UNIFORM JURY INSTRUCTIONS-CIVIL
Chapter

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. 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.]

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

The law establishes specific qualifications for jurors and makes it a duty of a citizen to serve as a juror. It is the responsibility of the trial judge to open proceedings and to conduct the case with dignity. While granting the parties ample opportunity for full presentation of their cases, the trial judge must facilitate the administration of justice with reasonable dispatch.

Considerable time will be saved in all trials if the court will prepare in advance and distribute to all members of the venire basic information with regard to the mechanics of a jury trial. The court should also prepare in advance of trial, and make available to counsel involved, a list of all members of the venire, showing as a minimum their names, addresses, ages and employments, together with such other pertinent information as may reduce the time expended in jury selection and avoid much time wasted in individual interrogation of prospective jurors.

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.

If the jury as selected is to properly perform its function then certain basic instructions and explanations are necessary not only at the outset of the trial but from time to time during the course of the trial with detailed instructions on the law prior to the jury commencing its final deliberations. The instructions of this chapter are recommended guidelines to aid the court in getting the trial underway in an orderly manner. UJI 13-106 is mandatory.

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

13-101. Voir dire orientation statement.

Good morning ladies and gentlemen:

You have been summoned here as prospective jurors.

The case which you are about to try is a civil case as distinguished from a criminal case. It is a lawsuit filed by .... who is called the plaintiff against .... who is called the defendant.

In this case the plaintiff claims damages due to

(NOTE: The trial court will here insert a very brief statement as to the type or kind of case to be tried such as ... "injuries alleged to have been suffered as a proximate result of the negligence of the defendant in an automobile accident at the corner of Third and Central.")

[Twelve] [Six] members will constitute the jury in this case.

The jurors finally selected will consider all of the evidence submitted during the course of the trial and then determine the true facts and come to their verdict with the help of certain instructions on the law which the court will give to you from time to time.

It has been estimated that this trial will last .... days.

It will not be necessary to keep the jurors together at night [during the course of the trial, the jury will be taken to lunch by the bailiff at the expense of the county].

DIRECTIONS FOR USE

This instruction is a statement to help orient the jury as to the particular case before the commencement of voir dire examination. Such a statement will help to put the panel at ease for the selection of those who will try the case.

[As amended, effective January 1, 1987.]

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.

13-102. 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 propounded to you by the court or by the lawyers under the court's direction touching upon your qualifications to serve as a juror in this case?

DIRECTIONS FOR USE

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.

[As amended, effective January 1, 1987.]

Committee comment. - Just as it is essential that the witness understands the solemnity of his position before testifying, so also the jury should be carefully sworn to make full and complete answers of any questions asked of them during the voir dire.

13-103. Voir dire explanation.

The clerk will now call sufficient names to provide the jurors required for this trial.

As the name and number of each juror is announced, the person called will come forward and take a seat in the jury box. Each juror is under oath. Each of you must truthfully answer the questions asked by the court and by the lawyers for the parties. The court will not permit improper questions of you. 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.

Under New Mexico law, each side may excuse as many as five members of the panel without cause, and you should not be embarrassed by any question propounded or consider it a reflection upon you if you are one of those excused.

DIRECTIONS FOR USE

The foregoing statement should be changed or modified as may be required under the facts and circumstances of each case. The foregoing are merely suggestions and aids to the trial judge as to what areas might properly be covered in this preliminary statement.

[As amended, effective January 1, 1987.]

Committee comment. - Section 38-5-14 NMSA 1978 includes both the challenges made for cause and the peremptory challenges. Rule 1-038 of the Rules of Civil Procedure for the District Courts specifies the number of jurors in a particular case and the challenges. The rules following refer to trials generally.

13-104. Voir dire questioning by court.

Ladies and gentlemen, I will now ask you some preliminary questions concerning your qualifications as jurors in this case and, after my questions, the attorneys for the parties may have further questions.

I will first introduce the parties to the lawsuit.

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

Are any of you acquainted with the plaintiff?

Are any of you acquainted with the family or friends of the plaintiff?

Are any of you acquainted with the defendant?

Are any of you acquainted with the family or friends of the defendant?

At this time I will 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.)

Are any of you acquainted with the attorney for the plaintiff?

Are any of you acquainted with the family or friends of the attorney for the plaintiff?

Are any of you acquainted with any partners or associates of the attorney for the plaintiff?

Are any of you acquainted with the attorney for the defendant?

Are any of you acquainted with the family or friends of the attorney for the defendant?

Are any of you acquainted with any partners or associates of the attorney for the defendant?

Have any of you, any members of your family or any of your

friends ever been sued by any of the attorneys in this case or any of their partners or associates?

WITH RELATION TO THE FACTS OF THIS PARTICULAR CASE:

Do any of you have any knowledge whatsoever with regard to this case, any parties, any witnesses or any circumstances surrounding the case?

Have you read about it in the newspapers or heard anything about it on radio or television?

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

Do you have any knowledge, information or belief with reference to the case?

Have any of you, any of your close friends or any member of your immediate family ever sustained injuries to your ....?

(Leg, head, knee, low back, etc.)

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

Have you or any member of your immediate family ever been a party to a lawsuit involving ....?

(personal injury, death, contract, etc.)

(NOTE: If so, who? What? When? Where? How?)

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

Do any of you know of any facts which would hinder you in 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 any of you now have an opinion, tendency or feeling, not known to the court, which would influence your verdict in this case?

Do any of you conscientiously believe that if selected as a juror in this case you will not be able to render a fair and impartial verdict?

The lawyers may now ask you further questions concerning your qualifications.

DIRECTIONS FOR USE

The foregoing instruction is an example of the preferred type of voir dire examination by the court, but the particular case will control the precise interrogation by the court.

It is the duty of the trial judge to explain the salient features of the case to the jury and to help to examine the jury so as to uncover any bias, prejudice, sympathy or preconceived ideas which would be detrimental to any of the litigants. The trial judge should never read at length the pleadings to the jury. The trial judge should not permit individual repetitious interrogation of individual jurors.

[As amended, effective January 1, 1987.]

Committee comment. - Rule 1-047A of the Rules of Civil Procedure for the District Courts lodges in the court discretion to permit counsel to make *supplemental* examination of the jury. Such discretion should be freely granted to further the real purpose of voir dire, but not an abuse thereof. The purpose of voir dire examination is not another opportunity to make a closing argument or to presell the jury on the merits of one side of the case. Voir dire (speak the truth) is for the purpose of conducting examination of the jurors touching upon their competence. It should not be used for any other purpose.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75B Am. Jur. 2d Trial §§ 1706 et seq., 1918 to 1920.

Prejudicial effect of reference on voir dire examination of jurors to settlement efforts, 67 A.L.R.2d 560.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case, 99 A.L.R.2d 7.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family, 38 A.L.R.4th 267.

Propriety of asking prospective female jurors questions on voir dire not asked of prospective male jurors, or vice versa, 39 A.L.R.4th 450.

Necessity for presence of judge during voir dire examination of prospective jurors in state criminal case, 39 A.L.R.4th 465.

Effect of false or erroneous answer on voir dire as to previous claims or actions against himself or his family, 66 A.L.R.4th 509.

Propriety and prejudicial effect of federal court's refusal on voir dire in civil action to ask or permit questions submitted by counsel, 72 A.L.R. Fed. 638.

88 C.J.S. Trial § 3.

13-105. Oath to empaneled jury.

Do you and each of you solemnly swear or affirm that you will well and truly try the issues joined between the parties to the pending cause and a true verdict render according to the law and evidence submitted?

DIRECTIONS FOR USE

A jury is not properly empaneled until they have been sworn.

[As amended, effective January 1, 1987.]

Committee comment. - The oath is usually administered by the clerk but, of course, could be administered by the judge.

13-106. Admonitions to jury on conduct.

Ladies and gentlemen:

You have now been selected as the jury which will try this case. The court will now give you certain rules which you must follow in the course of this trial.

1. During the recesses and adjournments, while this case is in progress, you should not discuss the case with other jurors or with anyone else.

2. You should not allow anyone to discuss this case in your presence or within your hearing. If, during the course of this trial, anyone should try to discuss the case with you, advise such person that you are a juror and cannot discuss the case. If such person still persists, then you will immediately report the matter to the court.

3. If this case receives any publicity during the course of the trial, you should not read about it in the newspapers. You should not watch or listen to any television or radio newscasts about this trial.

4. There are at least two sides to every lawsuit. You should not attempt to make up your mind about the case until the matter is submitted to you for your deliberations.

5. You should not form an opinion or express an opinion as to any issue in this case until you have heard all of the evidence, the instructions of the court and the closing statements of the attorneys.

6. The production of evidence in court is governed by rules of law. From time to time it will be my duty as judge to rule on the evidence. You will not concern yourself with the reasons for the rulings of the court. You will not consider what would or would not have been the answers to questions which the court rules cannot be answered. Remarks, arguments and statements of the lawyers are not evidence; neither are comments of the court.

7. The evidence which you will consider in this case, in order to arrive at a true verdict, consists of the testimony of the witnesses; the exhibits, if any, admitted into evidence; any facts admitted or agreed to by the attorneys as well as any facts which the court instructs you to accept as true.

8. Ordinarily, jurors are not permitted to take notes during the trial. You must rely upon your individual memories of the evidence in the case. If exhibits such as pictures, drawings, maps, written documents and the like are received in evidence and passed among you for examination, you must not comment with other jurors or whisper back and forth about them. Each juror must study the exhibit alone. Do not assist your neighboring juror.

9. Ordinarily the attorneys representing the various parties in the lawsuit will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will find himself or herself with a question unanswered after all of the evidence is presented. However, should this occur, the juror is privileged to write out the question and ask the bailiff to hand it to the court. Your name, as juror, should appear at the bottom of the question. The court must first pass upon the propriety of the question before it can be asked in open court. If the question is proper, the court will ask it. If it is not a proper question, you will realize that, in not asking it, the court found it unacceptable as a matter of law.

10. Jurors must not visit the scene of the accident (or other event) on their own. Jurors cannot make experiments with reference to the case. Jurors must decide the case solely upon the evidence received in court.

[In the event the court determines that an inspection of the site is desirable, then the court will escort the jury as a whole to the scene. This is known as a "jury view". If a jury view is to be had in this case, then you will receive special instructions as to your duties in that connection.]

DIRECTIONS FOR USE

These admonitions and any others the court deems appropriate shall be read to the jury immediately upon its qualification and prior to opening statements or the presentation of

testimony and evidence. See Rule 1-051C. The object of this instruction is to immediately acquaint the jury with certain rules of conduct to guide their actions and to make their work more meaningful.

The last paragraph of the instruction, relating to jury views, will not be given in every case but only when a jury view is contemplated at the outset of the trial.

These admonitions and any others given will become a part of the record in the case.

[As amended, effective January 1, 1987.]

Committee comment. - The admonitions herein stated are not intended to restrict the court in giving other instructions and directions which would tend to aid the jury in the administration of justice. At noon and overnight recesses, some of these admonitions can be repeated, particularly is this so in protracted trials.

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).

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).

ANNOTATIONS

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.

89 C.J.S. Trial §§ 452 to 454.

13-107. The rule of exclusion.

It is a rule of law that witnesses may be excluded from the courtroom so that they cannot hear the testimony of other witnesses. This rule does not apply to parties, a designated representative of a [company] [association], or expert witnesses.

The rule of exclusion has been invoked in this case and all witnesses to whom the rule applies will be required to remain outside the courtroom until they are called to testify. Witnesses excluded from the courtroom should not discuss with other witnesses their testimony before they or the other witnesses testify but they may discuss their testimony with the lawyers.

DIRECTIONS FOR USE

Rule 11-615 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.

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

Committee comment. - To be effective, the motion for exclusion should be made to the court at the outset of the trial and the request should be made prior to opening statements. [Revised, effective November 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, added the second sentence of the first paragraph, substituted "and all witnesses to whom the rule applies will be required to remain outside" for "and, therefore, all of the witnesses will be required to leave" in the first sentence of the second paragraph, and, in the Directions for Use, substituted "presentation of a claim" for "presentation of his cause" in the third paragraph.

13-108. Opening statement.

It is the practice of this court to permit the attorneys for each side to make an opening statement to the jury at this time if they so desire.

The purpose of the opening statement is to outline the facts which that party hopes to prove.

An opening statement can be helpful to you in order to better understand the issues of the lawsuit and also to place in proper perspective the evidence as it is offered in court.

The statements of the attorneys are not evidence.

After the opening statements are concluded, the plaintiff will then be required to present [his] [her] [its] case. After the conclusion of the plaintiff's case, the defendant will then submit [his] [her] [its] case. After the presentation of all of the evidence, the court will then instruct you on the law applicable to the case and, after the lawyers have made their closing statements, you will then be permitted to commence your deliberations.

At this time the plaintiff may proceed with the opening statement.

DIRECTIONS FOR USE

If opening statement is to be made, it should be made after the jury has been sworn and prior to the presentation of any evidence by a particular party. Opening statements may be waived. Defendant may reserve the right to make opening statement until the commencement of the defendant's case.

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

Committee comment. - It has been held in New Mexico that the denial of the right to address the jury is reversible error. Conner v. Flaska, 32 N.M. 162, 252 P.2d 1001 (1927).

Where plaintiff's opening statement shows no cause of action, the trial court may direct a verdict or dismiss the action. Trial courts have been admonished to exercise this right with caution. Stubblefield v. Crawford, 69 N.M. 313, 366 P.2d 708 (1961).

The opening statement which outlines the evidence to be submitted, the facts intended to be proved and the party's theories can be of considerable benefit to the jury. The purpose of the opening statement is *not* to serve as the final argument nor as a preface thereto. While latitude is allowed counsel, the exercise of the right is subject to control by the court in its discretion. Unduly protracted opening statements should not be countenanced.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction, and substituted "the right to make opening statement" for "his right to opening statement" in the last sentence of the Directions for Use.

Statement held not prejudicial. - Prosecutor's opening statement about a "cock-and-bull story" told by the defendant did not require a mistrial, where the court gave an instruction advising the jury that opening statements are not evidence and should not include argument, and advising that statements of counsel's personal opinion are inappropriate even during argument. State v. Reynolds, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990).

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 any event, all instructions sent to the jury room should have been read 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.]

ANNOTATIONS

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 other jurors or with any other person, or allow anyone to discuss the case with you or in your presence.

Avoid any publicity this case may receive. Do not read, listen to or watch any news accounts of this trial.

Do not express any opinion about the case or form any fixed opinion until the case is finally submitted to you for your decision.

DIRECTIONS FOR USE

This instruction should be given after UJI 13-108. It can be repeated from time to time at recesses and should be restated to the jury at the end of each day.

[As amended, effective January 1, 1987.]

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

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

89 C.J.S. Trial §§ 452 to 454.

13-202. Discussion of exhibits prohibited.

When an exhibit is presented to you, 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 when the case is finally submitted to you for your decision.

DIRECTIONS FOR USE

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

[As amended, effective January 1, 1987.]

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

ANNOTATIONS

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.

Deposition testimony is testimony that was taken under oath before trial and has been preserved [in writing] [by video]. This testimony is entitled to the same consideration that you give any other testimony at this trial.

DIRECTIONS FOR USE

This instruction should be given in any case in which a deposition is presented, and can be given when the deposition is presented or at the close of the case with the other instructions, or at both times. See Introduction to 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.]

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.

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 testimony under oath and are entitled to the same consideration that you give any other testimony.

DIRECTIONS FOR USE

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

[As amended, effective January 1, 1987.]

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).

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

A medical witness may be permitted to testify concerning statements made to [him] [her] in connection with efforts to learn the patient's history and condition for purposes of diagnosis or treatment. While such statements are not evidence of their own truth, they may be considered for the purpose of showing the information upon which the doctor's opinion was based. To whatever extent the opinion of a medical witness is based upon such statements, you are entitled to consider the trustworthiness of such statements in determining the weight to be given to such opinion.

DIRECTIONS FOR USE

The testimony of a medical witness concerning subjective symptoms as related by the patient to the doctor and as recited by the doctor to the jury as part of the history the doctor obtained calls for the giving of this instruction. The instruction may be given, if requested by counsel, at the time that the doctor recites this history or it may be given at the conclusion of the case with other instructions given to the jury before closing arguments.

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

Committee comment. - To allow a doctor to testify as to statements made by the person whom the doctor was examining, such statements must necessarily have formed a basis for the doctor's diagnosis or opinion. See Herrera v. Springer Corp., 89 N.M. 45, 546 P.2d 1202 (Ct. App. 1976), cert. denied, 89 N.M. 206, 549 P.2d 288 (1976); Waldroop v. Driver-Miller Plumbing & Heating Corp., 61 N.M. 412, 301 P.2d 521 (1956); and Rules 11-703 and 11-803D of the Rules of Evidence, and commentaries thereto. Statements to the medical witness may also be considered as admissions or for impeachment.

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 Directions for Use.

13-206. Corporation a party.

The .... in this case is a corporation. A corporation
(Plaintiff, defendant, or other party)

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.

DIRECTIONS FOR USE

This instruction may be given during the course of the trial. Where applicable, it shall be included in the general instructions given to the jury before closing arguments.

[As amended, effective January 1, 1987.]

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).

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. The fact that the witness has talked to an attorney does not reflect adversely on the truth of such testimony.

DIRECTIONS FOR USE

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.]

13-208. Insurance has no bearing.

Whether a party is insured has no bearing on whether such a party was negligent.
[Evidence has been admitted that
..
(Plaintiff, defendant, etc.)
was insured. You may consider this evidence, not in determining negligence
but only for the limited purpose of proving
....]
(Agency, ownership or control, bias or prejudice of a witness, etc.)

DIRECTIONS FOR USE

Where the claim is based on some act or omission other than negligence, e.g., supply of a defective product, then an appropriate substitution shall be made for the word "negligence".

When insurance is mentioned by inadvertence, 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.

In a case where evidence of insurance has been admitted pursuant to Rule 11-411 after the court's consideration of such evidence under Rule 11-403, 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 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.]

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.

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).

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.

DIRECTIONS FOR USE

At the time the hypothetical question is asked, it may be appropriate for the court to give this instruction so the jury may understand the purpose of the hypothetical question. When given, this instruction would usually follow UJI 13-213.

This instruction may also be included in the general instructions at the conclusion of the case.

[As amended, effective January 1, 1987.]

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

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.

DIRECTIONS FOR USE

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?

DIRECTIONS FOR USE

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 Directions for Use.

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?

DIRECTIONS FOR USE

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".

13-213. Expert testimony.

The Rules of Evidence do not ordinarily permit a witness to testify as to an opinion or conclusion. An expert witness is an exception to this rule. A witness who, by knowledge, skill, experience, training or education, has become expert in any subject may be permitted to state an opinion as to that subject.

You should consider each expert opinion and the reasons stated for the opinion, giving them such weight as you think they deserve. You may reject an opinion entirely if you conclude that it is unsound.

DIRECTIONS FOR USE

This instruction may be given at the time the expert testifies or it may be given with the closing instructions or it may be used both times.

There is included in these Uniform Jury Instructions an instruction on a hypothetical question which is found as UJI 13-209.

[As amended, effective January 1, 1987.]

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).

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).

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).

ANNOTATIONS

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.

88 C.J.S. Trial §§ 290, 310, 400.

CHAPTER 3
ISSUES; BURDEN OF PROOF; CAUSATION; EVIDENCE

Part A
Statement of Issues, Burden of Proof.

Part B
Burden Of Proof.

Part C
Causation.

Part D
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.

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.

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. Instruction 13-302 exemplifies the desired manner of drafting this all-important instruction. A simple, commonsense, 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.]

ANNOTATIONS

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).

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 when the court is to give you formal instructions on the law governing this case and to guide you in your deliberations.

Please pay close attention to these instructions.

You alone are the judges of the facts of this case.

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

I will read these instructions only once, but the written instructions will be given to you to take to the jury room for your further assistance.

DIRECTIONS FOR USE

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.]

PART A
STATEMENT OF ISSUES, BURDEN OF PROOF

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

In this civil action the plaintiff(s) seek(s) compensation from the defendant(s) for damages which plaintiff(s) claim(s) were proximately caused by ....

(Negligence, [and]

A Defective Product, [and]

Breach of Warranty, [and]

Breach of Contract, [and]

Fraudulent Misrepresentation, [and]

Etc.)

DIRECTIONS FOR USE

Combined with UJI 13-302B through 13-302F, 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 13-302F is intended to result in an instruction which (A) establishes by name an identity for each theory of recovery, and then (B) states factual contentions, proximate cause and burden of proof for one single theory, immediately followed by (C) a statement of denials and affirmative defenses applicable to that theory and (D) a statement of the factual contentions, proximate cause and burden of proof for each affirmative defense.

Parts B through D may be restated for each additional theory of recovery, unless undue repetition would dictate that the contentions be combined for, or in response to, more than one theory of recovery. Any counterclaim should be stated in Part D, which also includes a statement of plaintiff(s)' denial and/or contentions in avoidance of affirmative defenses or in reply to counterclaims.

Part E is a statement of other contentions and denials, proximate cause 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.

Part F is a statement of the specific questions which must be answered to determine liability, followed by a general statement that answers to other questions will be required in the special verdict form if liability is found. In framing the preliminary questions, care must be taken not to confuse the burden of proof. The question should be tested by the effect of evenly balanced evidence. This is shown in Example C, question 5, *infra.* Where the questions cannot all be stated in the affirmative or in the negative, the instruction must make clear the effect of answers that are a "Yes" and "No" mix.

Committee comment. - UJI 13-302A through 13-302F 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 usually cannot be completed until 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.

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

To establish the claim of
..
(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 contention(s) [applicable to that defendant]:

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

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

DIRECTIONS FOR USE

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".

Committee comment. - See the Directions for Use and Committee Comment to UJI 13-302A.

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

The defendant(s) deny(ies) the contentions of the plaintiff(s) [under the claim of] .... [and defendant(s)

claim(s) that:
..
(theory of recovery(ies) by name)

(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.)].

DIRECTIONS FOR USE

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

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

ANNOTATIONS

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), proximate cause and burden of proof.

To establish the claim of...,
(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 contention(s) [applicable to the person named]:

(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.)

To establish the claim

of... .,
(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.)

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

[As a counterclaim, the defendant(s) seek(s) compensation from the plaintiff(s) for damages which defendant(s) claim(s) were proximately caused
by
...
....
(theory of counterclaim by name)

To establish the claim of .... on the part of [a] plaintiff(s), the
(theory of counterclaim by name)
defendant(s) has/have the burden of proving [at least one of] [each of] the following contention(s) [applicable to that plaintiff:

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

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

The plaintiff(s) deny(ies) the contentions of defendant(s) [and plaintiff(s) claim(s)
that
...
.....
(theory of affirmative defense to counterclaim not already at issue under preceding claims)

To establish the claim of
..
(theory of affirmative defense to counterclaim by name)
on the part of defendant(s), the plaintiff(s) has/have the burden of proving ....].

DIRECTIONS FOR USE

See Directions for Use to UJI 13-302A. If there is an affirmative defense requiring proof of proximate cause, in addition to negligence of the plaintiff and/or others, it would be stated in the second regular paragraph of UJI 13-302D.

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

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

Related to the claims, ... contend(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, ... contend(s) and has/have the burden of proving that: ....

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

DIRECTIONS FOR USE

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.

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 the [any] defendant negligent?**
2. **Was any negligence of [a] defendant a proximate cause of**

[a] plaintiff's injuries and damages?

[1. Was the product defective?]

[2. Was any product defect a proximate cause of [a] plaintiff's injuries and damages?]

If you answer "No" to either question 1 or 2 on the special verdict form, [and if you also answer "No" to either question ____ or ____,] you shall return the special verdict for the defendant(s) and against the plaintiff(s).

If, on the other hand, you answer "Yes" to questions 1 and 2, [or if you answer "Yes" to questions ____ and ____,] you shall determine the amount of money that will compensate plaintiff(s) for the injuries and damages, and 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.

DIRECTIONS FOR USE

The trial court may in its discretion reserve the reading of UJI 13-302F until immediately prior to presenting the special verdict form. The test for what constitutes a preliminary question is whether the answer would end the case. In the event the determination of no liability on the part of any one of several defendants would be dispositive, e.g., cases of vicarious liability resting on the act or omission of a single person, then the preliminary questions may be drafted to direct the jury to the appropriate determinative issue, thereby avoiding possible conflict in the verdict. (See Example A, *infra.*)

EXAMPLE A

INSTRUCTION NO. ....

In this civil action the plaintiff seeks compensation from the defendants for damages which plaintiff claims were proximately caused by negligence.

To establish the claim of 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 and circumspection, in a manner so as to endanger or be likely to endanger others.

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

The defendants deny the contentions of the plaintiff and claim 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 the claim of excuse or justification, the defendants have the burden of proving the contention that 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 contention constitutes excuse or justification for plaintiff's contention that Doe failed to stop and yield the right-of-way to plaintiff's vehicle.

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

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

2. Plaintiff failed to keep a proper lookout.

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

The plaintiff denies the contentions of defendants.

Related to the claims, plaintiff contends 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 contentions are denied.

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 Doe negligent?

2. Was any negligence of defendant Doe a proximate cause of plaintiff's injuries and damages?

If you answer "No" to either question 1 or 2 on the special verdict form, you shall return the special verdict for the defendants and against the plaintiff.

If, on the other hand, you answer "Yes" to questions 1 and 2 on the special verdict form, you shall determine the amount of money that will compensate plaintiff for the injuries and damages, and 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.

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 proximate 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 civil action the plaintiffs seek compensation from the defendants for damages which plaintiffs claim were proximately caused by negligence.

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

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

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

The defendants deny the contentions of the plaintiffs under the claim of negligence and defendants claim that the decedent was negligent.

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

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 also contend, and have the burden of proving, that negligence of the decedent was a proximate cause of the injuries and damages.

The plaintiffs deny the contentions of the defendants.

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 any defendant negligent?

2. Was any negligence of a defendant a proximate cause of plaintiffs' injuries and damages?

If you answer "No" to either question 1 or 2 on the special verdict form, you shall return the special verdict for the defendants and against the plaintiffs.

If, on the other hand, you answer "Yes" to questions 1 and 2 on the special verdict form, you shall determine the amount of money that will compensate plaintiffs for the injuries and damages, and you will otherwise answer the questions on the special verdict form which I will hand to you at the conclusion of these instructions.

EXAMPLE C

INSTRUCTION NO. ....

In this civil action the plaintiff Public Utility Company seeks compensation from the defendant Ajax Construction Company for damages which plaintiff claims were proximately caused by negligence and breach of express warranty.

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

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 also contends, and has the burden of proving, that such negligence was a proximate cause of the structural crack which appeared in the wall of G-H cell, and of resulting damages.

Ajax denies the contentions of Public Utility Company under the claim of negligence and Ajax claims that Public Utility Company itself was negligent.

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

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

Public Utility Company denies these contentions of Ajax.

To establish the claim of breach of express warranty on the part of Ajax, Public Utility Company has the burden of proving its contention that 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 also contends, and has the burden of proving, that a breach of express warranty was a proximate cause of the damages.

Ajax denies these contentions of Public Utility Company and Ajax claims 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 the contention of Ajax with respect to failure to provide written notice of breach of express warranty.

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 Ajax negligent?

2. Was any negligence of Ajax a proximate cause of the

structural crack in G-H cell and damages to Public Utility Company?

3. Did Ajax give Public Utility Company an express warranty against defects in materials and workmanship which was breached by the nature of the construction of the concrete walls?

4. Was any breach of express warranty a proximate cause of the structural crack in G-H cell and damages to Public Utility Company?

5. Did Public Utility Company fail to provide Ajax with written notice of breach of warranty in compliance with the parties' contract?

If you answer "No" to either question 1 or 2 on the special verdict form, and if you also answer "No" to either question 3 or 4, or "Yes" to question 5 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 questions 1 and 2 on the special verdict form, or answer "Yes" to questions 3 and 4, and "No" to question 5 on the special verdict form, you shall determine the amount of money that will compensate plaintiff for the damages, and 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.

[As amended, effective 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 Directions for Use.

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 13-302F, as suggested for counterclaims. (See Directions for Use, UJI 13-302A.) 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 for that separate lawsuit. If the crossclaim or third-party claim is of the type that should be addressed only if the plaintiff recovers from the defendant who is asserting the crossclaim or third-party claim (e.g., indemnification), an appropriate direction to that effect should be included in the UJI 13-302F questions presented for the jury to answer, as well as in the directions within the special verdict form.

PART B
BURDEN OF PROOF

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 [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.]

[An exception to the general rule is that on the claim(s) of ....
(fraud, etc.)
a higher degree of proof is required. On the claim(s) of , plaintiff has the burden of proving the claim by clear and convincing evidence.]

DIRECTIONS FOR USE

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 January 1, 1987; November 1, 1991.]

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.

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. Proximate cause.

A proximate cause of an injury is that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred. 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.

DIRECTIONS FOR USE

This instruction should be used in all cases in which negligence is an issue and ties to UJI 13-302.

[As amended, effective January 1, 1987.]

Committee comment. - The definition of proximate cause in the instruction is taken from various New Mexico cases, e.g., Bouldin v. Sategna, 71 N.M. 329, 378 P.2d 370

(1963); Ortega v. Texas-New Mexico Ry., 70 N.M. 58, 370 P.2d 201 (1962); Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507 (1955); Rix v. Town of Alamogordo, 42 N.M. 325, 77 P.2d 765 (1938).

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); Martin v. Gomez, 69 N.M. 1, 363 P.2d 365 (1961).

This instruction (formerly UJI Civ. 12.10) has been cited in the following cases: 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); Galvan v. City of Albuquerque, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973); Edison v. Atchison, T. & S.F. Ry., 80 N.M. 183, 453 P.2d 204 (1969).

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).

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).

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

ANNOTATIONS

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.

DIRECTIONS FOR USE

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 proximate cause and is a companion instruction to UJI 13-307.

[As amended, effective January 1, 1987.]

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.

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.

DIRECTIONS FOR USE

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

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.

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

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.]

DIRECTIONS FOR USE

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.]

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.

DIRECTIONS FOR USE

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.]

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 53 Am. Jur. 2d Master and Servant §§ 1, 44.

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].

DIRECTIONS FOR USE

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.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 41 Am. Jur. 2d Independent Contractors § 33.

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.

56 C.J.S. Master and Servant § 3(3).

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

.. was the employee [agent] of
...
(Name of employee) (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)

DIRECTIONS FOR USE

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 53 Am. Jur. 2d Master and Servant §§ 413, 415.

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 .... was the employee of
...
(Name of employee) (Name of employer)
and as acting within the scope of [his] [her] [its] employment

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

DIRECTIONS FOR USE

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. - 53 Am. Jur. 2d Master and Servant § 460.

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.

57 C.J.S. Master and Servant § 570.

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.

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 53 Am. Jur. 2d Master and Servant § 427.

13-408. Apparent authority; reliance.

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    The defendant, ................., may, if there has been no
actual employ-
       (Name of alleged employer)
  ment, with right to control, nonetheless be liable for the
acts or omissions  of
  ..............................................................
........ , if:
        (Name of alleged apparent employee)
    1. ............ by [his] [her] [its] statements, acts or
conduct led  the
      (Name of alleged employer)
  plaintiff to reasonably believe .........................
was  defendant's
          (Name of apparent employee)
  employee.
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[No direct communication between plaintiff and .... employer
(Name of alleged employer)
is required; the statements, acts or conduct may consist of those made to the public in general.]

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

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

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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 Directions for Use.

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).

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.

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.

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., 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.

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.

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].

DIRECTIONS FOR USE

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. [77-14-37 NMSA 1978], 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.)

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

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. - 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Animals § 50.

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.

DIRECTIONS FOR USE

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 states the specifications of a barbed wire fence. Section 6 lists the specifications of a board fence. Section 7 declares the required specifications of a pole and post fence. Section 8 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.

DIRECTIONS FOR USE

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.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Animals § 116.

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.]

DIRECTIONS FOR USE

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 Civ. 5.3.

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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Animals §§ 88, 95, 124.

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)

DIRECTIONS FOR USE

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.

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)

DIRECTIONS FOR USE

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 through fall while alighting from vehicle, 56 A.L.R.2d 1257.

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.

DIRECTIONS FOR USE

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

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.

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

ANNOTATIONS

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 .... has filed this lawsuit against the
(here state name of condemning authority)
[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.

DIRECTIONS FOR USE

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 § 419. 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 §§ 418, 505, 506.

Right to open and close argument in trial of condemnation proceedings, 73 A.L.R.2d 618.

13-702. Power to condemn; constitution.

The .... has the right by law to
(here state the name of the condemning authority)
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.

DIRECTIONS FOR USE

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 § 376.

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.

DIRECTIONS FOR USE

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 § 418.

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.

DIRECTIONS FOR USE

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.]

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 .... that
(here state name of condemning authority)
the proposed ....project will result in benefits to the remaining
(insert type of project)
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 has proved that the proposed project will benefit the remaining property in any of the following particulars:

(here state name of condemning authority)

(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.

DIRECTIONS FOR USE

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 939 (1961); and City of Tucumcari v. Magnolia Petroleum Co., 57 N.M. 392, 159 P.2d 351 (1953).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Eminent Domain § 160; 27 Am. Jur. 2d Eminent Domain §§ 418, 505.

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 § 178; 30 C.J.S. Eminent Domain § 289.

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Eminent Domain § 201.

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 § 274.

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.

DIRECTIONS FOR USE

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 § 267.

29A C.J.S. Eminent Domain § 159.

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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, 75 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.

DIRECTIONS FOR USE

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.

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.

DIRECTIONS FOR USE

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 §§ 425, 427 to 430.

30 C.J.S. Eminent Domain § 289.

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.

DIRECTIONS FOR USE

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, 492 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 Directions for Use.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain § 427; 31 Am. Jur. 2d Expert and Opinion Evidence § 142.

30 C.J.S. Eminent Domain § 289.

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.

DIRECTIONS FOR USE

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 § 430. See also State ex rel. State Hwy. Comm'n v. Tanny, 68 N.M. 117, 359 P.2d 359 (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).

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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 427 to 430.

30 C.J.S. Eminent Domain § 289.

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 $ ....

DIRECTIONS FOR USE

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 § 266.

13-719. Access; loss of.

The .... may control, regulate and designate
(insert name of condemning authority)

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.

DIRECTIONS FOR USE

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 § 311.

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.

DIRECTIONS FOR USE

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 § 307.

13-721. Remote and speculative elements.

You should not take into consideration anything which is remote, uncertain or speculative.

DIRECTIONS FOR USE

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 §§ 279, 280.

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.

DIRECTIONS FOR USE

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 §§ 418, 506.

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.

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 413 to 415.

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

DIRECTIONS FOR USE

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 §§ 443 to 449.

30 C.J.S. Eminent Domain § 290.

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.

[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] ....

DIRECTIONS FOR USE

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.

[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 note. - 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.

13-802. Contract; material terms.

A material term is any term without which [.............] would not have entered into the contract.

DIRECTIONS FOR USE

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.

[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 1286 (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 note. - 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. Reserved.

ANNOTATIONS

Compiler's note. - 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.

DIRECTIONS FOR USE

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.

[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 note. - 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].

[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 note. - 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.

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.]

DIRECTIONS FOR USE

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.

[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 note. - 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
.. offer, [he] [she] must have informed
.. by a statement or conduct that [he] [she] agreed to the terms of the offer.

DIRECTIONS FOR USE

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.

[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 note. - 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 .... reply departs from the terms of .... offer, that reply is still an acceptance if:

[... agreed to the new term;] [or]

[the new term is so consistent with the offer that 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 .... agreement to the new term.]

DIRECTIONS FOR USE

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.

[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 note. - 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
...
. offer, then
will have accepted that offer even though the acceptance contained different or additional terms.

DIRECTIONS FOR USE

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.

[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 note. - 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.

.. notice of acceptance may be communicated in any reasonable way [unless
.... offer required a particular manner of acceptance].

DIRECTIONS FOR USE

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.

[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 note. - 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].

DIRECTIONS FOR USE

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.

[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 note. - 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.

DIRECTIONS FOR USE

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.

[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 note. - 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.]

DIRECTIONS FOR USE

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.

[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 note. - 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 ............................ wanted to
enter into the
          (promisor)
  contract, or any loss or detriment to
.....................................,
             (promisee)
  which
.............................................................
desired
...................................................... to suffer
or which  was
      (promisor)          (promisee)
  a reason for ................ to enter into the
contract.  Consideration may
       (promisor)
  consist of a return promise, an act, a forbearance, or the
creation, modification, or destruction of a legal relation.
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DIRECTIONS FOR USE

In the blanks insert the proper names of the promisor and the promisee, as appropriate.

[Effective November 1, 1991.]

ANNOTATIONS

Compiler's note. - 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 .... promise, the promise still may be enforceable if:]
[A promise may be enforceable if:]
1. .... made the promise;
2. .... reasonably relied on .... promise;
3. .... 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 .... promise.

DIRECTIONS FOR USE

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.

[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 note. - Pursuant to a supreme court order dated July 17, 1991, UJI 13-815, relating to discharge by other's breach, is withdrawn, and the above instruction is adopted effective November 1, 1991.

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.]

DIRECTIONS FOR USE

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.

[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 note. - 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.

[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), 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 note. - 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  other-
  wise, ......... is entitled to assign [his] [her] rights and
interest  under
      (the assignor)
  the contract. If ................................ has made an
assignment to
.................................................................
.............,
       (the assignor-obligee)              (the assignee)
  then .................. is entitled to receive the benefits of
the  contract
       (the assignee)
  and is entitled to enforce ............... obligations under
the  contract.]
         (the obligor)'s
    [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
............. and
.................................................................
.............,
            (the assignor)              (the assignee)
  and the surrounding circumstances, show that
...................... did  not
             (the assignor)
  intend to delegate [his] [her] duties to
..........................,  then
             (the assignee)
  ............................................... is also
obligated to perform
.................................................................
..............
      (the assignee)              (the assignor)'s
  duties under the contract.]
```

DIRECTIONS FOR USE

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.

[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 note. - 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.

DIRECTIONS FOR USE

This direction should be given in conjunction with UJI 13-818.

[Effective November 1, 1991.]

ANNOTATIONS

Compiler's note. - 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 .... and ....,
(third party)
must show that at least .... intended that ....
(contract promisee) (third party)

have the benefits of the contract and the right to enforce the contract.

DIRECTIONS FOR USE

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 blank should be filled in with the name of the contract promisee and the last blank should be filled in with the name of the third party.

[Effective November 1, 1991.]

Committee comment. - 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.

ANNOTATIONS

Compiler's note. - 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.

13-821. Third-party beneficiary; creditor beneficiary; enforcement of contract.

.... may recover the benefits of the contract between
... . and
(third party)
... if the performance of
... obligation under the terms of
(promisor's)
the contract will satisfy a debt that
.... owed to
... .
(promisee)   (third party)

DIRECTIONS FOR USE

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.

[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 note. - 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].

DIRECTIONS FOR USE

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.

[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. Gannet Co., 817 F.2d 659 (10th Cir. 1987); UJI 13-824.

ANNOTATIONS

Compiler's note. - 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.

[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 note. - 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 ......  had not fully carried
```

out [his] [her]
(promisee)

contractual obligations].

DIRECTIONS FOR USE

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.

[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 note. - 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.]

DIRECTIONS FOR USE

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.

[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 note. - 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.

DIRECTIONS FOR USE

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.

[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 note. - 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.

DIRECTIONS FOR USE

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.

[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 note. - 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 note. - 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.

DIRECTIONS FOR USE

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.

[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 note. - 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 note. - 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.

DIRECTIONS FOR USE

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.

[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. 740, 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).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.

DIRECTIONS FOR USE

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.

[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. 740, 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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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. 740, 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. 740, 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.

[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).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-832. Good faith and fair dealing.

No instruction drafted.

[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.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-833, 13-834. Reserved.

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.

DIRECTIONS FOR USE

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.

[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).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-836. Accord and satisfaction.

.... is excused from further performance of [his] [her] obligations
(Obligor)
under the contract if .... has [offered] [performed] and
..
(obligor)(third party) (obligee)
has accepted .... in full satisfaction of
..

obligations under (obligor's)

the contract.

DIRECTIONS FOR USE

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).

[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. 402, 780 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.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-837. Incapacity.

[If .... due to [mental infirmity] [physical infirmity] [intoxication]
(obligor)
was incapable of understanding what [he] [she] was doing when [he] [she]
entered into the contract, then .... is excused from the obligation to
(obligor)
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.]

DIRECTIONS FOR USE

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.

[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.

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.]

DIRECTIONS FOR USE

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.

[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.

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.

DIRECTIONS FOR USE

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.

[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, 266 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. R. Evid. 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).

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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

.... and .... reasonably anticipated would exist,

(plaintiff) (defendant)

then the .... is excused from performing that contractual obligation.

(promisor)

13-840 Impossibility or impracticability of performance

[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.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.

DIRECTIONS FOR USE

This instruction is to be used where one party prevents either fulfillment of a condition precedent to performance or performance itself.

[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.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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
..., then
.. is excused from
(identify contractual right)
[his] [her] obligation to comply with that condition of [his] [her] performance.

[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 182 (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). 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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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 .... on [any of] [his] [her] claim[s]
(plaintiff)
of breach of contract, then you must fix the amount of money damages which will
restore to .... what was lost by
.... breach [and what
(plaintiff) (defendant's)
.... reasonably could have expected to gain].
....
(plaintiff) (Plaintiff's)
claims for damages are:

(NOTE: Here insert the proper elements of damages.)

[If you should decide in favor of .... on any of [his] [her] claims,
(defendant)
then you must fix the amount of money damages which will restore to
.... what was lost by
.... [breach] [act(s)] [and what
(defendant) (plaintiff's)
.... reasonably could have expected to gain if
....
(defendant) (plaintiff)
had not [breached] [acted]].
.... claims for damages are:
(Defendant's)

(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.

DIRECTIONS FOR USE

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.

[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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.

13-844. Seller's remedy for buyer's breach; executed contract.

The [unpaid balance of the] contract price.

[Effective, November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after 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.
```

[Effective November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-846. Seller's incidental damages.

```
    The reasonable expense to
......................................... for
...............................................................
..............
          (seller)             (identify claimed expenses)
  as a result of
............................................................. breach.
        (buyer's)
```

DIRECTIONS FOR USE

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.

[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.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-847. Buyer's remedy for seller's breach.

The difference between the contract price and the reasonable cost to
.... of a substituted performance, less any costs saved as a result of
(buyer)
.. breach.
(seller's)

[Effective November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-848. Buyer's incidental damages.

The reasonable expense to

.. for
..,
as a result of
(buyer)
..
...... breach.
(seller's)

DIRECTIONS FOR USE

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.

[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.

The reasonable value of any loss
to .... resulting from [his] [her]
(buyer)
inability to [satisfy an obligation] [meet a need] about which [seller] should have known.

13-849 Buyer's consequential damages

[Effective November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after 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.]

DIRECTIONS FOR USE

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.

[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 P2d 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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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].

DIRECTIONS FOR USE

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.

[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).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-852. Reliance damages.

The reasonable cost to .... of having relied on the
(plaintiff)
contract, [less any loss which .... would have sustained
(plaintiff)
had the contract been fully performed].

[Effective November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-853 to 13-859. Reserved.

Committee comment. - These instruction numbers are reserved for instructions that may be added in the future regarding elements of contract damages.

13-860. Mitigation of damages.

A party may not recover as damages any cost or loss which [he] [she] reasonably could have avoided.

[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).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-861. Punitive damages.

If you find that ....
.... should
(name of party making claim for punitive damages)
recover compensation for damages, and if you further find that the conduct of
....
.........................was [malicious],
(name of party whose conduct gives rise to a claim for punitive damages)
[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.]

DIRECTIONS FOR USE

Appropriate bracketed language should be selected depending on the type of conduct offered to justify punitive damages.

[Effective November 1, 1991.]

Committee comment. -

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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.

[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 Civil 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 which plaintiff claims were proximately caused by breach of contract.**

A contract is a legally enforceable promise. It is formed by an offer and an acceptance.

[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 contentions:**

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 proximate 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.

[Effective, November 1, 1991.]

CHAPTER 9
FEDERAL EMPLOYERS' LIABILITY ACT

Introduction

This subject is governed by N.M. Const., art. XX, § 16, and art. XXII, § 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 XX, Sec. 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., art. XX, § 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., art. XX, § 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. Proximate Cause

No mention, whatever, of proximate cause 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 U.S.

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.

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 .... at ....
(Date) (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 ....,
(Na
me of workman)
deceased. The plaintiff brings this action for the benefit of ....
(Names
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.)

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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 a "proximate cause" requirement. 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.

ANNOTATIONS

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

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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 comment. - 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 proximate cause. Schmidt v. Great N. Ry., 7 Wash. App. 40, 497 P.2d 959 (1972).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

Library references. - Federal Jury Practice and Instructions § 84.15.

ANNOTATIONS

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

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.

DIRECTIONS FOR USE

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.

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.

DIRECTIONS FOR USE

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.

Library references. - Federal Jury Practice and Instructions § 84.02.

Virginia Jury Instructions § 40.06.

ANNOTATIONS

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

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.

DIRECTIONS FOR USE

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)), it would be inappropriate here to use the term "proximately contributed."

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.

DIRECTIONS FOR USE

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.

Library references. - Federal Jury Practice and Instructions §§ 84.03, 84.04.

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.

13-911. 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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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 1059 (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).

Library references. - Federal Jury Practice and Instructions § 84.09.

Missouri Approved Jury Instructions § 24.01.

Virginia Jury Instructions § 40.01.

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.

DIRECTIONS FOR USE

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.2d 886 (1918).

Library references. - Federal Jury Practice and Instructions § 84.09.

Missouri Approved July 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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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).

Therefore, if the term "proximate" is used in referring to "cause", it is possible that the jury would believe that there could be situations in which the defendant's negligence contributed to the injury, but where the contribution was so slight that the defendant could not be held liable. Several comparatively recent cases have held or suggested that the use of the term "proximate" serves no useful purpose and that the courts should cease using it. Tyree v. New York Cent. R.R., 382 F.2d 524 (6th Cir.), cert. denied, 389 U.S. 1014, 88 S. Ct. 589, 19 L. Ed. 2d 659 (1967); Iannacito v. Denver & R.G.W.R.R., 380 F.2d 1019 (10th Cir. 1967); Page v. St. Louis S.W. Ry., 312 F.2d 84, 98 A.L.R.2d 639 (5th Cir. 1963), later appeal, 349 F.2d 820 (5th Cir. 1965).

The New Mexico Supreme Court in Eidson v. Atchison, T. & S.F. Ry., 80 N.M. 183, 453 P.2d 204 (1969), approved use of general proximate cause instruction - UJI 13-1210, 1966 Edition.

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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).

Library references. - Federal Jury Practice and Instructions § 84.20.

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).

13-919. Verdict for plaintiff.

```
    We find for the plaintiff in the sum of $
................................
             ....................................................
```

....
Foreperson

DIRECTIONS FOR USE

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

DIRECTIONS FOR USE

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].

....

Foreperson

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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).

Law reviews. - For article, "Defamation in New Mexico," see 14 N.M.L. Rev. 321 (1984).

ANNOTATIONS

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.

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 proximately caused actual injury to 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.

DIRECTIONS FOR USE

The structure of this instruction is similar to the current negligence instructions. UJI 13-302A to 13-302F. This instruction focuses the jury's attention on the matter alleged to be defamatory, UJI 13-1002(A), states the elements of a defamation action which are in dispute, UJI 13-1002(B), the name of the defenses alleged by the defendant, UJI 13-1002(D), and the elements of the defenses which are in dispute. UJI 13-1002(D). 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).

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). This portion of the instruction varies from UJI 13-302F in that the negligence instruction is written with the assumption that a special verdict form will be used. In contrast, UJI 13-1002(F) 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.

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 proximately 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. 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.]

Committee comment. - 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 318, 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.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made minor stylistic changes in Section (F); and, in the Directions for Use, 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.

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).

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.]

DIRECTIONS FOR USE

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.

ANNOTATIONS

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)
(A) The entirety of the communication and the context in which the communication was made; and

(B)
(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.

DIRECTIONS FOR USE

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).

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.]

DIRECTIONS FOR USE

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.]

DIRECTIONS FOR USE

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, U.S. , 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., U.S. , 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.]

DIRECTIONS FOR USE

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.

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).

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.]

DIRECTIONS FOR USE

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.

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 proximately caused by the defamatory communication.

Plaintiff claims and has the burden of proving that the defamatory communication proximately 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 proximate 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.

DIRECTIONS FOR USE

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.]

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., U.S. , 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).

The definition of proximate cause used in this instruction is that used in all tort actions 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 Item (5) of the second paragraph and in the first sentence of the last paragraph.

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).

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.

DIRECTIONS FOR USE

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., U.S. , 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.

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).

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]

[....]

DIRECTIONS FOR USE

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

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.]

DIRECTIONS FOR USE

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, U.S. , 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., U.S. , 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. Erlinger 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, U.S. , 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.

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

REFER TO THE BOOK FOR THE PROPER FORM

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 proximately 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 proximately 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 proximately caused by the
defamatory communication.
Plaintiff claims and has the burden of proving that the
defamatory communication proximately 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 proximate 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.]

CHAPTER 11
MEDICAL MALPRACTICE

Introduction

With changes in wording as appropriate, the instructions of this chapter provide the basic elements of a malpractice action against health care providers in any field of practice, e.g., doctors of medicine, doctors of osteopathy, dentists, podiatrists, chiropractors. While the term "doctor" is used in reference to all practitioners, health care providers should be referenced by specific designation when "doctor" is inappropriate. This is exemplified parenthetically in the text of UJI 13-1101.

These instructions are also appropriate in a malpractice action against a hospital or other health care facility.

The elements of any malpractice claim are (1) the standard of care by which the actions of a health care provider are to be judged, (2) the manner in which the actions measure up to the standard and (3) whether the alleged acts were the proximate cause of the

injuries involved. Gerety v. Demers, 92 N.M. 396, 411, 589 P.2d 180, 195 (1978). The requisite proof and expert testimony in regard to these elements is discussed in the Committee Comment to UJI 13-1101, Duty of a doctor or other health care provider.

This chapter is designed to contain all the instructions necessary to instruct a jury on the basic elements of the malpractice claim. These instructions will be combined with other general instructions as shown in the appendix to this chapter. Negligence instructions outside this chapter, e.g., UJI 13-1601 and 13-1603, should be used only as provided in the Directions for Use of this chapter.

The Medical Malpractice Act (41-5-1 NMSA 1978 et seq.) does not affect the substantive law which is the subject of jury instructions. However, the Act does govern requisite panel hearings, statute of limitations, and pleadings. (Note, medical malpractice cases against a state agency require compliance with separate notice, statute of limitations and other provisions of the Tort Claims Act, 41-4-1 NMSA 1978 et seq.) UJI 13-1125 and 13-1126 provide the special interrogatories called for by section 41-5-7, future medical care and benefits, and by section 41-5-6, past medical care and related benefits.

[As amended, effective January 1, 1987.]

13-1101. Duty of doctor or other health care provider.

In [treating] [operating upon] [making a diagnosis of] [caring for] the plaintiff, the defendant doctor (or other health care provider(s) by specific designation) was under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors (or other health care provider(s) by specific designation) of the same field of medicine (or practice) as that of the defendant practicing under similar circumstances, giving due consideration to the locality involved. A failure to do so would be a form of negligence that is called malpractice.

The only way in which you may decide whether the defendant 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 (or other health care provider(s) by specific designation) testifying as expert witnesses. In deciding this question you must not use any personal knowledge of any of the jurors.

DIRECTIONS FOR USE

If malpractice can be determined in a specific case by resort to common knowledge ordinarily possessed by an average person, expert testimony is not required and the second paragraph of this instruction must be omitted. Where it is claimed that the defendant held [himself] [herself] out as a specialist, then UJI 13-1102 shall be used instead of UJI 13-1101.

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

Committee comment. - In Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977), the New Mexico Supreme Court reviewed and approved this instruction as a correct statement of New Mexico law. The reference in this instruction to locality is not the adoption of a strict rule requiring that a departure from accepted standards of care necessarily be established by testimony from physicians practicing in the same community as the defendant. The court must only be satisfied that, by education, training and experience, the witness is qualified to testify to the knowledge, skill and care ordinarily used by reasonably well-qualified doctors of the same field of medicine as that of the defendant practicing under similar circumstances, giving due consideration to the locality involved. Then, how localities differ, such as the lack of facilities, is merely one consideration for the fact-finder.

The Pharmaseal decision also holds that, while expert testimony is usually required to establish the elements of a malpractice claim - standard of care, breach of the standard and proximate cause - it is not mandatory in every case. 90 N.M. at 758, 568 P.2d at 594. A particular element may be decided by the jurors using their common knowledge if the issue involves a consideration of non-technical acts or omissions of the defendant which can be understood by laypeople without the assistance of medical or scientific experts. It must be emphasized that each element of a malpractice claim should be examined for the necessity of expert testimony. [As revised, effective November 1, 1991.]

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 Directions for Use.

I. GENERAL CONSIDERATION.

"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 and Surgeons §§ 159, 201, 202 and 262.

75A Am. Jur. 2d Trial §§ 1190, 1226; 75B Am. Jur. 2d Trial § 1662.

Liability of one causing personal injury for consequences of negligence, mistake or lack of skill of physician or surgeon, 100 A.L.R.2d 769, 100 A.L.R.2d 808.

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.

II. CONSIDERATION OF LOCALITY.

Consideration of locality by fact finder. - Under this instruction (former UJI Civ. 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.

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.

The defendant, holding [himself] [herself] out as a specialist in .... and having undertaken to [treat] [operate on] [make diagnosis of] [care for] the plaintiff in this specialized field, was under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified specialists in the same field of medicine practicing under similar circumstances, giving due consideration to the locality involved. A failure to do so would be a form of negligence that is called malpractice.

The only way in which you may decide whether the defendant 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.

DIRECTIONS FOR USE

The field of specialty of the defendant should be inserted in the blank in the first line of this instruction. The second paragraph of this instruction will be given or omitted under the same conditions discussed in the Directions for Use for UJI 13-1101.

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

Committee comment. - See Comment under UJI 13-1101. A general practitioner may be qualified to testify concerning the conduct of a specialist. Sewell v. Wilson, 97 N.M. 523, 528, 641 P.2d 1070, 1075 (Ct. App. 1982), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982). See Annotation, A.L.R.3d 1163, cited in Sewell v. Wilson, supra. The defendant doctor may testify to the standard of care, and as to whether the defendant possessed and applied the knowledge or used the skill and care required. Mascarenas v. Gonzales, 83 N.M. 749, 497 P.2d 751 (Ct. App. 1972).

Library references. - Illinois Pattern Jury Instructions, § 105.02.

81 A.L.R.2d 597; 37 A.L.R.3d 420.

70 C.J.S. Physicians and Surgeons § 64.

ANNOTATIONS

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

"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.

DIRECTIONS FOR USE

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. Duty to inform.

In treating [his] [her] patient, a doctor is under the duty to communicate to the patient (patient's representative) that information which a reasonably prudent person would need to know about:

[a] [his] [her] condition; [and]

[b] the alternatives for treatment; [and]

[c] the inherent and potential hazards of the proposed treatment; [and]

[d] 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 [he] [she] can reasonably expect to be obvious or known to [his] [her] 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.]

DIRECTIONS FOR USE

The parenthetical "patient's representative" should be used when a contention is made that an incapacitated person's representative, e.g., a spouse, was available.

This instruction is to be given in every case in which the plaintiff's proof creates a submissible issue for malpractice based on the doctor's duty to give information. If a particular aspect of the information normally required to be disclosed is not an issue in the case, the subpart of the first paragraph which defines this aspect should be omitted from the instruction.

The bracketed material in the second paragraph should not be used unless a jury can reasonably conclude 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 in cases where the defendant contends, and there is sufficient evidence for a jury to find, that disclosure of risk to the patient would endanger the patient's life or health.

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

Committee comment. - Compensable harm may be caused by the breach of the duty to inform without "informed consent" being at issue under UJI 13-1104C. 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 proposed treatment that would require immediate attention, without regard to any decision to be made by the patient consenting to treatment. This is because the relationship of physician and patient is one of trust and confidence, imposing upon the physician a fiduciary duty to reveal to the patient that which in his best interest he should know. Id. at 504; Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

ANNOTATIONS

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

"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.

Physician's duty to inform patient of nature and hazards of treatment in pregnancy and childbirth cases under the doctrine of informed consent, 69 A.L.R.3d 1250.

70 C.J.S. Physicians and Surgeons § 64.

13-1104B. Duty to inform; evidence.

What is customarily disclosed by reasonably well-qualified doctors of the same field of medicine as that of the defendant under similar circumstances is evidence of the information which ought to be communicated to the patient. However, what ought to be disclosed to a patient shall be determined by you in accordance with the standard of what a reasonably prudent person would regard as material [to [his] [her] decision].

DIRECTIONS FOR USE

This instruction is to be given in cases of malpractice based on lack of disclosure where expert witnesses have testified as to what is customarily disclosed concerning the condition, treatment or operation which the plaintiff has had. This instruction is optional, not mandatory. If the trial court determines that expert testimony is required to establish the standard of care for disclosure, this instruction shall not be given.

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

Committee comment. - As stated in the committee comment to UJI 13-1104C, the standard for disclosure is predicated upon the information which a reasonably prudent person would want to have. Generally speaking, Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978) rejects the rule in some jurisdictions that the standard of disclosure is established by the usual and customary practice of specialists in the same field under similar circumstances. Rather Demers v. Gerety, supra, adopts the approach that customary practice is part of the evidence relevant to the jury's determination of what information would be needed by the reasonably prudent person asked to decide whether to undergo or refuse recommended treatment.

Nonetheless, Demers v. Gerety, supra, also recognizes that there may be cases where the district judge will decide 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. Where the trial judge makes the determination that expert testimony is required, this instruction should not be given.

ANNOTATIONS

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

13-1104C. Informed consent.

A doctor has a duty to obtain a patient's informed consent to [treatment] [an operation]. For consent to be valid, it must be based upon information which a reasonably prudent person would need to know in deciding whether to undergo the [treatment] [operation].

DIRECTIONS FOR USE

This instruction, along with UJI 13-1104A, is given in every malpractice case based upon the doctrine of informed consent.

[Adopted effective January 1, 1987.]

Committee comment. - In Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962), the Supreme Court of New Mexico first discussed a doctor's duty of disclosure and the cause of action for its breach which has come to be called an action for "lack of informed consent". As the supreme court later observed in Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978), Woods is not really an authority precisely on point and it is arguable that the court's decision was based on a misrepresentation by the doctor rather than a negligent failure to disclose.

The supreme court discussion in Demers v. Gerety, supra, particularly the court's approval and adoption of the language from Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed. 2d 518 (1972), suggests that, where the plaintiff's action is predicated upon lack of informed consent, proof in the case will tend to focus on facts and issues which do not reside peculiarly within the medical domain. Canterbury v. Spence, 464 F.2d at 792. However, as recognized by Demers v. Gerety, supra, and UJI 13-1104B, what is customarily disclosed by reasonably well-qualified doctors may be relevant to, though not determinative of, the jury's decision.

A consent can be valid if the information is received from a source other than the doctor. Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978).

13-1105. Consent.

Consent may be express or implied. Consent is expressed when written or spoken. Consent is implied when the conduct of the patient or the failure of the patient to object would lead a reasonable person to believe that the patient had consented.

DIRECTIONS FOR USE

This instruction is to be given if there is an issue of fact as to the patient's consent to the treatment or procedure. Depending upon the evidence the issue may be whether a patient's authorized representative has given consent and, in such cases, the instruction should be reworded for "patient's representative".

[As amended, effective January 1, 1987.]

Committee comment. - Treatment without consent gives rise to the cause of action in battery. See UJI 13-1109A based upon the supreme court's decision in Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978). This instruction addresses the manner in which a patient manifests consent. Subsequent instruction address issues of competency and emergency. New Mexico statutes specify persons authorized to give consent for medical treatment of minors in cases of emergency and provide that emancipated minors have capacity to consent. See §§ 24-10-1 and 24-10-2 NMSA 1978.

"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).

ANNOTATIONS

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.

Physician's duty to inform patient of nature and hazards of treatment in pregnancy and childbirth cases under the doctrine of informed consent, 69 A.L.R.3d 1250.

13-1106. Consent; not required in emergency before surgery.

Consent is not required when the patient [patient's representative] is unable to give consent and an immediate [operation] [treatment] is necessary for life or health.

DIRECTIONS FOR USE

The patient's representative should be used when by reason of age, incompetency or disability the patient is unable to consent but evidence at trial establishes the availability of a spouse, parent, child or guardian acting on the patient's behalf.

[As amended, effective January 1, 1987.]

Committee comment. - This rule was recognized by the New Mexico Supreme Court in Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962), wherein the court, referring to the requirement of consent states:

An exception to the rule requiring a disclosure of the dangers of a treatment procedure, of course, is an actual emergency where the patient is in no condition to determine for himself.

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

Library references. - 70 C.J.S. Physicians and Surgeons § 64.

41 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 79, 87 and 110.

JIMI 7-68.1.

ANNOTATIONS

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 [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.

DIRECTIONS FOR USE

The authorized representative should be used when a contention is made that a legally authorized representative, e.g., spouse or guardian, was available to give consent but was not asked to do so and sufficient evidence supports this contention.

[As amended, effective January 1, 1987.]

Committee comment. - The general rule is set forth in 56 A.L.R.2d 695.

ANNOTATIONS

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 from a patient [patient's authorized representative] at a time when that person is able to understand what [he] [she] is doing.

DIRECTIONS FOR USE

The bracketed phrase should be used when the patient is an unemancipated minor or by reason of mental or physical disability is incapable of consenting to the procedure. Generally, the court should determine as a matter of law the person from whom consent is required if the patient is incompetent; however, where disputed evidence exists, the issue of competency must be determined by the jury.

[As amended, effective January 1, 1987.]

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

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. Battery; no 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 battery, for which [he] [she] is liable in damages. It is a battery to [perform an

operation] [medically treat] [examine or touch] upon one part of the body when the patient's consent was limited to another part of the body.

DIRECTIONS FOR USE

This instruction is to be given only when the procedure performed is not the one authorized, i.e., consent is given to pull the right top molar but the lower right molar is pulled erroneously. The issue to justify this instruction is whether the patient consented to the specific operation or procedure performed.

Appropriate bracketed material will be selected for the particular case.

[As amended, effective November 1, 1991.]

Committee comment. - In Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978), the supreme court held that a distinction exists between cases involving allegations of lack of informed consent and cases where the patient contends that he did not agree to the particular examination, treatment or operation performed by the doctor. The latter cases are to be treated as common-law battery actions. Generally included in the battery cases are those instances where the patient consented to the performance of one kind of operation and the physician performed a substantially different one for which consent was not obtained. Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955), aff'd, 74 Nev. 329, 331 P.2d 850 (1958).

In Demers v. Gerety, supra, the supreme court bases the necessity for distinguishing between the battery cases and lack of informed consent cases on evidentiary grounds. The court notes that in cases where the only question is whether the patient knew and agreed to what was going to be done, expert testimony is not required. The jury is not called upon to evaluate what the doctor should have told the patient but rather what in fact was said by the doctor about the nature of the operation. It is observed that jurors are equipped to determine what agreements were reached between patient and doctor without resort to expert testimony.

This instruction and UJI 13-1109B and 13-1109C, which follow, state the cause of action for battery as outlined by the supreme court in Demers v. Gerety, supra.

ANNOTATIONS

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

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 operation or procedure which the doctor performs.

DIRECTIONS FOR USE

This instruction should be given in every case in which the court submits to the jury an action in battery for failure to obtain a consent for the operation or procedure.

[As amended, effective November 1, 1991.]

Committee comment. - This instruction states the fact issue which will be involved in most battery actions. Generally, the battery cases come before the courts in the fact pattern of the patient having consented to some treatment or procedure and contending that a particular procedure or treatment was not contemplated or agreed to. E.g., Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978) ("Generally included in the battery cases are those instances where the patient consented to the performance of one kind of operation and the physician performed a substantially different one for which consent was not obtained, as is alleged by Demers in this case".).

ANNOTATIONS

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

13-1109C. Battery; damages.

To recover damages for battery the patient need not prove that [he] [she] was physically harmed by the operation [or procedure]. Damages may be awarded solely for the unauthorized touching.

DIRECTIONS FOR USE

This instruction shall be given in every battery action where the patient claims that the doctor performed a procedure or treatment, without consent, "substantially different" from the one authorized.

This particular instruction is simply another element of damages which is applicable only in a battery case and, when applicable, will be added to the other appropriate elements in UJI 13-1802.

[As amended, effective November 1, 1991.]

Committee comment. - The action recognized by Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978) is the common-law action for battery. The unconsented-to procedure or operation may have resulted in obvious physical harm to the patient, for example, the removal of the wrong limb. On the other hand, there may be no real physical harm resulting from the battery. Nonetheless, the battery is still actionable and substantial damages may be recovered simply for an offensive touching. Restatement of Torts (Second) § 18, Battery: Offensive Contact (1965). The illustration is given, under

comment d of the Restatement, of a surgeon making an examination of the patient while the patient is under anesthesia. If no consent was given for the examination the surgeon has committed a battery for which damages may be recovered.

In Demers v. Gerety, supra, the supreme court held that any unauthorized touching of the patient's body by itself gives the patient a claim for substantial damages.

ANNOTATIONS

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

13-1110. Duty of patient.

Every patient has a duty to exercise ordinary care for the patient's own health and safety. The patient's failure to exercise ordinary care to follow the doctor's reasonable medical advice is negligence.

DIRECTIONS FOR USE

This instruction should be given if the defendant has raised the negligence of the plaintiff as an affirmative defense and sufficient evidence has been introduced to justify a jury's special interrogatory that failure to follow medical advice was a proximate cause of the plaintiff's injury. If some aspect of the patient's conduct other than failure to follow medical advice justifies the submission of a negligence defense, the second sentence of this instruction should be modified to focus the jury's consideration of such conduct. Whenever this instruction is given, UJI 13-1601 and 13-1603 should also be given.

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

Committee comment. - The principles of comparative negligence apply in medical malpractice cases. Using the verdict forms of Chapter 22 the jury will apportion negligence between the physician and the patient after a finding of medical malpractice and a concurring negligent failure to follow reasonable medical advice.

ANNOTATIONS

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

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; doctor.

Where there is more than one medically accepted method of [diagnosis] [or] [treatment], it is not malpractice for a doctor to select any of the accepted methods.

DIRECTIONS FOR USE

This instruction should be used where sufficient evidence is introduced of several medically accepted methods of treatment. It is not given in every case.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Committee comment. - The doctor is under no duty to select a particular method of treatment if the evidence establishes that several alternatives are acceptable. The purpose of this instruction is to advise the jury that it is not malpractice to select one of the approved methods, even though such method should later turn out to be the wrong selection or a bad selection for a particular patient. No New Mexico case expressly discusses this principle but it is implicit in the duty of a doctor as defined by UJI 13-1101.

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. Doctor not guarantor; poor results not breach of duty.

A doctor 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 doctor.

DIRECTIONS FOR USE

The second sentence of this instruction should be given in every medical malpractice case. The first sentence of this instruction should always be given unless there is evidence from which a jury could conclude that the doctor has failed on a promise of a particular medical result.

[As amended, effective January 1, 1987.]

Committee comment. - Most malpractice cases involve a poor result. A bad result is not, of itself, evidence of malpractice. Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964).

Warranties of particular results will not be implied in professional services contracts. 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). To support a patient's action for breach of contract to provide a particular result, there must be evidence at each element of an express contract: a written or oral promise by the doctor, specifically bargained for by the patient.

ANNOTATIONS

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. Care required; sudden medical emergency.

A doctor who, without negligence on [his] [her] part, is suddenly and unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger to the patient, is not expected nor required to use the same judgment and prudence that is required of the doctor in the exercise of ordinary care in calmer and more deliberate moments.

If at that moment the doctor does what appears to [him] [her] to be the best thing to do, and if the choice and manner of action are the same as might have been followed by a reasonably well-qualified doctor under the same conditions, then the doctor has done all that the law requires, even if, in the light of after events, it might appear that a different course would have been better and safer.

DIRECTIONS FOR USE

This instruction is comparable to UJI 13-1617 and is designed specifically for the medical case as opposed to general law.

[As amended, effective November 1, 1991.]

Committee comment. - This doctrine was approved by the New Mexico Supreme Court in the case of Otero v. Physicians & Surgeons Ambulance Serv., Inc., 65 N.M. 319, 336 P.2d 1070 (1959). See also Montoya v. Winchell, 69 N.M. 177, 364 P.2d 1041 (1961); State ex rel. State Hwy. Comm'n v. Davis, 64 N.M. 399, 329 P.2d 422 (1958); 80 A.L.R.2d 5.

ANNOTATIONS

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

Failure to instruct constituting reversible error. - Failure to give a proffered instruction on sudden medical emergency constituted reversible error, where several physicians testified at trial that the malfunction of an anesthesia machine gave rise to an emergency or crisis. Sutherlin v. Fenenga, 111 N.M. 767, 810 P.2d 353 (Ct. App. 1991).

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 is 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.

DIRECTIONS FOR USE

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.]

Committee comment. - The question of the responsibility of a doctor for the negligence of persons such as nurses, assistants, technicians and other doctors has not been directly decided in New Mexico.

The New Mexico Court of Appeals in Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981) pointed out that the prior label for former UJI Civ. 11.14 - Captain of the Ship - was inappropriate because the instruction does not incorporate that doctrine. The court in Dessauer found it unnecessary to decide whether the borrowed servant doctrine applies in medical malpractice cases, but said "we assume that it does apply". The principal New Mexico case on borrowed servant or special employee is Dunham v. Walker, 60 N.M. 143, 288 P.2d 684 (1955).

In addressing this issue, most courts have applied one version or another of the "borrowed servant" rule. Some courts have held that the "right to control" alone is determinative, Yorston v. Pennell, 153 A.2d 255 (Pa. 1959), even though the doctor may not have been present when the negligent act occurred, may have been relying upon the professional competency of another person, and, in fact, may have exercised no direction, control or authority over such person. Rockwell v. Stone, 173 A.2d 48 (Pa. 1961); Rockwell v. Kaplan, 173 A.2d 54 (Pa. 1961). Other courts have required the actual exercise of the right to control. Miller v. Atkins, 236 S.E.2d 838 (Ga. App. 1977). Some courts have distinguished between the nature of the act being performed, i.e., administrative or clerical (e.g., sponge counts by nurses) versus acts involving professional skill or decision. Buzan v. Mercy Hospital, Inc., 203 So.2d 11 (Fla. 1967).

The better rule is to apply the general principle of the borrowed servant doctrine to medical malpractice cases, but to require that the particular activity at issue be performed under the immediate and direct supervision of the doctor. May v. Brown, 492 P.2d 776 (Or. 1972); Bernardi v. Community Hosp. Assoc., 443 P.2d 708 (Colo. 1968); Sherman v. Hartman, 290 P.2d 894 (Cal. App. 1955).

This instruction would be applicable in appropriate cases to the responsibility of a dentist or veterinarian who brings in an assistant, nurse, technician, etc.

The fact that the "assistant" (e.g., nurse) may be found to be the agent of the doctor does not necessarily mean that the assistant cannot also at the same time remain an employee of his general employer (e.g., hospital) so as to render such general employer responsible for the assistant's negligence. City of Somerset v. Hart, 549 S.W.2d 814 (Ky. 1977). See UJI 13-1121.

This instruction deals only with the vicarious responsibility of the physician and not with his personal negligence. The doctor may, of course, be negligent in the selection of an assistant, in the delegation of certain duties to the assistant, or in leaving the room while certain activities are to be performed in his absence.

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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. Proximate cause; 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 person would not have consented to the [treatment] [operation] had [he] [she] known of the [alternatives for treatment] [inherent and potential hazards].

DIRECTIONS FOR USE

Either UJI 13-1116A or 13-1116B 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. In many cases, the general instruction on proximate cause will still be appropriate.

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

Committee comment. - In Demers v. Gerety, 92 N.M. 396, 589 P.2d 180 (1978), the supreme court expressly adopts an objective approach to proximate causation in informed consent cases. The rationale for the adoption of the objective standard is discussed in Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S.

1064, 93 S. Ct. 560, 34 L. Ed. 2d 518 (1972), a decision expressly adopted by the New Mexico court in Demers v. Gerety, supra.

ANNOTATIONS

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

13-1116B. Proximate cause; 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 person would have acted upon the information to avoid the harm.

DIRECTIONS FOR USE

See Directions for Use, UJI 13-1116A.

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

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.

13-1117. Proximate cause; failure to warn.

Withdrawn, effective January 1, 1987.

13-1118. Res ipsa loquitur.

No instruction drafted.

Committee comment. - In Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964) the New Mexico Supreme Court expressed caution in the use of the res ipsa loquitur doctrine in medical malpractice cases, stating that most cases should be submitted under UJI 13-1101. However, the court also noted that there may be cases involving malpractice in which the doctrine should be applied.

13-1119. Duty of hospital; patient care.

A hospital has a duty to use ordinary care in furnishing [services] [equipment] for the patient. Ordinary care requires that the hospital possess and apply the knowledge, and use the skill and care, that is ordinarily used by reasonably well-operated hospitals, giving due consideration to all the circumstances and to the locality involved.

The only way in which you may decide whether the defendant hospital used ordinary care in this case is from evidence presented in the case by [doctors] [nurses] [laboratory technicians] [hospital administrators] [insert names of others] testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

DIRECTIONS FOR USE

As with UJI 13-1101, the second paragraph of this instruction is omitted if the issue of hospital malpractice can be determined by resort to common knowledge ordinarily possessed by an average person.

In cases of hospital malpractice which do not involve negligence in the providing or failure to provide medical services, as for example where the issue is premises liability or liability for contaminated food or defective products, appropriate instructions from Chapters 13, 14 and 16 should be used.

Committee comment. - 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.

13-1120. Hospital acts through employees.

A hospital acts only through its employees, such as .... [nurses, orderlies, technicians, etc.].

A hospital is responsible for injuries proximately resulting from the negligent acts or omissions of its employees [occurring within the scope of their employment].

DIRECTIONS FOR USE

The name of the employee or the proper job description should be placed in the blank in the first paragraph.

The bracketed language in the second paragraph should be used only if there is a question in issue on the scope of employment. If so, UJI 11-407 shall also be used.

[As amended, effective January 1, 1987.]

Committee comment. - Principles of agency law, as expressed in Chapter 4 of these instructions, define the scope of the 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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Hospitals and Asylums § 14 et seq.

13-1121. Hospital liability; loaned servant exception.

A hospital is not responsible for acts or omissions of its employees where [a doctor] [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].

DIRECTIONS FOR USE

The appropriate matters in brackets will have to be selected for the particular case and the other matters stricken.

Committee comment. - The word "exclusive" leaves open the fact issue of dual control, in the appropriate case, by the operating surgeon and the hospital authority. See Committee Comment to UJI 13-1114.

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.

DIRECTIONS FOR USE

When there is an issue in the case as to whether the nurse was acting pursuant to the doctor's orders, this instruction would ordinarily be given. This instruction is not applicable when the act being done upon the orders of the doctor is an administrative act rather than medical action.

[As amended, effective January 1, 1987.]

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.

13-1123. Hospital not guarantor; poor result not breach of duty.

A hospital does not guarantee a good medical result. [An unintended incidence of treatment] [A poor medical result] is not, in itself, evidence of any wrongdoing by the hospital.

DIRECTIONS FOR USE

Only the appropriate matter within the brackets should be included in the giving of the instruction.

[As amended, effective January 1, 1987.]

Committee comment. - Although there are no reported New Mexico cases on this subject involving hospitals, the same rule as that enunciated in Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964), would be applicable. See the Committee Comment to UJI 13-1112.

13-1124. Alternative method; hospital.

Where there is more than one medically accepted method of care, it is proper for a hospital to select any of the accepted methods.

DIRECTIONS FOR USE

This instruction should be used whenever there is evidence of more than one medically accepted manner of care and whenever a hospital's liability is in issue.

Committee comment. - See the Committee Comment to UJI 13-1111, relating to doctors, and the authorities cited therein. It should be noted that there is no New Mexico case specifically on point involving hospitals, but the cases cited in the comment to UJI 13-1111 are undoubtedly applicable.

13-1125. Special Interrogatory No. 1 - Future medical care and benefits.

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    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

DIRECTIONS FOR USE

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 $
....
.

....
....
Fo
reperson

DIRECTIONS FOR USE

This interrogatory is only to be used when the jury renders a verdict in excess of $500,000.

Committee comment. - See Section 41-5-6 NMSA 1978.

APPENDICES CHAPTER 11

APPENDIX 1. MALPRACTICE; INFORMED CONSENT

Jane Doe injured her back in a water skiing accident. She consulted Dr. Mark James, a neurosurgeon who diagnosed a herniated disc between the fourth and fifth lumbar vertebrae. Dr. James recommended removal of the disc. Jane Doe signed a written consent for the surgery.

During the surgery a surgical instrument for removing disc material penetrated the annulus fibrosis of the disc and punctured the right iliac artery. This occurrence was not discovered during surgery. The puncture of the artery was discovered on the second post-operative day and repair surgery was performed.

Penetration of the annulus fibrosis during disc surgery and injury to surrounding blood vessels is an inherent risk of the surgical procedure. Such injury occurs in a small but statistically determinable number of cases. The risk of this occurrence was not explained by Dr. James to Jane Doe prior to the surgery.

Jane Doe has filed suit against Dr. James on theories of malpractice in performing the surgery, delay in discovering puncture of the artery and lack of informed consent.

Instructions

UJI 13-301. Preliminary statement.

The time has now come when the court is to give you formal instructions on the law governing this case and to guide you in your deliberations. Please pay close attention to these instructions.

You alone are the judges of the facts of this case.

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

I will read these instructions only once, but the

written instructions will be given to you
to take to
the jury room for your further
assistance.

UJI 13-302A.
Statement of
theories.

In this civil action the plaintiff seeks
compensation
from the defendant for damages which
plaintiff claims
were proximately caused by the doctor's
malpractice.

UJI 13-302B.
Statement of
factual conten-
tions.

To establish the claim of malpractice on
the part of
Dr. James, the plaintiff has the burden
of proving at
least one of the following contentions:

1. In puncturing the right iliac
artery while
operating upon Jane Doe, Dr. James
failed to use
the skill and care ordinarily used by
reasonably
well-qualified neurosurgeons
practicing under
similar circumstances.

2. In treating Jane Doe, Dr. James
failed to use
the skill and care required to
diagnose
post-operatively the puncture of the
right iliac
artery.

3. In treating Jane Doe, Dr. James
failed to
obtain his patient's informed consent
by failing
to communicate the risk of puncturing
a blood
vessel during the surgery.

The plaintiff also contends (or) and has
the burden
of proving that such malpractice was a
proximate cause
of the injury and damages.

UJI 13-302C. Denial.

The defendant denies the contentions of the plaintiff.

UJI 13-302F. Questions presented for the jury.

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. Did Dr. James commit malpractice?
2. Was any malpractice of Dr. James a proximate cause of plaintiff's injury and damages?

If you answer "No" to either question 1 or 2 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 questions 1 and 2, you shall determine the amount of money that will compensate plaintiff for the injury and damages.

UJI 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 plaintiff has the burden of proof on malpractice, 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.

UJI 13-305. Proximate cause.

A proximate cause of an injury is that which in a natural and continuous sequence unbroken by an independent intervening cause produces the injury, and without which the injury would not have occurred. 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.

UJI 13-1102. Duty of specialist.

The defendant, holding [himself] [herself] out as a specialist in neurosurgery and having undertaken to treat and operate on the plaintiff in this specialized field, was under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well- qualified specialists in the same field of medicine practicing under similar circumstances, giving due consideration to the locality involved. A failure to do so would be a form of negligence that is called malpractice. The only way in which you may decide whether the

defendant 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.

UJI 13-1112. Doctor not guarantor.

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.

UJI 13-1104A. Duty to inform.

In treating [his] [her] patient, a doctor is under the duty to communicate to the patient that information which a reasonably prudent person would need to know about the inherent and potential hazards of the proposed treatment.

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.

UJI 13-1104B. Duty to inform; evidence.

What is customarily disclosed by reasonably well-qualified doctors of the same field of medicine as that of the defendant under similar circumstances is evidence of the information which ought to be communicated to the patient. However, what ought to

be disclosed to the patient shall be determined by you in accordance with the standard of what a reasonably prudent person would regard as material to his decision.

UJI 13-1104C. Informed consent.

A doctor has a duty to obtain a patient's informed consent to an operation. For consent to be valid, it must be based upon information which a reasonably prudent person would need to know in deciding whether to undergo the operation.

UJI 13-1116A. Proximate causation; informed consent.

A doctor who fails in [his] [her] duty to communicate inherent and potential hazards is liable for harm to the patient resulting from the operation if a reasonably prudent person would not have consented to the operation had [he] [she] known of the inherent and potential hazards.

UJI 13-1801. Liability 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.

UJI 13-1802. Measure of

damages. If you should decide there is liability,
you must

determine the amount of money which will
fairly

compensate Jane Doe for any of the
following damages

proved by her to have resulted from the
malpractice as

claimed:
UJI 13-1803,
13-1804, 13-1805,

1. The value of lost earnings and
the present

cash value of earning capacity to be
lost in the

future.
13-1806, 13-1807.

2. The reasonable expense of
necessary medical

treatment and services received.
Elements of
damages.

3. The reasonable value of necessary
nonmedical

expenses and services 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.

In determining compensation for pain and
suffering,

you should follow your conscience as
impartial jurors,

using calm and reasonable judgment and
being fair to

all parties.

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.

UJI 13-1821. Future damages.

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.

UJI 13-1822. Future damages; 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 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 13-213. Expert testimony.

The rules of evidence do not ordinarily permit a witness to testify as to an opinion or conclusion. An expert witness is an exception to this

rule. A witness who, by knowledge, skill, experience, training or education has become expert in any subject may be permitted to state an opinion as to that subject. You should consider each expert opinion and the reasons stated for the opinion, giving them such weight as you think they deserve. You may reject an opinion entirely if you conclude it is unsound.

UJI 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 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.

UJI 13-2001. Performance of your duties.

Faithful performance by you of your duties is vital to the administration of justice.

UJI 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.

UJI 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 of the case.

UJI 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.

UJI 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.

UJI 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 ten of you must agree upon the answer; however, the same ten need not agree upon each answer.

UJI 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.

UJI 13-2009.
Verdict of ten.

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.

UJI 13-2220.
Comparative
negligence;
special verdict
form.

On the questions submitted, the jury
finds as follows:

Question No. 1: Did Dr. James commit
malpractice?
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 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 malpractice of
Dr. James a
proximate cause of plaintiff's injury 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 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 plain.

UJI 13-1125. Future medical care.

Question No. 4: Do you find that plaintiff is in need of future medical care and related benefits?

Answer:

.... (Yes or No)

...

Foreperson

[As amended, effective November 1, 1991.]

APPENDIX 2. BATTERY/NO CONSENT; LIABILITY OF DOCTOR FOR NEGLIGENCE OF HOSPITAL EMPLOYEE

Experiencing abdominal pain, Richard Roe consulted Dr. Louis Paul, a general surgeon. Dr. Paul diagnosed gallstones and recommended their removal. Roe signed a consent form specifying gallbladder surgery.

The operation was performed at Mercy Hospital. Dr. Paul removed a small stone from Roe's gallbladder but, uncertain that the stone accounted for all of Roe's discomfort, decided to expand the operation to include general exploratory surgery of the abdomen. As the operative area was enlarged, Roe's appendix, which evidenced no sign of abnormality, came into view and Dr. Paul took the opportunity to remove it. The appendix was indeed normal. The exploratory surgery revealed nothing out of the ordinary.

Before the surgery began, but while Dr. Paul was present in the operating room, one of the hospital's operating room nurses, Jane Jones, positioned Roe on the operating table and strapped his legs to prevent movement. The nurse fastened an ankle strap too tightly. After the operation, Roe developed a gangrenous sore just below the site of the ankle strap.

Roe has filed suit against Dr. Paul and Mercy Hospital. On the battery claim the only physical harm claimed is for an extension of the surgical scar. The hospital does not claim that Dr. Paul assumed the exclusive right to control the conduct of nurse Jones.

Instructions

UJI 13-301. Preliminary statement.

The time has now come when the court is to give you formal instructions on the law governing this case and to guide you in your deliberations. Please pay close attention to these instructions.

You alone are the judges of the facts of this case.

First, I will summarize the issues between the

parties for your consideration. Second, I will state the rule of law governing this case. I will read these instructions only once, but the written instructions will be given to you to take to the jury room for your further assistance.

UJI 13-302A. Statement of theories.

In this civil action the plaintiff seeks compensation from the defendant Dr. Louis Paul for battery, and compensation from the defendants Dr. Paul and Mercy Hospital for damages which plaintiff claims were proximately caused by the negligence of a hospital employee, the operating room nurse, Jane Jones.

UJI 13-302B. Statement of factual contention.

To establish the claim of battery on the part of Dr. Paul, the plaintiff has the burden of proving that the doctor operated on a part of his body without his consent.

To establish the claim of negligence on the part of a hospital employee, the plaintiff has the burden of proving the contention that during the operation nurse Jones failed to use the skill and care required in fastening an ankle strap.

The plaintiff also contends and has the burden of proving that such wrongful conduct was a proximate cause of the injury and damages.

UJI 13-302C.
Denial. As to all claims, the defendants deny the
contentions
of the plaintiff.

UJI 13-302E.
Statement of
other contentions
and denials. Related to plaintiff's claim of
negligence on the
part of the operating room nurse,
plaintiff contends
and has the burden of proving that Dr.
Paul is liable
for the negligence of the nurse because
of his control
and supervision of her activities. This
contention is
denied.

UJI 13-302F.
Questions
presented for the
jury. After considering the evidence and these
instructions
as a whole, the preliminary question
presented for you
to answer on the special verdict form on
the claim of
battery is whether Dr. Paul committed a
battery.
If you answer "No" to that question on
the special
verdict form you shall return the special
verdict for
Dr. Paul and against the plaintiff on the
battery
claim.
If, on the other hand, you answer "Yes,"
you shall
determine the amount of money that will
compensate
plaintiff for the injury and damages
caused by the
battery.
After considering the evidence and these
instructions
as a whole, the preliminary questions

presented for
you to answer on the claim of negligence
of the
operating room nurse are as follows:

1. Was the nurse negligent?
2. Was any negligence of the nurse a
proximate
cause of plaintiff's injury and
damages?

If you answer "No" to either question 1
or 2 on the
special verdict form you shall return the
special
verdict for the defendants and against
the plaintiff
on this claim.
If, on the other hand, you answer "Yes"
to questions
1 and 2, you shall determine the amount
of money that
will compensate plaintiff for the injury
and damages,
and 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.

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 his claim by the
greater weight
of the evidence.

clear and
convincing
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

battery, negligence, and the doctor's control and supervision of the nurse, 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.

UJI 13-1109A. Battery; no 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 a patient without the patient's prior consent commits a battery, for which [he] [she] is liable in damages. It is a battery to perform an operation upon one part of the body when the patient's consent was limited to another part of the body.

UJI 13-1109B. Battery; validity of consent.

For a consent to be valid, the patient must know and agree to the specific operation or procedure which the doctor performs.

UJI 13-1109C. Battery; damages.

To recover damages for battery, the patient need not prove that [he] [she] was physically harmed by the operation. Damages may be awarded solely for the unauthorized touching.

UJI 13-1119. Duty of hospital; patient care.

A hospital has a duty to use ordinary care in furnishing services for the patient. Ordinary care

requires that the hospital possess and apply the knowledge, and use the skill and care, that is ordinarily used by reasonably well-operated hospitals, giving due consideration to all the circumstances and to the locality involved.

The only way in which you may decide whether the defendant hospital used ordinary care in this case is from evidence presented in the case by doctors and nurses testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

UJI 13-1120. Hospital acts through employees.

A hospital acts only through its employees, such as nurses.

A hospital is responsible for injuries proximately resulting from the negligent acts or omissions of its employees.

UJI 13-1123. Hospital; not guarantor; poor result not breach of duty.

A hospital does not guarantee a good medical result.

An unintended incident of treatment is not, in itself, evidence of any wrongdoing by the hospital.

UJI 13-305. Proximate cause.

A proximate cause of an injury is that which in a natural and continuous sequence unbroken by an independent intervening cause produces the injury, and

without which the injury would not have
occurred. 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.

UJI 13-1114. Liability of doctor for negligence of others.

A doctor is liable for the negligence of
a nurse if:
(1) the doctor has the right to control
the manner in
which the details of the particular
activity giving
rise to the injury is 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.

UJI 13-1801. Liability 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.
UJI 13-1802.
Measure of
damages. If you decide there is liability for
battery, you
must determine the amount of money which
will fairly
compensate Richard Roe for the nature,
extent and
duration of the injury proved by him to
have resulted
from the battery, including damages for
the
unauthorized touching.
If you should decide there is liability
for
negligence of the nurse, you must
determine the amount
of money which will fairly compensate
Richard Roe for
any of the following damages proved by
him to have
resulted from the wrongful conduct as
claimed:
UJI 13-1803,
13-1804, 13-1805, 1. The value of lost earnings and
the present
cash value of earning capacity to be
lost in the
future.
13-1806, 13-1807. 2. The reasonable expense of
necessary medical
treatment and services received.

Elements
of damages. 3. The reasonable value of necessary
nonmedical
expenses and services 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.

In determining compensation for pain and suffering, you should follow your conscience as impartial jurors, using calm and reasonable judgment and being fair to all parties.

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.

UJI 13-1821.
Future damages.

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.

UJI 13-1822.
Future damages; 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 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 13-213. Expert testimony.

The rules of evidence do not ordinarily permit a witness to testify as to an opinion or conclusion. An expert witness is an exception to this rule. A witness who, by knowledge, skill, experience, training or education has become expert in any subject may be permitted to state an opinion as to that subject.

You should consider each expert opinion and the reasons stated for the opinion, giving them such weight as you think they deserve. You may reject an opinion entirely if you conclude it is unsound.

UJI 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 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.

UJI 13-2001. Performance of your duties.

Faithful performance by you of your duties is vital to the administration of justice.

UJI 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.

UJI 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 witness' testimony, considered in light of all the evidence of the case.

UJI 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.

UJI 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.

UJI 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 ten of you must agree upon the

answer; however, the same ten need not agree upon each answer.

UJI 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.

UJI 13-2009. Verdict of ten.

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 - Battery

UJI 13-2220. Special verdict

On the questions submitted, the jury

finds as follows:
forms. **Question No. 1: Did Dr. Paul commit a battery on**

plaintiff Richard Roe?
Answer:
.... (Yes or No)
If the answer to Question No. 1 is "No", your

foreperson must sign this special verdict, which will

be your verdict for the defendant on this claim and

against the plaintiff. If the answer to Question No. 1

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

Question No. 2: In accordance with the damage

instructions given by the court, we find the total

amount of damages suffered by plai..
....
....

Foreperson

Special Verdict Form - Negligence

On the questions submitted on the claim of negligence

of the operating room nurse, the jury finds as follows:

Question No. 1: Was the nurse negligent?
Answer:
.... (Yes or No)
If the answer to Question No. 1 on this claim 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 on this claim. If the answer to Question No.

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

Question No. 2: Was any negligence of the nurse a proximate cause of plaintiff's injury 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 on this claim.

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 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.

UJI 13-1140.

Future medical care.

Question No. 4: Do you find that plaintiff Richard Roe is in need of future medical care and related benefits?

Answer: .... (Yes or No)

Question No. 5: Is Dr. Louis Paul liable for the negligence of the nurse?

Answer: .... (Yes or No)

....

Foreperson

[As amended, effective November 1, 1991]

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.

DIRECTIONS FOR USE

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.]

ANNOTATIONS

This instruction defines the common-law duty of persons operating vehicles - motor or otherwise.

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.

DIRECTIONS FOR USE

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).

Library references. - 61A C.J.S. Motor Vehicles §§ 554, 555.

ANNOTATIONS

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

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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).

Library references. - 61A C.J.S. Motor Vehicles §§ 547, 548, 553, 556.

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. - 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.

DIRECTIONS FOR USE

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).

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).

Library references. - 61A C.J.S. Motor Vehicles §§ 533, 543, 556.

ANNOTATIONS

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

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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).

Library references. - 65A C.J.S. Negligence §§ 168, 298.

ANNOTATIONS

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
................ [was  made
             (driver)
  available by
.............................................................. to
.................................................................
..... for  any
       (head of household)            (driver)
  purpose on this occasion] [or] [was furnished by
......................
.................................................................
..............
            (head of household)              (head of household)
  to family members of the household, including ..........., for
```

general use]
(driver)
[and that .... was a family member of
(driver)
.. household], then
... is liable for damages proxi-
(head of household) (head of household)
mately caused by negligent operation of the vehicle by ....
(driver)

DIRECTIONS FOR USE

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. 346, 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.

Library references. - 61A C.J.S. Motor Vehicles §§ 530, 531, 551.

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.

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).

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.

Committee comment. - Instructions found in Chapter 15 should be used where applicable.

Library references. - 61A C.J.S. Motor Vehicles §§ 533, 542, 556.

ANNOTATIONS

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.

Who is "pedestrian" with respect to rights given and duties imposed by traffic rules and regulations, 30 A.L.R.2d 1048.

Failure to comply with statute regulating travel by pedestrian along highway as affecting right to recovery, 45 A.L.R.3d 658.

61A C.J.S. Motor Vehicles §§ 543, 556.

13-1212. Emergency vehicles.

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.

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 goes upon the premises of another without permission or invitation.

DIRECTIONS FOR USE

This instruction is to be used if there is an issue as to whether the plaintiff was a trespasser.

[As amended, effective January 1, 1987.]

Committee comment. - No explicit definition of the word "trespasser" is found in the New Mexico cases. A general definition is set forth in 87 C.J.S. Trespass § 1.

ANNOTATIONS

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. Licensee; definition.

A licensee is a person who enters or remains on the premises with the permission or invitation of the [owner] [occupant]. [Such permission or invitation may be express or implied.] [A social guest is a licensee.]

DIRECTIONS FOR USE

This instruction is to be used if there is an issue as to whether the plaintiff was a licensee. The bracketed portions should be included only if applicable to the issues created by the evidence at trial.

[As amended, effective January 1, 1987.]

Committee comment. - The definition of licensee is adapted from Restatement (Second) of Torts § 330. The Restatement definition was cited with approval in Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966). See also Bogart v. Hester, 66 N.M. 311, 347 P.2d 327 (1960); Jellison v. Gleason, 77 N.M. 445, 423 P.2d 876 (1967).

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).

ANNOTATIONS

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. Business visitor; business invitee; invitee; definition.

A business visitor is a person who is invited to enter, or permitted to remain on, the premises [in the possession] of another for a purpose connected with business dealings with the [owner] [occupant] of the premises.

DIRECTIONS FOR USE

This instruction is to be used if there is an issue as to whether the plaintiff was a business visitor. The bracketed language should be included as appropriate.

[As amended, effective January 1, 1987.]

Committee comment. - The definition of invitee is adapted from Restatement (Second) of Torts § 332. The Restatement definition was cited in Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966).

Delivering prospective customers to bar. - Where plaintiff testified that he was at a bar parking lot to deliver some prospective customers to the club, he was a business invitee. Valdez v. Warner, 106 N.M. 305, 742 P.2d 517 (Ct. App. 1987).

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).

ANNOTATIONS

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.

13-1304. Status of party not an issue.

In this case, the plaintiff was a [trespasser] [licensee] [business visitor].

DIRECTIONS FOR USE

This instruction is to be used if the status of the party is not an issue. If used, the appropriate definition contained in UJI 13-1301, 13-1302 or 13-1303 should follow.

[As amended, effective January 1, 1987.]

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.

DIRECTIONS FOR USE

The bracketed language should be used as appropriate.

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

Committee comment. - Generally, there is no duty of a landlord toward a trespasser with regard to natural conditions. See UJI 13-1307. As to trespassing children, see UJI 13-1312.

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. - 49 Am. Jur. 2d Landlord and Tenant § 767.

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.

DIRECTIONS FOR USE

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 for injury to patron on premises from criminal attack by third party, 93 A.L.R.3d 999.

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.

DIRECTIONS FOR USE

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. Duty to licensee.

An [owner] [occupant] owes a duty to a licensee if, and only if:

(1) [He] [She] knows or has reason to know of a condition of [his] [her] land involving an unreasonable risk of harm to the licensee; and

(2) [He] [She] should reasonably expect that the licensee will not discover or realize the danger.

In such case, [he] [she] has a duty to make the condition safe or to warn the licensee of the condition and risk involved; however, if the licensee knew or had reason to know of the condition, the [owner] [occupant] has no duty to warn.

DIRECTIONS FOR USE

This is a basic instruction governing duty to a licensee with respect to natural or artificial conditions of the land. It is to be used in every case in which there is evidence that the status of the party is that of a licensee and the facts presented justify the instruction.

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

Committee comment. - Adapted from Restatement (Second) of Torts § 342. Restatement cited with approval in Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966). This instruction was held inapplicable to a licensee using a private right-of-way in Moore v. Burn Constr. Co., 98 N.M. 190, 646 P.2d 1254 (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.

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. - Liability of owner or occupant of premises to fireman coming thereon in discharge of his duty, 11 A.L.R.4th 597.

Liability of storekeeper for injury to customer arising out of pursuit of shoplifter, 14 A.L.R.4th 950.

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.

13-1309. Duty to business visitor (invitee) arising from a condition of the premises.

An [owner] [occupant] owes a business visitor the duty to use ordinary care to keep the premises safe for use by the business visitor.

DIRECTIONS FOR USE

This instruction and UJI 13-1310 would be used, as appropriate, in the general case of a business visitor. For cases of slip and fall in a place of business, see UJI 13-1318 and 13-1319.

[As amended, effective January 1, 1987.]

Committee comment. - See Cotter v. Novak, 57 N.M. 639, 261 P.2d 827 (1953), where liability was denied and the trailer park operator was held not chargeable with the knowledge that loose nails would be used in a dart gun. See Bogart v. Hester, 66 N.M. 311, 347 P.2d 327 (1959); Snider v. Town of Silver City, 56 N.M. 603, 247 P.2d 178 (1952) and Chaves v. Torlina, 15 N.M. 53, 99 P.2d 690 (1909).

Owner of building who invited another to inspect it, with view of selling the property, must use ordinary care in having premises in reasonably safe condition for inspection. Boyce v. Brewington, 49 N.M. 107, 158 P.2d 124, 163 A.L.R. 583 (1945).

See Edwards v. Ross, 72 N.M. 38, 380 P.2d 188 (1963); Coca v. Arceo, 71 N.M. 186, 376 P.2d 970 (1962); Ware v. Cattaneo, 69 N.M. 394, 367 P.2d 705 (1962) (apartment owner); DeBaca v. Kahn, 49 N.M. 225, 161 P.2d 630 (1945).

See also Latimer v. City of Clovis, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972); Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966).

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).

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).

ANNOTATIONS

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.

65 C.J.S. Negligence § 63(45); 65A C.J.S. Negligence § 287.

13-1310. Duty to business visitor; known or discoverable danger.

An [owner] [occupant] owes a duty to a business visitor, with respect to known or obvious dangers, if and only if:

(1) The [owner] [occupant] knows or has reason to know of a dangerous condition on [his] [her] premises involving an unreasonable risk of danger to a business visitor; and

(2) The [owner] [occupant] should reasonably anticipate that the business visitor will not discover or realize the danger [or that harm will result to the business

visitor, even though the business visitor knows or has reason to know of the danger].

If both of these conditions are found to exist, then the [owner] [occupant] had a duty to use ordinary care to protect the business visitor from harm.

DIRECTIONS FOR USE

This instruction is appropriate in the general case of a business visitor where the evidence establishes, or where the jury could find from the evidence, that the plaintiff was injured by a known or obvious danger. The bracketed language in Subparagraph (2) should be used where appropriate.

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

Committee comment. - This instruction is adopted from Restatement (Second) of Torts §§ 342, 343. The Restatement is cited with approval in Proctor v. Waxler, 83 N.M. 58, 488 P.2d 108 (Ct. App. 1971), aff'd, 84 N.M. 361, 503 P.2d 644 (1972), and in Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966). For a discussion of the elements of this instruction, see Greiser v. Brown, 102 N.M. 11, 690 P.2d 454 (Ct. App. 1984).

ANNOTATIONS

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

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).

Question of fact precludes granting summary judgment for defendant. - Where a fact question exists as to whether the condition which resulted in plaintiff's injury involved an unreasonable risk of danger and whether the defendant/owner should reasonably have anticipated that the plaintiff/business visitor would not discover or realize the danger, genuine issues of fact exist and preclude the granting of summary judgment in favor of the defendant. Greiser v. Brown, 102 N.M. 11, 690 P.2d 454 (Ct. App. 1984).

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. - 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 owner of store, office or similar place of business to invitee falling on tracked-in water or snow, 20 A.L.R.4th 438.

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, 20 A.L.R.4th 517.

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

13-1311. Duty to licensee-business visitor limited in scope.

Where an [owner] [occupant] owes a [licensee] [business visitor] the duty to use ordinary care to keep the premises safe for use, this duty is limited.

First, it extends only to the area which the plaintiff has been invited to use or the area the defendant might reasonably expect the plaintiff to use.

Second, within that area it extends only to the manner of use which the defendant might reasonably expect of the plaintiff.

Therefore, if plaintiff was on a portion of the premises to which [he] [she] was not invited and that [he] [she] would not reasonably be expected to use, or if [he] [she] was using the premises for a purpose other than that for which [he] [she] was invited and for which [he] [she] would not reasonably be expected to use them, then the defendant only owed [him] [her] the duty that would be owed to a trespasser.

DIRECTIONS FOR USE

This instruction should be used where plaintiff is a business visitor or licensee and there is a question as to whether the plaintiff remained within the scope of the invitation or license.

As to the duty of an owner or occupant of land to a trespasser, see UJI 13-1305, 13-1306 and 13-1307.

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

Committee comment. - See Mitchell v. C & H Transp. Co., 90 N.M. 471, 565 P.2d 342 (1977), where the court held that the duty to exercise ordinary care that is owed to an invitee by the owner or occupant of premises includes the duty to provide an invitee with

safe means of ingress and egress. See also Mitchell v. Pettigrew, 65 N.M. 137, 333 P.2d 879 (1958), where a bar patron who fell into a hole near the building housing the bar was held to be using the premises within the scope of her invitation.

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.

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 §§ 159 to 182.

13-1312. Trespassing children (attractive nuisance).

An [owner] [occupant] has a duty to prevent injury to a trespassing child resulting from .... artificial condition of the land if:
(describe structure or artificial condition)

(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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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 note. - 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. - 49 Am. Jur. 2d Landlord and Tenant §§ 788 to 790.

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].

DIRECTIONS FOR USE

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).

Instruction property 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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 49 Am. Jur. 2d Landlord and Tenant § 774.

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.

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

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).

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).

ANNOTATIONS

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; business visitor; dangerous condition not created by proprietor.

The defendant was not an insurer of the safety of the plaintiff, but [he] [she] did owe [him] [her] the duty to exercise ordinary care to keep [his] [her] premises in a safe condition for the plaintiff's use. In performing this duty, the defendant had the duty to make reasonable inspections of the premises and the duty to exercise ordinary care to correct, or to warn the plaintiff of the presence of, any dangerous condition existing on the premises, of which [he] [she] had knowledge or of which [he] [she] would have had knowledge had [he] [she] performed the duty of reasonable inspection. A dangerous condition, as used herein, means a condition which a person exercising ordinary care would foresee as being likely to cause injury to one exercising ordinary care for [his] [her] own safety.

DIRECTIONS FOR USE

Either this instruction or UJI 13-1319 should be used in slip and fall cases involving business visitors.

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

Committee comment. - The proprietor's duty in a slip and fall case, O'Neil v. Furr's, Inc., 82 N.M. 793, 487 P.2d 495 (Ct. App. 1971), in New Mexico would appear to extend to other injuries sustained by business invitees. See Lay v. Vip's Big Boy Restaurant, Inc., 89 N.M. 155, 548 P.2d 117 (Ct. App. 1976). For operation of rule in lessee-proprietor situation, see Mitchell v. C & H Transp. Co., 90 N.M. 471, 565 P.2d 342 (1977). The foregoing instruction applies only to business invitees. The proprietor owes no such duty to a licensee or a trespasser.

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. - 62 Am. Jur. 2d Premises Liability §§ 37, 144.

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.

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, 20 A.L.R.4th 517.

Liability of operator of grocery store to invitee slipping on spilled liquid or semiliquid substance, 24 A.L.R.4th 696.

65 C.J.S. Negligence §§ 63(119) et seq., 81(11).

13-1319. Slip and fall; business visitor; dangerous condition caused by proprietor or actual knowledge shown.

The defendant was not an insurer of the safety of the plaintiff, but [he] [she] did owe [him] [her] the duty to exercise ordinary care to keep the premises in a safe condition for the plaintiff's use. If a dangerous condition existed on defendant's premises which was caused by the defendant or [his] [her] employees, or if the defendant had actual knowledge of such a condition, although not caused by [him] [her] or [his] [her] employees, then, in either event, it was [his] [her] duty to exercise ordinary care to correct, or to warn the plaintiff of the presence of such dangerous condition. A dangerous condition is a condition which a person exercising ordinary care would foresee as likely to cause injury to one exercising ordinary care for [his] [her] own safety.

DIRECTIONS FOR USE

Either this instruction or UJI 13-1318 should be used in slip and fall cases involving business visitors.

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

Committee comment. - See committee comment to UJI 13-1318. Duty to warn or protect business invitee against dangerous conditions created by ice and snow arises only when the condition is unreasonably dangerous. Proctor v. Waxler, 84 N.M. 361, 503 P.2d 644 (1972).

ANNOTATIONS

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

"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 operator of grocery store to invitee slipping on spilled liquid or semiliquid substance, 24 A.L.R.4th 696.

65 C.J.S. Negligence §§ 90, 281.

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).

Policy considerations have prevented the application of strict liability to automobile manufacturer's liability under the doctrine of "crashworthiness" or "second collision" alleging faulty design of an automobile which enhances the injury received by a passenger in an accident. 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.

[Approved, effective November 1, 1991.]

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.

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).

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.]

DIRECTIONS FOR USE

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Products liability: toxic shock syndrome, 54 A.L.R.4th 50.

Products liability: polyvinyl chloride, 54 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.

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.

DIRECTIONS FOR USE

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, 54 A.L.R.4th 73.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning weapons and ammunition, 54 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.

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.

DIRECTIONS FOR USE

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.

Industry customs [standards] [codes] [rules] are evidence of ordinary care, but they are not conclusive.

DIRECTIONS FOR USE

In a negligence action, this instruction must be given when the court has admitted evidence of industry practices or customs. UJI 13-1408, a comparable instruction, applies to an action in strict liability. UJI 13-1405 and 13-1408 are both given where evidence of industry practices or custom is introduced and plaintiff is proceeding on both theories of liability. This instruction shall be given following UJI 13-1404.

Evidence of custom will not be admitted, and this instruction must not be given, where liability is predicated solely upon violation of a statute or ordinance. See UJI 13-1421. In cases where violation of a statute or ordinance is not the sole basis for liability, evidence of custom may be admitted on a theory which is not based upon a statutory violation; in such a case, a special instruction must limit the application of industry custom or practice.

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.

Where a standard or code is embodied in a statute or ordinance and compliance is mandatory, custom will not excuse violation of the standard and is not admissible to show an industry practice in conflict with the statute. Apodaca v. Miller, 79 N.M. 160, 164-5, 441 P.2d 200, 204-5 (1968); Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 723, 427 P.2d 240, 245 (1967).

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 proximately 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].

DIRECTIONS FOR USE

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.

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 v. Hertz Corp., supra, 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.

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 Aktiengeselischaft, 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).

ANNOTATIONS

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.]

DIRECTIONS FOR USE

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 proximate 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.

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 forseeable 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.]

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).

ANNOTATIONS

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.

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.

Industry customs [standards] [codes] [rules] are evidence of the acceptability of the risk, but they are not conclusive.

DIRECTIONS FOR USE

In a strict liability action, this instruction must be given when the court has admitted evidence of industry practices or customs. UJI 13-1405, a comparable instruction, applies to an action in negligence. UJI 13-1405 and 13-1408 are both given where evidence of industry practices or custom is introduced and plaintiff is proceeding on both theories of liability. This instruction shall be given following UJI 13-1407.

As with UJI 13-1405, evidence of custom is not admissible, and this instruction must not be given where liability is based exclusively upon statutory violation. See UJI 13-1405, directions for use.

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).

ANNOTATIONS

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.

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:

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    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.
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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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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, 54 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.

DIRECTIONS FOR USE

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. - 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.

DIRECTIONS FOR USE

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, 54 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.

DIRECTIONS FOR USE

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 Directions for Use.

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.]

DIRECTIONS FOR USE

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. Ap. 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.]

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).

ANNOTATIONS

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.

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.]

DIRECTIONS FOR USE

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].

DIRECTIONS FOR USE

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.]

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].

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

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.

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].

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

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".

DIRECTIONS FOR USE

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, 54 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 proximately 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].

DIRECTIONS FOR USE

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 proximately caused by the violation.

This instruction contains the element of proximate cause, without definition, and should be accompanied by UJI 13-1424.

[As amended, effective November 1, 1991.]

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.

Compiler's note. - 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, 723-4, 427 P.2d 240, 245 (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 proximately 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 proximate cause of the harm done.

DIRECTIONS FOR USE

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 proximate 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 proximate cause of plaintiff's injury and resulting damages.

ANNOTATIONS

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Products liability: injury caused by product as a result of being tampered with, 67 A.L.R.4th 964.

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.

13-1423. Strict products liability; component part.

"Products liability" applies to the supplier of [a component part] [material intended for further processing] which proximately 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 proximate cause of the harm done.

DIRECTIONS FOR USE

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 proximate 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, directions for use.

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 proximate cause of plaintiff's injury.

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).

ANNOTATIONS

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. Proximate cause; independent intervening cause.

The proximate cause of an injury is that which, in a natural and continuous sequence [unbroken by any independent intervening cause], produces 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.]

DIRECTIONS FOR USE

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, or both.

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

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; proximate cause.

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 proximate cause of injury.

DIRECTIONS FOR USE

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. Where failure to warn or product misrepresentation are not submissible jury issues, UJI 13-1424 is the only instruction to be given on proximate cause.

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 proximate cause definition does not adequately focus this issue and, therefore, the committee has drafted this separate instruction on proximate cause in warning cases.

Other courts have dealt with the proximate cause issue in a variety of ways. In Technical Chemical Co. v. Jacobs, 480 S.W.2d 602 (Tex. 1972), proximate cause 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 proximate cause, 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 proximate cause 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 proximate cause should not be included in UJI 13-1425 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.

13-1426. Strict products liability; misrepresentation; proximate cause.

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 proximate 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 proximate 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.

Proximate cause 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 proximate cause in a misrepresentation case. The injury must result from the quality, condition or character, which was misrepresented.

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.

DIRECTIONS FOR USE

This instruction will be given in every products liability case where there is sufficient evidence that negligence of the plaintiff was a proximate cause of injury. It applies regardless of the theories of liability used.

[Adopted, effective November 1, 1991.]

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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.

DIRECTIONS FOR USE

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.]

DIRECTIONS FOR USE

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 defective and 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].

DIRECTIONS FOR USE

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.

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.

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.

DIRECTIONS FOR USE

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).

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.

DIRECTIONS FOR USE

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).

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.]

DIRECTIONS FOR USE

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 .... violated [this] [any one

(party)

of these] statute[s], then 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.]

DIRECTIONS FOR USE

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 Directions for Use 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).

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.]

DIRECTIONS FOR USE

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 directions for use 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 Directions for Use.

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; proximate cause.

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 proximate cause of or contributed to, an injury found by you to have been suffered by the plaintiff.

DIRECTIONS FOR USE

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.]

Committee comment. - To be actionable, the negligence resulting from the violation of a statute or ordinance must be a proximate 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). [As revised, effective November 1, 1991.]

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.

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.)

DIRECTIONS FOR USE

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 Directions for 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. Violation of law; proximate cause.

Negligence resulting from a violation of a 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 proximate cause of, or contributed to, an injury found by you to have been suffered by the plaintiff.

DIRECTIONS FOR USE

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.

Committee comment. - To be actionable, the negligence resulting from the violation of a statute or ordinance must be a proximate 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).

Library references. - 57 Am. Jur. 2d Negligence §§ 261 to 268.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 C.J.S. Negligence § 105.

65A C.J.S. Negligence §§ 205, 290, 301.

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.

Liability of owner or operator of shopping center for injury to patron on premises from criminal attack by third party, 93 A.L.R.3d 999.

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.

DIRECTIONS FOR USE

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).

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.

65 C.J.S. Negligence §§ 1(1) to 1(14).

13-1602. Contributory negligence; definition.

Withdrawn, effective October 1, 1984.

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".

ANNOTATIONS

Compiler's note. - The cases below were decided prior to the 1984 withdrawal of former UJI Civ. 16.2.

When contributory negligence not available as defense. - Where a manufacturer has a duty to install safety devices and breaches that duty, and the plaintiff is injured by the very eventuality that the safety devices were designed to guard against, contributory negligence as a defense is not available to the manufacturer. Jasper v. Skyhook Corp., 89 N.M. 98, 547 P.2d 1140 (Ct. App. 1976), rev'd on other grounds, 90 N.M. 143, 560 P.2d 934 (1977).

Conventional contributory negligence is not a defense when the doctrine of strict liability applies. Jasper v. Skyhook Corp., 89 N.M. 98, 547 P.2d 1140 (Ct. App. 1976), rev'd on other grounds, 90 N.M. 143, 560 P.2d 934 (1977).

But when contributory negligence as matter of law. - Where plaintiff, driving on a four lane highway, zig-zagged between and past two vehicles and made an illegal left turn from the right-hand lane into another road, immediately thereafter being struck by defendant's car, plaintiff was contributorily negligent as a matter of law. Catalano v. Lewis, 90 N.M. 215, 561 P.2d 488 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Where evidence supports instruction. - Where the evidence raised a factual question as to whether decedent unreasonably exposed herself to danger which she had reason to know about and raised a factual question as to whether her conduct fell below the standard to which she, as a 15-year-old, should conform in order to protect herself from harm, it supported instructions on both assumption of risk and contributory negligence. LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

Although there was a lot of traffic, plaintiff was watching children ahead and in the roadway, and when the cars ahead of her stopped quickly she stopped her car and was hit from behind by the defendant's car. In a suit for personal injuries, the issue of her contributory negligence was properly submitted under instructions consistent with UJI

Civ. 13.1 and 13.12 (now UJI 13-1301 and 13-1312). Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

And where evidence does not. - Since there was no evidence to the effect that the plaintiff was contributorily negligent, or to the effect that a sudden emergency arose, instructions on these theories should not have been given; it is error to instruct on issues which are unsupported by the evidence or which present a false issue. Archibeque v. Homrich, 88 N.M. 527, 543 P.2d 820 (1975).

Instruction not sufficient to inform of plaintiff's duty of care. - This instruction (former UJI Civ. 16.2), read with defendant's theories of contributory negligence, did not cover the elements of UJI Civ. 12.3 (now UJI 13-1604), since the contributory negligence instructions informed the jury that plaintiff might be contributorily negligent, but the instructions 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 UJI Civ. 12.3 (now UJI 13-1604) 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).

But sufficient as to element of contributory negligence. - This instruction is the definition of contributory negligence to be given - nothing more, nothing less - and trial court properly refused defendant's request to include in the court's instruction that the duty of the plaintiff was to exercise reasonable care to avoid injury to himself at all times. Anderson v. Welsh, 86 N.M. 767, 527 P.2d 1079 (Ct. App. 1974).

Question of contributory negligence for jury. - If there is any evidence from which a legitimate inference can be drawn and upon which reasonable minds might differ, then the question of plaintiff's contributory negligence is for the jury. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Husband's contributory negligence not imputed to wife. - Although all real and personal property acquired after marriage by either spouse other than by gift, descent or devise is community property, the cause of action and recovery for personal injuries to the wife are her separate property, so that she may sue in her own name for pain and suffering and personal injuries without joinder of her husband, and her husband's contributory negligence is not imputed to her. Roberson v. U-Bar Ranch, Inc., 303 F. Supp. 730 (D.N.M. 1968).

But imputation where cause of action belongs to community. - Where a cause of action for negligence belongs to the community, negligence of one spouse will be imputed to and bar recovery by the other spouse. Roberson v. U-Bar Ranch, Inc., 303 F. Supp. 730 (D.N.M. 1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence §§ 298 to 302.

Modern trends as to contributory negligence of children, 32 A.L.R.4th 56.

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.

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.

DIRECTIONS FOR USE

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).

Library references. - 65A C.J.S. Negligence § 289.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence § 76.

Liability to real-property purchaser for negligent appraisal of property's value, 21 A.L.R.4th 867.

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.]

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.]

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).

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

Law reviews. - For note, "Torts - Negligence - Judicial Adoption of Comparative Negligence in New Mexico," see 11 N.M.L. Rev. 487 (1981).

ANNOTATIONS

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. Contributory negligence; parent; child.

Withdrawn, effective October 1, 1983.

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.

Compiler's notes. - The cases below were decided prior to the 1983 withdrawal of former UJI Civ. 16.7.

When contributory negligence permitted defense. - Where a parent seeks recovery in his own right and for his own benefit, when a child has been killed, the law permits the defense of contributory negligence. Foster v. United States, 183 F. Supp. 524 (D.N.M. 1959), aff'd, 280 F.2d 431 (10th Cir. 1960).

Scope of contributory negligence. - If danger and hazard existed incident to the irrigation ditch in which her two children drowned, if plaintiff knew or should have known of the hazard attending the children's going alone to the aunt's residence and in crossing the ditch and if she knew, or should have known, of such danger, she, herself, was guilty of contributory negligence in permitting the children to encounter such dangers and hazards without their being shielded and protected in some manner. Thus, if there was negligence on the part of the defendant in improperly maintaining the ditch, then the plaintiff likewise was guilty of contributory negligence which proximately contributed to the cause of the accident and the death of the two children. Foster v. United States, 183 F. Supp. 524 (D.N.M. 1959), aff'd, 280 F.2d 431 (10th Cir. 1960).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence § 377; 58 Am. Jur. 2d Negligence § 469.

Basis of rule that contributory negligence of person injured precludes recovery by parent or spouse, 42 A.L.R. 717.

Contributory negligence of beneficiary as affecting action under death or survival statute, 2 A.L.R.2d 785.

Contributory negligence of child injured while climbing over or through railroad train blocking crossing, 11 A.L.R.3d 1168.

Contributory negligence of spouse or child as bar to recovery of collateral damages suffered by other spouse or parent, 21 A.L.R.3d 469.

Modern trends as to contributory negligence of children, 32 A.L.R.4th 56.

65A C.J.S. Negligence §§ 260, 261, 295.

13-1608. Negligence of parent; none as a matter of law.

Withdrawn, effective October 1, 1984.

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.

13-1609. Contributory negligence; not applicable to all plaintiffs.

Withdrawn, effective October 1, 1984.

Committee comment. - See Committee Comment to UJI 13-1601.

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.

DIRECTIONS FOR USE

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. Contributory negligence of sole beneficiary; Wrongful Death Act.

Withdrawn, effective October 1, 1983.

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.

13-1612. Contributory negligence of one beneficiary; Wrongful Death Act.

Withdrawn, effective October 1, 1983.

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.

13-1613. Contributory negligence of sole beneficiary under common carrier death statute.

Withdrawn, effective October 1, 1983.

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.

13-1614. Contributory negligence of one of several beneficiaries under common carrier death statute.

Withdrawn, effective October 1, 1983.

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.

13-1615. Comparative negligence.

Withdrawn, effective October 1, 1983.

Committee comment. - See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

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.

DIRECTIONS FOR USE

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. Sudden emergency.

A person who, without negligence on [his] [her] part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence or the appearance of an imminent danger to [himself] [herself] or another, is not expected nor required to use the same judgment and prudence that is required of [him] [her] in the exercise of ordinary care in calmer and more deliberate moments.

[His] [Her] duty is to exercise only the care that a reasonably prudent person would exercise in the same situation.

If, at that moment, [he] [she] does what appears to [him] [her] to be the best thing to do and if [his] [her] choice and manner of action are the same as might have been followed by any reasonably prudent person under the same conditions, then [he] [she] has done all that the law requires of [him] [her], even though, in the light of after events, it might appear that a different course would have been better and safer.

DIRECTIONS FOR USE

This instruction may apply to any person whose negligence is in issue. The fact that there may be evidence that a person negligently created the sudden emergency does not preclude giving this instruction.

[As amended, effective November 1, 1991.]

Committee comment. - Neither evidence of negligence creating the emergency, nor of lack of time to react, both of which are jury questions, prevents the giving of this instruction. Trujillo v. Baldonado, 95 N.M. 321, 621 P.2d 1133 (Ct. App. 1980); 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). The sudden emergency doctrine is merely the application of the 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. 687, 567 P.2d 486 (1977).

ANNOTATIONS

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

Purpose of instruction. - The purpose of this instruction is to advise the jury that in determining whether an individual exercised the care of a reasonable person, the jury can consider that the individual had very little time to make a decision. Romero v. State, 112 N.M. 291, 814 P.2d 1019 (Ct. App.) ??? modified on other grounds, 112 N.M. 332, 815 P.2d 628 (1991).

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).

Effect of party's negligence on application of doctrine. - The fact that the party relying on this doctrine may have contributed by his negligence to causing the emergency does not preclude giving the 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).

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).

Evidence sufficient for instruction. - Evidence that the lead car came to a sudden stop in the middle of the block without signaling for any turn, that plaintiff's car also came to a sudden stop and almost immediately thereafter defendant's car hit plaintiff's car, 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 sufficient for an instruction on sudden emergency. Sandoval v. Cortez, 88 N.M. 170, 538 P.2d 1192 (Ct. App. 1975).

But where instruction erroneous. - Where testimony indicates that defendant was not confronted with an unexpected peril, an instruction on sudden emergency is erroneous because it injects a false issue into the case. Delgado v. Alexander, 84 N.M. 456, 504 P.2d 1089 (Ct. App. 1972), aff'd, 84 N.M. 717, 507 P.2d 778 (1973).

Where the evidence showed only defendant's negligence, without any peril arising from the actual presence or the appearance of imminent danger to herself or another, the giving of a sudden emergency instruction was improper. Bachicha v. Lewis, 105 N.M. 726, 737 P.2d 85 (Ct. App. 1987).

Evidence of defendant's negligence does not bar sudden emergency instruction. Trujillo v. Baldonado, 95 N.M. 321, 621 P.2d 1133 (Ct. App. 1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence § 93.

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.

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 proximate 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.

DIRECTIONS FOR USE

This instruction will be used only when the act of God may be found to be the sole proximate 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.]

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence § 16.

13-1619. Malicious, willful or wanton misconduct.

Withdrawn, effective November 1, 1991.

Committee comment. - Definitions of conduct justifying recovery of punitive damages are contained in UJI 13-1827.

13-1620. Contributory malicious, willful or wanton misconduct.

Withdrawn, effective October 1, 1983.

Committee comment. - See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and see Committee Comment to UJI 13-1619.

13-1621. Last clear chance; discoverable peril; escape impossible.

Withdrawn, effective October 1, 1983.

Committee comment. - See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

13-1622. Last clear chance; escape possible.

Withdrawn, effective October 1, 1983.

Committee comment. - See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

13-1623. Res ipsa loquitur.

In support of the claim that .... was negligent,
relies [in part] upon the doctrine of "res ipsa loquitur" which is a Latin phrase and means "the thing speaks for itself". In order for the jury to find
.... negligent on this doctrine,
.... has the burden of proving each of the following propositions:

1. that the injury or damage to .... was proximately caused by
....
(name of instrumentality or occurrence)
which was under the exclusive control and management of ....; and

2. that the event causing the injury or damage to was of a kind which does not ordinarily occur in the absence of negligence on the part of the person in control of the instrumentality.

If you find that proved each of these propositions, then you may, but are not required to, infer that
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 used ordinary care for the safety of others in [his] [her] [its] control and management of the
then the doctrine of res ipsa loquitur would not support a finding of negligence.

DIRECTIONS FOR USE

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.

[As amended, effective November 1, 1991.]

Committee comment. - It is possible that defendants may rely on res ipsa loquitur in cases tried under New Mexico comparative negligence principles. The control of the instrumentality must be exclusive. Joint control is not sufficient. Begay v. Livingston, 99 N.M. 359, 658 P.2d 434 (Ct. App. 1981), reversed on other grounds, Livingston v. Begay, 98 N.M. 712, 652 P.2d 734 (1982); 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). 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). In showing control a person may need to prove that there was no probable opportunity of tampering with a product by third persons. Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N.M. 43, 278 P.2d 575 (1955).

The doctrine of res ipsa loquitur does not impose liability as a matter of law. It only avoids a directed verdict against the person proving the applicability 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 that 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). Cf. Renfro v. J.D. Coggins Co., 71 N.M. 310, 378 P.2d 130 (1963) (defendant has the burden of meeting or balancing the inference of negligence).

In New Mexico, a party using the doctrine of res ipsa loquitur is not required to establish compliance with ordinary care. Chapin v. Rogers, 80 N.M. 684, 459 P.2d 846 (Ct. App. 1969). [As revised, effective November 1, 1991.]

ANNOTATIONS

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.

I. GENERAL CONSIDERATION.

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).

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, 54 A.L.R.4th 201.

Applicability of res ipsa loquitur in case of multiple medical defendants - modern status, 67 A.L.R.4th 544.

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.)

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.

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.

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.

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.

DIRECTIONS FOR USE

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.

Library references. - 35 C.J.S. Explosives §§ 8, 11(1) et seq.

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.

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 .... was extreme and
(name of defendant)
outrageous under the circumstances; and
(2) .... acted intentionally or recklessly; and
(defendant)
(3) As a result of the conduct of ....,
(defendant)
.... experienced severe emotional distress.
(plaintiff)
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.

DIRECTIONS FOR USE

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.]

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.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-1629. Negligent infliction of emotional distress to bystander.

To recover for negligent infliction of emotional distress, ...
(plaintiff)
must prove that:

[(1) .... had a close family relationship with ....;] and
(plaintiff) (victim)

[(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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.]

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 proximate cause of plaintiff's harm; and

4. That defendant's conduct was not justifiable under all the circumstances.

DIRECTIONS FOR USE

This instruction should be given together with UJI 13-1631A where justification is offered by the defendant and put into issue.

[Adopted, effective November 1, 1991.]

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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.

DIRECTIONS FOR USE

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.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-1632. Negligent misrepresentations.

A party is liable for damages proximately 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.

DIRECTIONS FOR USE

This instruction is to be used in those cases where the misrepresentation is not fraudulent in character. See UJI 13-1633 for fraudulent misrepresentation.

[Adopted, effective November 1, 1991.]

Committee comment. - Negligent misrepresentation, resulting in damage is a cause of action distinct from fraud and deceit or rescission. Maxey v. Quintana, 84 N.M. 38, 499 P.2d 356 (Ct.App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972) (damages for negligent misrepresentation that existing mortgage on house was V.A. rather than F.H.A., resulting in cost to buyer being higher).

While New Mexico recognizes recovery for damages under both fraudulent (see UJI 13-1633) and negligent misrepresentation, such misrepresentations, along with innocent misrepresentations in certain circumstances, may give rise to other remedies or defenses. Thus, where a contract is entered into as a result of a misrepresentation - fraudulent, negligent or innocent - the misrepresentation may give rise to a defense to a suit for breach of contract or may give rise to a claim for rescission of the contract. See Snell v. Cornehl, 81 N.M. 248, 466 P.2d 94 (1970) (claim for rescission based on misrepresentation); McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967) (contract induced by fraud is voidable). Typically claims or rescission and defenses to contract based on misrepresentation are determined by the judge and are not submitted to the jury. [Approved, effective November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-1633. Fraud.

A party is liable for damages proximately caused by [his] [her] fraudulent misrepresentation. To prove fraud, ... must prove:
(party claiming fraud)

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 .... to rely on the representation; and
(party claiming fraud)

Fourth, ... did in fact rely on the representation.
(party claiming fraud)
Each of these elements must be proved by clear and convincing evidence.

DIRECTIONS FOR USE

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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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, 13-1701 to 13-1704 as well as private actions under the Insurance Practices Act, 13-1706, and the Unfair Practices Act, 13-1707. The Chapter is self-contained with instructions on proximate cause, 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.

[Adopted, effective November 1, 1991.]

ANNOTATIONS

Compiler's note. - 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.

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.]

DIRECTIONS FOR USE

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 note. - 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.]

DIRECTIONS FOR USE

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, 790 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 note. - 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.

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.

DIRECTIONS FOR USE

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 note. - 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.

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.

DIRECTIONS FOR USE

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 note. - 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.

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.

DIRECTIONS FOR USE

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 708 (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 note. - 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.

DIRECTIONS FOR USE

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.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after 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.

DIRECTIONS FOR USE

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

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-1708. Breach of fiduciary duty.

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).

13-1709. Proximate cause.

A proximate 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.

DIRECTIONS FOR USE

This instruction must be given in every cause of action under Chapter 17.

[Adopted, effective November 1, 1991.]

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 proximate cause of the loss if the insurer acted in reliance upon such conduct. [Approved, effective November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-1711. Affirmative defense; comparative fault.

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.

DIRECTIONS FOR USE

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.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after 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).

DIRECTIONS FOR USE

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.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after 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].

DIRECTIONS FOR USE

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).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-1715. Indemnification.

The amount of any judgment against
....
(plaintiff in this action)
in favor of
....
..
(plaintiff in the other action)

DIRECTIONS FOR USE

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.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

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.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

13-1717. First party coverage; attorney fees.

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, then you may award punitive damages.

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.

DIRECTIONS FOR USE

This instruction must be given in every action under UJI 13-1702, 13-1703 and 13-1704. Because this instruction is complete on the availability of punitive damages in insurance bad faith actions, UJI 13-1827 is unnecessary and should not be given in such cases.

[Adopted, effective November 1, 1991.]

Committee comment. - Bad faith supports punitive damages upon a finding of entitlement to compensatory damages. See 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). Thus, in every case where sufficient evidence supports instructions on compensatory damages for bad faith, the evidence also supports giving an instruction on punitive damages. Because of the fiduciary obligations inhering in insurance contracts and because of concerns arising from the bargaining position typically occupied by the insured and the insurer, there is a more relaxed standard for the award of punitive damages in these cases when compared with other breach of contract cases. Romero v. Mervyn's, 109 N.M. 249, 255, 784 P.2d 992, 998, footnote 3, (1989).

Where the insured has a cause of action under UJI 13-1707 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).

Gross negligence or recklessness also provides an additional basis for recovery of punitive damages by the insured against the insurer on claims for breach of an insurance contract. Romero v. Mervyn's, 109 N.M. 249, 255, 784 P.2d 992, 998 (1989). The committee has drafted this instruction specifically for that case where punitive damages are supported by evidence of bad faith. If gross negligence or recklessness are also relied upon as a separate and additional basis for punitive damages this instruction should be properly expanded.

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. [Approved, effective November 1, 1991.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated July 17, 1991, this instruction is effective for cases filed on or after November 1, 1991.

CHAPTER 18 DAMAGES

Part A Personal Injury Damages; Elements.

Part B Property Damages; Elements.

Part C Miscellaneous Damages.

Part D Wrongful Death.

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.

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

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.

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. 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.

DIRECTIONS FOR USE

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.]

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).

Library references. - 25A C.J.S. Damages §§ 181, 185.

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.

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).

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.

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.

13-1803. Earnings.

The value of lost earnings [and the present cash value of earning capacity reasonably certain to be lost in the future].

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

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].

DIRECTIONS FOR USE

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.

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].

DIRECTIONS FOR USE

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].

DIRECTIONS FOR USE

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).

Library references. - 25A C.J.S. Damages §§ 181, 185.

ANNOTATIONS

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.

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.

DIRECTIONS FOR USE

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).

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. 635, 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, 32-1-46 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).

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).

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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 Directions for Use 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.

25A C.J.S. Damages § 185(6).

13-1810. Loss of services of wife.

The reasonable value of the services of his wife, of which the family has been deprived [and the present cash value of services of his wife, of which the family is reasonably certain to be deprived in the future].

DIRECTIONS FOR USE

This is another element of damages to be included in UJI 13-1802 when the wife has been injured to such an extent that the husband, as the head of the community, has sustained a financial loss. The element may be applicable also in wrongful death as a loss of pecuniary benefits.

When the bracketed portion of the instruction is used, there should also be given to the jury, the instruction in this chapter on future damages requiring discount to present cash value, UJI 13-1822.

Committee comment. - Damages for loss of consortium are not compensable in New Mexico. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961). 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). See Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963).

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).

ANNOTATIONS

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).

13-1811. 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.

DIRECTIONS FOR USE

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).

Library references. - 25A C.J.S. Damages § 184.

ANNOTATIONS

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

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).

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.

DIRECTIONS FOR USE

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.

Library references. - 25A C.J.S. Damages § 186.

ANNOTATIONS

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.

DIRECTIONS FOR USE

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...."

Library references. - 25A C.J.S. Damages § 186.

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

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.

DIRECTIONS FOR USE

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).

Library references. - 25A C.J.S. Damages § 186.

ANNOTATIONS

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 of similar property used during the time reasonably required for the repair of the damaged property.

DIRECTIONS FOR USE

Under proper circumstances this instruction becomes a part of UJI 13-1802 and is inserted in the blank space.

Committee comment. - Damages for loss of use are not recoverable unless, in fact, it was reasonably necessary for the plaintiff to rent other property and the other property was, in fact, rented. No recovery can be made above the rental actually paid out or incurred. If the property is totally destroyed, then damages for loss of use are not recoverable. Curtis v. Schwartzman Packing Co., 61 N.M. 305, 299 P.2d 776 (1956).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

Library references. - 25A C.J.S. Damages § 186.

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

Library references. - 25A C.J.S. Damages § 184.

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 Directions for Use, which read: "Change will need to be made in the use of the pronoun, when the evidence requires."

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].

DIRECTIONS FOR USE

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.

Library references. - 25A C.J.S. Damages § 185.

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

Library references. - 25A C.J.S. Damages § 177 et seq.

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

Library references. - 88 C.J.S. Trial §§ 223, 361.

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

Library references. - 25A C.J.S. Damages § 177 et seq.

ANNOTATIONS

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 .... and has released ....

(name of released defendant) (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)

DIRECTIONS FOR USE

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 adaption 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.

Library references. - 18 C.J.S. Contribution § 1 et seq.

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.

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. Vicarious liability; punitive damages.

The principal [employer] is liable for punitive or exemplary damages only when the principal [employer] has in some way authorized, participated in or ratified the acts of the agent [employee].

DIRECTIONS FOR USE

This instruction should be used when a claim for punitive damages is permitted to go to the jury and the only liability of the principal/employer arises from vicarious liability.

Committee comment. - No definition of "ratified" is felt necessary, but more common words, such as "approved" or "confirmed", are not necessarily sufficiently precise in this context. The particular acts of ratification relied upon should be set forth specifically, in the appropriate case, when setting forth the statement of the issues in UJI 13-302A et seq. The instruction will not be used unless specification of ratification is supported in the evidence and reasonable inference can be made therefrom.

In Jessen v. National Excess Ins. Co., 108 N.M. 625, 776 P.2d 1244 (1989), the New Mexico Supreme Court held that an insurance company was liable for the bad faith of an independent contractor hired to investigate and adjust a first party insurance claim. The court found that the duty of good faith dealing by parties to an insurance contract is a non-delegable duty, breach of which supports the award of punitive damages. Id. at 629, 776 P.2d at 1248. [As revised, effective November 1, 1991.]

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).

13-1827. Punitive damages.

If you find that .... should recover compensation for damages,
(name of party making claim for punitive 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], [willful], [reckless], [wanton], [grossly negligent], [fraudulent] [or] [in bad faith], then you may award punitive damages.

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 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.]

[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.]

[Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's (rights) (safety).]

[Grossly negligent conduct is an act or omission done without the exercise of even slight care under the circumstances.]

DIRECTIONS FOR USE

This instruction is an all-purpose instruction usable in any civil action except where a UJI chapter covering a particular cause of action contains the exclusive instruction on punitive damages, for example, UJI 13-861 (Contracts and UCC Sales) and UJI 13-1718 (Bad Faith).

Bracketed words and definitions should be selected as supported by the evidence. Separate verdicts must be used for punitive damages when there is more than one party against whom punitive damages are sought. UJI 13-1826 applies to vicarious liability.

[Adopted, effective November 1, 1991.]

Committee comment. - Punitive damages cannot be recovered without a recovery of compensatory damages. 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).

Punitive damages are to punish the wrongdoer and to deter similar conduct by others. Colbert v. Journal Publishing Co., 19 N.M. 156, 142 P. 146 (1914).

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 (1989).

The definition of malice in this instruction describes conduct where the defendant not only intended to do the act which is ascertained to be wrongful, but knew it was wrong when he did it. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966); see also Romero v. Mervyn's, 109 N.M. 249, 784 P.2d 992 (1989).

The definition of wanton conduct in this instruction suggests a quality of wrongfulness when the evidence demonstrates conduct committed without concern for the consequences, rather than intentionally, and connotes an "utter indifference to or conscious disregard for the rights of others." See Curtiss v. Aetna Life Ins. Co., 90 N.M. 105, 108, 560 P.2d 169, 172 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

In tort actions, New Mexico has eliminated the distinction between ordinary and gross negligence with the adoption of comparative negligence, insofar as that distinction is used as a basis for deciding liability, a finding of gross negligence is still a sound basis for awarding punitive damages. Ruiz v. Southern Pacific Transp. Co., 97 N.M. 194, 201, 638 P.2d 406, 413 (Ct. App. 1981), cert. quashed, 97 N.M. 242, 638 P.2d 1087 (1981); Valdez v. Cillesen, Sun, Inc., 105 N.M. 575, 734 P.2d 1258 (1987); Jessen v. National Excess Ins. Co., 108 N.M. 625, 628, 776 P.2d 1244 (1989).

While punitive damages need not be reasonably proportional to actual damages, they "must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason and justice." Faubion v. Tucker, 58 N.M. 303, 270 P.2d 713 (1954). See Sierra Blanca Sales Co. v. Newco Indus., Inc., 84 N.M. 524, 505 P.2d 867 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

The factors to be weighed by the jury in addition to other circumstances are the enormity and nature of the wrong and aggravating circumstances. Sweitzer v. Sanchez, 80 N.M. 408, 456 P.2d 882 (Ct. App. 1969). The award for punitive damages must not be "disproportionate to the circumstances". There is no vicarious liability for punitive damages in the absence of participation, authorization or ratification or where there is imposed upon a party a duty which has been recognized as non-delegable and whose breach supports the recovery of punitive damages. Fredenburgh v. Allied Van Lines, 79 N.M. 593, 446 P.2d 868 (1968); Jessen v. National Excess Ins. Co., 108 N.M. 625, 776 P.2d 1244 (1989).

Punitive damages against more than one party must be separately stated. Vickery v. Dunivan, 59 N.M. 90, 279 P.2d 853 (1955). [As revised, effective November 1, 1991.]

ANNOTATIONS

Compiler's note. - 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.

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).

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).

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).

But nominal damages insufficient for exemplary damages. - "Nominal damages" is a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages, and thus is insufficient to support an award of exemplary damages. Christman v. Voyer, 92 N.M. 772, 595 P.2d 410 (Ct. App. 1979).

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).

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).

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).

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 §§ 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.

25A C.J.S. Damages § 188.

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

Plaintiff brings this lawsuit as personal representative of ...., the deceased. A statute of this state allows damages to be awarded for surviving beneficiaries should death or related damages as described in this instruction be proximately caused by the wrongful act, neglect or default of another. [In this case, the surviving beneficiaries are ....

...]

If you should decide for the plaintiff on the question of liability, you must then fix the amount of damages which you deem fair and just, including in your award compensation for any of the following elements of damages proved by the plaintiff:

(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; and

(3) The monetary worth of the life of the deceased.

(4) The mitigating or aggravating circumstances attending the wrongful act, neglect or default.

In determining the monetary worth of the life of the deceased, you should consider the age, earning capacity, health, habits and life expectancy of the deceased.

You may also consider the loss to the beneficiaries of expected benefits that have a monetary value. While the presence or absence of a measurable monetary loss is a factor for consideration, damages may be awarded even where monetary loss to the surviving beneficiaries cannot be shown.

In considering loss of earnings or earning capacity, deductions must be made from gross earnings or earning capacity for income taxes, social security taxes, other taxes and personal living expenses of the deceased. Damages for future loss of money are paid in a lump sum and, therefore, a reasonable discount must be made for the future earning power of that sum.

It is not permissible for you to be influenced by the grief or sorrow of the family or the loss of the deceased's society to the family. Similarly, 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 such damages as may be fair and just 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 upon speculation, guess or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice.

DIRECTIONS FOR USE

If there is no claim supported by the evidence for a given element of damages, e.g., pain and suffering, then that element must be stricken and the paragraphs stating the elements must be appropriately renumbered. This instruction is complete in and of itself. UJI 13-1802 is not necessary and should not be used in conjunction with this instruction. It is contemplated that the surviving beneficiaries would be identified by the trial court

only when relevant and material to the fact issue of loss to the beneficiaries of expected benefits. The comparative negligence of any statutory beneficiary would be properly handled under the special verdict, UJI 13-2220, with the effect upon distribution to be determined as a matter of law.

Committee comment. - The controlling statute is 41-2-3, NMSA 1978. The controlling case law includes Stang v. Hertz Corp., 81 N.M. 69, 463 P.2d 45 (Ct. App. 1969), aff'd, 81 N.M. 348, 467 P.2d 14 (1970) (damages for pain and suffering; the reasonable expenses of necessary medical care and treatment; and substantial damages even where monetary loss to the surviving beneficiaries cannot be shown); 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) (the reasonable expenses of funeral and burial); Lidan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972) (loss to the beneficiaries of expected beneficial services that have a monetary value); and, generally, see Baca v. Baca, 81 N.M. 734, 472 P.2d 997 (Ct. App. 1970), and Varney v. Taylor, 77 N.M. 28, 419 P.2d 234 (1966), later appeal, 79 N.M. 652, 448 P.2d 164 (1968), 81 N.M. 87, 463 P.2d 511 (1969).

In Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990) the New Mexico Supreme Court held that the mitigating or aggravating circumstances attending the wrongful act, neglect or default is a factor to be considered by the jury in setting compensatory damages under the wrongful death act. Id. at 467, 797 P.2d at 256. The court relied upon the containment of this language within the damage section of the Wrongful Death Act, N.M.S.A. 1978, 41-2-3 (Repl. Pamp. 1989) and the purpose of the wrongful death action to promote safety by making negligence that causes death costly to a wrong doer. "Under our fault system, there is a policy of deterrence associated with responsibility for compensatory damages. This fact is at the heart of fault versus no-fault policy considerations. It is a question separate from that of punitive damages." Id. at 467, 797 P.2d at 256. [As revised, effective November 1, 1991.]

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).

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).

ANNOTATIONS

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.

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.

DIRECTIONS FOR USE

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).

Library references. - 25A C.J.S. Damages §§ 181, 185; 25A Death § 90.

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.

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.

CHAPTER 19 MISCELLANEOUS MATTERS

Part A Miscellaneous Matters.

Part B No Instructions Drafted.

PART A MISCELLANEOUS MATTERS

13-1901. Two or more plaintiffs.

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.]

DIRECTIONS FOR USE

This instruction should be used only when there are multiple parties plaintiff and the issues relating to recovery by each plaintiff are separate and distinct. It would not be applicable, for example, in cases where it would be inconsistent for a jury to find for less than all of multiple plaintiffs seeking damages arising out of the same occurrence. The bracketed second paragraph applies when some of the instructions apply to less than all of the plaintiffs.

[As amended, effective January 1, 1987.]

13-1902. Two or more defendants.

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.

DIRECTIONS FOR USE

This instruction should be used when there are multiple defendants and the issues relating to liability to the plaintiff are different among the defendants. It would not be applicable, for example, in cases involving vicarious liability of one of two or more defendants.

[As amended, effective January 1, 1987; 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 second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75B Am. Jur. 2d Trial § 1283.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 A.L.R.2d 524.

88 C.J.S. Trial § 374.

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.

DIRECTIONS FOR USE

This instruction may be given when the court considers it appropriate.

[As amended, effective January 1, 1987.]

Committee comment. - Failure to give this instruction was held not to constitute an abuse of discretion in 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).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75B Am. Jur. 2d Trial § 1451.

89 C.J.S. Trial § 462.

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.

DIRECTIONS FOR USE

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 Directions for Use.

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.

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.

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 note. - 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.

DIRECTIONS FOR USE

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).

Library references. - 88 C.J.S. Trial §§ 297, 298, 320, 322.

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

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).

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

Library references. - 88 C.J.S. Trial §§ 315, 316, 363 to 365.

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 Directions for Use, which read: "The pronouns in this instruction will need to be changed under certain circumstances."

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.

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

Library references. - 88 C.J.S. Trial §§ 298, 320, 322.

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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).

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).

ANNOTATIONS

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. No damages unless liability.

You are not to discuss damages unless you have first determined that there is liability.

DIRECTIONS FOR USE

This instruction is to be given in every case where the issue of damages is submitted to the jury.

Committee comment. - See UJI 13-1801 and the comment thereto.

It is the intent of the committee that this subject matter be covered twice, due to the natural sympathy for an injured plaintiff and to expedite the trial of the case.

This instruction was cited in the following cases from the New Mexico appellate courts, to wit: Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (Ct. App. 1977); Martinez v. Schmick, 90 N.M. 529, 565 P.2d 1046 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (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); 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); Demers v. Gerety, 87 N.M. 52, 529 P.2d 278 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974); 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) and Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

Library references. - 88 C.J.S. Trial §§ 298, 320, 322.

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 (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).

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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, 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 Uniform Jury Instruction 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 § 466 states:

"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".

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

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.]

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.

DIRECTIONS FOR USE

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

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.

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).

13-2105. Failure of party to testify.

No instruction to be given.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

Library references. - 65A C.J.S. Negligence §§ 285, 286.

13-2108. Highest degree of care.

No instruction to be given.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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. Loss of consortium; damages.

No instruction to be given.

DIRECTIONS FOR USE

This is not a recognized cause of action in the state of New Mexico.

Committee comment. - It has been held that the wife has no action for loss of consortium, except in the case of intentional or malicious injury. The court also recognized a split of authority on the question as to whether the right should, under modern precepts, be continued in the husband, but it seems that the action would be denied. Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963); Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

The *Roseberry* decision denied an action for loss of consortium on behalf of the wife where her husband was negligently injured on the basis of:

(a) community property concepts;

(b) modern concepts;

(c) possible double recovery of damages; and

(d) the legislature hasn't acted.

Library references. - 41 C.J.S. Husband and Wife § 117.

Parents may not recover for lost consortium from their child in negligence action. Hoskie v. United States, 666 F.2d 1353 (10th Cir. 1981); Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 26 to 29.

Necessity of physical injury to support cause of action for loss of consortium, 16 A.L.R.4th 537.

Negligence of spouse or child as barring or reducing recovery for loss of consortium by other spouse or parent, 25 A.L.R.4th 118.

When must loss-of-consortium claim be joined with underlying personal injury claim, 60 A.L.R.4th 1174.

25A C.J.S. Damages §§ 183, 185(3).

13-2113. Negligence of outside agency.

No instruction to be given.

DIRECTIONS FOR USE

Intervention of outside agency instructions is a confusion of proximate cause and such instructions should not be given in New Mexico.

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 proximate 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 proximate 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). 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.

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).

ANNOTATIONS

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

Library references. - 88 C.J.S. Trial §§ 315, 316, 363 to 365.

ANNOTATIONS

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.

65A C.J.S. Negligence § 301.

13-2121. Witness; credibility of special.

No instruction to be given.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

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.

DIRECTIONS FOR USE

See Ruiz v. Southern Pac. Transport Co., 97 N.M. 197, 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
$................................
...
....
Forepers
on

DIRECTIONS FOR USE

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.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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. - 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

DIRECTIONS FOR USE

The formal caption of the lawsuit should be added to the top of each instruction 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.]

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".

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

DIRECTIONS FOR USE

The formal caption of the particular case will need to be added to the instruction 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 parties plaintiff 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 is used.

[As amended, effective November 1, 1991.]

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".

13-2204. Verdict for defendants; multiple parties.

We find for all the defendants.

....
....

Foreperson

DIRECTIONS FOR USE

See directions for use, 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

DIRECTIONS FOR USE

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

DIRECTIONS FOR USE

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

DIRECTIONS FOR USE

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".

[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, or multiple parties, plaintiff and the award is to be joint as to the plaintiffs; 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. However, if there are multiple parties plaintiff and the award could be different for each plaintiff, then, of course, separate verdict forms will have to be issued for each plaintiff and there will need to be added the name of each particular plaintiff on each separate verdict form. In like manner, if there are multiple defendants and the award for the plaintiff or plaintiffs could be against different defendants, but not all, or in varying amounts, then, of course, separate verdict forms will need to be submitted for the defendants. If the counterclaim is not that of all defendants or if the amount is different for the defendants, then, of course, separate verdict forms will be needed to cover that situation.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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. - 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

DIRECTIONS FOR USE

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, probably, separate forms of verdict should be submitted to the jury, but all forms of verdicts submitted should each have the separate, and like, caption of the case.

[As amended, effective November 1, 1991.]

Committee comment. - See UJI 13-2207.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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. - 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

DIRECTIONS FOR USE

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. Verdict forms UJI 13-2207, 13-2208 and 13-2209 are, in effect, 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 will be required.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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. - 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

DIRECTIONS FOR USE

In preparing this form of verdict for jury presentation, first there will be the caption of the case and then the title can be completed, as indicated above.

Such a 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.]

Committee comment. - See committee comments to verdict forms, UJI 13-2207 through 13-2209.

Three other forms of verdict are possible in the situation which justifies use of UJI 13-2210, above. UJI 13-2209 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 would be used when a verdict could be rendered for the plaintiff alone and against the defendant. UJI 13-2208 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.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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. - 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

DIRECTIONS FOR USE

Use this verdict form (in addition to others) on a straight, simple cross-claim case.

[As amended, effective November 1, 1991.]

Committee comment. - Usually the cross-claim situation involves a claim for judgment over.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-2212. Verdict for cross-defendant.

We find for the defendant .... on the cross-claim.

....

Foreperson

DIRECTIONS FOR USE

This type of form will be used when no dollar amount is involved.

[As amended, effective November 1, 1991.]

Committee comment. - In indemnification claims, usually a dollar amount is not claimed.

ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, substituted "Foreperson" for "Foreman".

13-2213. Verdict for third-party plaintiff.

....
....
Foreperson

DIRECTIONS FOR USE

When appropriate, this form, together with other instructions as are applicable, shall be submitted to the jury in order that all issues between the parties may be determined.

[As amended, effective November 1, 1991.]

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, again, the court will enter the proper judgment, but it is not for the jury to determine a dollar amount and, therefore, 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".

13-2214. Verdict for third-party defendant.

We find for the third-party defendant.
....
....
Foreperson

DIRECTIONS FOR USE

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

DIRECTIONS FOR USE

This form of verdict will be used when plaintiff alleges joint liability, which is denied, and the evidence is such as to permit the jury to decide the issue.

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.]

Committee comment. - This form of verdict may also be adapted for use where there are multiple plaintiffs 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. The court should draft other proper possibilities in cases of multiple parties.

Of course, 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.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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. - 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

DIRECTIONS FOR USE

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, 41-3-1 NMSA 1978 et seq.

This form of verdict may also be adapted for use in case there are multiple defendants still remaining in the case and they are found to be joint tortfeasors.

[As amended, effective November 1, 1991.]

Committee comment. - When settlement has been made, either before trial or in the course of trial by some, but not all defendants and the jury is so informed, this instruction, with one for the defense outright, is proper.

This form of verdict was approved in the case of Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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. - 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

DIRECTIONS FOR USE

The specific questions to be propounded to the jury will be set forth one after the other, leaving room following the question so that the jury can make proper answer. 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.]

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".

13-2218. Comparative negligence; no comparison among defendants or non-parties; general verdict.

If you find that plaintiff's injury was proximately caused by a combination of negligence of the defendant and contributory 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 contributory negligence. This gives you the amount of damages to be awarded to plaintiff in your verdict.

DIRECTIONS FOR USE

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 Directions for Use under UJI 13-2220 regarding choice of verdict forms and modifications that may be necessary.

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

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.

13-2219. Comparative negligence; comparison among defendants or non-parties; general verdict.

If you find that plaintiff's injury was proximately 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 proximate cause of damage. The total of the percentages must equal 100% for the persons whose negligence did proximately 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).

DIRECTIONS FOR USE

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 Directions for Use under UJI 13-2220 regarding choice of verdict forms and modifications that may be necessary.

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).

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).

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 proximate 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 proximate cause of damage.

....
....%
(Name)

....
....%
(Name)

....
....%
(Name)

100% 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

DIRECTIONS FOR USE

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.]

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.

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 $
..
....

..
....
Fo reperson

[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.