 3) the similarity or differences in the evidence relevant to the causes of action; 4) the nature of the duties allegedly breached by each defendant; and 5) the nature of the harm or damages caused by each defendant. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

13-1802D. Successive tortfeasors; divisibility of injury not in dispute or decided as a matter of law.

In this case, if you find that _____ (*one or more original tortfeasors*) [was] [were] negligent and caused injury to the plaintiff, and _____ (one or more successive tortfeasors) [was] [were] negligent and caused injury to the plaintiff, you will first decide the amount of damages from _____ (*the original injury*) and you will then decide the amount of damages from _____ (*the successive injury*).

You will next compare the negligence of each person whose [negligence] [fault] contributed to the first injury. You will then compare the negligence of each person whose [negligence] [fault] contributed to the second injury.

USE NOTES

This instruction is to be given in a successive tortfeasor case where the court determines or the parties agree that the case involves separate and distinct injuries and the case includes defendants who are potential original and successive tortfeasors.

These instructions should be customized to refer to injuries and parties. The last paragraph of this instruction should be modified or deleted when there is only one original or only one successive tortfeasor and it is not necessary to compare negligence. The instructions should avoid the use of legal terms such as "successive tortfeasor" and "original injury," which likely have little meaning to the jury.

In drafting the verdict form, attorneys should take care that (1) the jury does not compare the negligence of tortfeasors who caused the original injury with the negligence of the tortfeasors who caused the second injury and (2) damages are separately determined. These principles are reflected in the exemplar verdict forms appearing in the Appendix.

[Approved by Supreme Court Order 07-8300-36, effective February 1, 2008.]

ANNOTATIONS

Cross references. — For several liability, *see* 41-3A-1 NMSA 1978.

For the appendix referred to in the use note, *see* UJI Civil Appendix, Chapter 18 NMRA.

Successive tortfeasor liability jury instruction. — Jury instruction that "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by the subsequent medical treatment, if any" properly set forth successive tortfeasor liability. Payne v. Hall, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599.

Burden of proof in subsequent medical negligence. — In claims against a subsequent medical tortfeasor the standard adopted in Lujan v. Healthsouth Rehabiltation Corp., 120 N.M. 422, 902 P.2d 1025 (1995) applies: the plaintiff must prove 1) that the successive tortfeasor's negligence resulted in injuries separate from and in addition to the injuries caused from the initial tort, and 2) the degree of enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent physician's negligence. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

13-1802E. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that _____ (*one or more original tortfeasors*) negligently caused injury to the plaintiff and _____ (*one or more successive tortfeasors*) negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff's injuries are divisible; or, in other words, whether the negligence of _____:

Alternative A: the _____ (*successive tortfeasors*) caused a separate injury or made the original injury measurably worse.

Alternative B: the _____(*original tortfeasor(s)*) caused an injury that is separate, in nature or extent, from the injury(ies) caused by _____ (*the successive tortfeasors*).

If you find that the plaintiff's injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the injuries and each defendant will be responsible for its proportionate share of the plaintiff's damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose [negligence/fault] contributed to _____ (*the first injury*) and then compare the negligence of each person whose [negligence/fault] contributed to _____ (*the second injury*).

_____ says that the plaintiff received injuries caused by [_____ (*the original tortfeasor or tortfeasors*)] [_____ (*the successive tortfeasor or tortfeasors*)] that are distinct from injuries caused by [_____ (*the original tortfeasor or tortfeasors*)] _____ therefore bears the burden of proving, by the greater weight of the evidence, both that the plaintiff received [an original injury] [a second injury] that is separate and distinct from [a second injury or from enhanced injuries] [the original injury] and the amount of damages and injuries from the separate injuries.

USE NOTES

This instruction should be given when successive torts are at issue and the jury is to decide whether the plaintiff has suffered divisible injuries.

When suit is brought only against the original tortfeasor, this instruction should be drafted using "Alternative B" to ask the jury to determine whether the original tortfeasor caused injury that is separate and causally-distinct from any injury caused by the successive tortfeasor. *See* Payne v. Hall, 2006-NMSC-028, 139 N.M. 659, 137 P.3d 599. However, in other cases, the issue will be framed using "Alternative A" as whether the successive tortfeasor caused an injury that is separate and distinct from an injury caused by the original tortfeasor. This issue is for the trial court. Accordingly, the terms "original" and "successive," describing the tortfeasors, are bracketed so that the order may be changed, depending on the trial court's determination of how to frame the question of divisibility.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as "successive tortfeasor" and "original injury," which likely have little meaning to the jury.

In drafting the verdict form, attorneys should take care that (1) the jury does not compare the negligence of tortfeasors who caused the original injury with the negligence of the tortfeasors who caused the second injury and (2) damages are separately determined. These principles are reflected in the exemplar verdict forms appearing in the Appendix. The fourth paragraph of this instruction should be modified or deleted when there is only one successive tortfeasor and it is not necessary to compare negligence.

[Approved by Supreme Court Order 07-8300-36, effective February 1, 2008.]

Committee comment. — When there is conflicting evidence whether the plaintiff suffered injuries that may be separate and distinct, the jury must be permitted to decide the issue. Payne v. Hall, 2006-NMSC-029, ¶ 43, 139 N.M. 659, 137 P.3d 599 ("[W]hen the existence of causally-distinct, divisible injuries is not clear, then the question should be given to the jury to decide."). If the injuries are divisible, the original tortfeasor is jointly and severally liable both for the original injury and for the subsequent injuries; the successive tortfeasor is liable only for the successive injury; and the original tortfeasor

may be entitled to indemnification or comparative contribution from the successive tortfeasor. Lujan v. Healthsouth Rehabilitation Corp., 120 N.M. 422, 427, 902 P.3d 1025,1030 (1995) ("In cases involving successive tortfeasors whose separate causal contributions to the plaintiff's harm can be measured, the doctrine of joint and several liability applies ... to the enhanced portion of the injury."); Lewis v. Samson, 2001-NMSC-035, ¶ 14, 131 N.M. 317, 35 P.3d 972 (determining medical provider would be liable for the entirety of an enhanced injury when the plaintiff successfully demonstrated an enhanced injury and the degree of enhancement). This instruction is written on the assumption that the trial court will place the burden of proving divisible injuries on the party asserting divisibility, but the law on this point is not perfectly clear. *See* Couch v. Astec Indus., Inc., 2002-NMCA-084, ¶ 34,132 N.M. 631, 53 P.3d 398 (assuming without deciding that the plaintiff asserting enhanced injury bore burden of proof on the issue); Lewis v. Samson, 1999-NMCA-145, ¶ 83, 128 N.M. 269, 992 P.2d 282 (Hartz, J., dissenting) (noting that who bears the burden of proving enhanced damages is not clear under New Mexico law), *rev'd on other grounds* by 2001-NMSC-035.

Cross references. — For several liability, *see* 41-3A-1 NMSA 1978.

ANNOTATIONS

Successive torfeasor exception. — Where tortfeasor and other defendants were involved in a chain reaction automobile accident, the fact that there were multiple and separate collisions is not enough by itself to establish successive tortfeasor liability and the lapse of time between the various chain reaction impacts is not enough to deem the other defendants successive tortfeasors. Gulf Ins. Co. v. Cottone, 2006-NMCA-150, 140 N.M. 728, 148 P.3d 814

Burden of proof in subsequent medical negligence. — In claims against a subsequent medical tortfeasor the standard adopted in Lujan v. Healthsouth Rehabiltation Corp., 120 N.M. 422, 902 P.2d 1025 (1995) applies: the plaintiff must prove 1) that the successive tortfeasor's negligence resulted in injuries separate from and in addition to the injuries caused from the initial tort, and 2) the degree of enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent physician's negligence. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

Test for successive or concurrent tortfeasors. — Several factors are relevant in determining whether tortfeasors are successive or concurrent. These factors include: 1) the identity of time and place between the acts of alleged negligence; 2) the nature of the cause of action brought against each defendant; 3) the similarity or differences in the evidence relevant to the causes of action; 4) the nature of the duties allegedly breached by each defendant; and 5) the nature of the harm or damages caused by each defendant. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

13-1803. Earnings.

The value of lost earnings [and the present cash value of earning capacity reasonably certain to be lost in the future].

USE NOTE

This instruction is to be used in conjunction with UJI 13-1802. Standing alone the instruction is not complete.

The first part of the instruction is to be used for lost earnings to date of trial and, when there is an issue supported by the evidence concerning lost earning capacity in the future, then the bracketed material is to be used.

When future damages are involved, the jury will need to be instructed with reference to discounting present dollars in order to arrive at the "present cash value".

Committee comment. — Loss of earnings of a minor during minority belong to the parent or legal guardian and are not a proper element of damages for the minor. A minor plaintiff is entitled only to those lost earnings which accrue after majority. A separate instruction is included in this chapter on that matter.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 185.

Evidence sufficient for instruction. — Testimony of plaintiff in a personal injury case that since the accident she had not been able to perform her usual occupation of housework for pay because of headaches and pain, along with that of experts who testified that they found objective evidence of pathology, was sufficient evidence to justify the instruction on loss of future earning capacity. Selgado v. Commercial Whse. Co., 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974).

Earnings of crime victims. — Earnings are properly includable within "actual damages" to be awarded crime victims, as contemplated by 31-17-1A(2) NMSA 1978. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 356.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

13-1804. Medical expense.

The reasonable expense of necessary medical care, treatment and services received [including prosthetic devices and cosmetic aids] [and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future].

USE NOTE

This instruction is again a part of UJI 13-1802 and is to be inserted in the blank in UJI 13-1802 in the proper case. In addition, include the bracketed material which relates to future medical expenses where proper. There must be adequate evidence that such expenses are reasonably certain to be incurred.

As to "present cash value" use UJI 13-1822.

Committee comment. — This instruction was cited in the case of Vaca v. Whitaker, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974). [As amended, effective November 1, 1991.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 355.

Measure of damages for loss of earning capacity of person engaged in business for himself, 9 A.L.R. 510, 27 A.L.R. 430, 63 A.L.R. 142, 122 A.L.R. 297.

Medical expenses as item of damages in action for personal injury resulting in death, 54 A.L.R. 1077.

Damages on account of loss of earnings or impairment of earning capacity due to wife's personal injury as recoverable by her or by her husband, 151 A.L.R. 479.

Sufficiency of evidence in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Damages on account of medical expenses, past or future, due to injury to wife, as recoverable by her or by the husband, 21 A.L.R.3d 1113.

Sufficiency of evidence to prove future medical expenses as result of injury to back, neck, or spine, 26 A.L.R.5th 401.

13-1805. Nonmedical expense.

The reasonable value of necessary nonmedical expenses which have been required as a result of the injury [and the present cash value of such nonmedical expenses reasonably certain to be required in the future].

USE NOTE

Under proper circumstances, this instruction is to be included in the blank in UJI 13-1802. It is not every case where the bracketed material will be used. If the bracketed material is used, then UJI 13-1822 on present cash value must also be used.

Committee comment. — If the plaintiff has sustained injuries which require caretaking expenses, then such expense is a proper element of damages when plaintiff has proved that the expense has been incurred and the reasonable value thereof. Mere inconvenience is not a proper element of damages. [As amended, effective November 1, 1991.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 355.

Damages in action for personal injuries or death as including value of care and nursing necessitated by the injury, rendered by one to another or by a third person gratuitously or as a result of hospitalization insurance previously carried, 90 A.L.R.2d 1323.

13-1806. Nature, extent, duration.

The nature, extent and duration of the injury [including disfigurement].

USE NOTE

This instruction is to be used as part of UJI 13-1802 and, when applicable, is to be inserted following the first paragraph of the instruction. Of course, the bracketed material will only be given to the jury when the evidence warrants.

Committee comment. — There seems to be no question in the adjudicated cases that, in the proper circumstances, an instruction referring to the nature, extent and duration of the injury is a proper element for the jury to consider.

This instruction was cited by the New Mexico Court of Appeals in the case of Vaca v. Whitaker, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974), and Demers v. Gerety, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd, 86 N.M. 141, 520 P.2d 869 (1974).

ANNOTATIONS

Library references. — 25A C.J.S. Damages §§ 181, 185.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 11, 86.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sexual organs and processes, 13 A.L.R.4th 183.

Excessiveness or adequacy of damages awarded for injuries to legs and feet, 13 A.L.R.4th 212.

Excessiveness or adequacy of damages awarded for injuries to back, neck or spine, 15 A.L.R.4th 294.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, respiratory system, 15 A.L.R.4th 519.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries, 16 A.L.R.4th 238.

Excessiveness or adequacy of damages awarded for injuries causing particular diseases or conditions, 16 A.L.R.4th 736.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sensory or speech organs and systems, 16 A.L.R.4th 1127.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent, 61 A.L.R.4th 251.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 A.L.R.4th 309.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child, 61 A.L.R.4th 413.

Excessiveness or adequacy of damages awarded for injuries to head or brain, 50 A.L.R.5th 1.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system, 51 A.L.R.5th 467.

13-1807. Pain and suffering.

The pain and suffering experienced [and reasonably certain to be experienced in the future] as a result of the injury.

The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiff with fairness to all parties to this action.

USE NOTE

This is another portion of the general damages instruction that is to be inserted in the appropriate blank in UJI 13-1802 in the proper case.

Committee comment. — Pain and suffering are proper elements of damages in a personal injury action. This matter was before the New Mexico Court of Appeals in 1974 in the case of Vaca v. Whitaker, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974).

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 185.

No standard is fixed by law for measuring the value of pain and suffering; rather, the amount to be awarded is left to the jury's judgment. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Compensable pain and suffering from injuries to the brain extends far beyond that suffered at the time the initial injury occurs. Hoskie v. United States, 666 F.2d 1353 (10th Cir. 1981).

Recoverable under parental liability statute. — Pain and suffering is an actual damage recoverable under the parental liability statute, 32A-2-27 NMSA 1978. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

For two-pronged approach for proof of future pain and suffering, see Rael v. F & S Co., 94 N.M. 507, 612 P.2d 1318 (Ct. App. 1979).

Admissions. — Defense counsel's statement to the jury in closing argument that defendants were responsible for plaintiff's pain resulting from an accident, but that the jury should decide "what that should be," was not a judicial admission by defendant concerning the amount of damages. Baxter v. Gannaway, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

Standard of review of award. — As a general rule, unless it appears that the amount awarded for pain and suffering is so grossly out of proportion to the injury received as to shock the conscience, an appellate court is precluded from substituting its judgment for that of the fact finder. Additionally, an appellate court will not disturb a trial court's award for pain and suffering unless it appears from the record that the award was influenced by partiality, prejudice, corruption, or a mistaken view of the evidence. Sheraden v. Black, 107 N.M. 76, 752 P.2d 791 (Ct. App. 1988).

Amount awarded generally not reviewable. — In every case of personal injury, a wide latitude is allowed for the exercise of the judgment of the jury; and, unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience, an appellate court cannot substitute its judgment for that of the jury. Grammer v. Kohlhaas Tank & Equip. Co., 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979).

Pain and suffering award upheld. — Appellate court sustained an award of $83.00 for pain and suffering on the grounds that it was not the duty of the appellate court to evaluate the value of pain and suffering and because the amount in this case was not so unrelated to the evidence as to shock the conscience of the court. Baxter v. Gannaway, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

Review of award where mistake committed. — Where the reviewing court is left with the definite and firm conviction that a mistake has been committed, resulting in an inadequate award, the trial court's award will be remanded for recomputation. Hoskie v. United States, 666 F.2d 1353 (10th Cir. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 350 to 353.

Future pain and suffering as element of damages for physical injury, 81 A.L.R. 423.

Instructions regarding measurement of damages for pain and suffering, 85 A.L.R. 1010.

Per diem or similar mathematical basis for fixing damages for pain and suffering, 3 A.L.R.4th 940.

Excessiveness or adequacy of damages awarded for injuries causing particular diseases or conditions, 16 A.L.R.4th 736.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sensory or speech organs and systems, 16 A.L.R.4th 1127.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent, 61 A.L.R.4th 251.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child, 61 A.L.R.4th 413.

Recoverability of compensatory damages for mental anguish or emotional distress for tortiously causing another's birth, 74 A.L.R.4th 798.

13-1808. Aggravation of preexisting condition.

The aggravation of any preexisting ailment or condition, but you may allow damages only for the aggravation itself and not for the preexisting ailment or condition.

USE NOTE

When the evidence shows that the plaintiff was suffering from a preexisting condition and the same has been aggravated as a result of the injury and the extent of the aggravation is proved, this instruction is proper. This is a portion of the general damages instruction to be inserted in the blank in UJI 13-1802 when appropriate.

Committee comment. — The law recognizes "aggravation" as a separate element of compensable damages.

The New Mexico case of Hebenstreit v. Atchison, T. & S.F. Ry., 65 N.M. 301, 336 P.2d 1057 (1959), cites cases from other jurisdictions and holds that in tort cases the plaintiff must prove the extent of aggravation of a preexisting condition with reasonable certainty, otherwise the issue should not go to the jury. Also see Britton v. Boulden, 87 N.M. 474, 535 P.2d 1325 (1975); Vaca v. Whitaker, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974); Demers v. Gerety, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 141, 520 P.2d 869 (1974).

In order to get the issue to the jury, plaintiff must prove the aggravation by medical evidence. Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 184.

Proper denial of instructions. — This instruction was applicable to plaintiff's claim of aggravation of a preexisting ailment or condition, but her first request for an instruction on aggravation was not limited thereto, and her second request did not include the claim of aggravation. So that, although the two requests, at least in part, were repetitious, neither request was correct and both were properly denied. Britton v. Boulden, 87 N.M. 474, 535 P.2d 1325 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 360.

13-1809. Loss of earning capacity by minor.

The present cash value of earning capacity reasonably certain to be lost in the future after the plaintiff has reached the age of eighteen (18) years.

USE NOTE

In the proper case, where a minor has sustained personal injuries and the parent is suing for expenses incurred, such as medical expenses and money lost, such as earnings of the minor, and the minor is also suing for pain and suffering and impairment of earning capacity after he becomes of age, it will be proper to utilize UJI 13-1802 for the parent with the necessary elements of damage that pertain thereto and then another UJI 13-1802 for the minor with the necessary elements that pertain to that matter.

In like manner, such an instruction would apply when one other than the parent is the guardian of the estate of the minor.

When, and if, a case is presented involving a spouse situation where the community is liable for the expenses incurred in treatment and has a loss of earnings, a separate set of damages instructions may be necessary for the community and a further set for the injured spouse. In such situations, it will be necessary to custom tailor an instruction to include in the measure of damages each of the legal elements, including the

reasonable value of the services of the spouse, but loss of consortium is not a legal measure of damages in a spouse situation in New Mexico. Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963); Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961). Even before the Equal Rights Amendment [N.M. Const., art. II, § 18] to the New Mexico Constitution, the New Mexico Supreme Court had held that a wife alone may recover damages for her personal injury and for the resulting pain and suffering. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826, 35 A.L.R.2d 1190 (1952).

[As amended, effective November 1, 1991.]

Committee comment. — In the first edition a separate form of damages instruction was drawn for injury to a spouse, with subparts thereto (former UJI Civ. 14.18, UJI Civ. 14.19, UJI Civ. 14.20, UJI Civ. 14.21), but it is doubtful that such separate instructions are now needed in the book as the bench and bar have become accustomed to the form of damages presentation contained in UJI 13-1802. Therefore, with the foregoing explanation, additional instructions in this area will not be included in this work.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first paragraph of the Use Note and substituted "impairment of earning capacity" for "there is proper evidence that his earning capacity will be impaired" near the middle of that paragraph.

Parents may not recover for lost consortium from their child in negligence action. Hoskie v. United States, 666 F.2d 1353 (10th Cir. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 101.

Measure and elements of damages for personal injury resulting in death of infant, 14 A.L.R.2d 485, 45 A.L.R.4th 234, 77 A.L.R.4th 411.

25A C.J.S. Damages § 185(6).

13-1810. Loss of services of spouse.

The reasonable value of the services of [his wife] [her husband] of which the family has been deprived [and the present cash value of services of [his wife] [her husband] of which the family is reasonably certain to be deprived in the future].

USE NOTE

This is another element of damages to be included in UJI 13-1802 when a spouse has been injured. When the bracketed portion of the instruction is used, the jury should also be instructed on future damages requiring discount to present cash value, See UJI 13-1822.

[As amended, effective February 1, 1994; January 1, 1996.]

ANNOTATIONS

The 1996 amendment, effective January 1, 1996, substituted "spouse" for "wife" in the instruction heading and inserted "[her husband]" in two places in the instruction, and rewrote the Use Note.

Single person may recover for loss of own household services. — Where a single person suffers the loss of capacity to perform household services for one's self, that person is also entitled to recover the reasonable value of loss of household services. McNeely v. Henry, 100 N.M. 794, 676 P.2d 1359 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 101.

Pecuniary value of services rendered by deceased without legal obligation as element of damages for his death, 53 A.L.R. 1102.

When must loss-of-consortium claim be joined with underlying personal injury claim, 60 A.L.R.4th 1174.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 A.L.R.4th 309.

25A C.J.S. Damages § 176(10).

13-1810A. Loss of consortium.

The emotional distress of _____ *(plaintiff)* due to the loss [of the society], [guidance], [companionship] and [sexual relations] resulting from the injury to _____ *(name of injured or deceased spouse or child of plaintiff).*

USE NOTE

This is another element of damage to be included in the appropriate case in UJI 13-1802 when the spouse or child of the plaintiff has been injured or killed. The specific bracketed elements of loss of consortium should be included as appropriate to the plaintiff's loss.

In a wrongful death case, the loss of consortium is a separate claim of the surviving spouse or "familial caretaker" and may be included in the elements of a wrongful death claim in UJI 13-1830 in appropriate circumstances. Reference should be made to the Use Note under UJI 13-1830.

If there is a factual dispute whether the person seeking loss of consortium damages for a minor child was the "familial caretaker", then the jury should be provided with a definition of "familial caretaker". The Supreme Court described a "familial caretaker" as a person who lived with and cared for the child for a significant period of time prior to the death or injury. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-39, P31, 126 N.M. 263, 273, 968 P.2d 774.

[Adopted, effective October 1, 1996; as amended, effective March 20, 2000.]

Committee commentary. — *Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994) recognized loss of consortium as a claim for damages in the context of death or injury to a spouse. *Romero* overruled *Roseberry v. Starkovich*, 73 N.M. 211, 387 P.2d 321 (1963), and *Kilkenny v. Kenny*, 68 N.M. 266, 361 P.2d 149 (1961), on this issue. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-39, 126 N.M. 263, 968 P.2d 774 recognized loss of consortium for a "familial caretaker", such as a parent or grandparent who loses a child to death or where the child suffers a serious injury.

ANNOTATIONS

The 2000 amendment, effective March 20, 2000, rewrote the Use Note.

For article, "New Tort Rules for Unmarried Partners: The Enhanced Potential for Successful Loss of Consortium and NIED Claims by Same Sex partners in New Mexico after *Lozoya*", see 34 N.M.L. Rev. 461 (2004).

For article, "Valuing Relationships: The Role of Damages for Loss of Society", see 35 N.M.L. Rev. 301 (2005).

13-1811. Mitigation.

In fixing the amount of money which will reasonably and fairly compensate plaintiff, you are to consider that an injured person must exercise ordinary care to minimize or lessen [his] [her] damages. Damages caused by [his] [her] failure to exercise such care cannot be recovered.

USE NOTE

This instruction is designed to be used when the evidence creates an issue as to whether plaintiff exercised ordinary care to mitigate damages which were incurred after the injury and not before.

UJI 13-1603. Ordinary care, must be given when this instruction is used.

[As amended, effective November 1, 1991.]

Committee comment. — New Mexico follows the general rule that an injured person must use ordinary care to mitigate his damages. Mitchell v. Jones, 47 N.M. 169, 138 P.2d 522 (1943), citing 15 Am. Jur., Damages §§ 27 and 36 (see now 22 Am. Jur. 2d Damages §§ 30, 32, 38, 39).

Under the doctrine of avoidable consequences, a person injured by the tort of another is not entitled to damages for loss which could have been avoided by ordinary care. Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970) (plaintiff injured in rear end car accident and thereafter was further injured in three household accidents).

The obligation to mitigate damages extends not only to obtaining medical attention, but also to curing of the injury and using reasonable measures to prevent aggravation and to effect a cure. Substantial authority requires an injured person to submit to surgery or medical treatment to minimize tort damages. 62 A.L.R.3d 9, 70. The award should not include any sums for physical or mental pain and suffering or loss of earnings caused by failure to reasonably care for injuries sustained and this would include negligence in failure to consult a doctor, to follow a doctor's advice, to promptly see a doctor or to otherwise care for the injuries. Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444 (Tex. 1967).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral.

Library references. — 25A C.J.S. Damages § 184.

Whether to give instruction is question of law. — The matter of whether the court should give this instruction is a question of law to be decided by the trial court based upon the facts and the evidence. Hansen v. Skate Ranch, Inc., 97 N.M. 486, 641 P.2d 517 (Ct. App. 1982).

This is the only instruction allowed on mitigation of damages for personal injuries. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

No duty to fasten seat belt. — There is no authority, statutory or otherwise, which imposes a duty upon the operator of a motor vehicle to fasten a seat belt, and the failure to fasten a seat belt at the time of the accident is not a breach of duty which would authorize a mitigation of damages. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

And failure to use voluntary protective device not grounds for mitigation. — The common law dictates that the tort-feasor may not rely upon the injured party's failure to utilize a voluntary protective device to escape all or a portion of the damages which the

plaintiff incurred as a consequence of the defendant's negligence. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

But doctrine of avoidable consequences. — Under the doctrine of avoidable consequences, plaintiff cannot recover damages for injuries resulting from consequences after the accident occurred if plaintiff could reasonably have avoided those consequences. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

Defendant must prove that exercise would alleviate plaintiff's injuries. — The burden is on the defendant to prove by substantial evidence that the personal injuries suffered by the plaintiff would have been alleviated by continued exercises, as plaintiff's doctor had recommended. Absent such showing, the defendant is not entitled to this instruction. Hansen v. Skate Ranch, Inc., 97 N.M. 486, 641 P.2d 517 (Ct. App. 1982).

Giving of complementary instruction proper. — The trial court did not err in giving a non-uniform jury instuction which referred to the defendant's burden of proving that the damages of a plaintiff in a personal injury suit would be relieved by future employment opportunities, along with an instruction which referred to plaintiff's duty to mitigate damages by using ordinary care. The giving of complementary instructions is not an abuse of discretion. Blacker v. U-Haul Co., 113 N.M. 542, 828 P.2d 975 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 360.

Part B
Property Damages; Elements

13-1812. Personal property; no salvage value.

In determining property damages, if any, you may award the fair market value of the property immediately before the occurrence.

USE NOTE

This instruction to be used in conjunction with UJI 13-1802.

If the property has any salvage value, then UJI 13-1813 will be used and not this instruction.

Committee comment. — This instruction is intended to be used when the damaged property has no salvage value, and it may also be used where the salvage is of doubtful value, if any.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 186.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 357.

13-1813. Personal property; costs of repair.

In determining property damages, if any, you may award the reasonable expense of necessary repairs to the property which was damaged.

USE NOTE

Again, it is pointed out that this instruction is to be inserted in the blank space in UJI 13-1802, when the evidence justifies the same.

Committee comment. — In the case of Snider v. Town of Silver City, 56 N.M. 603, 247 P.2d 178 (1952), the supreme court approved as a measure of damages the cost of restoring the buildings to the condition they were in prior to the time of damage.

In the case of Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958), an instruction was given to the effect that the jury could award damages "to the extent of the actual damage done to [the] building . . .."

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 186.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 357.

13-1814. Personal property; before and after rule.

In determining property damage, if any, you may award the difference between the fair market value of the damaged personal property immediately before the occurrence and its fair market value immediately after the occurrence.

USE NOTE

This instruction is to be used when the property is damaged beyond repair but the property does have a salvage value.

This instruction is to be used with UJI 13-1802 and is to be inserted following the first paragraph.

Committee comment. — The ordinary and usual measure of damages to personal property is that contained in the foregoing instruction and, therefore, this is the instruction which will generally be used in cases involving damage to both personal and real property.

In Robert E. McKee Gen. Contractor v. Insurance Co. of N. Am., 269 F.2d 195 (10th Cir. 1959), where a stock of merchandise was damaged, it was held that the measure of damages was the difference in the value of the merchandise before and after injury.

In O'Meara v. Commercial Ins. Co., 71 N.M. 145, 376 P.2d 486 (1962), the actual cash value was the measure of damages under an insurance policy. The court determined the cash value and deducted the salvage price.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 186.

Correct measure of damages. — The difference between the "before" and "after" fair market values of a business enterprise correctly measures the damages resulting from the destruction of or injury to the enterprise. Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975).

Basis of market value determination. — The market value, or fair market value, of a business enterprise, or of any other property, is not dependent upon the owner's financial capacity to operate or improve the enterprise or property, but is rather what a willing buyer would pay and a willing seller would accept for it in its condition at the time and place in question. Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 357.

13-1815. Personal property depreciation and repairs depreciation vs. before and after rule; unrepaired.

In determining property damage, you may award only the smaller of two figures which are calculated as follows:

One figure is the reasonable expenses of necessary repair to the property damaged plus the decrease, if any, in the fair market value of the repaired property as compared to its fair market value before the occurrence; and

The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

USE NOTE

This instruction is to be inserted following the first paragraph of UJI 13-1802, when the evidence justifies its use.

If there is no claim that the repaired property has depreciated in value, use UJI 13-1816.

If the cost of repairs plus depreciation will be less than the difference in value between the damaged and undamaged property, use UJI 13-1817.

If only the reasonable expense of necessary repairs is claimed and that is less than the difference in value of the property before and after the damage, use UJI 13-1813.

If the difference in the value of property before and after it was damaged is less than the reasonable cost of repairs, use UJI 13-1814.

This instruction may not be appropriate for damages to real estate, or improvements thereon, or property of intrinsic value or of no market value.

Committee comment. — The theory of damages is to make an injured party whole, not to enable him to make a profit as a result of the damages; therefore, it is proper that he recover the lesser figure in damages. See Curtis v. Schwartzman Packing Co., 61 N.M. 305, 299 P.2d 776 (1956). See also California Jury Instructions (Civil) 1746; Colorado Jury Instructions, 6:9 et seq.; Illinois Pattern Jury Instruction, 30.10; Iowa Jury Instructions, Chapter 3; Pattern Instructions for Kansas, 2d ed., §§ 9.10-9.21; Missouri Approved Jury Instructions, 4.01 et seq.; Wisconsin Jury Instructions, p. 1800 et seq.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 186.

Cost of obtaining new financing in order to rebuild. — See Topmiller v. Cain, 99 N.M. 311, 657 P.2d 638 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 357.

13-1816. Personal property; repairs vs. before and after rule.

In determining property damages, you may award only the smaller of two figures which are calculated as follows:

One figure is the reasonable expense of necessary repairs to the property; and

The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

USE NOTE

This phrase is to be inserted between the first two bold paragraphs of UJI 13-1802, when the evidence justifies its use.

This instruction is to be used when there is an issue as to whether the cost of repairs or the difference in value of the property before and after it is damaged is the lesser amount. When the cost of repairs is admittedly the lesser amount, use UJI 13-1813; when the converse is true, use UJI 13-1814.

This instruction may not be appropriate for damages to real estate or improvements thereon. See UJI 13-1819.

Committee comment. — In the case of O'Meara v. Commercial Ins. Co., 71 N.M. 145, 376 P.2d 486 (1962), it was held that the actual cash value was the measure of damages under an insurance policy. The court determined the cash value and deducted the salvage price in arriving at the measure of damages. In the case of Robert E. McKee Gen. Contractor v. Insurance Co. of N. Am., 269 F.2d 195 (10th Cir. 1959), it was held that, where stock or merchandise was damaged, the measure of damages was the difference in the value of the merchandise before and after the injury.

The court of appeals in 1974 cited this instruction in the case of Gawlick v. American Bldrs. Supply, Inc., 86 N.M. 77, 519 P.2d 315 (Ct. App. 1974).

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 186.

13-1817. Personal property; repairs plus depreciation.

In determining damages to personal property, you may award the reasonable expense of necessary repairs to the property, plus the decrease, if any, in the fair market value of the repaired property as compared to its fair market value before the occurrence.

USE NOTE

This instruction is to be used when the damages to which plaintiff is entitled are both the cost of repairs and the depreciation in value.

When applicable this instruction is a part of UJI 13-1802.

If only the reasonable expense of necessary repairs is supported by the evidence use UJI 13-1813.

Committee comment. — There are occasional cases when the difference in value before and after cannot be ascertained with reasonable certainty, but the cost of repairs

plus the depreciation in value constitute a fair method of ascertaining the loss of damages to the plaintiff.

DePalma v. Weinman, 15 N.M. 68, 88, 103 P. 782, 787, 24 L.R.A. (n.s.) 423 (1909) states:

Certainly if appellants by their wrongful acts caused the destruction and injury of appellees' goods, they were holden for the value of those destroyed and the injury to those damaged, and if such wrongful acts caused appellees to have to move the remaining stock and fixtures to another place, to again resume their business, it seems equally clear that they should pay such expense.

The repairs are recoverable even if the repairs were more than the actual value, at least in situations where the personal property was unique or almost irreplaceable. Curtis v. Schwartzman Packing Co., 61 N.M. 305, 299 P.2d 776 (1956).

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 186.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 357.

13-1818. Personal property; loss of use.

The reasonable rental value of similar property during the period reasonably required for the repair of the damaged property.

USE NOTE

This instruction should be inserted into UJI 13-1802 to define the measure of damages when damages for loss of use of personal property are at issue.

[As amended, effective January 1, 1996.]

Committee comment. — Damages for loss of use of damaged personal property are recoverable even if the plaintiff does not actually rent substitute property during the period required for repairs. *Cress v. Scott,* 117 N.M. 3, 868 P.2d 648 (1994).

ANNOTATIONS

The 1996 amendment, effective January 1, 1996, substituted "rental value of similar property during the period" for "rental of similar property used during the time" in the instruction, and rewrote the Use Note and the Commentary.

Recovery even if substitute property not rented. — Damages for loss of use are recoverable even if other property was, in fact, not rented. Cress v. Scott, 117 N.M. 3, 868 P.2d 648 (1994).

Measure of damages. — Loss-of-use damages may be measured by the reasonable rental value of a substitute vehicle, even in the absence of actual rental. Cress v. Scott, 117 N.M. 3, 868 P.2d 648 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 357.

13-1819. Real property.

You shall determine what was the value of the property immediately before the occurrence and immediately after the occurrence. The difference between these two figures is the legal measure of damages to real property.

USE NOTE

This instruction, when applicable, is to be used in conjunction with UJI 13-1802 and is to be inserted following the first paragraph of that instruction.

The general rule on the measure of damages to real property is stated in the foregoing instruction. However, in certain peculiar situations, the courts have determined that there are other damages and other measures thereof. In such instances, the attorney for the plaintiff will have to prepare the applicable instruction for submission to the court.

Committee comment. — The Supreme Court of New Mexico has recognized that under certain circumstances the measure of damages to real property may vary. See Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958); Snider v. Town of Silver City, 56 N.M. 603, 247 P.2d 178 (1952). See also Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975).

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 186.

Tort cause of action. — In a tort cause of action for loss of property, there is no required means of calculating damages and the before and after rule is merely one way in which the jury can be instructed to view the evidence. Castillo v. City of Las Vegas, 2008-NMCA-141, 145 N.M. 205, 195 P.3d 870.

Negligent injury to a surface estate. — In determining the damages for negligent injury to a surface estate by a mineral lessee, the jury should determine the most reasonable means of making the surface owner whole, without regard to whether the injury was permanent or temporary, and in doing so, may rely on evidence of the cost of

repair or diminution in value of the property. McNeill v. Burlington Resources Oil & Gas Co., 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121.

Insufficient proof of damages. — Where an owner presented no evidence of actual loss in value or of increased costs resulting from the interference with his property through a wrongful lis pendens filing, the property owner's damages cannot be quantified this way, and the trial court did not abuse its discretion in awarding only nominal damages. Ruiz v. Varan, 110 N.M. 478, 797 P.2d 267 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 132 to 136.

13-1820. Mitigation of damages to property.

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that a person who is damaged must exercise ordinary care to minimize existing damages and to prevent further damages. Plaintiff may not recover for losses which could have been prevented by reasonable efforts on [his] [her] part.

USE NOTE

This instruction is to be used with the applicable instruction on damage to property and is to be inserted following the first paragraph of UJI 13-1802.

This mitigation of damages instruction can apply both to personal property and real property situations.

[As amended, effective November 1, 1991.]

Committee comment. — It is doubtful that an affirmative defense is necessary in order to raise the issue of mitigation of damages. If the evidence justifies the submission, then the instruction should be given to the jury.

The duty to mitigate damages to property is set forth in 22 Am. Jur. 2d Damages § 43.

Reference is made to the case of Mitchell v. Jones, 47 N.M. 169, 138 P.2d 522 (1943), as to the manner of pleading mitigation.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the second sentence; and deleted the former first sentence of the Use Note, which read: "Change will need to be made in the use of the pronoun, when the evidence requires."

Library references. — 25A C.J.S. Damages § 184.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 360.

25A C.J.S. Damages § 35.

Part C
Miscellaneous Damages

13-1821. Future damages; extent and amount.

If you have found that plaintiff is entitled to damages arising in the future, you must determine the amount of such damages.

If these damages are of a continuing nature, you may consider how long they will continue.

[As to loss of future earning ability, you may consider that some persons work all their lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.]

USE NOTE

This instruction may be applicable to various types of damages and should be given when there is proper evidence that damages will, in fact, exist in the future.

If the prospective damages involve earning capacity then the third paragraph will be given and the brackets will be removed. However, the third paragraph applies only to earning capacity and not to any other type of future damages. Use with UJI 13-1803 or 13-1830.

UJI 13-1805 will also be given when the evidence presents an issue of permanency of an injury to an individual.

Committee comment. — The New Mexico Supreme Court in the case of Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961) discussed future "loss of earnings".

Certain future damages must be reduced to present cash value and, in that connection, reference is made to UJI 13-1822.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 185.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Business interruption, without physical damage, as actionable, 65 A.L.R.4th 1126.

13-1822. Future damages; discount to present cash value.

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages by making allowance for the fact that any award you might make would, if properly invested, earn interest. You should, therefore, allow a reasonable discount for the earning power of such money and arrive at the present cash value of the total future damages, if any.

Damages for any future pain and suffering are not to be so reduced.

USE NOTE

Whenever the jury is given the option or is directed to award future damages, this instruction should be given. However, defendant may waive such instruction.

Use this instruction with UJI 13-1802.

Committee comment. — The rule is universal that future damages are to be reduced except for future pain and suffering and disfigurement. 154 A.L.R. 801. If future disfigurement is an issue, then the instruction will need to be modified to include disfigurement.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 177 et seq.

Breach of well-sharing agreement. — Where plaintiff sued defendant for breach of a land ownership and well-sharing agreement between the owners of adjoining ranches which placed a duty on defendant to maintain a water well on defendant's ranch and supply water to plaintiff for livestock; the well on defendant's land quit pumping water; plaintiff learned that the well was actually operational in 2001; plaintiff did not inform defendant until 2003 that the well was operational; in 2001, plaintiff installed a submersible pump in the well, but removed it four days later out of concern that plaintiff's work on the well could ruin the well; plaintiff hauled water to the livestock tank on defendant's land from 2001 until 2003 when plaintiff installed a submersible pump to begin regular pumping from the well; and defendant lied to plaintiff about trying to fix the well, intentionally misled a well expert who had asked to evaluate the well by having the expert examine a different well, intentionally deprived plaintiff of water by disabling the well, and failed to make the well operational even after learning that the well could produce water, the court was justified in concluding that plaintiff's failure to inform defendant in 2001 that the well was operational was not a failure to mitigage. Skeen v. Boyles, 2009-NMCA-080, 146 N.M.627, 213 P.3d 531.

Computation of present value of workmen's compensation award. — In computing the present value of a workmen's compensation award as a factor in determining attorneys fees, the five percent discount rate mentioned in 52-1-30B NMSA 1978 (now

repealed) in calculating lump sum awards should be considered as a minimum level in the range of discount figures and not the ceiling. In computing the discount, the formula referred to in this instruction is an appropriate standard. Jennings v. Gabaldon, 97 N.M. 416, 640 P.2d 522 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 108, 349.

Reduction of allowance for future pain and suffering to present worth, 28 A.L.R. 1177.

Duty to instruct, and effect of failure to instruct, jury as to reduction to present worth of damages for future loss on account of death or personal injury, 77 A.L.R. 1439, 154 A.L.R. 796.

Rate of discount to be considered in computing present value of future earnings or benefits lost on account of death or personal injury, 105 A.L.R. 234.

Effect of anticipated inflation on damages for future losses - modern cases, 21 A.L.R.4th 21.

25A C.J.S. Damages § 194.

13-1823. Admitted liability.

The defendant has admitted liability for any damage which may have proximately resulted from the occurrence. You need only decide [what damages to plaintiff resulted from this occurrence and] what damages plaintiff should recover for these injuries.

USE NOTE

This instruction should precede UJI 13-1802, or the prototype thereof, whenever it is used. UJI 13-1802 or an instruction of like import will need to be given on the measure of damages, even when the defendant has admitted liability.

In the second sentence a phrase is bracketed. If there is an issue in the particular case as to whether some or all of the damages of which the plaintiff complains were in fact caused by the occurrence, then you will use the bracketed material; otherwise, it will be omitted.

In all cases where the defendant admits liability, the plaintiff is entitled to at least nominal damages.

This instruction should be given in all cases where the defendant has admitted liability. No verdict form should be submitted to the jury permitting them to determine liability. The only verdict form should specify the amount of damages to be awarded to the plaintiff.

Committee comment. — Experience shows that this instruction will be used infrequently. When the defendant does admit liability, it frequently causes concern as to the proper type of instructions to be given to the jury. This instruction should be of assistance both to the bench and bar in this connection.

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 223, 361.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25A C.J.S. Damages § 179.

13-1824. No allocation of damages among joint defendants.

If you find that plaintiff is entitled to recover damages against more than one defendant, you must return a verdict in one single sum against the defendants whom you find to be liable.

USE NOTE

This instruction is to be used when there are multiple parties defendant and the jury is permitted to find in favor of one or more defendants and against more than one defendant.

This instruction stands alone. It is not an element to be added to UJI 13-1802.

Committee comment. — Care should be exercised to submit proper verdict forms to the jury when a situation is presented which would justify the use of an instruction of this type.

ANNOTATIONS

Library references. — 25A C.J.S. Damages § 177 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 14.

25A C.J.S. Damages § 189.

13-1825. Uniform contribution; settlement with one defendant.

Evidence has been introduced that plaintiff voluntarily settled [his] [her] claim against _____ *(name of released defendant)* and has released _____ *(name of released defendant)* from further liability by reason of the occurrence giving rise to this lawsuit.

If you find in favor of plaintiff and against the defendant _____ *(name of remaining defendant)* then you should assess the full amount of

damages which you find to be proper under the evidence and the damages instructions here given to you.

Any offset or reduction in the amount of damages will be made by the court and should not be of concern to you in determining the damages, if any, to be assessed against _____ *(name of remaining defendant).*

USE NOTE

This instruction is to be used only where a joint tortfeasor has been released in conformity with the Uniform Contribution Among Tortfeasors Act, 41-3-1 NMSA 1978 et seq. Some adaptation of the instruction will be needed when there are more than two joint tortfeasors involved.

The instruction is not appropriate for use with a "covenant not to sue," nor with a release which does not discharge the remaining parties pro rata in accordance with the act.

The adjustment of the judgment rendered by the jury, by reason of the release, should be made following verdict by the court on the basis of the terms and conditions of the release and the act.

This instruction stands alone and is not an element of UJI 13-1802 but is to be used when circumstances justify.

[As amended, effective November 1, 1991.]

Committee comment. — Application of the Uniform Contribution Among Tortfeasors Act is discussed in Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969) and in Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

See also Johnson v. City of Las Cruces, 86 N.M. 196, 521 P.2d 1037 (Ct. App. 1974). In Alder v. Garcia, 324 F.2d 483 (10th Cir. 1963), the joint tortfeasor who took both a release and a partial assignment of plaintiff's cause against the other tortfeasor was denied relief on either, on grounds of public policy.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the first paragraph.

Library references. — 18 C.J.S. Contribution § 1 et seq.

When no joint liability for defendant and third-party defendant. — Where suits against a defendant and a third-party defendant are based on different theories of

liability, there is no joint tort liability and the trial court properly refused to give a jury instruction as to contribution among joint tortfeasors. Exum v. Ferguson, 97 N.M. 122, 637 P.2d 553 (1981).

This instruction is no longer appropriate in its present form. — The jury should be instructed to assess the full amount of damages; however, the last paragraph, informing the jury that the court will make any offset or reduction, no longer applies. Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983) (decided prior to 1984 amendment deleting last paragraph).

Refusal to give instruction held proper. — In an action against several defendants for breach of contract, negligence, bad faith, and deceptive trade practices, in failing to procure property insurance for an aircraft, where the only defendant at trial successfully obtained a dismissal of the complaint of negligence and the matter went to the jury only on the breach of contract claim, the jury was not deciding a tort claim but a contract claim. Thus the trial court did not err by refusing to submit to the jury an instruction on contribution among tortfeasors. McConal Aviation, Inc. v. Commercial Aviation Ins. Co., 110 N.M. 697, 799 P.2d 133 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Contribution §§ 70, 71.

25 C.J.S. Damages § 98(2).

13-1826. Withdrawn.

Committee comment. — Vicarious liability for punitive damages, formerly addressed in this instruction, is now addressed in UJI 13-1827.

Withdrawals. — Pursuant to a court order dated May 14, 1998, this rule, relating to vicarious liability for punitive damages, is withdrawn effective July 1, 1998.

13-1827. Punitive damages; direct and vicarious liability.

(Introduction)

In this case, _____ (*name of party making claim for punitive damages*) seeks to recover punitive damages from _____ (*name of party against whom punitive damages are sought, either directly or vicariously*). You may consider punitive damages only if you find that _____ (*party making claim*) should recover compensatory [or nominal] damages.

(Direct Liability)

If you find that the conduct of _____ (*name of party against whom direct liability for punitive damages is asserted*) was [malicious], [willful],

[reckless], [wanton], [fraudulent] [or] [in bad faith], then you may award punitive damages against [him] [her] [it].

(Vicarious Liability)

Additionally, if you find that the conduct of _____ (*name of agent or employee of party on whose conduct vicarious claim for punitive damages is based*) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], you may award punitive damages against _____ (*name of party against whom vicarious liability for punitive damages is asserted*) if:

(A) _____ (*name of agent or employee*) was acting in the scope of [his] [her] employment by _____ (*name of party*) and had sufficient discretionary or policy-making authority to speak and act for [him] [her] [it] with regard to the conduct at issue, independently of higher authority; [or if]

(B) _____ (*name of party*) in some [other] way [authorized,] [participated in] [or] [ratified] the conduct of _____ (*name of agent/employee*).

(Definitions)

Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

Reckless conduct is the intentional doing of an act with utter indifference to the consequences. When there is a high risk of danger, conduct that breaches the duty of care is more likely to demonstrate recklessness.

Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's [rights] [safety].

(Conclusion)

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature and enormity of the wrong and such aggravating and mitigating circumstances as may be shown. The property or wealth of the defendant is a legitimate factor for your consideration. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.

USE NOTE

This instruction provides a general framework for a punitive damage instruction usable in any civil action involving direct or vicarious claims for punitive damages. Some other chapters of UJI Civil contain punitive damage instructions specifically applicable to particular causes of action which should be used where appropriate. *See, e.g.*, UJI 13-861 (contracts and UCC sales) and 13-1718 (insurance bad faith).

This instruction is divided into sections by italicized headers for ease of reference in these use notes. The headers should not be included in the instruction as given to the jury. Within each section, bracketed language should be selected as appropriate.

The sections labeled Introduction and Conclusion should always be given. UJI 13-1832 must be given following this instruction if the bracketed reference to nominal damages is included in the "Introduction". Where the case includes a claim for punitive damages on a theory of direct liability, the section labeled "Direct liability" should be given. Where the case includes a claim for punitive damages on a theory of vicarious liability, the section labeled "Vicarious liability" should be given. Depending on the facts and pleadings, both direct and vicarious claims may be included in the same case, against the same or different parties. Subparagraphs A and B of the Vicarious Liability section should be given as appropriate, unless the court determines that the elements addressed in these subparagraphs (scope of authority and managerial capacity, or authorization, participation, ratification) have been established as a matter of law. Appropriate entries from the "Definitions" section should be given depending on whether the offending conduct is alleged to be malicious, willful, etc.

Separate verdicts must be used for punitive damages when there is more than one party against whom punitive damages are sought.

In an unusual or complex case, it may be appropriate to modify this general form of instruction to instruct the jury clearly and correctly on the law. *See* Committee Comment.

[Adopted, effective November 1, 1991; as amended, effective July 1, 1998; as amended by Supreme Court Order 08-8300-021, effective September 10, 2008.]

Committee commentary. — Punitive damages cannot be recovered without a recovery of compensatory or nominal damages. *Sanchez v. Clayton*, 117 N.M. 761, 767, 877 P.2d 567, 673 (1994); *Hudson v. Otero*, 80 N.M. 668, 459 P.2d 830 (1969); *Montoya v. Moore*, 77 N.M. 326, 422 P.2d 363 (1967); *Crawford v. Taylor*, 58 N.M. 340, 270 P.2d 978 (1954).

The standard for an award of punitive damages vicariously against an employer or principal is addressed in *Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*, 118 N.M. 140, 879 P.2d 772 (1994), *Brashear v. Baker Packers*, 118 N.M. 581, 883 P.2d 1278 (1994), and *Rhein v. ADT Automotive, Inc.*, 122 N.M. 646, 930 P.2d 783 (1996).

The bracketed phrases of this instruction which describe the types of conduct giving rise to punitive damages are disjunctive; if, for example, a defendant acts recklessly, it is unnecessary to show intentional misconduct. *Greentree Acceptance, Inc. v. Layton*, 108 N.M. 171, 173, 769 P.2d 84, 86 (1989); *State Farm Gen. Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974); *see also Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 628, 776 P.2d 1244, 1247 (1989). The New Mexico Supreme Court in *Paiz v. State Farm Fire & Casualty Co.*, 118 N.M. 203, 213, 880 P.2d 300, 310 (1994) eliminated gross negligence as a basis for an award of punitive damages for contract claims. Following the decision in *Paiz*, the committee recommended that gross negligence be removed as a basis for punitive damages in both contract and tort cases. This recommendation was adopted by the New Mexico Supreme Court in 1998.

The Supreme Court indicated in *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 881 P.2d 11 (1994), that the risk of danger posed by the product or the tortfeasor's conduct is a valid consideration in determining whether the conduct rises to the level of recklessness necessary to show a culpable mental state. Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to establish the requisite culpable mental state to support an award of punitive damages.

Punitive damages against more than one party must be separately stated. *Vickrey v. Dunivan*, 59 N.M. 90, 279 P.2d 853 (1955).

In some cases it may be appropriate to modify this general form of instruction to instruct the jury clearly and correctly on the law. For instance, it may be necessary to specify the kind of conduct allegedly giving rise to direct or vicarious punitive damages liability against various parties - *e.g.*: "If you find that the conduct of Truck Driver in his driving of the vehicle leading up to the accident was reckless or wanton, then you may award punitive damages against him. If you find that the conduct of Trucking Company in connection with its screening and hiring of Truck Driver was reckless or wanton, then you may award punitive damages against it. Additionally, if you find that the conduct of Truck Driver was reckless or wanton, you may award punitive damages against Trucking Company if ...."

ANNOTATIONS

The 1998 amendment, effective for cases filed on and after July 1, 1998, rewrote this instruction.

The 2008 amendment, approved by Supreme Court Order 08-8300-021, effective September 10, 2008, added the second sentence of the definition of reckless conduct; added the enormity of the wrong as a circumstance to be considered in determining the amount of punitive damages in the second sentence of the definition of punitive damages; and added the third sentence in the definition of punitive damages.

Compiler's notes. — Pursuant to a supreme court order dated July 17, 1991, former UJI 13-1827, relating to exemplary or punitive damages, is withdrawn, and the above instruction is adopted, effective November 1, 1991.

Breach of well-sharing agreement. — Where the owners of adjoining ranches entered into a written land ownership and well-sharing agreement which placed a duty on defendant to maintain a water well on defendant's ranch and supply water to plaintiff for livestock; the well on defendant's land quit pumping water; defendant lied to plaintiff about trying to fix the well, intentionally misled a well expert who had asked to evaluate the well by having the expert examine a different well, intentionally deprived plaintiff of water by disabling the well, and failed to make the well operational even after learning that the well could produce water, the court did not abuse its discretion by awarding punitive damages. Skeen v. Boyles, 2009-NMCA-080, 146 N.M.627, 213 P.3d 531.

Hostile work environment sexual harrassment. — Where plaintiff's employer failed to act after observing firsthand that its staff attorney had subjected plaintiff to hostile work environment sexual harassment, the district court properly allowed the jury to consider punitive damages. Littell v. Allstate Insurance Co., 2008-NMCA-012, 143 N.M. 506, 177 P.3d 1080.

Due process. — The ratio of punitive damages to compensatory damages of 3.6 to 1 did not violate due process. Littell v. Allstate Insurance Co., 2008-NMCA-012, 143 N.M. 506, 177 P.3d 1080.

When punitive damages awarded. — Punitive damages may be awarded only when the wrongdoer's conduct may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff's rights. These words are to be taken as used in the disjunctive. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 769 P.2d 84 (1989).

Punitive damages may be awarded against wrongdoer in contract action when his conduct is maliciously intentional, fraudulent, oppressive or committed recklessly or with a wanton disregard of the wronged party's rights. Sierra Blanca Sales Co. v. Newco Indus., Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 187, 548 P.2d 865 (1976).

Punitive damages are to be awarded when actual or nominal damages are inadequate to satisfy the wrong committed. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 769 P.2d 84 (1989).

Alternative bases for punitive damages award. — When the jury instructions provide two alternative bases for awarding punitive damages, the jury verdict will be upheld if there is substantial evidence in the record to support either. Atler v. Murphy Enterprises, Inc., 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001, cert. quashed, 2005-NMCERT-008.

Evidence justified award of punitive damages. — Where a review of the record leads to the conclusion that there was substantial evidence from which the jury could conclude that defendants demonstrated an utter indifference to the consequences or a conscious disregard for public safety when they failed to conduct the required inspections and abdicated their responsibility to operate the ride at the New Mexico State Fair in a safe manner, there was evidence to support a finding that defendants' conduct was reckless or wanton, justifying an award of punitive damages. Atler v. Murphy Enterprises, Inc., 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001, cert. quashed, 2005-NMCERT-008.

Cause of action required. — Punitive damage awards must be supported by an established cause of action. Sanchez v. Clayton, 117 N.M. 761, 877 P.2d 567 (1994).

Requirements for awarding punitive damages. — For punitive damages to be imposed on an employer for the misconduct of an employee, a plaintiff must prove (1) employer authorization, participation, or ratification and (2) that the employee's conduct satisfied the general requirements for the imposition of punitive damages. Campbell v. Bartlett, 975 F.2d 1569 (10th Cir. 1992).

Where plaintiff introduced no documentation or evidence to show that safety problems arose from or reflected a reckless indifference, a culpable mind, actual malice, or a conscious disregard for workers' safety, or evidence that defendant simply disregarded applicable safety features and practices, the plaintiff has not produced evidence sufficient to show the culpable mental state necessary to support an award of punitive damages. Couch v. Astec Indus., Inc., 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

Summary judgment improper when authorization in issue. — Where there is a material issue of fact whether a corporation, through its policies and tariffs, authorized the actions of its employees, summary judgment on punitive damages is improper. Templin v. Mountain Bell Tel. Co., 97 N.M. 699, 643 P.2d 263 (Ct. App. 1982).

Factors to be weighed in assessing punitive damages are the enormity and nature of the wrong and any aggravating circumstances. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 769 P.2d 84 (1989).

Requires more than gross negligence. — The limited purpose of punitive damages is to punish and deter persons from conduct manifesting a "culpable mental state". Thus, the proposition that in a contract case, including one involving an insurance contract, punitive damages may be predicated solely on gross negligence is disavowed. Now, in addition to, or in lieu of, such negligence there must be evidence of an "evil motive" or a "culpable mental state." Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 880 P.2d 300 (1994).

Punitive damages may be apportioned among several wrongdoers according to the degree of culpability or according to the existence or nonexistence of the requisite state

of mind for such damages in the several defendants. Sierra Blanca Sales Co. v. Newco Indus., Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 187, 548 P.2d 865 (1976).

Punitive damage award must be related to injury and actual damages proven. — The amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice. Chavez-Rey v. Miller, 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982).

Punitive damages do not have to be in reasonable proportion to the actual damages, but they must not be so unrelated to the injury as to plainly manifest passion and prejudice rather than reason and justice. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 769 P.2d 84 (1989).

Damages related to degree of negligence. — Whether under a theory of contract or tort, the submission of the issue of punitive damages should be in language of either gross negligence or reckless disregard for the interests of the insured and is especially appropriate when the evidence shows the insurer utterly failed to exercise care for the interests of the insured in denying or delaying payment on an insurance policy. Jessen v. National Excess Ins. Co., 108 N.M. 625, 776 P.2d 1244 (1989).

Although the agent of the insurance company incorrectly advised the plaintiff that the policy it bought covered on-the-job injuries and that it was not necessary to buy a separate worker's compensation policy, the conduct of the insurer's agent, who never read the Worker's Compensation Act, did not amount to gross negligence, as the policy language was ambiguous and was later clarified by the company. Thus, punitive damages were not recoverable. Charter Servs., Inc. v. Principal Mut. Life Ins. Co., 117 N.M. 82, 868 P.2d 1307 (Ct. App. 1994).

Gross negligence still sound basis for punitive damages. — A finding of gross negligence is still a sound basis for awarding punitive damages, even though the concept of gross negligence is abolished as a defense against contributory negligence. Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

Bad faith will support an award for punitive damages. Boudar v. E.G. & G., Inc., 106 N.M. 279, 742 P.2d 491 (1987).

Employer's actions establishing liability for punitive damages. — An employer's knowledge that a polygraph examination which resulted in an employee's termination was defective, and his failure to advise the employee's supervisor of the error, constituted a callous disregard to the rights and interests of the employee and supported a finding of liability for punitive damages. Conant v. Rodriguez, 113 N.M. 513, 828 P.2d 425 (Ct. App. 1992).

Finding of intentional emotional distress in sexual harassment by employee. — Where employer received several reports of employee's sexual harassment of his co-

workers, but took no action, there was sufficient cause for a finding of intentional emotional distress against plaintiff, so as to warrant punitive damages. Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

Cumulative conduct of employees may demonstrate corporate recklessness. — Companies should not escape liability because their employees failed to communicate with each other. The culpable mental state of the corporation may be inferred from the very fact that one employee could be ignorant of the acts or omissions of other employees with potentially disastrous consequences. Clay v. Ferrellgas, Inc., 118 N.M. 266, 881 P.2d 11 (1994), cert. denied, 513 U.S. 1151, 115 S. Ct. 1102, 130 L. Ed. 2d 1069 (1995).

Punitive damages based on employee's culpable state of mind. — Jury instructions as to punitive damages, which failed to protect defendant from improper jury prejudice based on defendant's employee's culpable state of mind and his dishonesty following the accident, were erroneous. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197.

Insurance coverage. — Punitive damages arising from an automobile accident were covered by defendant's insurance policy, which provided that the insurer pay "damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." Baker v. Armstrong, 106 N.M. 395, 744 P.2d 170 (1987).

Discovery sanctions distinguished. — Since the factual information available to the court and jury at the time of trial did not support sanctions against the defendant, sanctions could not have been included in an award of punitive damages, and an award of sanctions more than two years after the final judgment, based on discovery violations, did not duplicate the award for punitive damages; even if the available information had been sufficient to sustain sanctions at the time of the trial, the sanctions would not have been subsumed by the award of punitive damages since such damages concern the defendant's misconduct toward the injured party and are noncompensatory, and civil sanctions concern the defendant's conduct toward the tribunal and are compensatory. Gonzales v. Surgidev Corp., 120 N.M. 151, 899 P.2d 594 (1995).

Managerial capacity as basis for corporate punitive damages. — Where corporate general manager was responsible for the financing of mobile homes and dealt directly with the lender and was responsible for advertising and determining value of trade-ins, the general manager had sufficient discretionary authority to bind the corporation for punitive damages. Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717.

Corporate ratification as basis for punitive damages. — Where managerial agents of a corporation knew of the fraud of their employees; authorized the employees to substitute a fence for a garage and deck, which plaintiffs had purchased, without the consent of the plaintiffs; paid one employee a full commission on the fraudulent sale;

failed to discipline or fire the employees; and where corporation kept funds that the corporation had wrongfully charged plaintiffs for the garage and deck and did not want its local office files policed for falsifications, the corporation ratified the fraud of its employees and was liable for punitive damages. Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For note, "Did *Cooper v. Leatherman* Require State Appellate Courts to Apply a De Novo Standard of Review for Determining the Constitutional Excessiveness of Punitive Damages Claims? *Aken v. Plains Electric & Transmission Cooperative, Inc.*", see 34 N.M.L. Rev. 405 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 240, 361, 362.

Principal's liability for punitive damages because of false arrest or imprisonment or malicious prosecution by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 A.L.R.3d 1109.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Propriety of awarding punitive damages to separate plaintiffs bringing successive actions arising out of common incident or circumstances against common defendant or defendants ("one bite" or "first comer" doctrine), 11 A.L.R.4th 1261.

Allowance of punitive damages in action against attorney for malpractice, 13 A.L.R.4th 95.

Derivative liability of partner for punitive damages for wrongful act of copartner, 14 A.L.R.4th 1335.

Recovery of punitive damages in action by purchasers of real property charging fraud or misrepresentation, 19 A.L.R.4th 801.

Necessity of determination or showing of liability for punitive damages before discovery or reception of evidence of defendant's wealth, 32 A.L.R.4th 432.

Punitive damages: power of equity court to award, 58 A.L.R.4th 844.

Standard of proof as to conduct underlying punitive damage awards - modern status, 58 A.L.R.4th 878.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 A.L.R.5th 242.

Validity, construction and application of statutes requiring that percentage of punitive damages awards be paid directly to state or court-administered fund, 16 A.L.R.5th 129.

Intoxication of automobile driver as basis for awarding punitive damages, 33 A.L.R.5th 303.

25A C.J.S. Damages § 188.

13-1827A. Punitive damages; evidence of harm or injury to non-parties to the litigation.

_____ (*Name of the plaintiff*) has introduced evidence of [harm to others] [risk of harm to others] as a result of _____ (*name of the defendant*)'s conduct. You may consider this evidence in determining the nature and enormity of _____ (*name of the defendant*)'s wrongful conduct toward _____ (*name of the plaintiff*). You may not, however, include in your award of punitive damages any amount that punishes _____ (*name of the defendant*) for harm to others not before this court.

USE NOTE

This instruction must be given where the jury is instructed on the issue of punitive damages, UJI 13-1827, and evidence of harm or injury to non-parties to the litigation has been admitted into evidence during the trial.

[Approved by Supreme Court Order 08-8300-021, effective September 10, 2008.]

Committee comment. — In *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), the Supreme Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063, 166 L.Ed. at 948. At the same time, the Court acknowledged that conduct that poses a substantial risk of harm to others in addition to the plaintiff, that poses a risk to the public at large, or that is repeated may be more reprehensible than other conduct. Ultimately, the Court imposed an obligation on the State to establish procedures to prevent the risk that a jury "in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others[.]" *Id.* at 1065. The purpose of this instruction is to address the risk identified by the Supreme Court so that a jury is instructed that it can consider evidence of injury or harm to others in determining the

reprehensibility of the conduct that injured the plaintiff, but that it may not punish the defendant for causing harm to others who are not parties to the litigation.

13-1828. Vicarious liability; indemnity between tortfeasors.

If there is no wrongdoing on the part of the principal, then the principal is entitled to indemnity from [his] [her] agent.

USE NOTE

This instruction should be modified if the relationship of the parties is other than principal and agent, such as employer and employee, etc.

This instruction is not designed for use in a case in which the basis of indemnity is contractual.

[As amended, effective November 1, 1991.]

Committee comment. — See Hancock v. Berger, 77 N.M. 321, 422 P.2d 359 (1967), where it was held that a broker was entitled to indemnity against saleswoman although liability of broker rested solely on respondeat superior.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral.

13-1829. Indemnity between active and passive tortfeasors - *No instruction drafted*.

No instruction drafted.

USE NOTE

The trial lawyers and judge will need to submit to the jury an instruction when the New Mexico law on this point is covered by the evidence.

Committee comment. — No instruction has been prepared on this subject, but this does not mean that an instruction should not be given in a proper case.

A number of New Mexico cases have discussed the right to indemnity of one whose negligence is "passive" or "secondary" from the "active" or "primary" wrongdoer. Because of the widely varying factual situations in which this principle may be involved, and because no New Mexico case is directly in point on this question, an instruction in the usual format of the Uniform Jury Instructions and adapted to the particular factual situations should be prepared in a proper case.

The following cases, while discussing this rule, have refused to apply it on grounds that the negligence was concurring, or that the duties of the parties were the same, or that the negligence of the party seeking indemnity was more than merely "passive":

Standhardt v. Flintkote Co., 84 N.M. 796, 508 P.2d 1283 (1973); Harmon v. Farmers Mkt. Food Store, 84 N.M. 80, 499 P.2d 1002 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972); Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969); Lommori v. Milner Hotels, Inc., 63 N.M. 342, 319 P.2d 949 (1957); Krametbauer v. McDonald, 44 N.M. 473, 104 P.2d 900 (1940).

For discussion of a variety of factual situations in which the right of indemnity between tortfeasors may exist, see Restatement of Restitution, § 87 et seq.

See also BAJI, "Implied Indemnity - Indemnification Active or Passive Negligence", § 12.69 for draft which appears to coincide with the present, but undeveloped, New Mexico case law on the subject matter.

Part D
Wrongful Death

13-1830. Measure of damages; wrongful death (including loss of consortium).

This lawsuit has been brought by _____ (*plaintiff*) [individually and] on behalf of the surviving beneficiaries of _____ (*name of decedent*) who is now deceased. The surviving beneficiaries are _____ (*names of surviving beneficiaries*).

New Mexico law allows damages to be awarded to the surviving [spouse], [parent(s)], [grandparent(s)], [other familial caretaker(s)] [and] beneficiaries if the death or the related damages described in this instruction were caused by the wrongful act, neglect, or default of another. If you should find for _____ (*plaintiff*) on the question of liability, you must then fix the amount of money which you deem fair and just for the life of _____ (*name of decedent*), including in your award compensation for any of the following elements of damages proved by the evidence:

1. The reasonable expenses of necessary medical care and treatment and funeral and burial;

2. The pain and suffering experienced by the deceased between the time of injury and death;

3. The lost earnings, the lost earning capacity and the value of the lost household services of the deceased considering the deceased's age, earning capacity, health, habits, and life expectancy. In considering loss of earnings or earning capacity,

deductions must be made for income taxes, social security taxes, other taxes, and personal living expenses of the deceased. The damages set forth in this paragraph are damages for future loss of money and are paid in a lump sum. Therefore, a reasonable discount must be made for the future earning power of the damages awarded;

4. The value of the deceased's life apart from [his] [her] earning capacity;

5. The mitigating or aggravating circumstances attending the wrongful act, neglect or default;

[6. The emotional distress to the [spouse], [parent(s)], [grandparent(s)], [other familial caretaker(s)] caused by the loss of [society,] [guidance,] [companionship] and [sexual relations] enjoyed with the deceased;]

7. The loss of guidance and counselling to the deceased's minor children.

8. You may also consider the loss to the beneficiaries of other expected benefits that have a monetary value. While the presence or absence of a measurable monetary loss to beneficiaries is a factor for consideration, damages may be awarded even where monetary loss to the surviving beneficiaries cannot be shown.

The property or wealth of the beneficiaries or of the defendant is not a legitimate factor for your consideration.

The guide for you to follow in determining fair and just damages is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the beneficiaries with fairness to all parties to this action. Your verdict must be based on evidence, not on speculation, guess, or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family [or the loss of the deceased's society to the family].

USE NOTE

The wrongful death instruction enumerates the various elements of damage which may be recovered upon the wrongful death of an individual. It is important to note that the elements of damage listed in the instruction may not all be recoverable by the same person or entity. For example, a personal representative is not entitled to recover for the surviving spouse's or familial caretaker's loss of consortium unless the personal representative is one and the same as the surviving spouse or familial caretaker. Similarly, the personal representative may not always recover each of the elements of damages depending upon the evidence produced at trial. If there are no minor children, item 7 should be excluded. Similarly, if there are no lost earnings, earning capacity or household services item 3 should be excluded, and so on. Only those elements supported by the evidence are to be included in the instruction given the jury.

If the personal representative is also the surviving spouse or familial caretaker, the damages described in item 6 should be included and the bracketed material in the last sentence of the instruction should be excluded. If the personal representative is not the surviving spouse or familial caretaker, the damages in item 6 should not be included in the instruction and the bracketed language in the last sentence should remain in the instruction. The amount awarded to the beneficiary's personal representative must be set out separately in a special verdict form from the amount awarded to the surviving spouse or familial caretaker for her or his loss of consortium. In addition, various elements of damages can be broken out separately on the special verdict form if the court determines that there is a need to do so in order to identify damages recoverable by the estate, by the statutory beneficiaries and by the surviving spouse or familial caretaker for loss of consortium. If there is a factual dispute whether the person seeking loss of consortium damages for a minor child was the "familial caretaker", then the jury should be provided with a definition of "familial caretaker". The Supreme Court described a "familial caretaker" as a person who lived with and cared for the child for a significant period of time prior to the death or injury. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-39, 126 N.M. 263, 273, 968 P.2d 774.

[As amended, effective October 1, 1996; March 20, 2000; as amended by Supreme Court Order No. 08-8300-33, effective November 24, 2008.]

Committee commentary. — The wrongful death instruction was drafted as a consequence of the Court's opinion in *Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994). *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, 126 N.M. 263, 968 P.2d 77, recognized loss of consortium for a "familial caretaker", such as a parent or grandparent who loses a child to death or where the child suffers a serious injury.

ANNOTATIONS

The 1996 amendment, effective for cases filed in the district courts on and after October 1, 1996, rewrote the instruction.

The 2000 amendment, effective for cases filed on and after March 20, 2000, in the first sentence of the second undesignated paragraph inserted "[parent(s)], [grandparent(s)], [other familial caretaker(s)] [and]"; in Pargraph 6, inserted "[parent(s)], [grandparent(s)], [other familial caretaker(s)]; in the Use Note, inserted "or familial caretaker" throughout and added the last paragraph; and made minor stylistic changes throughout the Instruction.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-33, effective November 24, 2008, in the second paragraph of the rule, changed "were proximately caused by the wrongful act" to "were caused by the wrongful act".

This instruction is mandatory. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

"Mitigating or aggravating circumstances" construed. — In a wrongful death action in which the state was a defendant, an instruction allowing the jury to consider mitigating or aggravating circumstances in setting compensatory damages did not violate the prohibition on punitive damages contained in 41-4-19B NMSA 1978. Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

No standard is fixed by law for measuring the value of pain and suffering; rather, the amount to be awarded is left to the jury's judgment. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Negligent infliction of emotional distress. — As a threshold requirement to establish the genuineness of a claim for negligent infliction of emotional distress, it is sufficient to allege and prove that (1) the plaintiff and the victim enjoyed a marital or intimate family relationship, (2) the plaintiff suffered severe shock from the contemporaneous sensory perception of the accident, and (3) the accident caused physical injury or death to the victim. It is not mandatory for a plaintiff to produce expert medical testimony in order to establish the claim for emotional injury. Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

Verdict for less than evidence would sustain does not show instruction not followed. — Where the evidence will sustain an award of a greater amount, the fact that the verdict is for a lesser amount does not show that the jury failed to follow this instruction. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Testimony of economist to establish monetary worth of deceased's life is an expression of an opinion. The jury can give the economist's damage testimony such weight as the jury thinks it deserves, even if the testimony is uncontradicted. Strickland v. Roosevelt County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Because the value of life itself is compensable under the Wrongful Death Act (41-2-1 NMSA 1978 et seq.), the jury must determine fair and just compensation for the reasonable expected nonpecuniary rewards the deceased would have reaped from life as demonstrated by his or her health and habits. Admissibility of evidence directed at establishing this value is governed by the rules of evidence of the applicable trial court. However, the plaintiffs may introduce expert testimony by an economist for establishing the value of life itself. Romero v. Byers, 117 N.M. 422, 872 P.2d 840 (1994).

Reference to "exemplary damages" not reversible error. — Although trial court's instructions were prefaced with a reference to exemplary damages, a term not used or defined in this instruction, such reference was merely a minor deviation from this instruction and not reversible error in the absence of a showing of prejudice. McCarson v. Foreman, 102 N.M. 151, 692 P.2d 537 (Ct. App. 1984).

The value of a husband's household services was an evidentiary item admissible in establishing the present worth of the husband's life. Corlett v. Smith, 107 N.M. 707, 763 P.2d 1172 (Ct. App. 1988).

Failure to instruct constituting harmless error. — Where the trial court gave an instruction in accordance with UJI 13-1801 (liability must be determined before damages) in a wrongful death and medical malpractice action, but failed to give an instruction based on UJI 13-2008, the error was harmless, in view of the court's use of the similar language contained in UJI 13-1830 in charging the jury. Sutherlin v. Fenenga, 111 N.M. 767, 810 P.2d 353 (Ct. App. 1991).

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages §§ 127 to 129.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 16 A.L.R.4th 589.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent, 61 A.L.R.4th 251.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 A.L.R.4th 309.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child, 61 A.L.R.4th 413.

Recovery of damages for loss of consortium resulting from death of child - modern status, 77 A.L.R.4th 411.

Who, other than parent, may recover for loss of consortium on death of minor child, 84 A.L.R.5th 687.

13-1831. Mortality tables.

According to a table of mortality, the life expectancy of persons aged _____ years is _____ additional years. This figure is not conclusive. It is the average life expectancy of persons who have reached that age. This figure may be considered by you in connection with other evidence relating to the probable life expectancy of _____, including evidence of [his] [her] occupation, health, habits and other activities, bearing in mind that some persons live longer and some live shorter than the average.

USE NOTE

Care should be exercised in completing the blank spaces to conform to the evidence.

This instruction may be used in conjunction with UJI 13-1830 in wrongful death cases.

This instruction may also be used in conjunction with UJI 13-1802 and 13-1806 in permanent injury cases.

[As amended, effective November 1, 1991.]

Committee comment. — Mortality tables need not be read into evidence or read to the jury during the course of the trial. It is sufficient that the court fill in the blanks above with the proper figures. The court can take judicial notice of the mortality tables which are included in the New Mexico Statutes.

For New Mexico law, see Padilla v. Atchison, T. & S.F. Ry., 61 N.M. 115, 295 P.2d 1023 (1956); Dominguez v. Albuquerque Bus Co., 58 N.M. 562, 273 P.2d 756, 50 A.L.R.2d 414 (1954). This instruction was cited in Higgins v. Hermes, 89 N.M. 379, 384, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made a substitution to make a reference gender neutral in the last sentence.

Library references. — 25A C.J.S. Damages §§ 181, 185; 25A Death § 90.

Evidence relevant to life expectancy. — Plaintiff's activities of drinking, abusive conduct, resisting arrest, battery and shooting a person in a bar were relevant to plaintiff's life expectancy and the number of years for which damages for permanent injury and pain and suffering should have been assessed, and exclusion of this evidence was reversible error. De La O v. Bimbo's Restaurant, Inc., 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 Am. Jur. 2d Damages § 316.

Part E
Nominal Damages

13-1832. Nominal damages.

If you find that _____ *(plaintiff)* has established a right to recover from _____ *(defendant)* but that _____ *(plaintiff)* has suffered [no harm], [insignificant harm], [or] [damages that cannot be ascertained], you may award [him] [her] [it] nominal damages. Nominal damages are a trivial sum of money, usually one cent or one dollar, awarded to a party who has established a right to recover but has not established that [he] [she] [it] is entitled to compensatory damages.

USE NOTE

This instruction should not be used when the cause of action requires proof of actual damages.

[Adopted effective, January 1, 1999.]

Committee comment. — This instruction defines nominal damages and explains when such damages may be awarded. Nominal damages are referenced in UJI 13-1827 and will support an award of punitive damages. There may be other situations in which the jury should be instructed as to the availability of nominal damages as a remedy when the substantive elements of a cause of action have been established. *See Sanchez v. Clayton,* 117 N.M. 761, 877 P.2d 567 (1994).

APPENDIX TO CHAPTER 18

Appendix 1. Examples of instructions and special verdict forms for use in successive tortfeasor cases.

INTRODUCTION

This Appendix contains a set of sample instructions and exemplars drafted by the Committee on Uniform Jury Instructions for Civil Cases and is intended to cover many of the situations in which one party or another may argue either that one party is liable for the negligence or fault of another party based on successive tortfeasor principles or that a plaintiff received more than one divisible injury.

For those successive tortfeasor cases where the parties stipulate, or the court rules, that the plaintiff's injuries are divisible, the Committee considered three scenarios where different instructions would be useful. First, for those cases where suit is brought against the original tortfeasor only and no claim is made against the potential successive tortfeasor, the Committee determined that no special successive tortfeasor instruction on "divisibility" was necessary. In such cases, the Committee contemplated that the jury would determine the original tortfeasor's liability for enhanced injuries under the rules of proximate cause with the aid of UJI 13-1802A NMRA. Counsel can adapt the sample instructions and verdict form in the Appendix to Chapter 11 for use under this first scenario. Second, for those cases where divisibility is not a jury issue and suit is brought against the potential successive tortfeasor only, the Committee contemplated

that the trial court would instruct the jury using 13-1802B NMRA. A sample set of instructions and a verdict form for this first scenario appear as Example A in this Appendix. Third, in those cases where suit is brought against both the potential original and successive tortfeasors, the Committee contemplated the use of 13-1802C NMRA. The sample instructions and verdict form for this third scenario appears in Example B of this Appendix.

For all cases governed by successive tortfeasor principles in which the jury is asked to determine whether injuries are divisible, the Committee contemplated the use of UJI 13-1802D NMRA. Two sets of sample instructions and verdict forms, under Examples C and D, appear in this Appendix. Example C was drafted for use in a case where the plaintiff alleges that two defendants each caused a divisible injury. Example D is based loosely on the facts of Payne v. Hall, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599, with a minor variation consisting of the addition of a third-party claim, and demonstrates the use of 13-1802D NMRA in a more complex case.

Each of the exemplar instructions and verdict forms was drafted in contemplation that they would be used chiefly in negligence cases. The Committee recommends that particular attention be paid to revising the instructions and verdict forms before they are adapted for use with strict liability, crashworthiness, or so-called "second-injury" or "rollover" cases where successive tortfeasor principles may be at issue.

EXAMPLE A
Statement of facts

The plaintiff, injured in automobile accident, is transported to a hospital where he claims he received negligent care. The plaintiff brings suit against the health care provider only, and the parties agree, or the court decides as a matter of law, that any injuries received at the hospital are causally distinct from injuries the plaintiff received in the automobile accident.

UJI 13-302A. Statement of theory(ies) for recovery;

UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof; and

UJI 13-302C. Statement of denial and affirmative defense(s).

In this case the plaintiff seeks compensation from the defendant medical provider for damages the plaintiff says were caused by negligent medical treatment of injuries first received by the plaintiff in an automobile accident. The plaintiff says the defendant caused an injury separate from the first injuries, or made them worse.

To establish negligent medical treatment on the part of the defendant, the plaintiff has the burden of proving that, in treating the plaintiff, the defendant failed to possess

and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances.

The plaintiff has the burden of proving such negligent medical treatment was a cause of a separate injury, or made the first injury measurably worse.

The defendant denies what the plaintiff says.

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed:

.

(NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact the plaintiff may have been unusually susceptible to injury or likely to be harmed. The defendant is said to "take the plaintiff as he finds [him] [her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802B. Successive tortfeasor only defendant; no question for jury on divisibility of injuries.

In this case, the plaintiff says and has the burden of proving by the greater weight of the evidence that the defendant medical provider caused injuries that were separate and distinct from, or that amounted to a measurable worsening of, injuries the plaintiff received in the automobile accident.

In determining what damages, if any, were caused by the defendant medical provider, you should award the plaintiff compensation only for the separate injury caused by the medical provider and for any measurable worsening of the plaintiff's condition caused by the medical provider that would have been avoided had the medical provider acted within the standard of care, but not for damages from the automobile accident.

Special Verdict Form
Example A

An exemplar special verdict form suitable for this fact pattern appears in the appendix to Chapter 11 (Medical Negligence).

EXAMPLE B
Statement of facts

The plaintiff, injured in automobile accident with another driver, is transported to a hospital where he claims he received negligent care. The plaintiff brings suit against the other driver and the other driver brings a third-party complaint against the medical provider, and the parties stipulate, or the court decides as a matter of law, that the injuries received in the automobile accident are divisible from the injuries claimed to have been caused at the hospital.

UJI 13-302A-D. Statement of theory(ies) for recovery;

UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof;

UJI 13-302C. Statement of denial and affirmative defense(s); and

UJI 13-302D. Statement of factual contentions of defendant(s), causation and burden of proof.

In this case the plaintiff seeks compensation from the defendant driver for damages the plaintiff says were caused by negligence.

To establish negligence on the part of the defendant driver, the plaintiff has the burden of proving that the defendant driver failed to stop and yield the right-of-way to the plaintiff's vehicle.

The plaintiff has the burden of proving that such negligence was a cause of injuries and damages.

The defendant denies what the plaintiff says, and the defendant says that the third-party defendant medical provider's negligent treatment [caused injury separate from the first injuries received in the automobile accident], [or] [made the first injury measurably worse] [or] [caused injury which would not have occurred with proper medical treatment].

To establish that negligent medical treatment [caused injury separate from the first injuries] [or] [made the first injuries measurably worse] [or] [caused injury which would not have occurred with proper medical treatment], the defendant has the burden of proving (1) in treating the plaintiff, the medical provider failed to possess and apply the

knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances, and (2) such negligent medical treatment [was a cause of separate injury] [or] [made the first injury measurably worse] [or] [caused injury which would not have occurred with proper medical treatment].

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed:

.

(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact the plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to "take the plaintiff as he finds [him][her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802C. Successive tortfeasors; divisibility of injury not in dispute or decided as a matter of law.

In this case, if you find that the defendant other driver or the defendant medical [provider was] [providers were] negligent and caused injury to the plaintiff, you will first decide the amount of damages from the automobile accident and you will then decide the amount of damages from the medical treatment.

You will next compare the negligence of each person whose negligence contributed to the injuries caused by the car accident. You will then compare the negligence of each person whose negligence contributed to the injuries caused at the hospital.

Special Verdict Form
Example B

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer: Yes No

Other Driver _____ _____

Medical Provider _____ _____

If the answer to Question No. 1 is "No" for both the other driver and the medical provider, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is "Yes" as to either the other driver or the medical provider, you are to answer Question 2.

Question No. 2: For each person or company you found negligent in response to Question No. 1, was the negligence of that person or company a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer: Yes No Not applicable

Other Driver _____ _____ _____

Medical Provider _____ _____ _____

If you answered "No" or "Not applicable" as to both defendants listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: _____ Yes _____ No

If you answered "No" then you should skip the next question and go to Question No. 5. If you answered "Yes," then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [him] [her]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS ONLY ONE DEFENDANT NEGLIGENT

Question No. 5: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff and caused by the [defendant driver] [defendant medical provider] to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

[Other Driver	_____%]
[Medical Provider	_____%]
[Plaintiff	_____%]
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. Then the court will enter judgment for the plaintiff and against each defendant in the proportion of damages for which each defendant is responsible.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY HAS FOUND BOTH DEFENDANT DRIVER AND MEDICAL PROVIDER NEGLIGENT

Question No. 5: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the separate injuries caused by the defendant auto accident driver and the damages suffered by the plaintiff as a result of

the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:

Damages caused by auto accident defendant driver	_____
Damages caused at the hospital	_____
Total damages (*must be the sum of the two numbers above*)	_____

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons who contributed to the separate damages caused by the automobile accident and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to himself in the automobile accident.

Other Driver	_____%
Plaintiff	_____%
_____	_____
Total	100%

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury.

Medical Provider	_____%
Plaintiff	_____%
_____	_____
Total	100%

_____

Foreperson

EXAMPLE C
Statement of facts

The plaintiff, injured at a medical clinic, is transported to hospital where he claims he received additional negligent care. The plaintiff brings suit against the defendant clinic doctors and defendant hospital doctors, contending that each caused distinct injuries, and the issue of divisibility of injuries is for the jury.

UJI 13-302A. Statement of theory(ies) for recovery;

UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof; and

UJI 13-302C. Statement of denial and affirmative defense(s).

In this case the plaintiff seeks compensation from the defendant clinic doctors for damages from injuries the plaintiff says were caused by negligent medical treatment at the clinic and from the defendant hospital doctors for damages for enhanced and separate injuries the plaintiff says were caused by negligent medical treatment at the hospital.

To establish negligent treatment on the part of the defendant clinic doctors, the plaintiff has the burden of proving that, in treating the plaintiff, the clinic doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff either suffered an injury separate and distinct from any injury later received at the hospital or, in the alternative, that the plaintiff suffered a single injury caused at least in part by negligence on the part of the clinic doctors.

To establish negligent treatment on the part of the defendant hospital doctors, the plaintiff has the burden of proving that, in treating the plaintiff, the hospital doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff either suffered an injury separate and distinct from any injury the plaintiff received at the clinic, or that the hospital doctors made the plaintiff's original injuries measurably worse or, in the alternative, that the negligence of the hospital doctors, in combination with the negligence of the clinic doctors, contributed to bring about plaintiff's injuries and damages.

Both the clinic and the hospital deny what the plaintiff says.

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed:

.

(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to "take the plaintiff as he finds [him][her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802D. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that one or more of the clinic doctors and one or more of the hospital doctors negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff's injuries are divisible; or, in other words, whether the negligence of the clinic doctors caused an injury that is separate and causally distinct from any separate, enhanced or avoidable injury caused by the hospital doctors.

If you find that the plaintiff's injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the injuries and each defendant will be responsible for his or her proportionate share, if any, of the plaintiff's damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose negligence contributed to the injuries at the clinic and then compare the negligence of each person whose negligence contributed to the injuries at the hospital. The plaintiff would be entitled to recover from the clinic both the damages related to the distinct injuries caused by the clinic and any damages from additional or enhanced injuries from subsequent medical treatment at the hospital. The clinic, in turn, would be entitled to recover from the hospital the share of damages caused by the negligence on the part of the hospital.

The plaintiff says that the plaintiff received injuries caused by the clinic doctors that are divisible from the injuries caused by the hospital doctors. The plaintiff, therefore, bears the burden of proving, by the greater weight of the evidence, both that the plaintiff received an original injury at the clinic that is separate and causally distinct from a second injury received at the hospital, and the amount of damages and injuries from the separate injuries.

Special Verdict Form

Potential successive tortfeasor issue for the jury

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer:	Yes	No
Clinic doctor 1	_____	_____
Clinic doctor 2	_____	_____
Hospital doctor 1	_____	_____
Hospital doctor 2	_____	_____

If the answer to Question No. 1 is "No" for all persons listed, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is "Yes" as to at least one of the persons listed, you are to answer Question 2.

Question No. 2: For each person or persons you found negligent in response to Question No. 1, do you find that the negligence of that person or company was a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer:	Yes	No	Not applicable
Clinic doctor 1	_____	_____	_____
Clinic doctor 2	_____	_____	_____
Hospital doctor 1	_____	_____	_____
Hospital doctor 2	_____	_____	_____

If you answered "No" or "Not applicable" as to all the persons or companies listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: _____ Yes _____ No

If you answered "No" then you should skip the next question and go to Question No. 5. If you answered "Yes", then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [him] [her]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS AGAINST BOTH CLINIC DOCTORS BUT NOT AGAINST HOSPITAL DOCTORS, PLAINTIFF NOT NEGLIGENT

Question No. 5: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic doctor 1	_____%
Clinic doctor 2	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE
WHEN THE JURY HAS FOUND TWO CLINIC DOCTORS AND
ONE HOSPITAL DOCTOR NEGLIGENT AND
THE PLAINTIFF NEGLIGENT AND
THERE IS A SUCCESSIVE TORTFEASOR ISSUE

Question No. 5: In accordance with the court's instruction No. ___ regarding separate and causally-distinct injuries, did the clinic doctors cause an injury that is separate and causally distinct from any second injury or enhancement of the original injury caused by hospital doctor 2?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is "Yes," then skip Question Nos. 6 and 7 and answer Question Nos. 8-11. If the answer to Question No. 5 is "No," then answer Question Nos. 6 and 7.

Question No. 6: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic doctor 1	_____%
Clinic doctor 2	_____%
Hospital doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. The court will then enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom and you will return to open court.

_____

Foreperson

Question No. 8: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence at the clinic and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:

Damages caused by negligence of clinic doctors	_____
Damages caused by hospital doctor 2	_____
Total damages (*must be the sum of the two numbers above*)	_____

Go to Question No. 9.

Question No. 9: Compare the negligence of the following persons who contributed to the separate damages caused by negligence at the clinic and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to himself at the clinic.

Clinic doctor 1	_____%
Clinic doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

Go to Question No. 10.

Question No. 10: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by negligence at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury at the hospital.

Hospital doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

_____

Foreperson

EXAMPLE D
Statement of facts

The plaintiff says she was injured as a result of medical treatment at a medical clinic. She also contends and the trial court has determined that, under the "positive rule of decisional law" announced in Lewis v. Samson, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972, 985 (2001), the clinic is liable for any injuries or enhanced injuries the plaintiff received subsequently at a hospital. The clinic denies that it was negligent and contends that if the plaintiff received negligent medical care, it was at the hospital to which the plaintiff was transferred from the clinic. The plaintiff brings suit only against the clinic. The clinic has filed a third party claim against the hospital, seeking indemnity against the plaintiff's claim that the clinic is liable for injuries caused by negligence at the hospital. The trial court has determined that divisibility of injuries is a question for the jury. The physicians at the clinic and hospital are employees of the respective facilities.

UJI 13-302A. Statement of theory(ies) for recovery;

UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof; and

UJI 13-302C. Statement of denial and affirmative defenses.

In this case the plaintiff seeks compensation from the defendant clinic for damages from injuries the plaintiff says were caused by negligent treatment at the clinic and for any additional injuries or measurable worsening of her damages she suffered as a result of subsequent treatment required at the hospital.

To establish negligent treatment on the part of the clinic, the plaintiff has the burden of proving that, in treating the plaintiff, the clinic doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff suffered an injury.

The plaintiff also says, and has the burden of proving, that the injuries the plaintiff received at the clinic were separate and causally-distinct from any injury or measurable enhancement of her injuries caused by treatment at the hospital.

The clinic denies that it was negligent and contends that, if the plaintiff was injured through negligence, it was the result of treatment she received from doctors at the hospital.

To establish negligent treatment on the part of the hospital, the clinic has the burden of proving that, in treating the plaintiff, the hospital doctors failed to possess and apply

the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers and that such failure either caused or contributed to plaintiff's injuries.

UJI 13-1802 Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate her for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed:

.

(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to "take the plaintiff as he finds [him][her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802D. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that one or more of the clinic doctors negligently caused injury to the plaintiff and one or more of the hospital doctors negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff's injuries are divisible; or, in other words, whether the negligence of the clinic doctors caused an injury that is separate and causally-distinct from any separate, enhanced or avoidable injury caused by the hospital doctors.

If you find that the plaintiff's injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the plaintiff's injuries and each defendant will be responsible for its proportionate share, if any, of the plaintiff's damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose negligence contributed to the injuries at the clinic and then compare the negligence of each person whose negligence contributed to the injuries at the hospital. The plaintiff would be entitled to recover from the clinic both the

damages related to the distinct injuries received at the clinic and any damages arising from additional or enhanced injuries arising from the subsequent medical treatment necessitated by those injuries. The clinic, in turn, would be entitled to recover from the hospital the share of damages caused by negligence on the part of the hospital.

The plaintiff says that she received injuries caused by the clinic doctors that are separate and causally distinct from any separate injuries or measurable enhancement of the clinic injuries caused by the hospital doctors, she bears the burden of proving, by the greater weight of the evidence, that she received an injury at the clinic that is separate and causally distinct from any separate or enhanced injury received at the hospital, and the amount of damages and injuries attributable to the separate injuries.

Special Verdict Form

Potential successive tortfeasor issue for the jury

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer:	Yes	No
Clinic	_____	_____
Hospital	_____	_____

If the answer to Question No. 1 is "No" for the Clinic, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for the defendant and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is "Yes" as to the Clinic, you are to answer Question 2.

Question No. 2: For each health care provider you found negligent in response to Question No. 1, do you find that the negligence of that provider was a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer:	Yes	No	Not applicable
Clinic	_____	_____	_____
Hospital	_____	_____	_____

If you answered "No" as to the Clinic, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to the Clinic, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: ____ Yes _____ No

If you answered "No" then you should skip the next question and go to Question No. 5. If you answered "Yes," then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [him] [her]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS AGAINST CLINIC BUT NOT AGAINST HOSPITAL DOCTORS, PLAINTIFF IS NEGLIGENT

Question No. 5: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic	_____%
Plaintiff	_____%
	_____
Total	100%

The court will multiply the percentage of negligence for the Clinic by the plaintiff's total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which the defendant is responsible.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY HAS FOUND THE CLINIC AND THE HOSPITAL AND THE PLAINTIFF NEGLIGENT AND THERE IS A SUCCESSIVE TORTFEASOR ISSUE

Question No. 5: In accordance with the court's instruction No. ___ regarding separate and causally-distinct injuries, did the clinic cause an injury that is separate and causally distinct from any second injury or enhancement of the original injury caused by the hospital?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is "Yes," then skip Question Nos. 6 and 7 and answer Question Nos. 8-11. If the answer to Question No. 5 is "No," then answer Question Nos. 6 and 7.

Question No. 6: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. *(Here enter the total amount of damages without any reduction for comparative negligence.)*

Go to Question No. 7.

Question No. 7: Compare the negligence of the following parties and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic	_____%
Plaintiff	_____%
Hospital	_____%
	_____
Total	100%

The court will multiply the percentage of negligence for the defendant by the plaintiff's total damages. The court will then enter judgment against the defendant and in favor of the plaintiff in the proportion of damages for which the defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom and you will return to open court.

_____

Foreperson

Question No. 8: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence at the clinic and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:

Damages caused by negligence of clinic	_____
Damages caused by negligence of hospital	_____
Total damages	_____
(*must be the sum of the two numbers above*)	

Go to Question No. 9.

Question No. 9: Compare the negligence of the following parties who contributed to the separate damages caused by negligence at the clinic and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to herself at the clinic.

Clinic	_____%
Plaintiff	_____%
	_____
Total	100%

Go to Question No. 11.

Question No. 11: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by negligence at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury at the hospital.

Hospital doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

_____

Foreperson

[Approved by Supreme Court Order 07-8300-36, effective February 1, 2008.]

CHAPTER 19
Miscellaneous Matters

Part A
Miscellaneous Matters

13-1901. Recompiled.

ANNOTATIONS

Recompilations. — UJI 13-1901 NMRA relating to two or more plaintiffs was recompiled as UJI 13-115 NMRA, effective March 1, 2005.

13-1902. Recompiled.

ANNOTATIONS

Recompilations. — UJI 13-1902 NMRA, relating to two or more defendants, was recompiled as UJI 13-116 NMRA, effective March 1, 2005.

13-1903. Recompiled.

ANNOTATIONS

Recompilations. — Effective March 1, 2005, UJI 13-1903 NMRA has been amended and recompiled as UJI 13-117 NMRA.

13-1904. Jury deadlocked.

It is your duty, as jurors, to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgments. Each of you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favors such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinions of the other jurors.

I hope that, after further deliberation, you may be able to agree upon a verdict. That is why we try cases, to try to dispose of them and to reach a common conclusion, if you can do so, consistent with the consciences of the individual members of the jury. The court suggests that, in deliberating, you each recognize that you are not infallible, that you listen to the opinion of the other jurors and that you do so conscientiously with a view to reaching a common conclusion, if you can.

USE NOTE

1. This instruction should not be given as part of the original series of the instructions of the court to the jury, but only if, after reasonable deliberation, the jury reports to the court an inability to agree or fails to return a verdict.

2. At such time as the trial judge determines that a supplemental instruction is necessary, only this instruction should be given.

3. In giving the instruction the following procedure should be employed:

a. Before the trial judge attempts to ascertain whether the jury is deadlocked, counsel should be present along with the reporter. At that time, the court should, on the record, state the facts concerning any communication from the jury, or, if there has been no communication, the length of time the jury has been deliberating, and inform counsel that the court proposes to give this instruction, giving counsel an opportunity to make such objections as they desire.

b. In the presence of counsel and the reporter, the jury should be returned to the box, and the court, after cautioning the jury not to reveal the numerical division in the voting or which side has the preponderance, should ask the foreperson if they are able to reach a verdict. If they are not, the court should then give this instruction and return them to the jury room for further deliberations.

[As amended, effective January 1, 1987; November 1, 1991.]

Committee comment. — An instruction substantially as set forth above was approved by the New Mexico supreme court in Garcia v. Sanchez, 68 N.M. 394, 362 P.2d 779 (1961). In contrast, the trial court was held to have coerced the jury and thus committed reversible error where, after deadlock, the court inquired into how the jury was numerically divided, commented on the importance of the case and the time and expense of trial, and placed a time limit on further deliberations. Pirch v. Firestone Tire & Rubber Co., 80 N.M. 323, 455 P.2d 189, 38 A.L.R.3d 1273 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

After submission of a cause to the jury, all communications between the judge and the jury must take place in open court and in the presence of, or after notice to, the parties or their counsel. Amador v. Lara, 93 N.M. 571, 603 P.2d 310 (Ct. App. 1979).

Instructions of this nature have generated a substantial body of case law in the criminal field. See comments to UJI 14-5030.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1562, 1564, 1572, 1593 to 1596.

88 C.J.S. Trials § 297.

Part B
No Instructions Drafted

13-1905. Dead man statute - *No instruction drafted*.

No instruction drafted.

Committee comment. — The so-called "Dead Man Statute" caused considerable scholastic problems over the years and was previously covered by 20-2-5, 1953 Comp., but this statute has been repealed and the question presented is covered by the New Mexico Rules of Evidence.

13-1906. Entrustments - *No instruction drafted*.

No instruction drafted.

Committee comment. — Numerically, the cases do not justify involvement by the committee in this field of law and, therefore, no recommendations were tendered.

ANNOTATIONS

Compiler's notes. — The trial court and counsel will be required to draft applicable instructions for the particular case.

CHAPTER 20
Duties of Jurors

Introduction

The duties of jurors need to be clearly specified, not only so that the jury has guidelines as to what they are to do but also to help them to avoid any fatal error. Here

should be grouped the final instructions to the jury before they are to commence their deliberations.

All of the instructions in this chapter ordinarily will be given to the jury in every case, unless for some particular reason a particular instruction would not be applicable.

13-2001. Performance of your duties.

Faithful performance by you of your duties is vital to the administration of justice.

USE NOTE

This instruction shall be given to the jury in every case and shall replace all instructions of similar import which generally are much longer but, in essence, state the same principle.

Committee comment. — The jury should be impressed with the seriousness of their part in the administration of justice. This instruction is a basic statement of law ordinarily applicable in all jury cases.

This particular instruction was the subject matter of the decisions of both the appellate court and the supreme court in the case of Jewell v. Seidenberg, 82 N.M. 88, 475 P.2d 785 (Ct. App.), rev'd on other grounds, 82 N.M. 120, 477 P.2d 296, 49 A.L.R.3d 121 (1970).

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 297, 298, 320, 322.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1448.

13-2002. Duty to follow instructions.

The law of this case is contained in these instructions and it is your duty to follow them. You must consider these instructions as a whole, not picking out one instruction, or parts thereof, and disregarding others.

USE NOTE

This instruction will be given in all jury cases and will replace like instructions on the same subject matter heretofore given.

Committee comment. — This is the basic stock instruction, given so that the jury will not be misled into thinking that any single instruction supersedes any other given or that any one instruction is decisive of the lawsuit.

This instruction was cited in the partially concurring and dissenting opinion in the case of Williams v. Town of Silver City, 84 N.M. 279, 502 P.2d 304 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 297, 298, 320, 322.

Presumption that jurors considered instructions as a whole. — In the absence of proof to the contrary, jurors will be presumed to have considered instructions as a whole. Armstrong v. Industrial Elec. & Equip. Serv., 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981); Lamkin v. Garcia, 106 N.M. 60, 738 P.2d 932 (Ct. App. 1987).

Standard of review for sufficiency of instructions. — The standard for the reviewing court in determining the sufficiency of instructions is whether all of the instructions, when read and considered together, fairly present the issues and the law applicable thereto. Armstrong v. Industrial Elec. & Equip. Serv., 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1449.

13-2003. Jury sole judges of witnesses.

You alone are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account the witness' ability and opportunity to observe, the witness' memory, the witness' manner while testifying, any interest, bias or prejudice that the witness may have and the reasonableness of the testimony, considered in light of all the evidence in the case.

USE NOTE

This is a basic instruction to be given in all cases.

[As amended, effective November 1, 1991.]

Committee comment. — Regardless of the type of case involved, it is for the jury to determine the credibility of the witnesses and, further, to determine the weight to be given to the testimony of each witness. If there is no conflict in the testimony, there is nothing for the jury to determine, but if there is a conflict in the testimony, then it is for the jury to resolve the conflict and this instruction is a proper guide in this regard.

An instruction of this type was approved in State v. Massey, 32 N.M. 500, 258 P. 1009 (1927). See also State v. Poich, 34 N.M. 423, 282 P. 870 (1929). This instruction was cited in Murphy v. Frinkman, 92 N.M. 428, 589 P.2d 212 (Ct. App. 1978); Anderson v.

Welsh, 86 N.M. 767, 527 P.2d 1079 (Ct. App. 1974); and Greer v. Johnson, 83 N.M. 334, 491 P.2d 1145 (1971).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral in the second sentence; and deleted the former second sentence in the Use Note, which read: "The pronouns in this instruction will need to be changed under certain circumstances."

Library references. — 88 C.J.S. Trial §§ 315, 316, 363 to 365.

Law reviews. — For annual survey of New Mexico law of evidence, 19 N.M.L. Rev. 679 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1406.

Instructions regarding good or bad character of witnesses as affecting their credibility, 120 A.L.R. 1443.

88 C.J.S. Trial §§ 276, 311, 313.

13-2004. Witness impeached.

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct.

[or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.]

[or by evidence that the witness has been convicted of a crime.]

[or by evidence that the general reputation of the witness for truth, honesty or integrity is bad.]

[or by specific acts of wrongdoing of the witness.]

If you believe that any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness only such credit as you may think it deserves.

USE NOTE

The bracketed material will be used as required in each case.

The instruction is to be used whenever a witness (including a party) has been impeached in one or more of the manners provided by law.

Committee comment. — The various methods by which a witness may be impeached or discredited, according to the general authorities as well as New Mexico cases, have been analyzed and studied and the various elements have been set forth in this instruction. However, it is doubtful that, at any time, all of the various elements will be present and, therefore, care should be exercised in selecting the proper elements to be presented to the jury.

This instruction was cited in the following New Mexico cases: Anderson v. Welsh, 86 N.M. 767, 527 P.2d 1079 (Ct. App. 1974); Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973); and State v. Madrid, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 315, 316, 363 to 365; 98 C.J.S. Witnesses § 458 et seq.

Unambiguous instruction does not require reversal. — Instruction which informed jury as to permissible methods of impeachment and stated that if jury believed a witness had been impeached, jury could take impeachment into consideration in determining weight and credibility of witness's testimony, was not ambiguous and did not require a reversal. State v. Madrid, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

But refusal to give instruction may require reversal. — The Uniform Jury Instructions are to be given when justified by the facts, and the refusal to give such instructions when accompanied by the slightest prejudice to a party is reversible error. Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973).

However may introduce false issues if given without evidentiary support. — To have given the requested instruction, which included impeachment methods for which there was no evidentiary support, would have introduced false issues and would have misled the jury. Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1167; 75B Am. Jur. 2d Trial §§ 1411 to 1414.

Impeachment of witness by expert evidence tending to show mental or moral defects, 15 A.L.R. 932.

13-2005. Jury sole judges of the facts.

You are the sole judges of all disputed questions of fact in this case. It is your duty to determine the true facts from the evidence produced here in open court. Your verdict should not be based on speculation, guess or conjecture.

You are to apply the law, as stated in these instructions, to the facts as you find them and, in this way, decide the case. Neither sympathy nor prejudice should influence your verdict.

USE NOTE

This instruction shall be given in all cases and is intended to preclude other instructions of similar import.

Committee comment. — It is a basic precept of New Mexico law that, if requested, the jury must be informed that they are the sole judges of the facts. This provision, prior to the adoption of mandatory jury instructions in New Mexico, was long a part of the rules of procedure in New Mexico. The latter portion of the instruction purposely repeats cautions contained in other instructions.

This instruction was cited by the New Mexico Supreme Court in the case of Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296, 49 A.L.R.3d 121 (1970) and by the court of appeals in the case of Anderson v. Welsh, 86 N.M. 767, 527 P.2d 1079 (Ct. App. 1974).

This instruction was cited and quoted in part in the specially concurring opinion of Judge Sutin in the case of Higgins v. Hermes, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 298, 320, 322.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1448 et seq.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers as ground for mistrial, new trial or reversal, 93 A.L.R.3d 556.

88 C.J.S. Trial § 297.

13-2006. All jurors to participate.

The jury acts as a body. Therefore, on every question which the jury must answer it is necessary that all jurors participate regardless of the vote on another question. Before a question can be answered, at least [five] [ten] of you must agree upon the answer; however, the same [five] [ten] need not agree upon each answer.

USE NOTE

This instruction shall be given in all civil jury cases in New Mexico, whenever there is more than one matter for the jury to settle.

Committee comment. — Active participation by the entire jury is the intent of the jury system. Simply because one or more jurors disagree on a particular issue would not justify their being excluded from further deliberations. Therefore, if a juror should refuse to vote with the majority on liability but there would be the required number voting in favor of liability, that juror should not be excluded from discussions or voting on damages. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

ANNOTATIONS

Findings by juror no bar to future participation. — The one juror who has found both parties negligent cannot be kept from active participation in the assessment of damages. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1647 et seq.

13-2007. Closing arguments.

After these instructions on the law governing this case, the lawyers may make closing arguments, or statements, on the evidence and the law. These summaries can be of considerable assistance to you in arriving at your decision and you should listen carefully. You may give them such weight as you think proper. However, neither these final discussions nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in these instructions.

USE NOTE

This instruction will ordinarily be given in all jury trials and is to replace instructions of like nature previously given.

Committee comment. — The foregoing instruction is to protect the parties from prejudicial statements and remarks of counsel made during the course of the trial. See Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337, 84 A.L.R.2d 1269 (1960). In the case of Miera v. Territory, 13 N.M. 192, 81 P. 586 (1905), the supreme court, in approving such an instruction, pointed out that it left the jury at liberty to give such weight as they might think proper to the arguments of counsel, in explaining and interpreting the evidence, but not to regard them as actual evidence.

This instruction (U.J.I. Civ. 17.7 in the first edition) was cited in the following cases: Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (Ct. App. 1977); Romero v. Melbourne, 90

N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); Higgins v. Hermes, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); State v. Herrera, 84 N.M. 46, 499 P.2d 364 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972), 409 U.S. 1110, 93 S. Ct. 918, 34 L. Ed. 2d 692 (1973) and State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 294, 321.

This instruction is sufficient to advise jury of their duty to decide the case upon the evidence presented, not upon argument of counsel. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1235.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers as ground for mistrial, new trial or reversal, 93 A.L.R.3d 556.

88 C.J.S. Trial § 324.

13-2008. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated April 22, 2002, this instruction, relating to no damages unless liability, is withdrawn effective June 1, 2002.

13-2009. Verdict of jury.

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.

You will be given the Court's instructions and [a special] verdict form[s]. [In this case it will be necessary for you to answer the preliminary questions presented to you on the verdict form.]

When as many as [ten] [five] of you have agreed upon a verdict [and your answers to the questions presented on the special verdict form], your foreperson must sign the appropriate form[s] and you will all then return to open court.

USE NOTE

This instruction should be given in every case. The bracketed language in the second and third paragraphs is used when special interrogatories or preliminary questions are presented under verdict forms UJI 13-2217 or UJI 13-2220. Where used

instead of the special verdict form questions, "special interrogatories" should be substituted for "preliminary questions." The instruction is given without the bracketed language where a general verdict form is used.

[As amended, effective November 1, 1991.]

Committee comment. — In civil cases in New Mexico, a majority of the jury renders the jury's verdict. Rule 1-038F and G, Rules of Civil Procedure for the District Courts. The verdict is announced by a jury foreperson. The verdict must be in writing and signed by the foreperson. Rule 1-308F and G. Chapter 22 of these instructions contain the appropriate jury verdict forms for general verdicts and special verdicts accompanied by special interrogatories or answers to preliminary questions necessary to rendering of a verdict in cases of comparative fault.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, rewrote the instruction to the extent that a detailed comparison would be impracticable.

Instruction not appropriate in federal constitutional claim. — This instruction cannot be used as authority for less than unanimous jury where plaintiff's claims are based on a violation of federal constitutional rights sought to be enforced through 42 U.S.C. § 1982 and not based on violation of state law. Bledsoe v. Garcia, 742 F.2d 1237 (10th Cir. 1984).

Not unduly repetitious of other instructions. — Plaintiff's objection that the giving of former UJI Civ. 14.1 (now UJI 13-1801) and this instruction unduly emphasized, by repetition, the consideration of liability before damages instruction was without merit. Uniform Jury Instructions require that both instructions are to be given purposely to cover the subject matter twice. Demers v. Gerety, 87 N.M. 52, 529 P.2d 278 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1437.

CHAPTER 21
No Instructions to Be Given

Introduction

Unnecessary instructions must be deleted.

Jury instructions differ among the various jurisdictions. Historical concepts and tradition have spawned and protected many instructions that are not needed for the proper enlightenment or guidance of the jury to a true verdict. One of the most important developments in mandatory jury instructions is the mandate that certain instructions will

not be given. When standardized jury instructions were originally attempted, probably the biggest problem was in forcing the trial courts to give up certain stock instructions which had long been in use. Illinois, with its "Pattern Jury Instructions" in 1961, evolved specific directions that certain matters were not to be the subject matter of instructions in the future. The New Mexico Supreme Court adopted that theory and the first edition of UJI - Civil declared that certain subject matters should not be given in the future (Paragraph E of Rule 1-051, Rules of Civil Procedure for the District Courts; UJI Civ. - Chapter 19, first edition).

This same concept is carried forward in this second edition.

Not only are the matters specified herein not to be the subject matter of instructions in the future, unless coming within the exception specified in Rule 1-051, but the same are examples of instructions of like nature which shall not be hereafter used.

13-2101. Assumption of risk - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction is to be given on the doctrine of assumption of risk as a separate defense, per se.

However, the principle still applies in New Mexico under the "reasonable person" standard of contributory negligence. A voluntary exposure to a known danger will preclude recovery.

[As amended, effective November 1, 1991.]

Committee comment. — In the case of Williamson v. Smith, 83 N.M. 336, 341, 491 P.2d 1147 (1971), after reviewing previous decisions and discussing the doctrine, it was stated:

For these reasons, assumption of risk will no longer be a defense in New Mexico, and UJI 13-1310 on that subject will no longer be given. If pleaded and warranted by the evidence, the ground formerly occupied by the doctrine of assumption of risk will be covered by the law pertaining to negligence and contributory negligence....

By what we have said, we do not mean to infer that a given state of facts which would heretofore have constituted a valid defense on the basis of assumption of risk will no longer prevail. To the contrary, such a set of facts, if properly pleaded and proven, will be as efficacious as formerly. It will however henceforth be regarded as contributory negligence and governed by the principles pertaining to that doctrine.

Contributory negligence is a broad and flexible doctrine keyed to reasonableness of conduct. This court has approved the Restatement (Second) of Torts

Section 466 states:

"§ 466. Types of Contributory Negligence

The plaintiff's contributory negligence may be either

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm."

ANNOTATIONS

Library references. — 65A C.J.S. Negligence §§ 174, 181, 281 et seq.

Assumption of risk subject to comparative negligence rule. — Assumption of risk, as a form of negligence, and other liability concepts based on, or related to, negligence of either plaintiff, defendant or both, are subject to the newly adopted comparative negligence rule. Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 278.

Motor vehicle passenger's contributory negligence or assumption of risk where accident resulted from driver's drowsiness, physical defect, or illness, 1 A.L.R.4th 556.

13-2102. Child; care required for safety of - *No instruction to be given*.

No instruction to be given.

USE NOTE

Ordinary care is the standard of care to be exercised in the State of New Mexico. The circumstances may change but the standard of care remains constant.

Committee comment. — Under the law of New Mexico and pursuant to UJI 13-1603 and 13-1604, the defendant is required in all instances to use ordinary care commensurate with the circumstances, and no other care is required of any person under such circumstances.

To instruct that one must anticipate the ordinary behavior of children and, therefore, exercise greater care for their protection and safety is an argument about what constitutes ordinary care under the circumstances and is not a rule of law. See Marrujo v. Martinez, 65 N.M. 166, 334 P.2d 548 (1959).

Library references. — 65A C.J.S. Negligence § 281 et seq.

13-2103. Decedent; presumption of due care - *No instruction to be given*.

No instruction to be given.

Committee comment. — The presumption of due care had its origin in jurisdictions where the burden of proof was on the plaintiff to prove that the plaintiff used due care (Illinois Pattern Jury Instructions, Chapter 20). This is not the rule in New Mexico and, therefore, no such instruction is proper. The presumption involves only the contributory negligence of the decedent. The presumption is procedural and simply fixes the burden on the defendant of producing some evidence to rebut the presumption. A defendant, however, already has a greater burden. The defendant must not only offer some evidence to rebut the presumption, but also must prove that the decedent was guilty of contributory negligence by a preponderance of the evidence.

The authorities in the various jurisdictions are in a state of hopeless confusion on this issue. Armstrong v. West Texas Rig Co., 339 S.W.2d 69 (Tex. Civ. App. 1960); Graham v. Milsap, 77 Idaho 179, 290 P.2d 744 (1955); Arenson v. National Auto & Cas. Ins. Co., 45 Cal. 2d 81, 286 P.2d 816 (1955); Vinson v. East Texas Motor Freight Lines, 280 S.W.2d 124 (Mo. 1955); Hutton v. Martin, 41 Wash. 2d 780, 252 P.2d 581 (1953); Mecham v. Allen, 1 Utah 2d 79, 262 P.2d 285 (1953); Ammundson v. Tinholt, 228 Minn. 115, 36 N.W.2d 521, 7 A.L.R.2d 1318 (1949); Silva v. Traver, 63 Ariz. 364, 162 P.2d 615 (1945).

A New Mexico rule was stated in Hartford Fire Ins. Co. v. Horne, 65 N.M. 440, 338 P.2d 1067 (1959):

We believe the correct rule is that the presumption operates to protect or shield a person in whose favor it is invoked until credible and substantial evidence which would support a finding is introduced to the contrary, and that it then vanishes as though it never existed....

"Credible" and "substantial" evidence which would support a finding should be sufficient to establish contributory negligence, the burden already imposed on the defendant. UJI 12.16 from the first edition was cited in Archibeque v. Homrich, 87 N.M. 265, 531 P.2d 1238 (Ct. App.), rev'd, 88 N.M. 527, 543 P.2d 820 (1975); Wilson v. Wylie, 86 N.M. 9, 518 P.2d 1213 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974); White v. Wayne A. Lowdermilk, Inc., 85 N.M. 100, 509 P.2d 575 (Ct. App. 1973). See also Rule 11-301, Rules of Evidence. [As revised, effective November 1, 1991.]

ANNOTATIONS

Refusal to instruct not error. — It is not an error for the trial court to refuse to instruct the jury that there is a presumption of due care on the part of a decedent in a wrongful death action. Bloom v. Lewis, 97 N.M. 435, 640 P.2d 935 (Ct. App. 1980).

Presumption of due care of decedent not sufficient to fix liability. — The rule of evidence that in a death case the decedent is presumed to have exercised ordinary care was not enough to place liability upon the defendant, since even if the children were exercising ordinary care for their own safety it did not necessarily follow that defendant was negligent, or that such negligence was the proximate cause of death; cases of unavoidable accident where all parties exercised ordinary care are not unknown to the law. Foster v. United States, 183 F. Supp. 524 (D.N.M. 1959), aff'd, 280 F.2d 431 (10th Cir. 1960).

13-2104. Failure of party to produce evidence or witness - *No instruction to be given.*

No instruction to be given.

USE NOTE

No instruction should be given on this subject matter.

Committee comment. — Such an instruction is found in many works on jury instructions. Study reveals that these are usually founded upon a particular statute of the state involved. There is no such statute in the State of New Mexico. The matter can be covered in argument.

In the criminal case of State v. Soliz, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969), reference was made to this instruction.

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 271, 312, 355.

Comment on failure to call witness is permitted. — Although no instruction is to be given concerning the production of witnesses, New Mexico law permits comment, in closing argument, concerning the failure to call a witness. State v. Vallejos, 98 N.M. 798, 653 P.2d 174 (Ct. App. 1982).

New Mexico law permits comment, in closing argument, concerning the failure to call a witness, so long as the argument has a basis in the evidence and the statement made cannot be construed as a comment on the failure of the defendant to testify. State v. Ennis, 99 N.M. 117, 654 P.2d 570 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Adverse presumption or inference based on party's failure to produce or question examining doctor - modern cases, 77 A.L.R.4th 463.

13-2105. Failure of party to testify - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given on this subject matter.

Committee comment. — Instructions such as the foregoing in some states are predicated upon a particular statute. There is no statute, applicable to civil cases, covering this point in the State of New Mexico.

Instructions of this nature are arguments which are better made by the trial lawyers than by the judge. The court should not comment on the evidence to the jury on a matter of this nature and, therefore, instructions on this subject matter should be deleted.

Library references. — 88 C.J.S. Trial §§ 271, 312, 355.

13-2106. Flight from accident not negligence - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given on this subject matter.

Committee comment. — The mere fact that a person flees from an accident is not proof, nor even evidence, of negligence and the court should not enter into the argument by declaring either way.

This again is a subject which well might be argued by the attorney to the jury. It is not a proper subject of instruction. Instructing on the subject matter or along the lines of that indicated above would be an undue emphasis on certain evidence.

Library references. — 65A C.J.S. Negligence §§ 285, 286.

13-2107. Foreseeability as negligence - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given in a negligence case on foreseeability in any form other than the negligence instruction and ordinary care instruction which cover this matter properly. See UJI 13-1601 and 13-1604.

Committee comment. — Foreseeability is actually an element of negligence and is so stated in UJI 13-1601, but there is no justification in giving a separate instruction on this point and the practice followed by some courts should not be followed here.

The New Mexico instructions on negligence and ordinary care properly cover the subject matter and no separate instruction on foreseeability is necessary or needed in the ordinary negligence case.

ANNOTATIONS

Library references. — 65A C.J.S. Negligence §§ 285, 286.

Law reviews. — For article, "The Continuing Debate over Tort Duty in New Mexico: The Role of Foreseeability and Policy in *Herrera v. Quality Pontiac*", see 34 N.M.L. Rev. 433 (2004).

13-2108. Highest degree of care - *No instruction to be given*.

No instruction to be given.

USE NOTE

Ordinary care under the circumstances is the proper standard of care in New Mexico and in most jurisdictions.

Committee comment. — It is the opinion of the committee that there should be no degrees of care in New Mexico, as our supreme court has stated on numerous occasions. Notwithstanding the case of Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507 (1955), the proper standard is one of ordinary care under the circumstances and UJI 13-1603 should be used in such instances.

In like manner, the duty of the carrier to protect passengers from injuries by third persons should be that of ordinary care under the circumstances. Any instruction requiring a higher or different degree of care should be refused. The same is true with reference to duty of care to protect passengers from other passengers.

Some states have special statutes giving to common carriers certain police powers. New Mexico has no such statutes and, therefore, instructions in this vein should be rejected.

No special instructions are required with reference to the duty of a common carrier to disabled, infirm or intoxicated persons or to children. The proper standard of care is that of due care under the circumstances.

Special instructions, sometimes tendered, recognizing a distinction between passenger and invitee and specifying when the invitation terminates are without practical distinction and the committee determined that no such instruction should be given in New Mexico.

See also: LeDoux v. Martinez, 57 N.M. 86, 254 P.2d 685 (1953); Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24, rehearing denied, 46 N.M. 492, 131 P.2d 981 (1942); Archuleta v. Jacobs, 43 N.M. 425, 94 P.2d 706 (1939). This instruction was cited in Smith v. Greyhound Lines, 382 F.2d 190 (10th Cir. 1967).

13-2109. Hospital and business records - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction concerning hospital and business records should be given.

Hospital and business records, like any other documents, are matters of evidence and the admissibility thereof is determined by the Rules of Evidence. No special comment to the jury is necessary.

Committee comment. — When the court gives an instruction such as the foregoing it singles out a portion of the evidence for improper emphasis. This matter well may be argued to the jury. There is no necessity for a special instruction on hospital and business records. In the first instance, before the matter is submitted into evidence it has been ruled on as a matter of law. Thereafter, the court should treat it as other evidence, leaving to counsel the matter of emphasis and argument.

Library references. — 88 C.J.S. Trial §§ 310, 357.

13-2110. Inherently improbable testimony - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given on this subject matter.

Committee comment. — The lawyers in their summation well might argue that a witness has testified to matters that are inherently improbable or that such testimony should not be believed, but an instruction on this specific point is argumentative. Furthermore, it is covered already by other instructions, particularly when the jury is advised that it is their duty to determine the facts.

Library references. — 88 C.J.S. Trial §§ 270, 311, 357 et seq.

13-2111. Jury to consider all the evidence - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given on this subject matter.

Committee comment. — Instructions of this nature are pure legal jargon without substance; the jury does not understand the technicalities involved and does not need them in arriving at a true verdict. The uniform jury instructions on the burden of proof make an instruction of this nature unnecessary.

Library references. — 88 C.J.S. Trial §§ 270, 306 et seq.

13-2112. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated May 14, 1998, this rule, relating to loss of consortium not a recognized cause of action, is withdrawn and the rule number reserved for future use, effective July 1, 1998.

13-2113. Negligence of outside agency.

No instruction to be given.

USE NOTE

Intervention of outside agency instructions is a confusion of causation and such instructions should not be given in New Mexico.

[As amended, effective March 1, 2005.]

Committee comment. — Some courts heretofore have given an instruction to the jury advising them that if they should find that the action of a third person or an outside

agency, not a party to the suit, was merely a contributing cause of injury to the plaintiff, then the acts of the third party or of the outside agency are not a defense to the defendant against the claim of the plaintiff. On the other hand, if the jury should find that the sole cause of the injury to the plaintiff was negligence of the third party or of an outside agency, the plaintiff is not entitled to recover from the defendant.

Such an instruction is clearly argumentative. The basic subject matter is covered by other instructions (*e.g.,* UJI 13-309 NMRA). If the attorneys for the parties desire to argue the point, they are free to do so, but the court should not give such an instruction to the jury. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, was prepared pursuant to a Supreme Court order dated December 10, 2004 authorizing the removal of the word "proximate" from the civil jury instructions and the amendment of civil jury instructions to conform them with the Supreme Court March 1, 2005 approval of the revision of Chapters 1, 2 and 3 of UJI Civil. The 2005 amendment substituted "causation" for "proximate cause" in the Use Note and deleted "proximate" preceding "cause" in the comment.

Library references. — 65A C.J.S. Negligence §§ 290, 301.

Contributory negligence and independent intervening cause are questions for jury, unless, as a matter of law, there is no evidence upon which to submit the issue to the jury. City of Belen v. Harrell, 93 N.M. 601, 603 P.2d 711 (1979).

Suicide not necessarily intervening cause. — It cannot be said that in every case suicide is an independent intervening cause as a matter of law. City of Belen v. Harrell, 93 N.M. 601, 603 P.2d 711 (1979).

When defendant not entitled to instruction. — Defendant who failed to stop at an intersection and struck plaintiff's car was not entitled to an instruction relating to negligence of an outside agency on grounds that the stop sign for defendant's street was turned sideways where the record showed that, prior to collision, defendant did not see the stop sign because he was looking to the left, away from the sign. Williams v. Cobb, 90 N.M. 638, 567 P.2d 487 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence § 192.

13-2114. Number of witnesses - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction need be given as to the effect or noneffect of the number of witnesses testifying on one side or the other.

Committee comment. — It has been common procedure in New Mexico for the side producing the greater number of witnesses to submit an instruction on the foregoing. On the other hand the side that has the lesser number of witnesses submits a contrary instruction to the effect that the number of witnesses is of no consequence.

This might be a question for argument. Basically, the matter of witnesses is already covered by the instruction on the credibility of a witness. Furthermore, no lawsuit should be determined by the number of witnesses which a side produces.

Quantitative measurement of evidence is not a proper basis for determination of a lawsuit. Wigmore says this rule originated in the Roman Law. VII Wigmore on Evidence 239 (3d ed.).

An instruction of such a nature would be contrary to the New Mexico rule as expressed in State v. Hunter, 37 N.M. 382, 24 P.2d 251 (1933).

Library references. — 88 C.J.S. Trial § 369.

13-2115. One witness against many - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given on this subject matter.

Committee comment. — The general trend of standardized statewide jury instructions is to omit an instruction on this issue. Although the number of witnesses testifying on one side or the other may be important, still the number is not conclusive. The matter is covered by the instruction on the credibility of a witness and, if given, an instruction on this issue tends to prejudice one side or the other of the lawsuit by emphasizing or minimizing the testimony of the witnesses on that side, or by singling out the testimony of a single witness in a particular lawsuit.

Library references. — 88 C.J.S. Trial § 369.

13-2116. Oral admissions - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given to the effect that oral admissions should be viewed with caution. This is a matter of evidence and the weight of such evidence is to be determined by the jury.

Committee comment. — The matter of oral admissions is again a vehicle which properly belongs in the closing argument of the attorney. It is not a proper subject of instruction. It would unduly emphasize a single portion of the evidence. Therefore, any instruction along these lines is improper. See Territory v. Douglas, 17 N.M. 108, 124 P. 339 (1912).

Library references. — 88 C.J.S. Trial § 361.

13-2117. Party competent as a witness - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given on this subject matter.

Committee comment. — There may have been a time in the growth of the law that such an instruction was proper, but today it is without merit. Furthermore, the matter can be covered in arguments of the attorneys, since other instructions inform the jury that they can consider the bias or interest of a witness.

The competency of witnesses is now governed by Article 6 of the New Mexico Rules of Evidence.

Library references. — 88 C.J.S. Trial §§ 315, 365.

13-2118. Reliance on personal observations - *No instruction to be given*.

No instruction to be given.

USE NOTE

The jury should not be instructed that they are to rely on their ordinary experience as jurors in determining the case nor that they should consider the evidence presented in court in light of their personal observations, unless specifically instructed to the contrary.

Committee comment. — An instruction of this nature invites the jury to go beyond the evidence that has been submitted in court and is contradictory to the law that the jury must determine the case on the evidence submitted in court. The common sense of a juror is not obliterated by the other instructions of the court. Regardless of instructions

by the court, the jury will view the evidence through their personal observations and experiences in life.

Library references. — 88 C.J.S. Trial §§ 298, 320, 322.

13-2119. Remarks of judge - *No instruction to be given*.

No instruction to be given.

USE NOTE

There is no necessity to instruct the jury that any remarks or rulings of the court were not intended to express an opinion, therefore, no instruction should be given on this subject matter.

Committee comment. — The reading of an instruction on the point indicated above is not necessary under the Uniform Jury Instructions in New Mexico because by other instructions the jury has already been advised that they are the sole judges of the facts. Furthermore, under New Mexico law the court has the right to comment on the evidence under former Rule 51(e), N.M.R. Civ. P. (superseded, see Rule 11-107).

One of the purposes of the uniform jury instructions is to reduce the volume of verbiage and the quantity of instructions given to a jury. In the ordinary course of events, no useful purpose is served by an instruction such as this.

Library references. — 88 C.J.S. Trial §§ 49 to 51, 54.

13-2120. Unavoidable accident - *No instruction to be given*.

No instruction to be given.

USE NOTE

UJI Civ. 13.9 of the first edition was abolished by the supreme court in 1973. Therefore, no instruction is to be given on this subject matter at this time.

Committee comment. — Unavoidable accident was a theory of defense deeply imbedded in New Mexico jurisprudence over a period of many years until abolished in the case of Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973). (See also the court of appeals opinion of Chief Judge Wood, 84 N.M. 456, 504 P.2d 1089.) In abolishing this defense by name, it is apparent that the defense continues under a different name. The supreme court stated:

[T]hat the defense in question is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause. Since the ordinary instructions on negligence and proximate cause sufficiently show that

the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose.

It is merely another way of saying that the defendant is not negligent. The defendant is not entitled to have this defense over-emphasized. The instruction is not only unnecessary but is confusing. The instruction on unavoidable accident may mislead the jury as to the proper manner of determining liability, which is to be based on the concepts of negligence and proximate cause. Rules concerning those elements are sufficiently complicated without engrafting upon them the unnecessary concept of unavoidability.

Alexander v. Delgado, 84 N.M. at 719, 507 P.2d at 780-1.

ANNOTATIONS

Library references. — 88 C.J.S. Trial §§ 315, 316, 363 to 365.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Negligence §§ 16, 17, 19.

Instructions on unavoidable accident, or the like, in motor vehicle cases, 65 A.L.R.2d 12.

Instruction on "unavoidable accident," "mere accident," or the like, in motor vehicle cases - modern cases, 21 A.L.R.5th 82.

65A C.J.S. Negligence § 301.

13-2121. Witness; credibility of special - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction should be given as to the credibility of special categories of witnesses nor as to the weight to be given to their testimony.

Committee comment. — No special instruction should be given in this connection. When a witness testifies as an expert the instruction on expert testimony will be given. No instruction will be given which tends to single out the testimony of a certain witness and give it special attention. This is a matter that well might be argued by the attorneys in the case.

Some jurisdictions commonly give special instructions with regard to the testimony of employees, lawyers and other groups. This has never been the practice in New Mexico

and should not be added at this late date. If counsel has a basis for an argument as to these witnesses, the argument is permissible.

Library references. — 88 C.J.S. Trial §§ 315, 316, 363 to 365.

13-2122. Witness; need not be believed - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction is necessary to the effect that any witness need not be believed.

Committee comment. — Courts throughout New Mexico have instructed juries that they are not bound to believe a fact simply because a witness has testified on the matter.

This subject matter is covered by other instructions, for example, UJI 13-213, 13-2003 and 13-2004, and there is no longer a need for an instruction on this point.

The modern view is against instructions of this nature. 4 A.L.R.2d 1077. For New Mexico cases on this type of instruction, see Alexander v. Cowart, 58 N.M. 395, 271 P.2d 1005 (1954); State v. Gurule, 33 N.M. 377, 267 P. 63 (1928); Territory v. Muniz, 17 N.M. 131, 124 P. 340 (1912); Pacific Gold Co. v. Skillicorn, 8 N.M. 8, 41 P. 533 (1895); Faulkner v. Territory, 6 N.M. 464, 30 P. 905 (1892).

Library references. — 88 C.J.S. Trial §§ 315, 316.

13-2123. Witness; willfully false - *No instruction to be given*.

No instruction to be given.

USE NOTE

No instruction on whether or not a witness has testified "willfully false" is necessary.

Committee comment. — An instruction on this subject matter invades the province of the jury. It is a matter better left to the argument of advocates. The jury has already been advised by other instructions that they are the judges of the facts. If the testimony of the witness is inconsistent with other statements, then the matter will be covered by the instruction on impeachment.

The credibility of a witness is covered generally by UJI 13-2003.

Library references. — 88 C.J.S. Trial §§ 315, 364.

13-2124. Last clear chance - *No instruction to be given*.

No instruction to be given.

USE NOTE

It is not proper in New Mexico to give instructions on last clear chance. Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

Committee comment. — Last clear chance was a doctrine recognized in New Mexico prior to the adoption of comparative negligence. In prior editions last clear chance was broken down into two separate instructions. In the 1966 edition § 12.12 was entitled "Last clear chance; discoverable peril; escape impossible" and this same concept was carried forward in the Second Edition as UJI Civ. 16.21 (withdrawn effective October 1, 1983). In the earlier edition, the second concept of last clear chance was found in UJI Civ. 12.13 and entitled "Last clear chance; escape possible." As pointed out in the court of appeals decision adopting pure comparative negligence in New Mexico, last clear chance is no longer a viable doctrine in New Mexico law.

13-2125. Contributory malicious, willful or wanton misconduct - *No instruction to be given*.

No instruction to be given.

USE NOTE

See Ruiz v. Southern Pac. Transport Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1983) (cert. quashed).

CHAPTER 22
Verdicts

Introduction

All possible forms of verdicts have not been drafted but merely illustrations of the type of verdicts which are proper under varying circumstances.

In drafting these forms of verdicts, it was intended to illustrate to the bar and the bench how simple verdicts can be made.

In those cases where complexity arises from third-party actions, cross-claims and issues arising through a multiplicity of parties, then verdict forms will have to be drafted by the trial judge and care should be exercised so that every possible issue is submitted to the jury.

It is recommended that each form of verdict be submitted to the jury on an individual sheet and that the entire caption of the case appear on each individual sheet, where each form of verdict is submitted. Usually there is very little on such a sheet and, therefore, ample room should be left for completion of any necessary figures and for the signature of the foreman.

When multiple forms of verdicts are submitted to the jury, the trial court is cautioned to clearly and fully instruct the jury on the use of the various forms of verdicts submitted.

The form adopted should be adapted to New Mexico practice, as outlined in the following forms.

Special forms of verdict are set forth in Chapters 7, 8, 9 and 17.

ANNOTATIONS

Verdict should reflect clear intent of jury as to damages. — The verdict should leave no question as to the clear intent of the jury to render an award of damages and as to the amount of damages. Casarez v. Garcia, 99 N.M. 508, 660 P.2d 598 (Ct. App. 1983).

13-2201. Verdict for plaintiff; single parties.

We find for the plaintiff in the sum of $_____.

_____
Foreperson

USE NOTE

The caption of the case should be typed at the head of the verdict form which is submitted to the jury for their use. Following the caption of the case, there will then be a title such as - VERDICT FOR PLAINTIFF. The signature line should be sufficiently below the printed verdict so that the foreperson will have no problem in signing.

If the parties plaintiff are multiple and but one sum is to be awarded jointly, then all that is necessary is to add the letter "s" to the word plaintiff.

Like changes of a simple nature can be made for varying circumstances.

[As amended, effective November 1, 1991.]

Committee comment. — This is an illustration of the proper form of a simple verdict to be submitted to the jury where the sole question, for final determination, is the amount of money, if any, which the plaintiff will recover.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

Library references. — 89 C.J.S. Trial §§ 485, 487 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2202. Verdict for defendant; single parties.

We find for the defendant.

_____

Foreperson

USE NOTE

The formal caption of the lawsuit should be added to the top of each verdict form submitted to the jury for their consideration. Following the caption, there should be a title given to each verdict such as, in the above - VERDICT FOR DEFENDANT.

This type of verdict form can be used without change even when there are multiple parties plaintiff, when one sum is to be awarded jointly to the multiple parties plaintiff. In such instances, a change will occur in UJI 13-2201 where the singular will be changed to the plural. However, in the verdict form for the defense, no change needs to be made when only one verdict can be rendered for plaintiff and the converse is one verdict for the defendant. On the other hand, where multiple verdicts can be rendered for individual parties plaintiff, individual verdict forms for the defendant will be necessary, and, when it is possible for the jury to return a verdict for the defendant against all of the plaintiffs, such a verdict form should be submitted.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — There is no need to include the negative in a form of verdict. In a simple case of single parties, UJI 13-2201 and 13-2202 can be given to the jury with instructions that only one form of verdict need be reached by the jury and signed by its foreperson.

If there are multiple plaintiffs, and each is entitled to a separate verdict, then, of course, separate verdicts will need to be provided so that the jury can find in favor of any particular plaintiff or in favor of defendant as to that particular plaintiff. [As revised, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, effective March 1, 2005, replaced the word "instruction" with "verdict form" in the first sentence of the Use Note.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2203. Verdict for plaintiff; multiple defendants.

We find for the plaintiff in the sum of $_____ against all the defendants.

_____
Foreperson

USE NOTE

The formal caption of the particular case will need to be added to the verdict form before it is submitted to the jury. Ample room should be provided for entry of the sum which the jury may enter and also ample room should be provided for the signature of the foreperson. This form illustrates the type of verdict which can be used when the defendants are multiple and their liability is one and the same. This form of verdict can also be readily adapted for use with multiple plaintiffs such as cotenants against multiple defendants where the claims of the plaintiffs are joint and the liability of the defendants is the same. This form of verdict can also be used in a joint tortfeasor situation when UJI damage instruction 13-1825 NMRA is used.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — When the permissible verdict is against multiple defendants and the jury is not permitted to allocate damages among the various defendants, then this is the proper form of verdict for plaintiff.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, effective March 1, 2005, revised the Use Note to replace the word "instruction" with "verdict form" in the first sentence and replace "parties plaintiff" with "plaintiffs" in the next to last sentence.

13-2204. Verdict for defendants; multiple parties.

We find for all the defendants.

_____
Foreperson

USE NOTE

See Use Note, UJI 13-2202 and 13-2203.

[As amended, effective November 1, 1991.]

Committee comment. — See Committee Comments, UJI 13-2202 and 13-2203.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-2205. Verdict for plaintiff; separate liability.

We find for the plaintiff _____ and against the defendant _____.

_____
Foreperson

USE NOTE

See UJI 13-2201.

[As amended, effective November 1, 1991.]

Committee comment. — See UJI 13-2201.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-2206. Verdict for defendant; separate liability.

We find for the defendant _____ and against the plaintiff _____.

_____
Foreperson

USE NOTE

See UJI 13-2202 and 13-2203.

[As amended, effective November 1, 1991.]

Committee comment. — See UJI 13-2202 and 13-2203.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-2207. Verdict for plaintiff; counterclaim.

We find for the plaintiff on the complaint in the sum of $_____ and against the defendant on the counterclaim.

_____

Foreperson

USE NOTE

This form of verdict can, and should, be used where there is a single party plaintiff and a single party defendant who has filed a counterclaim. The caption of the case will need to be added and the title can simply read - Verdict for Plaintiff; Counterclaim.

If the plaintiffs are plural and only one sum is to be awarded jointly, then the only change in the form will be adding the letter "s" after the word plaintiff.

If there are multiple parties defendant but the verdict, if any, is to be against all of the defendants in like amount, the counterclaim is for the defendants jointly and but one sum could be awarded to them jointly, then the only change needed would be to add, following the word defendant, the letter "s".

[21.7; as amended, effective November 1, 1991.]

Committee comment. — Again, this is an illustration of a form of verdict which can be used in the simple lawsuit where there is one award; likewise, if there are multiple parties defendant and the award for plaintiff or plaintiffs can be only against them jointly, then this form can be used without change. If an award can be made against separate parties, the verdict forms should be separate. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

Library references. — 89 C.J.S. Trial §§ 485, 487 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2208. Verdict for defendant; counterclaim.

We find for the defendant in the sum of $_____ on the counterclaim and against the plaintiff on the complaint.

_____

Foreperson

USE NOTE

The specific form above can be used when there is a single defendant who has filed a counterclaim and a single plaintiff who is the counterdefendant.

If the parties are multiple, then simple amendment can be made. If the parties are multiple with differing interests, then, separate forms of verdict should be submitted to the jury.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — See UJI 13-2207.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The March 1, 2005 amendment rewrote the last sentence of the Use Note to delete "probably" before "separate forms of verdict" and "but all forms of verdicts submitted should each have the separate, and like, caption of the case".

Library references. — 89 C.J.S. Trial §§ 485, 487 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2209. Verdict for neither party; counterclaim.

We find neither party should recover.

_____
Foreperson

USE NOTE

In the ordinary case involving complaint and counterclaim, where the jury would be permitted to completely offset one matter against the other, verdict forms UJI 13-2207, 13-2208 and 13-2209 will all be needed. When multiple forms are given to the jury, they should be instructed as to the number of verdicts to be returned. In the simple case of a complaint and counterclaim of single parties only one verdict form should be signed.

[As amended, effective November 1, 1991.]

Committee comment. — *See* UJI 13-2207 NMRA. Verdict forms UJI 13-2207, 13-2208 and 13-2209 NMRA are informing the jury of the three possible results in the ordinary counterclaim case. Only one verdict can be returned.

These forms of verdict would not be suitable in a case involving a counterclaim in the nature of a setoff. In such instance, verdict form UJI 13-2210 NMRA will be required. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, revised the committee comment to delete "in effect" in the first sentence.

Library references. — 89 C.J.S. Trial §§ 485, 487 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2210. Verdict for both parties; for plaintiff on complaint; for defendant on counterclaim.

We find for the plaintiff in the sum of $_____ on complaint.

We find for the defendant in the sum of $_____ on counterclaim.

_____

Foreperson

USE NOTE

This form of verdict should be used only when the counterclaim involves a possibility of a verdict arising out of a different transaction than the claim of the plaintiff and where there can be an award for both parties.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — *See* committee comments to verdict forms, UJI 13-2207 through 13-2209 NMRA.

Three other forms of verdict are possible in the situation which justifies use of UJI 13-2210 NMRA. UJI 13-2209 NMRA would be used when it is possible to return a verdict for neither party, and this usually occurs when it is also possible to return a verdict for both parties. UJI 13-2201 NMRA would be used when a verdict could be rendered for the plaintiff alone and against the defendant. UJI 13-2208 NMRA would be used when there could be a verdict rendered in favor of the defendant on his counterclaim and against the plaintiff on the counterclaim and complaint.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, effective March 1, 2005, deleted the first paragraph of the Use Note.

Library references. — 89 C.J.S. Trial §§ 485, 487 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2211. Verdict for cross-claimant.

We find for the defendant _____ on the cross-claim in the sum of $_____ and against the defendant _____.

_____

Foreperson

USE NOTE

Use this verdict form (in addition to others) on a straight, simple cross-claim case.

[As amended, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The Committee Comment was deleted effective March 1, 2005.

13-2212. Verdict for cross-defendant.

We find for the defendant _____ on the cross-claim.

_____
Foreperson

USE NOTE

This type of form will be used when no dollar amount is involved.

[As amended, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The Committee Comment was deleted effective March 1, 2005.

13-2213. Verdict for third-party plaintiff.

We find for the third-party plaintiff.

_____

Foreperson

USE NOTE

This form should be submitted to the jury when all issues between the parties require a jury determination.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — When a third-party complaint is involved and the matter is submitted for jury determination, all of the necessary forms of verdict will need to be submitted to the jury.

Ordinarily, the jury does not determine the amount on a third-party complaint. When the third-party plaintiff is seeking indemnity, of course, the court will enter judgment proper under the law of indemnity. When the third-party complaint involves contribution, the court will enter the proper judgment, but it is not for the jury to determine a dollar amount and there is no need to include in the form of verdict a blank for the jury to fill in an amount.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, effective March 1, 2005, rewrote the Use Note. For the prior version of this instruction, see the historical version of New Mexico One Source of Law or a prior NMRA.

13-2214. Verdict for third-party defendant.

We find for the third-party defendant.

_____
Foreperson

USE NOTE

When UJI 13-2213 is used, then UJI 13-2214 will also be used.

[As amended, effective November 1, 1991.]

Committee comment. — Reference is to Committee Comment to UJI 13-2213.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-2215. Verdict against one of multiple defendants where liability was alleged as joint and several.

We find for the plaintiff against the defendant _____ in the sum of $_____.

We find the defendants _____ and _____ not liable.

_____

Foreperson

USE NOTE

This form of verdict will be used when plaintiff alleges joint liability.

This form of verdict should be used only where there are two or more defendants whose liability is alleged to be joint and several but where the jury finds for the plaintiff against only one of the defendants.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — This form of verdict may also be adapted for use where there are multiple plaintiffs. The court should draft other proper possibilities in cases of multiple parties.

A verdict form must also be submitted to the jury permitting a verdict for all defendants because it is necessary that the jury have a form to cover all of the various contingencies. [Revised, effective March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, effective March 1, 2005, deleted at the end of the first sentence of the Use Note"which is denied, and the evidence is such as to permit the jury to decide the issue". The 2005 amendment of the Committee Comment deleted from the first sentence "whose claims are joint against multiple defendants whose claims are alleged to be joint and several but where the jury may find against less than all of the defendants".

Library references. — 89 C.J.S. Trial §§ 485, 487 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2216. Verdict under Uniform Contribution Among Tortfeasors Act.

We find for the plaintiff _____ and against the defendant _____ in the sum of $_____ after allowing for all sums paid by other defendant[s].

_____

Foreperson

USE NOTE

This form of verdict may be used where plaintiff has sued two alleged joint tortfeasors and one of them has settled with plaintiff under the Uniform Contribution Among Tortfeasors Act, Section 41-3-1 NMSA 1978 et seq.

This form of verdict may also be adapted for use in when there are multiple defendants still remaining in the case and they are found to be joint tortfeasors.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — If before or during trial a defendant settles this instruction should be given.

This form of verdict was approved in the case of *Garrison v. Navajo Freight Lines*, 74 N.M. 238, 392 P.2d 580 (1964). [Revised, effective March 1, 2005.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, effective March 1, 2005, replaced "case" for "when" in the Use Note and rewrote the Committee Comment. *See* historical New Mexico One Source of Law or a prior NMRA for prior version of this Committee Comment.

Library references. — 89 C.J.S. Trial §§ 485, 487 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1788.

88 C.J.S. Trial § 322.

13-2217. Special interrogatories.

In the answer to the special interrogatories propounded by the court, we make the following answers to which we have, by proper majority, agreed:

Interrogatory No. 1:

_____

(NOTE: Here state clearly and briefly the specific question which is to be propounded to the jury, avoiding ambiguity and double-questions.)

Answer to Interrogatory No. 1: _____

Interrogatory No. 2:

_____

(NOTE: Again set forth the appropriate question to the jury.)

Answer to Interrogatory No. 2:

_____

Interrogatory No. 3:

_____

(NOTE: Here set forth the appropriate question.)

Answer to Interrogatory No. 3:

_____

_____

Foreperson

USE NOTE

The specific questions to be given to the jury will be set forth one after the other. Each question and answer need not be signed by the foreperson, but a signature of the foreperson is required at the end of all of the questions and answers.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — This form is for purpose of illustration only. When special interrogatories are submitted to the jury, this form may be used along with a general

verdict form. Special care should be exercised to avoid ambiguity in the questions propounded to the jury and under no circumstances should a multiple-form question be propounded under a single interrogatory.

The court may submit interrogatories in such form as the jury merely answers with a "yes" or "no" response. Sometimes the interrogatories are submitted to the jury in sequence so that a certain instruction obviates the need to answer other interrogatories.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

The 2005 amendment, effective March 1, 2005, rewrote the first sentence of the Use Note. *See* historical New Mexico One Source of Law or a prior NMRA for the prior version of the Use Note.

13-2218. Comparative negligence; no comparison among defendants or non-parties; general verdict.

If you find that plaintiff's injury was caused by a combination of negligence of the defendant and negligence of the plaintiff, you must determine the amount of damages to be awarded as follows:

First: In accordance with the damage instructions I have given you, determine the total amount of damages suffered by the plaintiff.

Second: Compare the negligence of plaintiff and defendant and determine a percentage for each so that the total of the percentages equals 100%.

Third: Reduce the plaintiff's total damages by the percentage of plaintiff's negligence. This gives you the amount of damages to be awarded to plaintiff in your verdict.

USE NOTE

This instruction is to be used only when comparative negligence is an issue in the lawsuit and the court is submitting the case on a general verdict without special interrogatories. If there is no evidence of plaintiff's negligence then there is no need for this instruction. This instruction is to be used only in cases where there is no apportionment of negligence among defendants or non-parties. *See also* the Use Note under UJI 13-2220 NMRA regarding choice of verdict forms and modifications that may be necessary.

[As amended, effective March 1, 2005.]

Committee comment. — Comparative negligence was adopted in New Mexico in the case of Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, revised the first sentence to delete "proximately" before "caused" and "contributory" before "negligence". The 2005 amendment also deleted "contributory" before "negligence" in the last paragraph.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Rescue doctrine: applicability and application of comparative negligence principles, 75 A.L.R.4th 875.

Applicability of comparative negligence principles to intentional torts, 18 A.L.R.5th 525.

Applicability of comparative negligence doctrine to actions based on negligent misrepresentation, 22 A.L.R.5th 464.

13-2219. Comparative negligence; comparison among defendants or non-parties; general verdict.

If you find that plaintiff's injury was caused by a combination of negligence of more than one person, you must determine the amount of damages to be awarded as follows:

First: In accordance with the damage instructions I have given you, determine the total amount of damages suffered by the plaintiff.

Second: Compare the negligence, if any, of [plaintiff(s)] [beneficiary(ies)] [and] [defendant(s)] [and] [non-parties] and determine a percentage for each. The percentage for any one or more of the persons named may be zero if you find that such person was not negligent or that any negligence on the part of such person was not a cause of damage. The total of the percentages must equal 100% for the persons whose negligence did cause the damage.

Third: Multiply the percentage of each defendant times the plaintiff's total damages. This gives you the amount of damages to be awarded to plaintiff against each defendant on the line provided in the appropriate verdict form. If the percentage found for [any one] defendant is zero, then the verdict as to [that] defendant will be for [that] defendant and against the plaintiff(s).

USE NOTE

This instruction is to be used only when comparative negligence is an issue in the lawsuit and the court is submitting the case on a general verdict without special interrogatories. This instruction is to be used only in cases where there is an issue of apportionment of negligence among defendants or non-parties. The persons whose

negligence is to be compared in the second paragraph should be stated by name. See also the Use Note under UJI 13-2220 NMRA regarding choice of verdict forms and modifications that may be necessary.

[As amended, effective March 1, 2005.]

Committee comment. — Comparative negligence was adopted in New Mexico in the case of Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981). Apportionment of damages among defendants was adopted in New Mexico by the court of appeals in Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

ANNOTATIONS

The 2005 amendment, effective March 1, 2005, revised the first sentence to delete "proximately" before "caused" and revised the paragraph beginning with "Second" to delete "proximately" and "proximate" before the word cause.

Consideration of unknown driver's negligence. — It is proper, in an appropriate case, to instruct a jury in a comparative negligence case to consider the negligence (and damages resulting from this negligence) of an unknown driver. Lamkin v. Garcia, 106 N.M. 60, 738 P.2d 932 (Ct. App. 1987).

Instruction properly submitted. — In a negligence action against a store owner, there was no error in the trial court's submission of an instruction permitting the jury to compare the alleged negligence of the plaintiff, the storeowner, and the landowner. Woolwine v. Furr's, Inc., 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).

Choice of law. — Where plaintiffs, who were employees of a Texas subcontractor who carried workers' compensation insurance issued by a Texas insurance company, sued a New Mexico contractor in common-law tort for injuries that occurred when a building that was under construction in New Mexico collapsed, the suit was governed by New Mexico tort law which governs the New Mexico contractor's right to assert the defense of comparative negligence and the intervention of the Texas insurance company to enforce its statutory subrogation rights under Texas law did not change the laws suit into a worker's compensation suit governed by Texas law. Terrazas v. Garland & Loman, Inc., 2006-NMCA-111, 140 N.M. 293, 142 P.3d 374.

Law reviews. — For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

13-2220. Comparative negligence; special verdict.

On the questions submitted, the jury finds as follows:

Question No. 1: Was the [any] defendant negligent?

Answer: _____ (*Yes or No*)

If the answer to Question No. 1 is "No", you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendant(s) and against the plaintiff(s), and you will all return to open court.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2.

Question No. 2: Was any negligence of [a] defendant a cause of [a] plaintiff's injuries and damages?

Answer: _____ (*Yes or No*)

If the answer to Question No. 2 is "No", you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendant(s) and against the plaintiff(s), and you will all return to open court.

If the answer to Question No. 2 is "Yes", you are to answer the remaining questions on this special verdict form. When as many as ten [five] of you have agreed upon each of your answers, your foreperson must sign this special verdict, and you will all return to open court.

Question No. 3: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by plaintiff(s) _____ to be $_____ (Here enter the total amount of damages without any reduction for comparative negligence).

[We find the total amount of damages suffered by plaintiff(s) _____ to be $_____ (Here enter the total amount of damages without any reduction for comparative negligence.)]

Question No. 4: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%, but the percentage for any one or more of the persons named may be zero if you find that such person was not negligent or that any negligence on the part of such person was not a cause of damage.

_____ _____ %
(Name)

_____ _____ **%**

(Name)

_____ _____ **%**
(Name)

_____ _____ **% 100%**
(Name) **TOTAL**

The court will multiply the percentage of [each] defendant times the plaintiff(s)' total damages as found by the jury under Question No. 3. The court will then enter judgment for plaintiff(s) against [each] defendant in the proportion of damages found as to [that] defendant. [If the percentage found by the jury for any one defendant is zero, then the court will enter judgment for that defendant and against the plaintiff(s) as to that defendant.]

_____

Foreperson

USE NOTE

Unless the trial court in its discretion decides it is best to submit the case under UJI 13-2201 and 13-2202 with comparative negligence instruction UJI 13-2218, or under UJI 13-2221 with comparative negligence instruction UJI 13-2219, then the trial court is to use UJI 13-2220 in all cases involving comparative negligence. The mandate within parentheses in Question No. 3 shall be used in every case. The bracketed paragraph in Question No. 3 is to be used when multiple plaintiffs may not necessarily have sustained the same total amount of damages. In appropriate cases, Question No. 4 may have to be modified, e.g., to state that the jury is to compare the negligence of plaintiff(s) and defendant(s) and/or the negligence of plaintiff with the unreasonableness of the risk of injury presented by the product in a strict products liability action.

The persons to be individually listed in Question No. 4 are each of those persons whose acts and omissions may affect proportionate liability under the facts and the law. The bracketed last sentence of the explanation of the effect of the answer to Question No. 4 need be included only where there are multiple defendants.

[As amended, effective November 1, 1991; March 1, 2005.]

Committee comment. — Comparative negligence was adopted in New Mexico in the case of Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981). Apportionment of damages among defendants was adopted in New Mexico by the court of appeals in Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman" throughout the instruction.

The 2005 amendment, effective March 1, 2005, revised Question 2 to delete "proximate" before "caused".

Preserving error for appeal. — Third-party plaintiff who failed to object to the omission of specific language from the special verdict form prior to submission of the case to the jury, would not be heard to complain of the omission on appeal. Ramos v. Rodriguez, 118 N.M. 534, 882 P.2d 1047 (Ct. App. 1994).

Use of pattern instructions not error. — District court did not err by denying plaintiffs' request to submit a special verdict form that would have itemized the damages awarded and submitting the UJI 13-2220 instruction instead; as the district court sufficiently instructed the jury as to each type of damages recoverable by plaintiffs in a separate instruction. Lozoya v. Sanchez, 2003-NMSC-009, 133 N.M. 579, 66 P.3d 948.

13-2221. Comparative negligence; verdict form.

I. We find for the defendant (A) _____ and against the plaintiff(s)

_____.

OR

We find for the plaintiff(s) (X) _____ and against the defendant (A) _____ in the sum of $_____.

[We find for the plaintiff(s) (Y) _____ and against the defendant (A) _____ in the sum of $_____].

II. We find for the defendant (B) _____ and against the plaintiff(s).

OR

We find for the plaintiff(s) (X) _____ and against the defendant (B) _____ in the sum of $_____.

_____
Foreperson

[As amended, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

Am. Jur. 2d, A.L.R. and C.J.S. references. — Comparative fault: calculation of net recovery by applying percentage of plaintiff 's fault before or after subtracting amount of settlement by less than all joint tortfeasors, 71 A.L.R.4th 1108.

13-2222. Successive tortfeasors; sample verdict form; divisible injuries.

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer:	Yes	No
Defendant 1	_____	_____
Defendant 2	_____	_____
Defendant 3	_____	_____
Defendant 4	_____	_____

If the answer to Question No. 1 is "No" for each [person] [company] listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for all defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is "Yes" as to at least one of the persons [or companies] listed, you are to answer Question 2.

Question No. 2: For each [person] [company] you found negligent in response to Question No. 1, was the negligence of that [person] [company] a cause of any injury or damage to the plaintiff? For each [person] [company] you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer:	Yes	No	Not applicable
Defendant 1	_____	_____	_____
Defendant 2	_____	_____	_____
Defendant 3	_____	_____	_____
Defendant 4	_____	_____	_____

If you answered "No" or "Not applicable" as to each [person] [company] listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for all defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: _____ Yes _____ No

If you answered "No" then you should skip the next question, and your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

If you answered "Yes," then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [himself] [herself]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN

THERE IS NO NEED TO SUBMIT QUESTION OF

DIVISIBLE INJURIES TO THE JURY

Question No. 5: Using the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Defendant No. 1	_____%
Defendant No. 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

_____

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE

JURY MUST DETERMINE THE QUESTION OF

DIVISIBLE INJURIES

Question No. 5: Using the court's instruction No. ___ regarding distinct injuries, did _____ [(*the successive tortfeasor or tortfeasors*)] [_____ (*the original tortfeasor or tortfeasors*)] cause an injury that is distinct from any [separate] [enhanced] [or] [avoidable] injury caused by _____ [(*the original tortfeasor or tortfeasors*)] [(*the successive tortfeasor or tortfeasors*)]?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is "Yes," then skip Question Nos. 6 and 7 and answer Question Nos. 8 - 11. If the answer to Question No. 5 is "No," then answer Question Nos. 6 and 7.

Question No. 6: Using the instructions on damages given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Defendant No. 1 _____%

Defendant No. 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. The court will then enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom, and you will return to open court.

_____

Question No. 8: Using the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence of _____ (*original tortfeasor or tortfeasors*) and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused by the negligence of _____ (*successive tortfeasor or tortfeasors*).

Answer:

Damages caused by [original tortfeasor or tortfeasors]	_____
Damages caused by [successive tortfeasor or tortfeasors]	_____
Total damages *(must be the sum of the two numbers above)*	_____

Go to Question No. 9.

Question No. 9: Compare the negligence of the following persons who contributed to the separate damages caused by _____ (original tortfeasor or tortfeasors) and find a percentage for each. The total of the percentages must equal 100%. [The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing the original injury to [himself] [herself].]

Defendant No. 1	_____%
Defendant No. 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

Go to Question No. 10.

Question No. 10: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by _____ (*the successive tortfeasor or tortfeasors*) and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury.

Defendant No. 3	_____%
Defendant No. 4	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of each defendant contributing to _____ (*the original injury*) and _____ (*the successive injury*) by the plaintiff's damages from each injury. The court will then enter judgment for the plaintiff and against each defendant in the proportion of damages for which that defendant is responsible.

_____

Foreperson

USE NOTES

This sample verdict form is to be used when the trial court will present a second set of questions to the jury, based on the jury's response to the initial set of questions. In simpler cases, the trial court may prefer to use a single set of questions covering all issues.

When a case presents the potential that the jury will find that successive tortfeasors caused separate and divisible injuries to the plaintiff, the jury should first be presented an initial set of questions designed to permit the court to determine whether there is any need for the jury to make the determination of divisibility. Cf. Payne v. Hall, 2006-NMSC-029, ¶ 44, 139 N.M. 659, 137 P.3d 599 (suggesting that the jury may need to be provided with alternative sets of instructions). Unless the jury finds at least one defendant involved in the original injury to be liable and at least one defendant involved in the subsequent injury to be liable, it is unnecessary to present the question of divisibility to the jury because the defendants liable will be concurrent tortfeasors as regards either the original or successive injuries. This sample special verdict form above asks the jury to identify which parties were negligent and whether they caused injuries to the plaintiff. Question No. 3 should only be included when there is evidence to support a finding of negligence on the part of the plaintiff.

Once the jury has determined which defendants are liable, the court can decide whether there is a need to allow the jury to determine whether injuries are divisible. If there is no such need, the first set of supplemental set of questions allows the jury, as in a routine case, to determine the plaintiff's total damages and then to compare the fault of each person who contributed to those damages. If there is a need to allow the jury to determine whether damages arising from two incidents are divisible, the second set of supplemental questions asks the jury to make that determination. In the second supplemental set of instructions, if the jury determines the plaintiff's injuries are not divisible, the jury then determines the plaintiff's total damages and compares the negligence of all defendants who are liable. If the jury determines the injuries are divisible, the jury determines the portion of damages attributable to each injury and then separately compares the negligence of the parties responsible for the separate injuries.

In drafting a set of questions based on this sample verdict form, the court may find it more convenient, depending on the context, to refer to the divisible injuries as either injuries caused by a particular party (e.g., "injuries caused by Fred Johnson and Mark Jackson" or "injuries caused by Dr. Smith or Dr. Wilger") or injuries related to a particular incident (e.g., "injuries received in the automobile accident" or "injuries received at the hospital"). The method of shorthand that works best for the particular case should be used consistently throughout the instructions to avoid confusing the jury. The verdict form should be drafted to make clear that the damages and injuries for which an award may be made are those caused by some fault of a defendant.

Because the supplemental sets of questions are to be presented to the jury only after the jury determines which defendants are liable, the questions in the supplemental sets should be customized to eliminate the names of parties the jury has already determined not to be liable.

This sample verdict form contains no question regarding the foreseeability of the risk of a successive injury as a result of the original injury. It will usually be the case that the court will decide this issue as a matter of law. See Lewis v. Samson, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972 (imposing, "as a `positive rule of decisional law' the requirement of joint and several liability upon the original tortfeasor for the original and enhanced injuries"). When the trial court does not decide foreseeability as a matter of law, it may be necessary to draft an additional question on this issue for the jury.

[Approved by Supreme Court Order 07-8300-36, effective February 1, 2008.]

Committee commentary. — The trial court should be careful to use the sample verdict form as a guide only. The sample form and exemplars in the Appendix reflect the state of the law at a particular time and, as the Supreme Court acknowledged in Payne v. Hall, 2006-NMSC-029, ¶ 2, 139 N.M. 659, 137 P.3d 599, the legal issues surrounding successive tortfeasor liability continue to evolve. The court and counsel, therefore, will want to be sure, when drafting successive tortfeasor instructions, to be sensitive to the context of the particular case and any legal developments after the drafting of these guides.

The sample form makes no attempt to inform the jury that a finding of divisibility may cause the original tortfeasor to be jointly and severally liable with the successive tortfeasor for the distinct injuries caused by the latter. The sample form assumes that the trial court will take into account the consequences of the jury's finding on such issues as joint and several liability and indemnity when entering judgment.

CHAPTER 23
Wrongful Discharge

13-2301. Employment at will; general rule.

An employment relationship calling only for performance of work and payment of wages is an "employment at will". A person employed at will may be discharged at any time for any reason or for no reason at all, unless an exception to this rule applies. An exception to this rule exists if the discharge is in violation of [an implied agreement] [public policy] [or] [a statute].

USE NOTE

This instruction must be given in every case involving a claim of wrongful discharge based upon breach of an implied employment agreement. If an issue of employment at will exists, it should also be given in cases involving claims of wrongful discharge in violation of public policy or in violation of a statute. It should not be given where the sole issue to be submitted is whether, or where the court has determined as a matter of law that, there is an express employment contract for a definite term or one that permits discharge only for cause or only by following certain prescribed procedures. This instruction should be followed by UJI 13-2302 through 13-2305 and related instructions, as appropriate.

[Approved, effective January 1, 1999.]

Committee comment. — The general rule on employment at will is found in *Garza v. United Child Care, Inc.,* 88 N.M. 30, 536 P.2d 1086 (Ct. App. 1975); *Gonzales v. United Southwest Nat'l Bank,* 93 N.M. 522, 602 P.2d 619 (1979); *Vigil v. Arzola,* 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *rev'd on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984), *overruled on other grounds*, *Chavez v. Manville Prods. Corp.,* 108 N.M. 643, 777 P.2d 371 (1989). This instruction follows closely the language of the instruction given by the trial court in *Kestenbaum v. Pennzoil Co.,* 108 N.M. 20, 766 P.2d 280 (1989), but adds language by which the trial court may introduce the applicable exceptions to the employment at will rule, *e.g.,* implied contract, violation of public policy, or statutory mandate. *Kestenbaum; Chavez; Shovelin v. Central New Mexico Elec. Coop., Inc.,* 115 N.M. 293, 850 P.2d 996 (1993).

[Approved effective January 1, 1999.]

13-2302. Wrongful discharge; implied contract to discharge only for cause.

In this case you must determine whether there was an implied agreement that _____ (*employee*) could be discharged only for cause. In order for there to be an implied agreement, there must be a promise, representation or conduct sufficiently specific to create a reasonable expectation in the mind of _____ (*employee*) that [he] [she] could be discharged only for cause. In determining whether there was an implied agreement, you may consider all the surrounding circumstances, including the parties' words and actions, [what they wanted to accomplish], [the way they dealt with each other], [how other employees in the same or similar circumstances were customarily dealt with by _____ (*employer*)] [and] [any writings, handbooks or procedures used by _____ (*employer*)].

[How other employees in the same or similar circumstances were customarily dealt with cannot by itself constitute sufficient evidence to establish an implied contract.] If such an agreement existed, and if _____'s (*employee's*) discharge violated that agreement, then the discharge was wrongful.

USE NOTE

The bracketed circumstances should be given when the evidence in the case permits. When this instruction is given, it should immediately follow UJI 13-2301, and be given with UJI 13-2306.

[Approved, effective January 1, 1999; as amended by Supreme Court Order 08-8300-012, effective June 13, 2008.]

Committee comment. — "New Mexico recognizes an exception to at-will employment for an implied contract based on words and conduct of the parties..., including provisions in a personnel manual or handbook". *Newberry v. Allied Stores, Inc.,* 108 N.M. 424, 426, 773 P.2d 1231, 1233 (1989) (citing *Kestenbaum v. Pennzoil Co.,* 108 N.M. 20, 766 P.2d 280 (1988)). Normally, whether there is an implied agreement "is a question of fact to be discerned from the totality of the parties' statements and actions regarding the employment relationship". Newberry, 108 N.M. at 427, 773 P.2d at 1234; *see also Lukoski v. Sandia Indian Management Co.,* 106 N.M. 664, 666, 748 P.2d 507, 509 (1988). In determining whether the at-will employment is altered by an implied contract, all the circumstances surrounding the employment relationship will be considered. *Kestenbaum; Newberry.*

The ultimate question is whether the employer, by sufficiently specific words or conduct, has created in the employee a "reasonable expectation" of job security. *Hartbarger v. Frank Paxton Co.,* 115 N.M. 665, 672, 857 P.2d 776, 783 (1993); *Lukoski,* 106 N.M. at 667, 748 P.2d at 510.

The Supreme Court has indicated that the manner in which other employees were treated is not by itself a sufficient basis for finding an implied contract. *Hartbarger,* 115 N.M. at 674, 857 P.2d at 785.

Where an implied agreement requiring good cause for termination is found, discharge of the employee cannot be justified on the basis of the employer's good faith, but rather must be supported by "reasonable grounds [for the employer] to believe that sufficient cause existed to justify [the employee's] termination". *Kestenbaum,* 108 N.M. at 27, 766 P.2d at 287. This is "an objective standard of reasonable belief". *Id.* at 28, 766 P.2d at 288.

[Approved, effective January 1, 1999.]

2008 Committee comment. — *See also Mealand v. Eastern N.M. Med. Center*, 2001-NMCA-089, ¶ 9, 131 N.M. 65, 33 P.3d 285 (stating that New Mexico adheres to an objective theory of contracts and that regardless of an employer's subjective intent, the employer may be bound by words in an employee handbook that support reasonable expectations on the part of the employee of specified procedures, and noting a potential conflict with *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶ 12, 121 N.M. 710, 917 P.2d 1382 (holding that a manual could not create a reasonable expectation of an implied contract when it contained an express reservation of the right to terminate an employee for any reason); *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 20 (holding that the conservancy district's written personnel policy constituted an implied employment contract and a valid written contract for the purposes of governmental immunity); *Sanchez v. The New Mexican*, 106 N.M. 76, 78, 738 P.2d 1321, 1324 (1987) (holding that an employee handbook did not constitute an implied contract when the language lacked specific contractual terms, made no promises, but simply declared a general approach to employment).

The 2008 amendment, approved by Supreme Court Order 08-8300-012, effective June 13, 2008, added the 2008 Committee comment.

13-2303. Wrongful discharge; implied contract to follow certain procedures.

In this case you must determine whether there was an implied agreement that _____ *(employer)* would follow a particular procedure in discharging _____ *(employee)* specifically or in discharging _____'s *(employer's)* employees generally. In order for there to be an implied agreement, there must be a promise, representation or conduct sufficiently specific to create a reasonable expectation in the mind of _____ *(employee)* that _____ *(employer)* would follow a particular procedure in discharging _____ *(employee)* or _____'s *(employer's)* employees generally. In determining whether there was an implied agreement, you may consider all the surrounding circumstances, including the

parties' words and actions, [what they wanted to accomplish], [the way they dealt with each other], [how other employees in the same or similar circumstances were customarily dealt with by _____ *(employer)*] [and] [any writings, handbooks or procedures used by _____ *(employer)*].

[How other employees in the same or similar circumstances were customarily dealt with cannot by itself constitute sufficient evidence to establish an implied contract.] If such an agreement existed, and if _____'s *(employee's)* discharge violated that agreement, then the discharge was wrongful.

USE NOTE

The bracketed language should be given when the evidence in the case permits. When this instruction is given, it should immediately follow UJI 13-2301 or, if given, UJI 13-2302.

[Approved, effective January 1, 1999.]

Committee comment. — An implied agreement to follow only certain procedures in the termination of an employee's employment is a variation of the more general implied agreement which overcomes the presumption of at-will employment. *See* Committee Comment to UJI 13-2302.

Where the implied agreement establishes a procedure whereby the employer must provide the employee with notice and specifics of the reason for termination, the employer can rely only on those reasons in justifying the termination and may not advance other justifiable reasons at trial. *Kestenbaum v. Pennzoil Co.,* 108 N.M. 20, 26-27, 766 P.2d 280, 286-87 (1989).

[Approved, effective January 1, 1999.]

13-2304. Retaliatory discharge.

In this case you must [also] determine whether _____ (*employee*) was discharged because [he][she] _____ (*insert conduct court has determined is protected by public policy*). If _____ (*employee*) was discharged because [he] [she] _____ (*insert conduct court has determined is protected by public policy*) [and if _____ (*employee's*) conduct which triggered the discharge was taken in furtherance primarily of a public interest rather than primarily a private interest], then the discharge was retaliatory and was wrongful.

In determining whether _____ (*employee*) was discharged because [he] [she] _____ (*insert conduct court has determined is protected by public policy*), you must determine whether that conduct was a

motivating factor in the decision to discharge [him] [her]. A motivating factor is a factor that plays a role in the decision to discharge. It need not be the only reason, nor the last nor latest reason, for the discharge.

USE NOTE

This instruction should be given in all wrongful discharge cases involving a claim of discharge in violation of public policy. If the case involves issues of employment at will, this instruction should immediately follow UJI 13-2301, UJI 13-2302 or UJI 13-2303, if given.

Before this instruction is given, the court must determine as a matter of law that a public policy exists that was violated if plaintiff was discharged for the reason alleged.

A statement of the public policy relied on by the plaintiff and a description of the act or refusal to act which was allegedly the reason for the discharge should be inserted in the instruction as indicated.

The bracketed clause in the second sentence, which raises the issue of public versus private interest, is to be given only in the limited class of "whistleblower" cases in which the plaintiff made a report of wrongdoing to a private party rather than to public authorities. *See* Committee Comment.

In some cases, it may be appropriate to give further instruction to the jury on the causation requirement associated with this claim. In those cases, the trial court must fashion a supplemental instruction based on the court's determination of the governing law.

[Approved, effective January 1, 1999; as amended by Supreme Court Order 08-8300-012, effective June 13, 2008.]

Committee comment. — A cause of action in tort for retaliatory or abusive discharge in violation of public policy originated in *Vigil v. Arzola,* 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *reversed on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984), *overruled on other grounds*, *Chavez v. Manville Prods. Corp.,* 108 N.M. 643, 777 P.2d 371 (1989), and has been recognized by the Supreme Court. *See, e.g., Paca v. K-Mart Corp.,* 108 N.M. 479, 775 P.2d 245 (1989); *Hartbarger v. Frank Paxton Co.,* 115 N.M. 665, 857 P.2d 776 (1993).

Relevant public policy may be derived from statutory provisions, or the court itself may declare public policy. *See Vigil* 102 N.M. at 688-89, 699 P.2d at 619-20; *see also Shovelin v. Central N.M. Elec. Co-op., Inc.,* 115 N.M. 293, 850 P.2d 996 (1993). Public policy would be violated by discharging an employee for making statements criticizing the employer's misuse of public funds, *Vigil v. Arzola,* serving as a juror, id., joining a labor union, id., refusing to commit perjury or engage in price fixing, *id.,* refusing to sign a false statement, *Zaccardi v. Zale Corp.,* 856 F.2d 1473 (10th Cir. 1988), exercising the

right to vote or refrain from voting, *Shovelin v. Central N.M. Elec. Coop., Inc.,* or seeking relief under the Human Rights Act, *Gandy v. Wal-Mart Stores, Inc.,* 117 N.M. 441, 872 P.2d 859(1994). A discharge based on the employer's belief or suspicion that the plaintiff engaged in protected activity is wrongful; the plaintiff need not establish the employer's actual knowledge. *See Weidler v. Big J Enters., Inc.,* 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089.

A retaliatory discharge claim based on an employee's reporting of activities that are illegal or raise health or safety concerns ("whistleblowing") exists only if the employee's action was taken in furtherance of the public interest rather than primarily to further a private interest. *Garrity v. Overland Sheepskin Co.,* 121 N.M. 710, 917 P.2d 1382 (1996).

A retaliatory discharge claim includes a causation element. *See Sanchez v. The New Mexican,* 106 N.M. 76, 738 P.2d 1321 (1987). "A sufficient nexus must exist between the public policy asserted by the employee and the reasons for his or her discharge." *Vigil,* 102 N.M. at 689, 699 P.2d at 620. The instruction above adopts a "motivating factor" formulation for the causation element. *See Weidler.* Federal courts have developed approaches to the causation issue that may be applicable in certain circumstances under New Mexico law. *See McDonnell-Douglas Corp. v. Green,* 411 U.S. 702 (1973) (indirect evidence of impermissible motive); *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (mixed motive). Further instruction may therefore be necessary in a particular case for the jury to understand and apply the causation requirement. It will be the responsibility of the trial court when necessary to prepare a supplemental instruction on causation appropriate to the case.

In *Chavez v. Manville Products Corp.* 108 N.M. 643, 777 P.2d 371, 376 (1989), the Supreme Court overruled the portions of *Vigil v. Arzola* that required proof of causation by clear and convincing evidence and that limited recovery to pecuniary losses. Punitive damages are recoverable on a retaliatory discharge claim. *Vigil.* Mitigation of damages by the plaintiff is required. *Vigil; see also Chavez.*

[Approved, effective January 1, 1999.]

Committee comment. — A cause of action in tort for retaliatory or abusive discharge in violation of public policy originated in *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *reversed on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), *overruled on other grounds*, *Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 777 P.2d 371 (1989), and has been recognized by the Supreme Court. *See, e.g., Paca v. K-Mart Corp.*, 108 N.M. 479, 775 P.2d 245 (1989); Hartbarger v. Frank Paxton Co., 115 N.M. 665, 857 P.2d 776 (1993).

Relevant public policy may be derived from statutory provisions, or the court itself may declare public policy. *See Vigil*, 102 N.M. at 688-89, 699 P.2d at 619-20; *see also Shovelin v. Central N.M. Elec. Co-op., Inc.*, 115 N.M. 293, 850 P.2d 996 (1993). Public policy would be violated by discharging an employee for making statements criticizing

the employer's misuse of public funds, *Vigil v. Arzola*, serving as a juror, *id.*, joining a labor union, id., refusing to commit perjury or engage in price fixing, *id.*, refusing to sign a false statement, *Zaccardi v. Zale Corp.*, 856 F.2d 1473 (10th Cir. 1988), exercising the right to vote or refrain from voting, *Shovelin v. Central N.M. Elec. Coop., Inc.*, or seeking relief under the Human Rights Act, *Gandy v. Wal-Mart Stores, Inc.*, 117 N.M. 441, 872 P.2d 859(1994). A discharge based on the employer's belief or suspicion that the plaintiff engaged in protected activity is wrongful; the plaintiff need not establish the employer's actual knowledge. *See Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089.

A retaliatory discharge claim based on an employee's reporting of activities that are illegal or raise health or safety concerns ("whistleblowing") exists only if the employee's action was taken in furtherance of the public interest rather than primarily to further a private interest. *Garrity v. Overland Sheepskin Co.*, 121 N.M. 710, 917 P.2d 1382 (1996).

A retaliatory discharge claim includes a causation element. *See Sanchez v. The New Mexican*, 106 N.M. 76, 738 P.2d 1321 (1987). "A sufficient nexus must exist between the public policy asserted by the employee and the reasons for his or her discharge." *Vigil*, 102 N.M. at 689, 699 P.2d at 620. The instruction above adopts a "motivating factor" formulation for the causation element. *See Weidler*. Federal courts have developed approaches to the causation issue that may be applicable in certain circumstances under New Mexico law. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 702 (1973) (indirect evidence of impermissible motive); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (mixed motive). Further instruction may therefore be necessary in a particular case for the jury to understand and apply the causation requirement. It will be the responsibility of the trial court when necessary to prepare a supplemental instruction on causation appropriate to the case.

In *Chavez v. Manville Products Corp.*, 108 N.M. 643, 777 P.2d 371, 376 (1989), the Supreme Court overruled the portions of *Vigil v. Arzola* that required proof of causation by clear and convincing evidence and that limited recovery to pecuniary losses. Punitive damages are recoverable on a retaliatory discharge claim. *Vigil*. Mitigation of damages by the plaintiff is required. *Vigil*; *see also Chavez*.

The 2008 amendment, approved by Supreme Court Order 08-8300-012, effective June 13, 2008, deleted language that required the jury to determine whether the employee was discharged in violation of public policy and that required the court to insert a statement of the alleged cause of the employee’s retaliatory discharge; requires the court to insert a statement of the employee’s conduct that the court has determined to be protected by public policy; added the statement that a discharge for conduct that the court has determined to be protected by public policy is retaliatory; and deleted the provision that a motivating factor is a factor without which the discharge would not have occurred.

At-will employment is an essential element for a retaliatory discharge claim. Weise v. Washington Tru Solutions, LLC, 2008-NMCA-121, ____ N.M. ____, 192 P.3d 1244.

Retaliatory constructive discharge. — Where plaintiff's employer failed to act after observing firsthand that its staff attorney had subjected plaintiff to hostile work environment sexual harassment consisting of pervasive sexual commentary and innuendo; to aggressive; physical intimidation; computer sabatoge; and false accusations of inadequate work performance, plaintiff's claim of retaliatory constructive discharge was supported by substantial evidence. Littell v. Allstate Insurance Company, 2008-NMCA-012, 143 N.M. 506, 177 P.3d 1080.

13-2305. Human Rights Act violation.

In this case you must [also] determine whether _____ *(employer)* violated a statute known as the New Mexico Human Rights Act.

[Under this statute, it is unlawful for an employer to _____ *(insert in this blank the appropriate alleged statutory violation, e.g., refuse to hire, fire, demote, promote or make a decision on or discriminate in matters of compensation or terms or conditions of employment regarding)* { a qualified person} { an otherwise qualified person} based on _____ *(insert in this blank the illegal consideration, such as race, national origin, ancestry, sex, religion, color, physical or mental handicap or serious medical condition).* { An employer may _____ *(insert in this blank the appropriate alleged statutory violation, as above)* a person, however, if the action is based on a bonafide occupational qualification. A bonafide occupational qualification is a reasonable and verifiable job requirement which permits discrimination when reasonably necessary to the normal operation of the particular business. The job requirement must concern job-related skills and must relate to the central purpose of the employer's business.}]

[Under this statute, it is unlawful for an employer to refuse to make accommodation for a person's mental or physical handicap or serious medical condition { unless the accommodation would be unreasonable or would cause an undue hardship to the employer}.]

[Under this statute, it is unlawful for an employer to engage in any form of retaliation against a person because [he] [she] _____ *(insert in this blank the protected conduct at issue for a retaliation claim under the Human Rights Act, e.g., opposed an unlawful discriminatory practice or filed a complaint, testified, or participated in a proceeding under the Human Rights Act).]*

USE NOTE

This instruction can serve as a basic instruction on the substantive law in cases involving claims of discrimination, failure to accommodate a disability, or retaliation in violation of the New Mexico Human Rights Act, §§ 28-1-1 to 28-1-7 and 28-1-9 to 28-1-14 NMSA 1978. It should be given, with the appropriate bracketed language included, in wrongful discharge cases where a violation of the Human Rights Act is alleged. If the case involves issues of employment at will, this instruction should immediately follow UJI 13-2301 or UJI 13-2302, 13-2303 or 13-2304, if given.

The bracketed portion relating to bona fide occupational qualification should only be included if the employer has submitted evidence supporting the affirmative defense of a bona fide occupational qualification justifying any discrimination. Similarly, the bracketed language relating to whether an accommodation would be unreasonable or would cause an undue hardship should be given only when appropriate in light of the contentions of the parties and the evidence presented.

[Approved, effective January 1, 1999.]

Committee comment. — The New Mexico Human Rights Act, Sections 28-1-1 to 28-1-7 and Sections 28-1-9 to 28-1-14 NMSA 1978, addresses a variety of discriminatory practices in addition to wrongful discharge. There are few New Mexico cases which directly address violations of the Act. *See, e.g., Smith v. FDC Corp.,* 109 N.M. 514, 787 P.2d 433 (1990); *Keller v. City of Albuquerque,* 85 N.M. 134, 509 P.2d 1329 (1973). However, the court and counsel may find guidance in federal cases addressing similar allegations, *Behrmann v. Phototron Corp.,* 110 N.M. 323, 795 P.2d 1015 (1990), although reliance is not required, *Martinez v. Yellow Freight Sys., Inc.,* 113 N.M. 366, 369, 826 P.2d 962, 965 (1992). The methodology adopted in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973), can be useful in analyzing a claim under the Human Rights Act. *See Cates v. Regents of New Mexico Inst. of Mining & Technology,* 1998-NMSC-002, 124 N.M. 633, 954 P.2d 65. This instruction is intended to be compatible with that methodology while addressing the specific statutory elements of the Human Rights Act. Supplemental instructions may be given when the trial court deems it appropriate.

The Committee anticipates, without trying to predict all situations, that the bracketed phrase relating to an "otherwise qualified" person will normally be used in cases alleging disability discrimination and the language relating to bona fide occupational qualification would be given in such cases, whereas the bracketed phrase relating to a "qualified" person will ordinarily be used in cases alleging, *e.g.,* race, gender, or age discrimination and the language relating to bona fide occupational qualification would not be given in such cases. The word "qualified" may be omitted where the plaintiff's qualifications are not at issue.

The definition and a discussion of various applications of "bona fide occupational qualification" may be found in *International Union, UAW v. Johnson Controls,* 111 S. Ct. 1196 (1991).

[Approved, effective January 1, 1999.]

13-2306. Cause justifying discharge.

If _____ ***(employer)*** **agreed that** _____ ***(employee)*** **could be discharged only for cause,** _____ ***(employer)*** **could discharge** _____ ***(employee)*** **without violating the agreement if** _____ ***(employer)*** **in fact believed that [he] [she] had a sufficient cause to justify the discharge of** _____ ***(employee)*** **and that belief was reasonable.**

USE NOTE

This instruction should be used if UJI 13-2302 is given.

[Approved, effective January 1, 1999.]

Committee comment. — *See* Committee Comment to UJI 13-2302.

[Approved, effective January 1, 1999.]

13-2310. Damages for wrongful discharge.

If you should decide in favor of _____ (*plaintiff*) on [any of] [his] [her] claim[s] for discharge [because [he] [she] was discharged because _____ (*insert conduct court has determined to be a violation of public policy*)] [in violation of [an implied contract], [or] [a statute]], then you must fix the amount of money damages that will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by [him] [her] to have resulted from the wrongful conduct of the defendant[s]:

(*NOTE: Here include the proper elements of damages.*)

[In addition, if you should decide in favor of _____ (*plaintiff*) on [his] [her] claim [for discharge because [he] [she] _____ (*insert conduct court has determined to be a violation of public policy*)] [or] [for discharge in violation of a statute], _____ (*plaintiff*) is entitled to recover an amount of money that will reasonably and fairly compensate [him] [her] for any emotional distress caused by the violation.]

[Any damages for _____ (*list elements of special damages subject to this paragraph*) awarded on the claim for breach of an implied agreement must be damages which were reasonably foreseeable as a consequence of any breach.]

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof, and not upon speculation, guess or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTE

This is the basic form of damages instruction for wrongful discharge claims. It must be completed by inserting appropriate elements of general and/or special damages as supported by the law and the evidence. *See* UJI 13-2311 et seq. The second paragraph should be included where a claim is based on retaliatory discharge or violation of the New Mexico Human Rights Act [28-1-1 NMSA 1978] and emotional distress damages are sought. The third paragraph should be included where a claim is based on breach of an implied employment agreement and special damages are sought. The trial court must determine what elements of damages are subject to the rule expressed in that paragraph, and those elements of damages should be inserted in the space indicated. *See* Committee Comment.

In appropriate cases, additional instructions such as an instruction on mitigation of damages, *see* UJI 13-860, UJI 13-1811; *see also* UJI 13-851, or instructions relating to damages arising in the future, *see* UJI 13-1821 and UJI 13-1822, should be given with this instruction.

[Approved, effective January 1, 1999; as amended by Supreme Court Order 08-8300-012, effective June 13, 2008.]

Committee comment. — The New Mexico Human Rights Act permits recovery of "actual damages." Section 28-1-13 NMSA 1978. The term "is synonymous with compensatory damages." *Behrmann v. Phototron Corp.,* 110 N.M. 323, 328, 795 P.2d 1015, 1020 (1990). Recovery may include past and future lost earnings. *Id.; see also Smith v. FDC Corp.,* 109 N.M. 514, 787 P.2d 433 (1990).

Damages for emotional distress are ordinarily not recoverable in actions based on breach of an implied employment contract. *See Silva,* 106 N.M. at 20, 738 P.2d at 514 (holding, in accord with general contract principles, that such damages "are not recoverable ... in the absence of a showing that the parties contemplated such damages at the time the contract was made"). Emotional distress damages are recoverable under a retaliatory discharge claim. *Chavez v. Manville Prods.* In *Silva,* the Supreme Court approved a jury instruction stating that the jury could find either breach of contract or retaliatory discharge but not both, because "if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge action is unnecessary and inapplicable." 106 N.M. at 21, 738 P.2d at 515. *See also Salazar v. Furr's, Inc.,* 629 F. Supp. at 1408 (retaliatory discharge claim "does not extend to cases for which another remedy is provided by law"). In *McGinnis v.*

Honeywell, Inc., 110 N.M. 1, 791 P.2d 452 (1990), however, the Court indicated that there would be reason to allow the jury to pass on both claims in an appropriate case because emotional distress damages are available for retaliatory discharge but not for breach of contract. In cases where both breach of contract and retaliatory discharge claims are submitted and emotional distress damages are sought, the jury should be instructed in a way that avoids double recovery on those elements of damages common to both claims and that prevents the jury from awarding emotional distress damages under the contract claim. A special verdict form may be used to guide the jury's approach in such cases. *See* UJI 13-2320.

Mitigation of damages applies to wrongful discharge cases. *McGinnis.* The burden of proof is on the defendant, "to prove by substantial evidence that [plaintiff's] damages would be alleviated by future employment opportunities." *McGinnis,* 110 N.M. at 7, 791 P.2d at 458.

As in other contract and tort cases, punitive damages can be awarded for breach of an implied employment contract or retaliatory discharge where supported by the evidence. *See Vigil v. Arzola; McGinnis v. Honeywell, Inc. See* UJI 13-861 and UJI 13-1827. Punitive damages may be awarded only where there is bad faith during the course of employment or in the discharge. *Bourgeous v. Horizon Healthcare Corp.,* 117 N.M. 434, 872 P.2d 852 (1994). Punitive damages are available in all retaliatory discharge cases. *Rhein v. ADT Automotive,* 1996-NMSC-066, 122 N.M. 646, 930 P.2d 783. Violation of the Human Rights Act does not support an award of punitive damages. *Behrmann v. Phototron Corp., supra.*

[Approved, effective January 1, 1999.]

The 2008 amendment, as approved by Supreme Court Order 08-8300-012, effective June 13, 2008, required the court to insert a statement of the conduct that the court has determined to be a violation of public policy.

13-2311. Lost wages.

The wages _____ *(plaintiff)* would have earned during the period that [he] [she] would have remained employed by _____ *(defendant)* had there been no wrongful discharge.

USE NOTE

This instruction should be inserted into UJI 13-2310, Damages for Wrongful Discharge, where loss of past or future wages is an element of the plaintiff's damages.

Where mitigation of damages is a jury question, it may be appropriate, in lieu of this instruction, to adapt the instruction applicable to damages for breach of an express contract of employment, if the instruction is suited to the facts. *See* UJI 13-851.

[Approved, effective January 1, 1999.]

13-2312. Lost benefits.

The value of employment benefits, including _____ *(here insert specific benefits at issue).*

USE NOTE

This instruction should be inserted into UJI 13-2310, Damages for Wrongful Discharge, where loss of employment benefits is an element of the plaintiff's damages. The benefits at issue should be specified by filling in the blank.

[Approved, effective January 1, 1999.]

13-2313. Expenses of securing new employment.

The reasonable expenses incurred by _____ *(plaintiff),* including _____ *(here insert claimed elements of expenses),* in securing new employment after the discharge.

USE NOTE

This is a typical element of special damages for wrongful discharge that could be inserted into UJI 13-2310 in appropriate cases. It is not intended to be exclusive. The expenses at issue should be specified by filling in the blank.

[Approved, effective January 1, 1999.]

13-2320. Special verdict form for wrongful discharge cases.

Question 1:

(A) Was there an implied contract of employment between _____ (*plaintiff*) and _____ (*defendant*) that _____ (*plaintiff*) would only be discharged [for cause] [and] [or] [through the use of certain procedures]?

Answer: _____ (Yes or No)

If the answer to Question 1(A) is "Yes," answer Question 1(B).

If the answer to Question 1(A) is "No," go to Question 2.

(B) Did _____ (*defendant*) breach the implied contract of employment with _____ (*plaintiff*)?

Answer: _____ (Yes or No)

If the answer to Question 1(A) is "Yes," and you have answered Question 1(B) (*regardless of the answer*), go to Question 3.

Question 2: Did _____ (*defendant*) discharge _____ (*plaintiff*) in retaliation for _____ (*identify public policy in issue*)?

Answer: _____ (Yes or No)

Go to Question 3.

Question 3: Did _____ (*defendant*) discharge _____ (*plaintiff*) in violation of _____ (*identify the statute in question, e.g., the New Mexico Human Rights Act, Title VII, etc.*)?

Answer: _____ (Yes or No)

If you did not answer Question 1(B) or if you answered "No" to Question 1(B), and if the answers to Question 2 and Question 3 are "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendant and against the plaintiff, and you will all return to open court.

If your answer to any of Questions 1(B), 2, or 3 is "Yes," you are to answer Question 4.

Question 4: Did _____'s (*defendant's*) conduct cause damage to _____ (*plaintiff*)?

Answer: _____ (Yes or No)

If the answer to Question 4 is "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendant and against the plaintiff, and you will all return to open court.

If the answer to Question 4 is "Yes," also answer Question 5.

Question 5: In accordance with the damage instructions given by the court, we find the damages suffered by _____ (*plaintiff*) to be:

(Elements of damages)	(Amount)
_____	$_____
_____	$_____

If the answer to Question 2 is "Yes," also answer Question 6.

Question 6: Did _____ (*plaintiff)* suffer emotional distress as a result of _____'s (*defendant's*) violation of _____ (*a statute allowing for recovery of emotional distress damages, e.g., the New Mexico Human Rights Act or Title VII*)?

Answer: _____ (Yes or No)

If the answer to Question 6 is "Yes," also answer Question 7.

Question 7: In accordance with the damage instructions given by the court, we find the damages suffered by _____ (*plaintiff*) for emotional distress to be $_____.

_____

Foreperson

USE NOTE

This instruction provides a form of special verdict for a wrongful discharge case involving claims for breach of an implied employment contract, retaliatory discharge, and violation of the New Mexico Human Rights Act [28-1-1 NMSA 1978]. It should be modified as necessary to suit the case at hand. The Court may exercise its discretion to utilize a general verdict form if appropriate in a given case. The Court should determine the appropriate elements of damage to be included under Question 5.

[Approved, effective January 1, 1999; as amended by Supreme Court Order 08-8300-012, effective June 13, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order 08-8300-012, effective June 13, 2008, added the note in Subsection (B) which instructs the user to proceed to Question No. 3 if the answer to Question No. 1(A) is positive; deleted the former reference in Question No. 2 to discharge in violation of public policy and required the insertion of a statement of the public policy for which the discharge is in retaliation; in Question No. 3, deleted the reference to the New Mexico Human Rights Act and required the insertion of a statement of the statute in issue; and in Question No. 6, deleted the reference to public policy or a violation of the New Mexico Human Rights Act and required the insertion of a statement of the statute allowing for recovery of emotional distress damages.

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