

Uniform Jury Instructions-Civil Chapter

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Chapter 1

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 Civ. 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 Civ. 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 an 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 1980. 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 Erwin 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 D. 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 D. 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 has been chairman since 1982. 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.

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 facts in each particular case.

The masculine singular has generally been used throughout these instructions, but this does not mean that the jury is to be so instructed. On the contrary, pronouns should be changed in the instructions read to the jury as the situation requires.

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.

Chapter 1

Instructions Before Trial

Instruction

- 13-101. Introduction.
- 13-101. Voir dire orientation statement.
- 13-102. Oath to jurors on voir dire examination.
- 13-103. Voir dire explanation.
- 13-104. Voir dire questioning by court.
- 13-105. Oath to empaneled jury.
- 13-106. Admonitions to jury on conduct.
- 13-107. The rule of exclusion.
- 13-108. Opening statement.

13-101. 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 veniremen 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 veniremen, 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.]

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 his 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

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 76 Am. Jur. 2d Trial §§ 1072, 1228.

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.

ANNOTATIONS

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 954.

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.

The rule of exclusion has been invoked in this case and, therefore, all of the witnesses will be required to leave 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 his cause, e.g., an agent who handled the transaction being litigated or an expert witness.

[As amended, effective January 1, 1987.]

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.

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 case. After the conclusion of the plaintiff's case, the defendant will then submit his 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 his 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 his right to opening statement until the commencement of the defendant's case.

[As amended, effective January 1, 1987.]

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).

ANNOTATIONS

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.

Chapter 2 Instructions During Trial Instruction

- 13-201. Introduction.
- 13-201. Recess instruction.
- 13-202. Discussion of exhibits prohibited.
- 13-203. Deposition testimony.
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- 13-210. Evidence for a limited purpose.
- 13-211. Oath to witness.
- 13-212. Oath to interpreter.
- 13-213. Expert testimony.

13-201. 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.]

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 601.

ANNOTATIONS

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

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

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.

ANNOTATIONS

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 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 he 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.]

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); *Waldrup 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.

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.

ANNOTATIONS

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 irresponsible 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.).

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 as he takes 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.]

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.

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:

ANNOTATIONS

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).

ANNOTATIONS

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. Blutworth, 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. Blutworth," see 13 N.M.L. Rev. 703 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial §§ 668, 691, 857.

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

Instruction

13-301. Introduction.

13-301. Preliminary statement.

Part A. STATEMENT OF ISSUES, BURDEN OF PROOF

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

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

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

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

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

13-302F. The special verdict form questions presented for the jury to answer.

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

Part B. BURDEN OF PROOF

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

Part C. CAUSATION

13-305. Proximate cause.

13-306. Independent intervening cause.

Part D. EVIDENCE

13-307. Rules of evidence.

13-308. Circumstantial evidence.

13-301. 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. - 75 Am. Jur. 2d Trial §§ 646 to 650.

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

COMPILER'S 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 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 foreman 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 foreman 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 foreman 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 foreman 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 foreman 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".

.....
..

Foreman

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.

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 his 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, I mean

(theory(ies) of recovery by name)

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 his 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.]

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).

ANNOTATIONS

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.

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. - 75 Am. Jur. 2d Trial §§ 754 to 757.

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).

ANNOTATIONS

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).

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

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 746.

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).

ANNOTATIONS

Inferences may be drawn from circumstantial evidence. *Ulibarri v. Village of Los Lunas*, 79 N.M. 421, 444 P.2d 606 (Ct. App. 1968); *Andrus v. Gas Co.*, 110 N.M. 593, 798 P.2d 194 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 848.

Chapter 4 Agency; Respondeat Superior Instruction

- 13-401. Introduction.
- 13-401. Agent; principal; definition.
- 13-402. Liability of principal.
- 13-403. Employee-employer; definition (master and servant)
- 13-404. Independent contractor.
- 13-405. Employer sued; no issue of employment, scope of employment or agency.
- 13-406. Employer sued; employment and scope of employment denied.
- 13-407. Scope of employment; definition.
- 13-408. Apparent authority; reliance.
- 13-409. Corporation acts through employees.
- 13-410. Joint venture.
- 13-411. Partnership.
- 13-412. Deviation.
- 13-413. Family purpose doctrine.

13-401. 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

COMPILER'S 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 agent when:

1. The agent was acting within the scope of his 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.

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 his agent and the liability of a master for the tortious act of his 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 his 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 his 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 his agent only when his 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.

ANNOTATIONS

Prima facie showing of no right to control. - Where evidence established a prima facie showing that defendant had the right to direct the result to be accomplished by defendant but did not have the right to control the manner in which the details of the work were to be performed, there were no genuine issues of material fact as to the applicability of either the doctrine of respondeat superior or the law of agency, and since

plaintiff had not presented any evidence to cast at least a reasonable doubt upon defendant's evidence, defendant was entitled to summary judgment as a matter of law on plaintiff's cause of action. *Savinsky v. Bromley Group, Ltd.*, 106 N.M. 175, 740 P.2d 1159 (Ct. App. 1987).

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.

ANNOTATIONS

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

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 him 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".

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

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 his employee committed or performed within the course and scope of his employment.

ANNOTATIONS

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)
employer)

(Name of

and that he was acting within the scope of his 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 was not acting within the scope of his employment

(Name of employer)

at the time of the occurrence, then is not liable to plaintiff

(Name of employer)

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.]

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

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).

ANNOTATIONS

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).

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

13-408. Apparent authority; reliance.

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 [its] statements, acts or conduct led the

(Name of alleged employer)

plaintiff to reasonably believe

..... **was defendant's**

(Name of apparent employee)

employee.

[No direct communication between plaintiff andemployer

(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.]

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.

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 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 employment, to give the separate UJI 13-406 and 13-407 instruction.

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

ANNOTATIONS

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.

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 § 953.

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 proprietary 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.

ANNOTATIONS

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.

ANNOTATIONS

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

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

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

13-413. Family purpose doctrine.

Chapter 5 Animals Instruction

- 13-501. Introduction.
- 13-501. Trespassing livestock.
- 13-502. Legal fence.
- 13-503. Livestock on fenced highway.
- 13-504. Riding animals on highway after dark.
- 13-505. Livestock on unfenced highway.
- 13-506. Liability of dog owner.

13-501. 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 land] [that the defendant drove his animals on plaintiff's land] [that the defendant willfully turned his 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).

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.

ANNOTATIONS

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.

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).

ANNOTATIONS

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).

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.

ANNOTATIONS

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.

ANNOTATIONS

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).

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

Instruction

- 13-601. Introduction.
- 13-601. Passenger - Train, plane, bus, taxi; definition.
- 13-602. Passenger - Elevator, escalator; definition.
- 13-603. Duty of carrier; boarding or alighting.
- 13-604. Duty of carrier; facilities.
- 13-605. Ordinary care.

13-601. 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

13 C.J.S. Carriers § 544.

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.

ANNOTATIONS

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).

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 § 716.

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

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 § 717.

13-605. Ordinary care.

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

[As amended, effective January 1, 1987.]

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

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

ANNOTATIONS

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

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

Chapter 7 Condemnation; Eminent Domain Instruction

13-701. Introduction.

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

13-702. Power to condemn; constitution.

13-703. Full taking; fair market value.

13-704. Partial taking; fair market value.

13-705. Partial taking; damages/benefits to land remaining.

- 13-706. Entire taking of leasehold; damages to landlord.
- 13-707. Entire taking of leasehold; damages to tenant.
- 13-708. Partial taking of leasehold; damages to landlord.
- 13-709. Partial taking of leasehold; damages to tenant.
- 13-710. Damages without taking.
- 13-711. Fair market value; definition.
- 13-712. Fair rental value; definition.
- 13-713. Present value; determination; discount.
- 13-714. Consideration of land uses.
- 13-715. Expert testimony.
- 13-716. Landowner's or tenant's value testimony.
- 13-717. Comparable sales.
- 13-718. Minimum and maximum values.
- 13-719. Access; loss of.
- 13-720. Monetary interest on amount of award.
- 13-721. Remote and speculative elements.
- 13-722. Special responsibility of jury.
- 13-723. Jury view.
- 13-724. Verdict in condemnation-eminant domain cases.

13-701. 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.

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

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.

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.

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 his interest, as parties are always entitled to instructions on theories of the case when supported by the evidence.

ANNOTATIONS

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 A.L.R.3d 488.

30 C.J.S. Eminent Domain § 289.

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 proposedproject 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

(here state name of condemning authority)

benefit the remaining property in any of the following particulars:

(NOTE: The trial lawyers and judge will need here to insert the particular elements of special damages, depending upon the trial proof, such as:

- (a) Improved access;
- (b) Increased or decreased traffic flow;
- (c) Desirability for commercial use.)

This determination should not change or, in any way, affect the money damages to be paid to the owner for the property actually taken.

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

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).

ANNOTATIONS

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.

ANNOTATIONS

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).

ANNOTATIONS

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.

ANNOTATIONS

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).

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

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).

ANNOTATIONS

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

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 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 his opinion as to the fair market value of his 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.

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

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.

DIRECTION 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).

ANNOTATIONS

Party may not object where instruction modified to accommodate his evidence. - Having presented evidence of another land sale by the condemnor, the condemnee cannot then complain that the sale was an unfair measure of value, or that this instruction should not have been modified so as to explain to the jury how they should consider such evidence. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

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

13-719. Access; loss of.

Themay control, regulate and desig-

(insert name of condemning authority)

nate 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 circuitry 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. Danfelter, 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

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.

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".

13-722. Special responsibility of jury.

The owner of property is usually reluctant to have his property taken. Thus, he is not a willing seller. Nevertheless, he is entitled to recover for damage to his 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.

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

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.

ANNOTATIONS

Jury may also use knowledge from view as independent evidence. - Juries are permitted to use their knowledge gained by a view of the property not only to interpret the evidence offered in the case, but also as independent evidence of the facts as these appear to them individually on the view. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 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 \$.....**

.....
.....

Foreman

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.

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

30 C.J.S. Eminent Domain § 290.

Chapter 8

Contracts

Instruction

- 13-801. Introduction.
- 13-801. Statement of issues; counterclaim; burden.
- 13-802. Express contracts; definition.
- 13-803. Implied contracts; definition.
- 13-804. Quasi-contract; definition.
- 13-805. Acceptance; formation of contract.
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- 13-828. Verdicts in contract cases.
- 13-828A. Verdict for plaintiff on complaint.
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Appendix 1. Contracts; counterclaim.

Appendix 2. Contracts; recoupment; counterclaim.

Appendix 3. Contracts; incapacity; undue influence; mental weakness.

13-801. Introduction.

The general format of these instructions should demonstrate the method whereby an action in contract is fitted into the mechanics of New Mexico's Uniform Jury Instructions.

Most contractual issues are for the determination of the trial court and not for jury determination. New Mexico has been with the majority of jurisdictions which have consistently and traditionally held the interpretation and construction of contracts to be a matter of law. The inclusion of instructions in this chapter certainly does not mean that every issue is for the jury. On the contrary, most issues are determined as a matter of law, and not as a question of fact.

This group of instructions is not intended to be all-inclusive. Actions arising out of the Uniform Commercial Code are statutory and appear in a separate chapter later in the pamphlet.

Specifically included in this chapter are contractual issues which have been determined to be triable by a jury. Contracts are multitudinous in subject matter and variety; and it, therefore, should be readily apparent that no effort has been made to encompass every kind of situation. When necessary, the trial judge should not hesitate to include other subject matters when properly presented by the trial lawyers.

Particular attention must be given to the directions for use and the committee comments, as compliance with the recommendations, suggestions and observations will save time and prevent many errors.

When the instructions are drafted by trial counsel, they should be personalized in order to be more meaningful to a jury. The names and dates should be specified. Pronouns, gender, plurality, etc., should all be particularized according to the facts of the particular case before submission to the court.

13-801. Statement of issues; counterclaim; burden.

This is a contract case in which each party claims to be entitled to money damages from the other.

The parties admit the making of the contract to this extent:

(NOTE: Here summarize the basic terms of the contract not controverted, otherwise insert a general statement as to the nature of the contract, such as this example:

This lease is a contract. The plaintiff leased his 25,000 acre ranch to the defendant for one (1) year at an annual rental of one dollar and fifty cents (\$1.50) per acre, that is thirty-seven thousand five hundred dollars (\$37,500), with this payment to be made at the end of the lease term. Further, during the lease term defendant at his own cost is to build five miles of fence on the ranch.)

Plaintiff claims:

(NOTE: Here set forth, in simple form, plaintiff's claims supported by the evidence, such as this example:

1. That defendant wrongfully refuses to perform the contract provision requiring him to pay plaintiff the thirty-seven thousand five hundred dollars (\$37,500) rent provided in the lease contract.
2. That defendant wrongfully refuses to perform the contract provision requiring him to build five miles of fence, which refusal damaged plaintiff five thousand five hundred dollars (\$5,500).

The defendant denies the plaintiff's claims and asserts the following defenses:

(NOTE: Here set forth, in simple form, such affirmative defenses as are supported by the evidence, such as this example:

That plaintiff waived the building of the five miles of fence because neither he nor defendant could obtain the wire at a cost within the contemplation of the parties at the time of the making of the contract.)

The defendant claims:

(NOTE: Here set forth, in simple form, defendant's claims supported by the evidence, such as this example:

1. That plaintiff negligently and materially misrepresented that the ranch could carry 1,000 steers when, in fact, it would only carry 500; by reason of which misrepresentation defendant has been damaged in the amount of fifteen thousand dollars (\$15,000).
2. That plaintiff negligently and materially misrepresented that the windmills were in good working condition when, in fact, defendant had to repair them to his damage in the amount of fifteen thousand dollars (\$15,000).
3. That plaintiff negligently and materially misrepresented that the dirt tanks were adequate for water storage for the cattle when in fact defendant had to clean the silt out of them with a bulldozer to his damage in the amount of seven thousand five hundred dollars (\$7,500).

The plaintiff denies the defendant's claims and asserts the following:

(NOTE: Here set forth, in simple form, such affirmative defenses as are supported by the evidence, such as:

1. That defendant accepted possession of the ranch in an "as is" condition without any contractual obligation on plaintiff's part that the windmills would be in any particular condition other than "subject to normal wear and tear".
2. That defendant accepted possession of the ranch in an "as is" condition without any contractual obligation on plaintiff's part that the dirt tanks would hold any more storage water than a view of them would indicate.
3. That the lack of normal rainfall after defendant took possession of the ranch resulted in an inadequate growth of grass, so that the ranch would only carry 500 head of steers; all of which was without fault of plaintiff.)

Each party has the burden of proving a claim or defense on which (he) (she) relies.

DIRECTIONS FOR USE

In some cases, the respective admissions or stipulations of the parties may need to be itemized in the summarization of the basic terms of the contract.

Committee comment. - "Recoupment" is an affirmative defense, arising out of the transaction upon which the plaintiff sued, and goes to the reduction, mitigation or abatement of plaintiff's damages. 80 C.J.S. Setoff and Counterclaim § 2. Although recoupment is not listed as an affirmative defense under Rule 1-008C, N.M.R. Civ. P., it may be so used. 2A Moore's Federal Practice, Paragraph 8.27[3], p. 1855. Recoupment may also be used as a compulsory counterclaim under Rule 1-013A, N.M.R. Civ. P. 3 Moore's Federal Practice, Paragraph 13.02, p. 13-53 and Paragraph 13.09, p. 13-293. Setoff arises out of a transaction different from that upon which the plaintiff sued and is a permissive counterclaim under Rule 1-013B, N.M.R. Civ. P. However used, the party pleading recoupment, whether defensively or by counterclaim, would have the burden of proof on that issue. J.A. Silversmith, Inc. v. Marchiondo, 75 N.M. 290, 404 P.2d 122 (1965); Allsup v. Space, 69 N.M. 353, 367 P.2d 531 (1961).

No instruction has been drafted concerning the construction and interpretation of contracts for the reason that it is a rare case where the jury makes such a determination. In the absence of extrinsic evidence being admitted, the construction, interpretation and determination of ambiguities in written contracts are for the court, and not for the jury. Southwest Motel Brokers, Inc. v. Alamo Hotels, Inc., 72 N.M. 227, 382 P.2d 707 (1963); Neher v. Viviani, 15 N.M. 460, 110 P. 695 (1910). See Jones v. International Union of Operating Eng'rs, 72 N.M. 322, 383 P.2d 571 (1963); Jernigan v. New Amsterdam Cas. Co., 69 N.M. 336, 367 P.2d 519 (1961); Stewart v. Brock, 60 N.M. 216, 290 P.2d 682 (1955); 17A C.J.S. Contracts § 616. Where extrinsic evidence is necessary to effect determination of an ambiguity, such may require submission to the jury. Jaeco Pump Co. v. Inject-O-Meter Mfg. Co., 467 F.2d 317 (10th Cir. 1972); Hartford Steam Boiler Inspection & Ins. Co. v. Schwartzman Packing Co., 423 F.2d 1170 (10th Cir. 1970); Tipton v. Clower, 67 N.M. 388, 356 P.2d 46 (1960); Marchant v.

McDonald, 37 N.M. 171, 20 P.2d 276 (1933); Smith v. Maljamar Oil & Gas Corp., 35 N.M. 255, 293 P. 967 (1930); 17A C.J.S. Contracts § 617.

Contract cases are most properly defended by a pleading incorporating a counterclaim. Recoupment, while not the best way of pleading, is not wholly wrong. This instruction adopts the better way of presenting the issues. If recoupment is the method of pleading used, nonetheless, such will, in this instruction, be treated as a counterclaim.

13-802. Express contracts; definition.

An [express] contract is an agreement in which all of the terms of an existing offer are clearly and positively accepted without condition or qualification. The minds of all of the parties must have met with the intention that each be bound by the terms of the contract.

DIRECTIONS FOR USE

Bracketed material is to be used only when the "express" character of the contract is an issue. An agency instruction should also be given if the evidence requires.

Committee comment. - There must be a meeting of the minds. Trujillo v. Glenn Falls Ins. Co., 88 N.M. 279, 540 P.2d 209 (1975); Lamonica v. Bosenberg, 73 N.M. 452, 389 P.2d 216 (1964). Acceptance of all of the terms of the contract must be unconditional, clear and positive with an intent to be bound thereby. Silva v. Noble, 85 N.M. 677, 515 P.2d 1281 (1973); Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966); Polhamus v. Roberts, 50 N.M. 236, 175 P.2d 196, 170 A.L.R. 991 (1946); 17 C.J.S. Contracts § 1(1)a; 17 Am. Jur. 2d Contracts § 1; Restatement of Contracts § 1.

13-803. Implied contracts; definition.

An implied contract is an agreement in which the parties by a course of conduct [and custom and usage] have shown an intention to be bound by such agreement.

DIRECTIONS FOR USE

This instruction is to be used where an implied contract, i.e., implied in fact, is an issue, even though formation of an express contract is also an issue. It should be used in cases where there is no express consideration agreed upon and recovery is based on quantum meruit.

Committee comment. - An implied contract can arise by a course of conduct or through custom and usage, absent an agreed consideration necessary for an express contract. 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 evidence to support an implied contract may be either written or oral or by conduct, or a combination thereof.

Restatement of Contracts § 5, Comment (a). In absence of proof of consideration in an express contract, recovery of reasonable value of services or goods, or in quantum meruit, can be had on implied contract. *Panhandle Irrigation, Inc. v. Bates*, 78 N.M. 706, 437 P.2d 705 (1968); *State ex rel. Gary v. Fireman's Fund Indem. Co.*, 67 N.M. 360, 355 P.2d 291, 84 A.L.R.2d 1072 (1960). The distinction between contract, quasi-contract, implied contract and quantum meruit recovery is primarily in the label, and not in result. *Id.* 98 C.J.S. Work and Labor § 37; 66 Am. Jur. 2d Restitution and Implied Contracts § 160.

ANNOTATIONS

Instruction proper where negligence predicated upon agreement. - Where a suit for negligence may be predicated upon an agreement between the parties, either express or implied, the giving of this instruction is not error. *Sanchez v. Martinez*, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

Instruction improper in professional services contract. - There is no cause of action based on implied warranty for a particular result in a professional services contract; therefore, it is error to instruct on implied warranty in an action against a surgeon for damages arising from unsatisfactory plastic surgery. *Toppino v. Herhahn*, 100 N.M. 585, 673 P.2d 1318 (Ct. App.), modified, 100 N.M. 564, 673 P.2d 1297 (1983).

Instruction on statute of frauds in negligence action based upon implied contract. - Where the plaintiff's cause of action is solely in contract based on an oral agreement which cannot be performed within one year, and there is no evidence of partial performance or memoranda confirming the agreement, the statute of frauds may constitute a complete defense, but where the plaintiff submits the case to the jury on a tort theory based upon the alleged negligent failure of the defendant to perform a duty imposed by an implied contract, denial of requested instructions on the statute of frauds is not error. *Sanchez v. Martinez*, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

13-804. Quasi-contract; definition.

When one accepts and retains a benefit under circumstances where it would not be fair to keep the benefit without payment of its reasonable value, the law requires that payment be made. [In this case the [plaintiff] [defendant] is entitled to be paid for the

.....

(State benefit for which payment is to be made)

You are to determine whether a benefit was received by defendant and the reasonable value of the benefit received, if any.

DIRECTIONS FOR USE

The bracketed material is to be used if the court finds that there was a benefit received and that the law created a contract.

An exception to the general law applies in mail cases, as the law now requires no payment for uninvited matters that come in the mail, even if they should have some value. There are further exceptions, specifically where the statute requires that a party may not recover unless he first has the required license and pleads the same. This applies with reference to contractors, realtors, etc.

Committee comment. - The difference between UJI 13-804 and UJI 13-803. Implied contracts; definition, is that, in the latter, the jury decides all issues, while, in the former, the only issue is that of the value of the benefit. New Mexico has no case on quasi-contract. See Restatement of Contracts § 5, Comment a.; 17 C.J.S. Contracts § 6; 66 Am. Jur. 2d Restitution and Implied Contracts § 11. "Reasonable value" is the same as "reasonable price", and the same recovery would be had in quantum meruit. Panhandle Irrigation, Inc. v. Bates, 78 N.M. 706, 437 P.2d 705 (1968); State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 355 P.2d 291, 84 A.L.R.2d 1072 (1960); 22 Am. Jur. 2d Damages § 78; Restatement of Contracts § 347; 98 C.J.S. Work and Labor § 65b.

13-805. Acceptance; formation of contract.

An offer to make a contract can be accepted in writing, by spoken words, by action and conduct or by a combination of such methods [unless a particular method of acceptance is required by the offer].

[The offer may be accepted by the same method of communication used in making the offer. A different method of acceptance may be used if the method is such as may be reasonably expected by one in the position of the parties.]

[The offer must be accepted before it is withdrawn and notice of the withdrawal is given.]

[A reply to an offer which has qualifications or requires performance of a new condition is a counteroffer and is not an acceptance.]

[An acceptance dependent upon the happening of an event becomes effective when that event happens.]

[Silence may be an acceptance if [a party with reasonable opportunity to reject an offer takes the benefits of the offer under circumstances which would indicate to a reasonable man that the benefits were offered with the belief that they would be paid for] [the offer states or gives the other party reason to understand that it will be accepted by silence or inaction, and such other party then remains silent or inactive] [the previous dealings of the parties reasonably indicate that the offer will be accepted by silence or inaction, and the party receiving the offer remains silent or inactive].]

DIRECTIONS FOR USE

Bracketed material should be used only where the evidence creates an issue. If other than money charges are an issue, the words "paid for" should be modified to reflect such.

Committee comment. - Unless a particular method of acceptance is required in the offer, acceptance can be made in a variety of ways. *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, 170 A.L.R. 991 (1946). Acceptance in the manner used by the offeror is impliedly authorized. *Polhamus v. Roberts*, supra; Restatement of Contracts § 64. An offeror can withdraw an offer any time before acceptance. *Tatsch v. Hamilton-Erickson Mfg. Co.*, 76 N.M. 729, 418 P.2d 187 (1966); Restatement of Contracts § 34. A counteroffer, rather than an acceptance, occurs when the acceptance is qualified or has conditions which vary the terms of the offer. *Polhamus v. Roberts*, supra; Restatement of Contracts § 60. Acceptance can depend upon the happening of an event. *Tatsch v. Hamilton-Erickson Mfg. Co.*, supra. Silence or inaction may become an acceptance. *Vance v. Forty-Eight Star Mill*, 54 N.M. 144, 215 P.2d 1016 (1949); Restatement of Contracts § 72.

ANNOTATIONS

COMPILER'S ANNOTATIONS

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.

13-806. Modification; change.

A contract may be changed at any time by express or implied agreement of all the parties.

DIRECTIONS FOR USE

Modification, i.e., change, commonly occurs as to time for performance or changes in types of performance, involving increases in consideration or substitution of quality and kind of materials.

Committee comment. - Modification, i.e., change, in an oral or written contract is for determination by the jury. *Michelson v. House*, 54 N.M. 197, 218 P.2d 861 (1950); *Cole v. Casabonne*, 39 N.M. 171, 42 P.2d 1115 (1935); *Raynolds v. Stabb*, 4 N.M. 603, 17 P. 136 (1888) (oral modification of written lease); 17 Am. Jur. 2d Contracts § 465. See 17A C.J.S. Contracts § 628; *Lindbeck v. Bendziunas*, 84 N.M. 21, 498 P.2d 1364 (Ct. App. 1972).

13-807. Performance; performed.

The "performance" of [a duty under] a contract consists of doing the things agreed to be done at the time and place and in the manner called for by the terms of the contract. In this case, the [defendant] [plaintiff] had the duty to [complete the work in a workmanlike manner] [by completing the work with materials and workmanship of superior nature] [by normal workmanship using standard materials] [substantially as required by the contract]
[.....
..].

(Use such other words as defined in the contract)

A party has "performed" under the terms of the contract if he has properly fulfilled his duty under the contract.

DIRECTIONS FOR USE

The language used to describe the degree and quality of the performance will ordinarily appear in the written contract or, otherwise, from the oral agreement of the parties.

Committee comment. - Performance required by the contract is an issue typically for jury determination. *Kirkpatrick v. McMillan*, 49 N.M. 100, 157 P.2d 772 (1945); *Hagerman v. Cowles*, 14 N.M. 422, 94 P. 946 (1908); 17 Am. Jur. 2d Contracts §§ 355, 378. See 17A C.J.S. Contracts § 630a. Every contract carries a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done. See

Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 408 P.2d 145 (1965); Andriola v. Milligan, 52 N.M. 65, 191 P.2d 716 (1948); Hagerman v. Cowles, supra. In the absence of more specific contractual requirements, the doctrine of substantial performance is applied to building contracts. Marchant v. McDonald, 37 N.M. 171, 20 P.2d 276 (1933).

13-808. Waiver.

Waiver means intentionally giving up a known right which a party had under the contract.

DIRECTIONS FOR USE

This instruction is not applicable when defects are latent and not reasonably discoverable by inspection. See Clear v. Patterson, 80 N.M. 654, 459 P.2d 358 (Ct. App. 1969); Pillsbury v. Blumenthal, 58 N.M. 422, 272 P.2d 326 (1954).

Committee comment. - Care should be used in the court's ascertainment of what evidence merits submission of waiver to the jury. Neither part payment nor failure to stop work constitutes evidence of waiver or of failure to perform a contract. Cowles v. Hagerman, 15 N.M. 600, 110 P. 843 (1910).

ANNOTATIONS

Waiver and acceptance of performance, both for jury determination, are the same in result. See Kirkpatrick v. McMillan, 49 N.M. 100, 157 P.2d 772 (1945); Cowles v. Hagerman, supra; 17 Am. Jur. 2d Contracts § 482; 17A C.J.S. Contracts § 493.

13-809. Reasonable time for performance.

The [plaintiff] [defendant] was obligated to perform the contract within a reasonable time. What is "a reasonable time" must be determined in the light of all of the surrounding circumstances, as shown by the evidence.

DIRECTIONS FOR USE

This instruction should be used only where no specific time for completion appears in the contract or such cannot be implied or the parties have not agreed on an extension.

Committee comment. - Unless time for completion can be ascertained by judicial construction of the contract, determination of a reasonable time therefor is for the jury. Rudy v. Newman, 54 N.M. 230, 220 P.2d 489 (1950); Loyd v. Southwest Underwriters, 50 N.M. 66, 169 P.2d 238 (1946); Owen v. Thompson, 29 N.M. 517, 224 P. 405 (1924); Neher v. Viviani, 15 N.M. 460, 110 P. 695 (1910); Hagerman v. Cowles, 14 N.M. 422, 94 P. 946 (1908); Baca v. Barrier, 2 N.M. 131 (1881); 17 Am. Jur. 2d Contracts §§ 329,

330; 17A C.J.S. Contracts §§ 503(1), 632; Restatement of Contracts § 276(1). All of the circumstances may be considered under the universal "prudent man" rule. 17 Am. Jur. 2d Contracts § 329; 17A C.J.S. Contracts § 503(4).

13-810. Specific time for performance.

The contract in this case provides that the act of [completion] [delivery] [describe the particular thing to be done] should be accomplished by [the day of , 19. . . . ,] [at (a.) (p.)m. o'clock] [.].

(Insert the event or act determining the time of performance)

DIRECTIONS FOR USE

When contractual delays are allowed under the terms of the contract, modification of this instruction will be necessary.

Committee comment. - Performance within the time provided by contract may be an issue for jury determination. *Kirkpatrick v. McMillan*, 49 N.M. 100, 157 P.2d 772 (1945). Time fixed for performance of the contract is not "of the essence" unless the parties have treated it as such in the language used by them or impliedly by extending the contract, or where the contract clearly shows an intent to that end. *Mercury Gas & Oil Corp. v. Rincon Oil & Gas Corp.*, 79 N.M. 537, 445 P.2d 958 (1968); *Rudy v. Newman*, 54 N.M. 230, 220 P.2d 489 (1950); *Owen v. Thompson*, 29 N.M. 517, 224 P. 405 (1924); 17A C.J.S. Contracts § 504(1); 17 Am. Jur. 2d Contracts § 332; Restatement of Contracts § 276(1). Rescission is a remedy available for a breach involving failure to perform on time. *Meech v. Gallegos*, 86 N.M. 28, 519 P.2d 124 (1974); *Montgomery v. Cook*, 76 N.M. 199, 413 P.2d 477 (1966). However, rescission is not triable by a jury. 50 C.J.S. Juries § 31; 47 Am. Jur. 2d Jury § 32.

13-811. Demand for performance.

When the time for performance is not fixed in a contract, a party cannot recover until a demand for performance has been made and the other party fails or refuses to perform within a reasonable time.

DIRECTIONS FOR USE

This instruction is to be used only where no time for performance is fixed by the contracting parties. It cannot be used in cases involving the Uniform Commercial Code.

Committee comment. - Demand for performance is statutory. See 56-5-3 NMSA 1978. Time of performance is fixed, and this instruction is not applicable, if the obligation sued on is a promissory note with a day for payment stated. *Barnett v. Wedgewood*, 28 N.M. 312, 211 P. 601 (1922). Similarly, no demand is necessary where escrowed papers are to be delivered a specified number of days after default. *Melfi v. Goodman*, 73 N.M. 320, 388 P.2d 50 (1963). The purpose of the statute is to give a party one last chance to perform his contractual obligations before suit is begun. *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. 1967). Demand for performance is not jurisdictional and must be raised in the trial court to be effective. *Mitchell v. Allison*, 54 N.M. 56, 213 P.2d 231 (1949). A demand for performance of an act essential to completion of the contract, but less than total performance, is sufficient. *Foster v. Colorado Radio Corp.*, supra.

13-812. Hindrance; prevention; excuse for nonperformance.

A party to a contract cannot recover damages if his 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.

Committee comment. - One cannot take advantage of his own act or omission to escape liability thereon. *Bogle v. Potter*, 72 N.M. 99, 380 P.2d 839 (1963); *Gibbs v. Whelan*, 56 N.M. 38, 239 P.2d 727 (1952); Restatement of Contracts § 295.

13-813. Impossibility of performance; discharge.

[Performance of a contract is excused if that performance depends upon the existence of a particular person or thing, and the person or thing perishes without fault of the party claiming excuse for nonperformance.]

[Performance of a contract is excused if performance is made impossible by a force of nature which could not be foreseen and avoided by the exercise of reasonable diligence and efficiency on the part of the party claiming excuse for nonperformance.]

DIRECTIONS FOR USE

Use bracketed material as indicated by the evidence.

Committee comment. - There is no definition of "act of God" by New Mexico courts. See 12 A.L.R. 1273; 26 A.L.R. 1431; 74 A.L.R. 1289; 1 C.J.S. Act of God, p. 1423. See also Trotter v. Callens, 89 N.M. 19, 546 P.2d 867 (Ct. App.), cert. denied, 89 N.M. 207, 549 P.2d 285 (1976) (tort arising out of aerial spraying) and UJI 13-1618, defining act of God; Clark v. Cassetty, 71 N.M. 89, 376 P.2d 37 (1962) (wind in wheat field blows fire started by trucks during harvest); Huntsman v. Smith, 62 N.M. 457, 312 P.2d 103 (1957) (collapse of defective wall in thunderstorm); Shephard v. Graham Bell Aviation Serv., Inc., 56 N.M. 293, 243 P.2d 603 (1952) (failure to properly tie down airplane after defendant received warnings of heavy winds); 6 Corbin on Contracts §§ 1324, 1329. The doctrines of "commercial frustration" or "implied condition" incorporate the above principles, but such are not applicable to demises of real property. Wood v. Bartolino, 48 N.M. 175, 146 P.2d 883 (1944); Restatement of Contracts §§ 455, 456, 457. Destruction by fire or act of God of improvements on leased premises does not terminate the lease. Scharbauer v. Cobean, 42 N.M. 427, 80 P.2d 785, 118 A.L.R. 102 (1938) (where lease void if building became untenable by fire; however, a partial destruction will not terminate lease although temporarily untenable). Conditions precedent to recovery on an insurance policy may be discharged by impossibility if the condition is not material. Harris v. Pacific Mut. Life Ins. Co., 137 F.2d 272 (10th Cir. 1943). Sale of realty conditioned upon sale of another property which didn't materialize is an impossible condition excusing performance. Sanders v. Freeland, 64 N.M. 149, 325 P.2d 923 (1958). A condition impossible to perform because of prohibitions in existing law can prevent the formation of a lease of realty. Hoke v. Brown, 79 N.M. 682, 448 P.2d 483 (Ct. App. 1968). No recovery may be had from the consequences of the action of natural causes in connection with a breach of contract unless within the contemplation of the parties when the contract was made. Barnard-Curtiss Co. v. United States, 257 F.2d 565 (10th Cir.), cert. denied, 358 U.S. 906, 79 S. Ct. 230, 3 L. Ed. 2d 227, 358 U.S. 906, 79 S. Ct. 233, 3 L. Ed. 2d 227 (1958).

ANNOTATIONS

COMPILER'S ANNOTATIONS

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. Rescission.

No instruction to be given.

Committee comment. - Rescission is an equitable remedy, so it is tried by the court without a jury. 50 C.J.S. Juries § 31; 47 Am. Jur. 2d Jury § 32. There is a difference between "rescission" and "discharge" from further duty under a contract as a result of material breach. 5A Corbin on Contracts §§ 1103, 1237. A helpful discussion on this issue is in Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951, 88 S. Ct. 1043, 19 L. Ed. 2d 1143 (1968).

Despite the abolishment of distinctions between law and equity and that only one form of action remains in New Mexico, equitable principles apply to an equitable action. *Allsup v. Space*, 69 N.M. 353, 367 P.2d 531 (1961); *Hall v. Bryant*, 66 N.M. 280, 347 P.2d 171 (1959). N.M. Const., art. II, § 12, confers "The right of trial by jury as it has heretofore existed..." and Rule 1-002, N.M.R. Civ. P., provides that "There shall be one form of action to be known as 'civil action'." There is no right to a jury in a mortgage foreclosure suit, despite any issue of a deficiency judgment. *Young v. Vail*, 29 N.M. 324, 222 P. 912, 34 A.L.R. 980 (1924). But cf. *Evans Financial Corp. v. Strasser*, 99 N.M. 788, 664 P.2d 986 (1983) (where the defendant in an equitable mortgage foreclosure action counterclaimed raising legal issues, the defendant was entitled to a jury trial on the issues presented in the counterclaim; overruling *Young v. Vail* to the extent that decision was inconsistent). Where plaintiff sues to quiet title, alleging that defendant is in possession, defendant has the right to a jury trial because plaintiff's action is by way of ejectment. *Pankey v. Ortiz*, 26 N.M. 575, 195 P. 906, 30 A.L.R. 92 (1921). A defendant is entitled to a jury trial where plaintiff sues to quiet title and defendant alleges possession. *Griego v. Roybal*, 79 N.M. 273, 442 P.2d 585 (1968). But cf. *Martinez v. Mundy*, 61 N.M. 87, 295 P.2d 209 (1956) (plaintiff brought suit in ejectment against defendant in possession who asked to quiet title, trial court denied a jury trial and decided the case on the equitable issues raised by defendant). If plaintiff sues to quiet title and defendant counterclaims to quiet title, each alleging the other is in possession, the parties waive a jury trial. *Quintana v. Vigil*, 46 N.M. 200, 125 P.2d 711 (1942). But cf. *Evans Financial Corp. v. Strasser*, supra. In a suit for specific performance of a contract for sale of realty, the fact that the defendant has to pay delinquent payments provided in the contract doesn't give a right to jury trial. *Mountain View Corp. v. Horne*, 74 N.M. 540, 395 P.2d 676 (1964). Where an action for specific performance for sale of personalty will not lie, amendment of the complaint requesting damages entitles plaintiff to a jury trial. *Pugh v. Tidwell*, 52 N.M. 386, 199 P.2d 1001 (1948). Amendment of complaint to a claim for damages, rather than one to establish a trust, gives plaintiff the right to a jury trial. *Barber's Super Mkts., Inc. v. Stryker*, 84 N.M. 181, 500 P.2d 1304 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972). Actions for declaration or establishment of trusts or for damages for breach of trusts are equitable, so there is no right to a jury trial. *Drake v. Rhueckhaus*, 68 N.M. 209, 360 P.2d 395 (1961). Where suit is brought primarily for damages, and a request for an injunction against pollution of a creek is incidental, plaintiff has a right to a jury trial on the damages issue. *Mogollon Gold & Copper Co. v. Stout*, 14 N.M. 245, 91 P. 724 (1907). Rescission, in any event, requires a substantial and material breach by the other party. *Montgomery v. Cook*, 76 N.M. 199, 413 P.2d 477 (1966).

All of the New Mexico cases on rescission have been tried without a jury. *Molybdenum Corp. of Am. v. Brazos Eng'r Co.*, 81 N.M. 708, 472 P.2d 971 (1970); *Woods v. City of Hobbs*, 75 N.M. 588, 408 P.2d 508 (1965); *Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.*, 69 N.M. 281, 365 P.2d 925 (1961); *Samples v. Robinson*, 58 N.M. 701, 275 P.2d 185 (1954); *Glaser v. Dannelley*, 23 N.M. 593, 170 P. 63 (1918). See 95 A.L.R. 1000.

13-815. Excuse for nonperformance; discharge by other's breach.

A party is excused from performing the contract if the other party breaches the contract in a substantial part and to a material degree.

DIRECTIONS FOR USE

This instruction is to be used where there is a failure of consideration in the case where mutual performances are contracted. It is not used where damages alone would fairly compensate the nondefaulting party.

Committee comment. - The substantial and material character of the breach depends upon adequacy of damages to give adequate compensation, degree of performance already had, relative hardship on the respective parties, willful or negligent or innocent behavior of the defaulting party and likelihood or certainty that the remainder of the contract would be performed. Restatement of Contracts §§ 274, 275, 397, 399; cf. *Id.*, § 347. The fact situation resembles that of rescission in equity, as discussed in UJI 13-814. Rescission, except that return of the parties to status quo is eliminated and the parties are left as they are.

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The fact situation giving rise to the equitable remedy of rescission will equally support the discharge from further performance on the law side of the court. Cf. *Meech v. Gallegos*, 86 N.M. 28, 519 P.2d 124 (1974) (rescission of real estate sales contract for failure of vendor to furnish title policy within one (1) year); *Molybdenum Corp. of Am. v. Brazos Eng'r Co.*, 81 N.M. 708, 472 P.2d 971 (1970) (rescission and damages by vendee on purchase of defective electric generator); *Montgomery v. Cook*, 76 N.M. 199, 413 P.2d 477 (1966) (rescission of real estate sales contract for failure of vendor to place deed and mortgage in escrow); *Woods v. City of Hobbs*, 75 N.M. 588, 408 P.2d 508 (1965) (cancellation or rescission release in workmen's compensation); *Allsup v. Space*, 69 N.M. 353, 367 P.2d 531 (1961) (restitution and reasonable value of services in personal service contract); *Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.*, 69 N.M. 281, 365 P.2d 925 (1961) (suit for breach of oil well drilling contract and, alternatively, for rescission and damages); *Samples v. Robinson*, 58 N.M. 701, 275 P.2d 185 (1954) (suit to foreclose mortgage on ranch with counterclaim for rescission based on failure to deliver butane tank and oral private lease); *Morgan v. Thompson*, 46 N.M. 282, 127 P.2d 1037 (1942) (suit to cancel deeds for failure of consideration in that defendants did not pay plaintiff's debts as agreed).

13-816. Anticipatory repudiation.

When a party [makes it positive and clear to the other party that the contract will not be performed] [or] [makes it reasonably appear that substantial performance is impossible], there is a total breach of contract. If the injured party treats the contract as ended, that party may refuse to further perform and, without demand, sue for money damages.

DIRECTIONS FOR USE

Bracketed material should be used as indicated by the evidence. Repudiation is a fact situation entirely different from rescission.

Committee comment. - Repudiation requires "distinct, unequivocal, and absolute refusal to perform according to the terms of the agreement". *Viramontes v. Fox*, 65 N.M. 275, 335 P.2d 1071 (1959) (refusal to close a land trade because of one thousand two hundred dollars (\$1,200) paving lien on motel was a repudiation supporting jury verdict of five thousand nine hundred dollars (\$5,900) as liquidated damages). Failure to demand further performance is not a waiver of the breach. *New Mexico-Colorado Coal & Mining Co. v. Baker*, 21 N.M. 531, 157 P. 167 (1916) (refusal to deliver balance of 9,000 tons of coal where legal principle applied, but which is now covered in U.C.C.). Repudiation has to be accepted by the injured party, otherwise it is waived. *Ostic v. Mackmiller*, 53 N.M. 319, 207 P.2d 1008 (1949) (guardian repudiates contract for land purchase by buying tax title); *United States Potash Co. v. McNutt*, 70 F.2d 126 (10th Cir. 1934) (geologist's suit for personal services). This instruction is in the nature of anticipatory breach. Restatement of Contracts § 318. Repudiation is not a rescission. 4 Corbin on Contracts §§ 977, 982. Repudiation creates the remedy for money damages triable to a jury, while rescission and restoration to status quo are equitable remedies. See Committee Comment to UJI 13-814.

13-817. Workmanlike manner.

"Workmanlike manner" or "workmanlike" means that all the work will be of good quality and reasonably free from faults and defects.

DIRECTIONS FOR USE

There is a wide variety of verbiage used in contracts, so this instruction will require insertion or modification to carry out the intent of the contract. This instruction is to be used only when the words "workmanlike manner" or "workmanlike" are used in the contract. When workmanship is of a different nature, use UJI 13-807.

Committee comment. - See *Plains White Truck Co. v. Steele*, 75 N.M. 1, 399 P.2d 642 (1963); *Andriola v. Milligan*, 52 N.M. 65, 191 P.2d 716 (1948). Where the standard of workmanship is contracted to be "superior", that means with greater skill and better materials than "normal", "typical", "standard" or "average". *Martin v. Foster*, 81 N.M. 583, 470 P.2d 304 (1970); 98 C.J.S. *Workmanlike*, p. 836; 17A C.J.S. *Contracts* § 630(b); 13 Am. Jur. 2d *Building and Construction Contracts* § 11. The language used in the instruction is adopted from the General Conditions of the Contract for Construction, Ar. 4.5.1., 1970 Ed., of the American Institute of Architects, which, it is believed, reflects the understanding intended in most contracts.

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The words "husbandlike manner", "good husbandry" or "farmerlike manner" in farm leases mean "to farm the land in a proper and diligent manner", which words are implied as a covenant in the lease. Shultz v. Ramey, 64 N.M. 366, 328 P.2d 937 (1958).

Unless excluded, there is an implied warranty that a merchant's goods are "merchantable" under the U.C.C., 55-2-314 NMSA 1978; i.e., such goods as would pass without objection in the trade, be of fair average quality if fungible and be fit for ordinary purposes for which the goods are used.

13-818. Custom and usage.

The term "custom and usage" refers to a practice in a particular trade, industry or business that is certain and uniform and which is so recognized that both parties are bound by such custom and usage in the determination of their obligations.

DIRECTIONS FOR USE

This instruction is to be used only in contract cases. It is not usable in malpractice or products liability or negligence cases.

Committee comment. - Custom and usage cannot vary plain and unambiguous terms of a contract. Tipton v. Clower, 67 N.M. 388, 356 P.2d 46 (1960); Smith v. Maljamar Oil & Gas Corp., 35 N.M. 255, 293 P. 967 (1930); Romero v. Romero, 29 N.M. 667, 226 P. 652 (1924); accord Major v. Bishop, 462 F.2d 1277 (10th Cir. 1972). The custom and usage relied on may be either local or general, or both. Smith v. Maljamar Oil & Gas Corp., supra. It is suggested that proof of custom and usage in contract cases is different from that in workmen's compensation cases where "general use" is the statutory criterion in 52-1-10 NMSA 1978. See Quintana v. East Las Vegas Mun. School Dist., 82 N.M. 462, 483 P.2d 936 (Ct. App. 1971); Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964); Romero v. H.A. Lott, Inc., 70 N.M. 40, 369 P.2d 777 (1962). Custom and usage is applied differently in negligence cases. Irwin v. Graham, 62 N.M. 72, 304 P.2d 875 (1956).

13-819. Negligent misrepresentation.

A party is liable for damages proximately caused by his negligent and material misrepresentation.

A material misrepresentation is any untrue statement upon which the other party did in fact rely in entering into the contract, and in the absence of which the other party would not have entered into the agreement.

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 13-820 for fraudulent misrepresentation.

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). Although negligent misrepresentation is a tort, contributory negligence is not a defense. *Neff v. Bud Lewis Co.*, 89 N.M. 145, 548 P.2d 107 (Ct. App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976) (suit by buyer of real property against broker for damages from broker's failure to disclose defective condition of heating and air conditioning). See *Hockett v. Winks*, 82 N.M. 597, 485 P.2d 353 (1971) (suit for damages arising out of sale of property), which overruled *Ham v. Hart*, 58 N.M. 550, 273 P.2d 748 (1954), all of which is explained in *Maxey v. Quintana*.

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The kinds of remedies are numerous; i.e., (1) rescind and sue for money paid, (2) sue for damages, (3) rescind and have status quo restored and (4) recoup for damages in action brought on contract. *Snell v. Cornehl*, 81 N.M. 248, 466 P.2d 94 (1970) (suit by vendor for damages or specific performance on sale of house and counterclaim for rescission based on latent defects). No jury is permitted as to issue of rescission. See UJI 13-814. Rescission, Committee Comment. To recover damages for fraud and deceit, the facts and degree of proof are entirely different. See UJI 13-820. Fraudulent misrepresentation, Committee Comment.

The degree of proof required of a party asserting negligent misrepresentation is a preponderance of the evidence. *State ex rel. Nichols v. Safeco Ins. Co. of Am.*, 100 N.M. 440, 671 P.2d 1151 (Ct. App. 1983).

Torts of deceit or fraud distinguished. - An action for negligent misrepresentation differs from the torts of deceit or fraud. Negligent misrepresentation is grounded in negligence rather than an intent to mislead. *State ex rel. Nichols v. Safeco Ins. Co. of Am.*, 440 N.M. 100, 671 P.2d 1151 (Ct. App. 1983).

Directed verdict improper. - In an action for negligent misrepresentation of certain plans and specifications published by a builder to prospective bidders, the trial court erred in granting a directed verdict in favor of the builder. Whether a bidder was reasonable in relying on the plans and specifications is a question for the jury. *Western States Mechanical Contractors v. Sandia Corp.*, 110 N.M. 676, 798 P.2d 1062 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Remedies for fraud or misrepresentation as to heating or cooling cost of realty purchased, 32 A.L.R.4th 828.

13-820. Fraudulent misrepresentation.

To recover for "fraudulent misrepresentation", a party must prove: first, a representation of an untrue fact was made; second, either the falsity of the fact was known by the party making it or the representation was recklessly made; third, the misrepresentation was made with the intent to deceive and to induce the other party to act on it; and fourth, the other party did in fact rely on the misrepresentation and acted on it to his damage. Each of these elements must be proved by clear and convincing evidence.

If you find these four elements, the other party can recover damages proximately resulting from the fraudulent misrepresentation.

DIRECTIONS FOR USE

This instruction is to be used in those cases where the misrepresentation is fraudulent in character and only damages are sought.

Under New Mexico law, the burden of proof in fraud cases is not simply the preponderance of the evidence, but the plaintiff must prove his case by clear and convincing evidence in order for there to be a jury issue and, if the plaintiff fails to come forward with the required measure of proof, then there is no jury issue.

Committee comment. - See UJI 13-819, Committee Comment. Sauter v. St. Michael's College, 70 N.M. 380, 374 P.2d 134 (1962) (suit for damages for fraudulent misrepresentation on sale of business arising out of defendant's failure to assign leases on realty); Hockett v. Winks, 82 N.M. 597, 485 P.2d 353 (1971) (principle of equity applicable to rescission of contracts is not the same as fraud and deceit at law).

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Liability of termite or other pest control or inspection contractor for work or representations, 32 A.L.R.4th 682.

Remedies for fraud or misrepresentation as to heating or cooling cost of realty purchased, 32 A.L.R.4th 828.

13-821. Capacity to contract; incompetency.

A person can enter into a binding contract only if he has sufficient understanding or capacity to make or communicate responsible decisions concerning his person or management of his affairs.

DIRECTIONS FOR USE

This instruction is to be used where incompetency, and not mere mental weakness, is the issue.

Committee comment. - See Committee Comment to UJI 13-823. Mental weakness; fraudulent misrepresentation; undue influence.

13-822. Undue influence; contracts.

Undue influence is improper. Influence alone, however, is not improper.

The term "undue influence" means that one unfairly and improperly influenced another so as to prevent that person from exercising a free and understanding judgment.

DIRECTIONS FOR USE

This instruction is intended to be applicable only in contract cases for money damages, which necessarily excludes wills, gifts and transactions between husbands and wives. While the language is frequently used interchangeably in the cases, the difference in capacity required is substantial. The issues may require bench and counsel to modify this instruction.

Committee comment. - Reference is made to UJI 13-823, Committee Comment on cancellation being an equitable remedy. 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 of Contracts § 497. While influence alone is not prohibited, undue influence will make the transaction voidable. *Nance v. Dabau*, 78 N.M. 250, 430 P.2d 747 (1967) (suit brought by widow's guardian to set aside deeds and contracts). Most of the cases involve either a confidential or fiduciary relationship which requires a separate instruction. *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 is a species of fraud. *In re Morrow's Will*, 41 N.M. 723, 73 P.2d 1360 (1937) (will contest). Fraud is an action in tort for which damages are recoverable. *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) (damages for fraud in procuring plaintiff's guarantee of note refinancing obligations on which defendant was a guarantor); *Montoya v. Moore*, 77 N.M. 326, 422 P.2d 363 (1967) (damages for fraud by insurance adjuster in obtaining plaintiff's release - plaintiff ratified and sued for damages).

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A confidential or a fiduciary relationship, coupled with suspicious circumstances, may raise a presumption of undue influence causing burden of proof to shift. *Nance v. Dabau*, supra; *Salazar v. Manderfield*, supra; *Cardenas v. Ortiz*, supra; *Walters v. Walters*, 26 N.M. 22, 188 P. 1105 (1920) (ill father transferred all properties to his son with promise to treat brothers and sisters equally); Rule 11-301. Parent and child relationship or kinship is not alone sufficient to raise presumption of undue influence.

Giovannini v. Turrietta, 76 N.M. 344, 414 P.2d 855 (1966) (deed by mother to son and daughter didn't 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 (16) years and parents now want it back).

13-823. Mental weakness; fraudulent misrepresentation; undue influence.

[Old age] [Illness] [Weakness of mind] alone is not enough to establish that a contract is not valid, but, in considering the issue of [fraud] [undue influence], as defined in these instructions, you may take into account evidence, if any, of the mental impairment of one of the parties.

DIRECTIONS FOR USE

When this instruction is used, UJI 13-820 or 13-822 must also be used.

Committee comment. - Cancellation of instruments, like rescission, UJI 13-814, is in equity where there is no right to a jury trial. 12 C.J.S. Cancellation of Instruments § 72; 13 Am. Jur. 2d Cancellation of Instruments § 62. In most of the cases cited below, the remedy sought is equitable while the facts bear in contract which makes the definition equally applicable to a suit for money damages. Lack of mental capacity can be classified into three categories for contract purposes. The category requiring the least impairment of mental capacity is mental weakness when coupled with fraud, duress or undue influence. *Giovannini v. Turrietta*, 76 N.M. 344, 414 P.2d 855 (1966) (suit to quiet title requiring cancellation of a deed); *Westover v. Harris*, 47 N.M. 112, 137 P.2d 771 (1943) (suit to cancel deeds and to return six hundred dollars (\$600) given daughter for plaintiff's last illness and burial); *Morgan v. Thompson*, 46 N.M. 282, 127 P.2d 1037 (1942) (suit to cancel deed on farm given in consideration of defendant paying debts); *Ravany v. Equitable Life Assurance Soc'y*, 26 N.M. 514, 194 P. 873 (1921) (suit by administrator to cancel annuity contract issued by defendant); 41 Am. Jur. 2d Incompetent Persons § 71; 17 C.J.S. Contracts § 133(1)a. The next category is that of extreme mental weakness, just short of total incapacity, i.e., insanity. See *Morgan v. Thompson*, 46 N.M. 282, 127 P.2d 1037 (1942). The third and last category is that of total incompetency or insanity. See *In re Estate of Peck*, 80 N.M. 290, 454 P.2d 772, cert. denied, 396 U.S. 942, 90 S. Ct. 376, 24 L. Ed. 2d 242 (1969), rehearing denied, 396 U.S. 1031, 90 S. Ct. 549, 24 L. Ed. 2d 528 (1970) (execution of will by adjudicated incompetent); *Pilon v. Lobato*, 54 N.M. 218, 219 P.2d 290 (1950) (action by guardian to cancel deed); *Ex parte Romero*, 51 N.M. 201, 181 P.2d 811 (1947) (habeas corpus arising out of voluntary commitment of intoxicated person); *Frkovich v. Petranovich*, 48 N.M. 382, 151 P.2d 337, 155 A.L.R. 295 (1944) (cancellation of mortgage executed by wife only while husband insane).

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The present statutory provisions for appointment of a conservator for the protection of property of minors and of persons under disability are contained in 45-5-401 NMSA 1978 et seq.

13-824. Duress; contracts.

Duress is

.....
..

(describe the particular type of duress)

which is enough to overcome the mind of a person of ordinary firmness so as to prevent that person from exercising a free and understanding judgment.

DIRECTIONS FOR USE

If a trust, fiduciary or confidential relation is an issue, this instruction must be used with the appropriate instruction on that issue. This instruction may require modification to adapt to particular circumstances. This instruction is intended to be applicable only in contract cases, which circumstance necessarily excludes it from cases involving wills, gifts and transactions between husbands and wives.

Committee comment. - Although "undue influence" and "duress" are commonly alleged together, they are not necessarily the same thing. *Cardenas v. Ortiz*, 29 N.M. 633, 226 P. 418 (1924) (suit to cancel deed to fiduciary). The classic case of duress by imprisonment is shown in *McDonald v. Carlton*, 1 N.M. (Gild.) 172 (1857) (prisoner sues to cancel reenlistment contract made while in guardhouse for sleeping on guard, to avoid being dishonorably discharged). The cases in contracts where duress in this sense is applicable are few. Restatement of Contracts § 493. This instruction does not lend itself to the tort known as economic duress. *Duke City Lumber Co. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975) (suit for damages arising out of refusal to loan operating monies, resulting in economic compulsion); *Bettini v. City of Las Cruces*, 82 N.M. 633, 485 P.2d 967 (1971) (suit to recover money paid to city to get utilities turned on where money was owed by plaintiff's predecessor in title); *Pecos*

Constr. Co. v. Mortgage Inv. Co., 80 N.M. 680, 459 P.2d 842 (1969) (suit for business duress and compulsion and damages for loss of construction time); Donald v. Davis, 49 N.M. 313, 163 P.2d 270 (1945) (suit on a note given to make up loss on a cow deal); Everett v. Gilliland, 47 N.M. 269, 141 P.2d 326 (1943) (suit for damages based on fraud and deceit in purchase of realty; payment of interest of two hundred eighty-five dollars (\$285) to get possession was one under duress); Caldwell v. Higginbotham, 20 N.M. 482, 151 P. 315 (suit for damages for refusal to permit 15% cut in sale of cattle herd). See Committee Comment to UJI 13-822. Undue influence; contracts.

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Am. Jur. 2d, A.L.R. and C.J.S. references. - Economic duress or business compulsion in execution of contract for sale of real property, 12 A.L.R.4th 1262.

13-825. Consideration; definition.

No instruction drafted.

Committee comment. - There is sufficient consideration for a promise if there is any benefit to the promisor or any loss or detriment to the promisee. *Wester v. Trailmobile Co.*, 59 N.M. 73, 279 P.2d 526 (1955); 17 C.J.S. Contracts § 74; 17 Am. Jur. 2d Contracts § 85; Restatement of Contracts § 75.

Every contract in writing imports a consideration in the same manner and as fully as if it were a sealed instrument. See 38-7-2 NMSA 1978; *Kirby Cattle Co. v. Shriners Hosp. for Crippled Children*, 88 N.M. 605, 544 P.2d 1170 (Ct. App. 1975), rev'd, 89 N.M. 169, 548 P.2d 449 (1976); *Rael v. Cisneros*, 82 N.M. 705, 487 P.2d 133 (1971); *May v. Walters*, 67 N.M. 297, 354 P.2d 1114 (1960); *In re Will of Quantius*, 58 N.M. 807, 277 P.2d 306 (1954); Restatement of Contracts § 110. This is to say that, consideration is presumed in a contract in writing. *In re Will of Quantius*, supra. While this presumption gives way to proof to the contrary, the most common proof offered is that of inadequacy of consideration which alone is not sufficient. *Infra*.

Mere inadequacy of consideration is not sufficient, in and of itself, to avoid a contract. *Hendrix v. Dominguez*, 58 N.M. 216, 269 P.2d 1099 (1954); *Featherstone v. Walker*, 43 N.M. 181, 88 P.2d 271 (1939); *Moruzzi v. Federal Life & Cas. Co.*, 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407 (1938); *Ravany v. Equitable Life Assurance Soc'y*, 26 N.M. 514, 194 P. 873 (1921); *Fraser v. State Sav. Bank*, 18 N.M. 340, 137 P. 592 (1913); Restatement of Contracts § 81. Inadequacy of consideration, coupled with conclusive and decisive fraud, might be a defense. *Featherstone v. Walker*, supra. It would take a rare state of facts to make "consideration" justiciable by a jury.

13-826. Implied warranty to use reasonable skill.

When a person undertakes to practice a trade or to do a kind of work which either requires some learning or special training or experience, he is obligated to exercise that degree of skill which a reasonably prudent person skilled in such work would exercise in those circumstances.

DIRECTIONS FOR USE

This instruction is to be used only where there is no express agreement to do the work in a particular fashion.

Committee comment. - The degree of skill required is commensurate with the nature of the service. *Clear v. Patterson*, 80 N.M. 654, 459 P.2d 358 (1969); *Garcia v. Color Tile Distrib. Co.*, 75 N.M. 570, 408 P.2d 145 (1965). The owner is paying for both skill and judgment. *Andriola v. Milligan*, 52 N.M. 65, 191 P.2d 716 (1948). The workman owes a duty to do a reasonably workmanlike job. *Plains White Truck Co. v. Steele*, 75 N.M. 1, 399 P.2d 642 (1965). It also applies to one who builds a house. *Jackson v. Goad*, 73 N.M. 19, 385 P.2d 279 (1963). The result is often the same as it would have been if there were an express warranty. *Underwood v. Marberry Constr. Co.*, 74 N.M. 664, 397 P.2d 311 (1964).

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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).

13-827. Contracts; measure of damages; general instruction.

If you should decide in favor of the plaintiff on any of his claims, then you must fix the amount of money damages which will restore to plaintiff what was lost by defendant's breach and what plaintiff reasonably could have expected to gain. The plaintiff's claims for damages are:

(NOTE: Here insert the proper elements of damage, such as this example:

(1) Damages for refusal to pay the rent provided in the lease contract; and

(2) Damages for refusal to build the five miles of fence.)

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

(NOTE: Here insert the proper elements of damage, such as this example:

(1) Damages for materially misrepresenting the carrying capacity of the ranch;

(2) Damages for materially misrepresenting the working condition of the windmills; and

(3) Damages for materially misrepresenting that the dirt tanks were adequate for water storage.)

If your verdict is that neither party shall recover damages against the other, you should so find.

Any damages found by you must be damages which, at the time of making the contract, the parties could reasonably have expected to be a consequence of any default.

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 prejudices 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. There should be inserted the respective elements of damages, in accordance with those items of damages which are hereinafter stated. UJI 13-827A through 13-827F encompass the most common elements of damages, but they are not intended to be exclusive. It is expected that the bench and bar will have to add many items of damages, as called for by the pleadings, the evidence and the law.

Although this chapter on the law of contracts is self-contained, it will be necessary 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. The omission of any of the general instructions in this chapter is not intended to mean that such instructions should not be used. On the contrary, the bench and bar are directed to use the general instructions with this chapter.

Committee comment. - The application of the rules of damages in contract actions requires the use of more judicial discretion than is usually the case. Restatement of Contracts § 329, comment a. The very purpose of allowing damages for breach of contract is to restore to the injured party whatever was lost by the breach and all that would have been gained 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, but rather they 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). The elements of damage 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); Restatement of Contracts § 329, comment a.

ANNOTATIONS

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.

13-827A. Damages; contract price.

The unpaid balance of the original contract price.

DIRECTIONS FOR USE

This is to be inserted in the proper blank of UJI 13-827, where the evidence justifies its use. Modification or waiver of contract price will be treated separately.

Committee comment. - A "breach" of contract is nonperformance of any contractual duty. Restatement of Contracts § 312.

13-827B. Damages; modification of contract.

The unpaid balance of that portion of the contract due to a change, that is,

.....
.
(insert kind of change or changes)

DIRECTIONS FOR USE

This is to be inserted in the proper place in UJI 13-827, where the evidence justifies its use.

Committee comment. - Time of performance of written contract may be enlarged by oral agreement. *Kingston v. Walters*, 16 N.M. 59, 113 P. 594 (1911). Parol modification, which is relied on, may give rise to estoppel. *Mercury Gas & Oil Corp. v. Rincon Oil & Gas Corp.*, 79 N.M. 537, 445 P.2d 958 (1968); *Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.*, 69 N.M. 281, 365 P.2d 925 (1961); Restatement of Contracts §§ 75(c), 224.

13-827C. Damages; specific undertaking.

The difference between the unpaid portion of the contract price and the cost to the [plaintiff] [defendant] of having another do the work.

DIRECTIONS FOR USE

This is to be inserted in the proper place in UJI 13-827, where the evidence justifies its use. This is to be used in contracts for a specific undertaking, which excludes personal service contracts and those for construction of houses and buildings. It is equally applicable to both the contractor and the owner.

Committee comment. - Construction of a sewer plant is a specific undertaking. *Louis Lyster, Gen. Contractor v. Town of Las Vegas*, 75 N.M. 427, 405 P.2d 665 (1965). Contract to cut timber is a specific undertaking. *Spencer v. Gross, Kelly & Co.*, 22 N.M. 426, 163 P. 1087 (1917). Compare *Montgomery v. Karavas*, 45 N.M. 287, 114 P.2d 776 (1941) as to measure of damages in construction of a building. Restatement of Contracts § 329, comment b.

ANNOTATIONS

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract, 41 A.L.R.4th 131.

13-827D. Damages; delay.

The value of the use of the property during the time the work was delayed.

DIRECTIONS FOR USE

This is to be inserted in the proper place in UJI 13-827, where the evidence justifies its use.

Committee comment. - The rental value of the property is the measure of damages for delay in completing a building or performance of work. *Brown v. Newton*, 59 N.M. 274, 282 P.2d 1113 (1955); *Price v. Van Lint*, 46 N.M. 58, 120 P.2d 611 (1941). Restatement of Contracts §§ 331(b), 346(b). Mere breach of contract by unreasonable delay cannot be converted into a tort by showing that failure to perform resulted in great inconvenience, trouble, annoyance and hardship to the other party. *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).

13-827E. Damages to owner; contracts for construction.

For [defective construction] [or] [and] [unfinished construction]

The reasonable cost of construction and completion as agreed in the contract,
[or]

[The difference between the value of the thing contracted for and the value of the performance that has been received, if completion, as provided for in the contract, would involve unreasonable waste of money.]

DIRECTIONS FOR USE

The bracketed material is to be used only where completion would involve unreasonable waste of money. It is noted that the first paragraph is the usual measure of damages, but if completion or correction would involve unreasonable waste of money then the second paragraph should be used. There may be an occasion when one or the other, or both, of the paragraphs will be required.

Committee comment. - New Mexico has adopted the provisions of Restatement of Contracts § 346. *Chavez v. Gribble*, 83 N.M. 688, 496 P.2d 1084 (1972); *Montgomery v. Karavas*, 45 N.M. 287, 114 P.2d 776 (1941).

ANNOTATIONS

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Modern status of rule as to whether cost

of correction or difference in value of structures is proper measure of damages for breach of construction contract, 41 A.L.R.4th 131.

13-827F. Damages; personal employment.

The contract price, less what the [plaintiff] [defendant] made or could have made during the same time in employment for which he is trained and suited.

DIRECTIONS FOR USE

This is to be inserted in the proper place in UJI 13-827, where the evidence justifies its use.

Committee comment. - The employer has the burden of proving that the employee was employed or could have secured employment. *Spencer v. Gross, Kelly & Co.*, 22 N.M. 426, 163 P. 1087 (1917). See *Western Union Tel. Co. v. Longwill*, 5 N.M. 308, 21 P. 339 (1889).

13-828. Verdicts in contract cases.

13-828A. Verdict for plaintiff on complaint.

We find for the plaintiff on the complaint in the sum of
\$.....

.....
.....
Foreman

13-828B. Verdict for defendant on complaint.

We find for the defendant on the complaint.

.....
.....
Foreman

13-828C. Verdict for defendant on counterclaim.

We find for the defendant on the counterclaim in the sum of
\$.....

.....
.....
Foreman

13-828D. Verdict for plaintiff on counterclaim.

We find for the plaintiff on the counterclaim.

.....
.....
Foreman

13-828E. Verdict for neither party.

We find that neither party should recover.

.....
.....
Foreman

13-828F. Verdict for both parties.

We find for the plaintiff in the sum of \$..... on the
complaint, and

We find for the defendant in the sum of \$..... on the
counterclaim.

.....
.....

Foreman

DIRECTIONS FOR USE

UJI 13-828A through 13-828E will each be given to the jury in any contract case involving a counterclaim or recoupment. In the event plaintiff recovers some or all of his damages on the complaint and defendant recovers some or all of his damages on the counterclaim, the trial court will enter judgment for the difference in favor of the party recovering the greater amount. Absent a counterclaim or recoupment, UJI 13-828A, 13-828B and 13-828E will be given.

Of course, the particular catchline of the case will have to be typed on the page where the verdict or verdicts appear and, of course there will be omitted the UJI verdict numbers, such as are on these pages, because they mean nothing to the jury. Likewise, the title of the instruction can be omitted because the body of the verdict speaks for itself and, therefore, it is not necessary to have either a UJI identification number or a title.

APPENDICES

APPENDIX 1. CONTRACTS; COUNTERCLAIM.

Subject Matter

The following is an example of a simple contract case where both parties are claiming monetary damages.

Statement of facts.

John Lessor, in writing, leased his 25,000 acre mountain ranch to Pete Lessee for one year at an annual rental of \$1.50 per acre, i.e., \$37,500, to be paid at the end of the lease year. During the lease period Pete Lessee was to rebuild five miles of designated fence at his own cost which was estimated to be \$900 per mile, i.e., \$4,500. John Lessor orally represented to Pete Lessee that (1) the ranch would carry 1,000 head of steers

during the spring to fall season and (2) the livestock watering system, consisting of windmills and dirt tanks, would be sufficient to water 1,000 head of steers during the spring to fall season. Pete Lessee, on taking possession of the ranch, discovered that John Lessor had overgrazed the ranch since it was shown to him, so that the ranch would only barely carry 500 steers, the windmills were in bad repair and it cost him \$6,000 to make them pump adequately and the dirt tanks were silted so much that he had to spend \$7,500 to have them cleaned. Pete Lessee abandoned the ranch shortly before the end of the lease year.

John Lessor sues for the annual rental of \$37,500 and for \$5,500 which it cost him to build the five miles of fence.

Pete Lessee defends alleging waiver and negligent and material misrepresentations. Pete Lessee, further, counterclaims in the alternative for (1) \$6,000 for repairs to the windmills, (2) \$7,500 for cleaning the dirt tanks and (3) \$15,000 for loss of profit by reason of being able to graze only 500 head instead of 1,000 head of steers.

A suggested set of instructions in recommended sequence in outline form illustrates the format as follows:

1. 13-801. Statement of issues; counterclaim; burden.
2. 13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.
3. 13-307. Rules of evidence.
4. 13-308. Circumstantial evidence.
5. 13-808. Waiver.
6. 13-819. Negligent misrepresentation.
7. 13-1801. Liability must be determined before damages.
8. 13-827. Contracts; measure of damages; general instruction.
9. 13-2004. Witness impeached.

- 10. 13-2001. Performance of your duties.
- 11. 13-2002. Duty to follow instructions.
- 12. 13-2005. Jury sole judges of the facts.
- 13. 13-2003. Jury sole judges of witnesses.
- 14. 13-2007. Closing arguments.
- 15. 13-2008. No damages unless liability.
- 16. 13-1903. Jury duty to consult.
- 17. 13-2009. Verdict of ten.
- 18. 13-828A. Verdict for plaintiff on complaint.
- 13-828B. Verdict for defendant on complaint.
- 13-828C. Verdict for defendant on counterclaim.
- 13-828D. Verdict for plaintiff on counterclaim.
- 13-828E. Verdict for neither party.

Instructions

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

<p>UJI Civ. 13-801. party claims to Statement of other. issues; leased his counterclaim; one (1) year at burden. \$37,500, of the year.</p>	<p>1. This is a contract case in which each be entitled to money damages from the This lease is a contract. The plaintiff 25,000 acre ranch to the defendant for an annual rental of \$1.50 per acre, i.e., with this payment to be made at the end Further, during the year, defendant at</p>
--	---

his own cost
ranch.
contract as just
both to pay
fence.

claims:
to perform
to pay
in the lease

to perform
to build five
plaintiff

claims and
defense:
building of the
he nor
cost within
the time of
contract.

claims:
materially
carry 1,000

was to build five miles of fence on the
The parties admit the making of the
stated, and defendant admits his refusal
the \$37,500 and to build the

Plaintiff

(1) That defendant wrongfully refuses
the contract provision requiring him
plaintiff the \$37,500 rent provided
contract.

(2) That defendant wrongfully refused
the contract provision requiring him
miles of fence, which refusal damaged
\$5,500.

The defendant denies the plaintiff's
asserts the following

(1) That plaintiff waived the
five miles of fence because neither
defendant could obtain the wire at a
the contemplation of the parties at
the making of the

The defendant

(1) That plaintiff negligently and
misrepresented that the ranch would

carry 500, by
damaged in the
\$15,000.
materially
were in good
defendant had to
amount of \$6,000.

materially
were adequate
when, in fact,
of them with a
of \$7,500.

claims and
following:
possession of the
any
part that
particular condition
subject to normal
tear.

possession of the
any
part that

steers when in fact it would only
reason of which defendant has been
amount of

(2) That plaintiff negligently and
misrepresented that the windmills
working condition when, in fact,
repair them to his damage in the

(3) That plaintiff negligently and
misrepresented that the dirt tanks
for water storage for the cattle
defendant had to clean the silt out
bulldozer to his damage in the amount

The plaintiff denies the defendant's
asserts the

(1) That defendant accepted
ranch in an "as is" condition without
contractual obligation on plaintiff's
the windmills would be in any
other than that which has been
wear and

(2) That defendant accepted
ranch in an "as is" condition without
contractual obligation on plaintiff's
the dirt tanks would hold any more

storage water
indicate.
after
ranch resulted in
that the ranch
all of which
plaintiff.
claim or
relies.
evidence.
evidence.

than a view of them would
(3) That the lack of normal rainfall
defendant took possession of the
an inadequate growth of grass, so
would only carry 500 head of steers,
was without fault of

Each party has the burden of proving a
defense on which he

of the

UJI 13-304.
civil cases
Burden of proof;
asserting an
greater weight of
the
the evidence;
or affirmative
clear and
weight of the
convincing
preponderance

2. It is a general rule, applicable in all
that a party seeking a recovery or a party
affirmative defense has the burden of proving
propositions necessary to support his claim
defense, as the case may be, by the greater
evidence or, as it is sometimes called, the

UJI 13-307. Rules
this case
of evidence.
the exhibits
facts
facts which the
true].

3. The evidence which you are to consider in
consists of the testimony of the witness [and
admitted into evidence by the court] [and any
admitted or agreed to by counsel] [and any
court instructs you to accept as

governed by
been my duty as

The production of evidence in court is
rules of law. From time to time it has

not concern
rulings. You
not have been
ruled could

answered.
UJI 13-308.
evidence.
Circumstantial
facts or
evidence.
inference of

proved.
UJI 13-808.Waiver.
known right

contract.
UJI 13-819.
caused by
Negligentmisrepre-
misrepresentation.
sentation.
untrue statement

rely in
absence of
entered into the

where the
believing that
true.

UJI 13-1801.
damages
Liability must be
is liability
determined before

judge to rule on the evidence. You must
yourselves with the reasons for these
should not consider what would or would
the answer to questions which the court
not be

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

5. Waiver means intentionally giving up a
which a party had under the

6. A party is liable for damages proximately
his negligent and material
A material misrepresentation is any
upon which the other party did, in fact,
entering into the contract, and, in the
which the other party would not have
agreement.

A negligent misrepresentation is one
speaker has no reasonable ground for
the statement made was

7. 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.
damages.
on damages
to whether the
be awarded.
UJI 13-827.
plaintiff on any
Contracts;
of money
measure of
what was lost
damages; general
reasonably could
instruction.
for damages
damage, such
rent provided
and
five miles of
defendant on any
amount of money
what was lost
reasonably
had not
damages are:
damage, such
misrepresenting the
ranch;
misrepresenting the

The fact that you are given instructions
is not to be taken as any indication as
court thinks damages should or should not

8. If you should decide in favor of the
of his claims, then you must fix the amount
damages which will restore to the plaintiff
by defendant's breach and what plaintiff
have expected to gain. The plaintiff's claims
are:NOTE: Here, insert the proper elements of
as: (1) Damages for refusal to pay the
in the lease contract;
(2) Damages for refusal to build the
fence.

If you should decide in favor of the
of his claims, then you must fix the
damages which will restore to defendant
by plaintiff's breach and what defendant
could have expected to gain if plaintiff
breached. The defendant's claims for

NOTE: Here insert the proper elements of
as: (1) Damages for materially
carrying capacity of the
(2) Damages for materially

and
misrepresenting that
water storage.
party who has
damages, if any,
incurred by
party.
shall recover
find.
which, at
parties could
consequence of any
have been
determine. Your
upon
conjecture.
damages.

Further, sympathy for a person,
and is not a
UJI 13-2004.
Witness impeached.
conduct [or by
has made

working condition of the windmills;
(3) Damages for materially
the dirt tanks were adequate for
Your verdict, then, should be for the
incurred the greater total amount of
less the total amount of damages, if any,
the other
If your verdict is that neither party
damages against the other, you should so
Any damages found by you must be damages
the time of making the contract, the
reasonably have expected to be a
default.
Whether any of these elements of damages
proved by the evidence is for you to
verdict must be based upon proof and not
speculation, guess or
proper basis for determining
any party, should not affect your verdict

9. A witness may be discredited or impeached
by
contradictory evidence or inconsistent
evidence that, at other times, the witness

which are material statements, under oath or otherwise,
the witness] inconsistent with the present testimony of
convicted of a [or by evidence that the witness has been
reputation of a crime] [or by evidence that the general
bad] [or by witness for truth, honesty or integrity is
witness]. specific acts of wrongdoings of the

impeached or If you believe that any witness has been
province to give the discredited, it is your exclusive
credit as you may testimony of that witness only such
deserves. think it

UJI 13-2001. 10. Faithful performance by you of your
duties is vital to the administration of
Performance of justice.
your
duties.

UJI 13-2002. Duty 11. The law of this case is contained in
these instructions and it is your duty to follow
to follow them. You must consider these instructions as a whole, not
instructions. picking out one instruction, or parts thereof, and
disregarding others.

UJI 13-2005. Jury 12. You are the sole judges of all disputed
questions of fact in this case. It is your duty to
sole judges of facts from the evidence produced here in open
determine the true verdict should not be based on speculation,
the facts. conjecture.
court. Your
guess or

these You are to apply the law, as stated in

them and, in sympathy nor verdict.

UJI 13-2003. Jury credibility of the sole judges of testimony of witnesses. given any ability and manner while he may have considered in case.

UJI 13-2007. Closing arguments. or These summaries arriving at carefully. You may However, remarks or course of the or as the law instructions.

UJI 13-2008. No damages unless

instructions, to the facts as you find this way, decide the case. Neither prejudice should influence your

13. You alone are the judges of the witnesses and the weight to be given to the each of them. In determining the credit to be witness, you may take into account his opportunity to observe, his memory, his testifying, any interest, bias or prejudice and the reasonableness of his testimony, light of all the evidence in the

14. After these instructions on the law case, the lawyers may make closing arguments, statements, on the evidence and the law. can be of considerable assistance to you in your decision and you should listen give them such weight as you think proper. neither these final discussions nor any other arguments of the attorneys made during the trial are to be considered by you as evidence correct statements of the law, if contrary to given to you in these

15. You are not to discuss damages unless you determined that there is

liability.
liability.

the evidence in the
case.

UJI 13-1903. Jury
duty of the
duty to consult.
decide the case

evidence. In

hesitate to

opinion, if

surrender your

of evidence

jurors, or

Remember that

of the

truth from

16. In deliberating on this case, it is the
jurors to consult with one another and to
only after an impartial consideration of the
the course of your deliberations, do not
re-examine your own views and change your
convinced it is erroneous; but do not
honest conviction as to the weight or effect
solely because of the opinion of your fellow
for the mere purpose of returning a verdict.
you are not partisans but are judges - judges
facts. Your sole interest is to ascertain the

UJI 13-2009.
before commencing
Verdict of ten.
your members as

17. Upon retiring to the jury room, and
your deliberations, you will select one of
foreman.

upon a

proper form, and

with your

When as many as ten of you have agreed
verdict, your foreman must sign the
you will all then return to open court
verdict.

UJI 13-828A.
complaint in the sum
Verdict for
..

18. We find for the plaintiff on the
of \$.

plaintiff
on
...
complaint.

UJI 13-828B. We find for the defendant on the
complaint.
Verdict for de-

fendant
on

complaint. Foreman
UJI 13-828C. We find for the defendant on the
counterclaim in the
Verdict for sum of \$.
..
defendant
on

counterclaim. Foreman
UJI 13-828D. We find for the plaintiff on the
counterclaim.
Verdict
for

plaintiff
on

counterclaim. Foreman
UJI 13-828E. We find that neither party should
recover.
Verdict

for
neither

party. Foreman

APPENDIX 2. CONTRACTS; RECOUPMENT; COUNTERCLAIM.

Subject Matter

Herewith follows another example of a contracts case where there is, in issue, the original contract and a counterclaim and also there is added the element of recoupment.

Statement of facts.

Defendant, John Johnson, entered into a short written contract with Smith & Sons, a partnership and plaintiff, to drill a water well on the Johnson Ranch in De Baca Co., N.M. The contract stated as follows:

Smith & Sons agrees to drill a stock water well on the Johnson Ranch in De Baca Co., N.M., commencing not later than June 1, 1975, to a depth of not more than 375'. Johnson shall pay Smith & Sons \$1.00 per foot for drilling and \$4.00 per foot for casing when the well is completed and the premises cleaned up.

Johnson didn't start drilling until October 15, 1975, several months late. After the well was drilled 200', the walls of the hole collapsed and Smith & Sons had to drill out the collapsed wall. The well was cased at 375' where adequate water was found. The well was not finished until April 1, 1976. Smith & Sons claims that a 4' hole is all that is normally required and that it is entitled to \$2.00 per foot more for 5' casing. After completion, Smith & Sons scraped the dirt and mud back around the hole, leaving the caliche and rock on top and the soil on the bottom. Johnson had to pay for hauling water for his livestock until the well was completed.

A suggested set of instructions, in recommended sequence, in outline form, illustrates the format as follows:

1. 13-801. Statement of issues; counterclaim; burden.
2. 13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.
3. 13-307. Rules of evidence.
4. 13-308. Circumstantial evidence.
5. 13-806. Modification; change.
6. 13-808. Waiver.

7. 13-809. Reasonable time for performance.
8. 13-817. Workmanlike manner.
9. 13-818. Custom and usage.
10. 13-1801. Liability must be determined before damages.
11. 13-827. Contracts; measure of damages; general instruction.
12. 13-213. Expert testimony.
13. 13-2001. Performance of your duties.
14. 13-2002. Duty to follow instructions.
15. 13-2005. Jury sole judges of the facts.
16. 13-2003. Jury sole judges of witnesses.
17. 13-2007. Closing arguments.
18. 13-2008. No damages unless liability.
19. 13-1903. Jury duty to consult.
20. 13-2009. Verdict of ten.
21. 13-828A. Verdict for plaintiff on complaint.
- 13-828B. Verdict for defendant on complaint.
- 13-828C. Verdict for defendant on counterclaim.
- 13-828D. Verdict for plaintiff on counterclaim.
- 13-828E. Verdict for neither party.

Instructions

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

UJI 13-801.
party claims to
Statement of
other.
issues; counter-

claim; burden.
to drill a

deep, to

which defendant

the drilling

contract price

and the

up.

contract as just

refusal to pay

contract.

claims:

to pay

casing as

contract;

the

pipe from 4'

\$2.00 per

and

late

1. This is a contract case in which each
be entitled to money damages from the

This contract means that plaintiff agreed

water well on defendant's ranch 375'

commence drilling by June 1, 1975, for

was to pay plaintiff \$1.00 per foot for

and \$4.00 per foot for casing, with the

to be paid when the well was completed

premises cleaned

The parties admit the making of the

stated, and the defendant admits his

the \$1,875.00 as stated in the

Plaintiff

(1) That defendant wrongfully refuses

plaintiff \$1,875 for drilling and

provided for in the

(2) That the parties agreed to change

contract to increase the size of the

to 5', so as to entitle plaintiff to

foot more, i.e., \$750;

(3) That the defendant waived the

commencement of the

work.
claims.
claims:
commencing and
reasonable
to haul
in the
and
up the
the contract
workmanlike
amount of \$500.
claims and
following:
drilling was over
extent required
area.
claim or
relies.
UJI 13-304.
civil cases,
Burden of proof;
asserting an
greater weight of
the
the evidence;
or affirmative
clear and
weight of the

The defendant denies the plaintiff's

The defendant

(1) That plaintiff's delay in
completing the well was not within a
time and caused the defendant to have
water for his livestock to his damage
amount of \$350;

(2) That plaintiff's failure to clean
premises after the drilling breached
because the work was not done in a
manner, damaging defendant in the

The plaintiff denies the defendant's
asserts the

(1) That the clean-up after the
was done in the manner and to the
by custom and usage in this

Each party has the burden of proving a
defense upon which he

2. It is a general rule, applicable in all
that a party seeking a recovery or a party
affirmative defense has the burden of proving
propositions necessary to support his claim
defense, as the case may be, by the greater

convincing
preponderance
evidence.
evidence.

UJI 13-307. Rules
this case
of evidence.
[and the

[and any

any facts

true].

governed by

been my duty as

not concern

rulings. You

not have been

ruled could

answered.
UJI 13-308.
evidence.
Circumstantial
facts or
evidence.
inference of

proved.
UJI 13-806.
express or
Modification;
parties.
change.

UJI 13-808.Waiver.
known right

contract.

evidence or, as it is sometimes called, the
of the

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

The production of evidence in court is
rules of law. From time to time it has
judge to rule on the evidence. You must
yourselves with the reasons for these
should not consider what would or would
the answer to questions which the court
not be

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

5. A contract may be changed at any time by
implied agreement of all the

6. Waiver means intentionally giving up a
which a party had under the

evidence. **circumstances, as shown by the**

UJI 13-809. 7. The plaintiff was obligated to perform the contract
Reasonable time within a reasonable time. What is a
reasonable time must
for performance. be determined in light of all the
surrounding

UJI 13-817. 8. "Workmanlike manner" or "workmanlike"
means that
Workmanlikemanner. all the work will be of good quality and
reasonably free
from faults and
defects.

UJI 13-818. 9. The term "custom and usage" refers to a
practice in
Custom and usage. a particular trade, industry or business that
is certain
and uniform and which is so recognized that
both parties
are bound by such custom and usage in the
determination of
their
obligations.

UJI 13-1801. 10. You are not to engage in any discussion
of damages
Liability must be unless you have first determined that there
is liability
determined before as elsewhere covered in these
instructions.
damages. The fact that you are given instructions
on damages is not to be taken as any indication as
to whether the
court thinks damages should or should not
be awarded.

UJI 13-827. 11. If you should decide in favor of the
plaintiff on any
Contracts;
of money
measure of
was lost by
damages; general
reasonably could
instruction. defendant's breach and what plaintiff
have expected to gain. The plaintiff's claims

for damages
original contract
and
portion of the
increasing the
5'.

defendant on any
amount of money
what was lost
reasonably
had not
damages are:

property during
and
premises
manner.

who has
damages, if any,
incurred by
party.

shall recover
find.

which, at
parties could

- are:
- (1) The unpaid balance of the price;
 - (2) The unpaid balance of that contract due to a change, that is, casing size from 4' to

If you should decide in favor of the
of his claims, then you must fix the
damages which will restore to defendant
by plaintiff's breach, and what defendant
could have expected to gain if plaintiff
breached. The defendant's claims for

- (1) The value of the use of the
the time the work was delayed;
- (2) The cost to defendant to have the
cleaned up in a workmanlike

Your verdict then should be for the party
incurred the greater total amount of
less the total amount of damages, if any,
the other

If your verdict is that neither party
damages against the other, you should so

Any damages found by you must be damages
the time of making the contract, the

consequence of any

reasonably have expected to be a default.

have been determine. Your upon conjecture.

Whether any of these elements of damages proved by the evidence is for you to verdict must be based upon proof and not speculation, guess or

prejudices against and is not a damages.

Further, sympathy for a person, or any party, should not affect your verdict proper basis for determining

UJI 13-213. Expert testimony. conclusion. An

12. The Rules of Evidence do not ordinarily permit a witness to testify as to an opinion or expert witness is an exception to this rule.

A witness expert in any permitted to witness is expert may opinion.

who, by education and experience, has become art, science, profession or calling may be state an opinion as to a matter in which the versed and which is material to the case. An also state the reasons for such

received in weight as you entirely if you unsound.

You should consider each expert opinion evidence in this case and give it such think it deserves. You may reject it conclude the opinion is

UJI 13-2001. duties is vital Performance of justice. your

13. Faithful performance by you of your to the administration of

duties.

one instruction, or parts thereof, and disregarding others.

UJI 13-2002. Duty 14. 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 instructions.

UJI 13-2005. Jury 15. You are the sole judges of all disputed questions of fact in this case. It is your duty to sole judges of determine the true facts from the evidence produced here in open the facts. 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 13-2003. Jury 16. You alone are the judges of the credibility of the witnesses and the weight to be given to the sole judges of testimony of each of them. In determining the credit to be witnesses. given any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony, considered in light of all the evidence in the case.

UJI 13-2007. 17. After these instructions on the law

governing this
Closing arguments. case, the lawyers may make closing arguments,
or

These summaries
arriving at
carefully. You may
However,
remarks or
course of the
or as
the law

statements, on the evidence and the law.
can be of considerable assistance to you in
your decision and you should listen
give them such weight as you think proper.
neither these final discussions nor any other
arguments of the attorneys made during the
trial are to be considered by you as evidence
correct statements of the law, if contrary to
given to you in these

instructions.
UJI 13-2008. No
have first
damages unless
liability.
liability.

18. You are not to discuss damages unless you
determined that there is

UJI 13-1903. Jury
duty of the
duty to consult.
the case only
evidence. In the
to
opinion, if
surrender your
of evidence
jurors, or
Remember that
of the

19. In deliberating on this case, it is the
jurors to consult with one another to decide
after an impartial consideration of the
course of your deliberations, do not hesitate
re-examine your own views and change your
convinced it is erroneous; but do not
honest conviction as to the weight or effect
solely because of the opinion of your fellow
for the mere purpose of returning a verdict.
you are not partisans but are judges - judges

truth from
case.
UJI 13-2009.
commencing
Verdict of ten.
your members as

facts. Your sole interest is to ascertain the
the evidence in the
20. Upon retiring to the jury room and before
your deliberations, you will select one of
foreman.

upon a
proper form and
with your

When as many as ten of you have agreed
verdict, your foreman must sign the
you will all then return to open court
verdict.

\$.

..

UJI 13-828A.
complaint in the sum
Verdict
for of

21. We find for the plaintiff on the

plaintiff
on

.....

...
complaint.
UJI 13-828B.
complaint.
Verdict
for

Foreman
We find for the defendant on the

defendant
on

.....

...
complaint.
UJI 13-828C.
counterclaim in the
Verdict for

Foreman
We find for the defendant on the
sum of \$.

..
defendant
on

.....

...

counterclaim.
UJI 13-828D.
counterclaim.
Verdict
for

Foreman
We find for the plaintiff on the

plaintiff
on

.....

...
counterclaim.
UJI 13-828E.
recover.
Verdict

Foreman
We find that neither party should

for
neither

.....

.....
party.

Foreman

APPENDIX 3. CONTRACTS; INCAPACITY; UNDUE INFLUENCE; MENTAL WEAKNESS.

Subject Matter

Here follows another group of instructions under a theoretical factual situation. This third appendix offers a different approach in the use of different instructions.

Statement of facts.

Robert F. Land executed a ranch lease on August 4, 1976, for one (1) year for 50 cents per acre for 6,000 acres. Plaintiff was appointed conservator of Land on February 15, 1977, and brings this action under 45-5-424 NMSA 1978, for damages alleging that Land was mentally incapacitated at the time the lease was made, was old and mentally weak and was unduly influenced by defendant to make the lease for a nominal rental when, in fact, the going annual rental in the area of the ranch was \$2.00 per acre. Plaintiff sues for money damages of \$9,000, i.e., \$1.50 per acre. The lease has expired by its terms, so there is no rescission issue. No presumption raised by mental weakness.

Defendant denies all the allegations of the complaint and affirmatively states that Land was financially unable to stock the ranch and invited defendant to do so with the idea that Land could better sell the ranch if it were stocked. Defendant further alleges that it cost him \$3,500 just to move the cattle to the Land ranch, for which amount he counterclaims.

A suggested set of instructions, in recommended sequence, in outline form, illustrates the format as follows:

1. 13-801. Statement of issues; counterclaim; burden.
2. 13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.
3. 13-307. Rules of evidence.
4. 13-308. Circumstantial evidence.
5. 13-821. Capacity to contract; incompetency.
6. 13-822. Undue influence; contracts.
7. 13-823. Mental weakness; fraudulent misrepresentation; undue influence.
8. 13-1801. Liability must be determined before damages.
9. 13-827. Contracts; measure of damages; general instruction.
10. 13-2004. Witness impeached.
11. 13-213. Expert testimony.
12. 13-2001. Performance of your duties.
13. 13-2002. Duty to follow instructions.
14. 13-2005. Jury sole judges of the facts.
15. 13-2003. Jury sole judges of witnesses.
16. 13-2007. Closing arguments.

17. 13-2008. No damages unless liability.
18. 13-1903. Jury duty to consult.
19. 13-2009. Verdict of ten.
20. 13-828A. Verdict for plaintiff on complaint.
- 13-828B. Verdict for defendant on complaint.
- 13-828C. Verdict for defendant on counterclaim.
- 13-828D. Verdict for plaintiff on counterclaim.
- 13-828E. Verdict for neither party.

Instructions

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

<p>UJI 13-801. party claims to Statement of other. issues; counter- claim; burden. sometimes referred F. Land, who incapacitated person by Robert F. Land one year a rent of i.e., \$3,000. contract.</p>	<p>1. This is a contract case in which each be entitled to money damages from the The plaintiff sues as conservator, to as a guardian, of the estate of Robert was adjudged to be a mentally another court on February 15, 1977. personally entered into a ranch lease for with the defendant on August 4, 1976, at \$0.50 per acre per year for 6,000 acres, This lease is a</p>
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contract to this
by both
defendant.

claims:

mentally
was made or
which,
weakness, made
binding
damages in the
difference between
i.e., \$3,000, and
acre, i.e.,

claim and

defense:

sell his ranch
better if it were
not in a
defendant agreed to
would cost
\$3,000, and
have made the

The parties admit the making of the
extent: The lease was executed in writing
Robert F. Land and the
Plaintiff

(1) That Robert F. Land was
incapacitated at the time the lease
was unduly influenced by defendant,
together with Land's age and mental
it impossible for him to enter into a
lease contract. This resulted in
amount of \$9,000, which is the
the rent paid at \$0.50 per acre,
the fair rental value of \$2.00 per
\$12,000.

The defendant denies the plaintiff's
asserts the following

(1) That Robert F. Land wanted to
but told defendant it would sell
stocked with cattle which Land was
financial position to do; so
stock it with his cattle if the lease
only \$0.50 per acre per year, i.e.,
defendant contends that he would not
lease if the rent had been higher,

which rental
circumstances.

was a fair amount under the

claims:

The defendant

move his

(1) That it cost defendant \$3,500 to

amount he should

livestock to Land's ranch, which

pay any

recover in the event that he has to

plaintiff.

damages to

claim.

The plaintiff denies the defendant's

UJI 13-304.

2. It is a general rule, applicable in all

civil cases,

Burden of proof;

asserting an

greater weight of

the

the evidence;

or affirmative

clear and

weight of the

convincing

preponderance

evidence.

evidence.

UJI 13-307. Rules

this case

of Evidence.

[and the

[and any

any facts

true].

governed by

been my duty as

not concern

rulings. You

that a party seeking a recovery or a party

affirmative defense has the burden of proving

propositions necessary to support his claim

defense, as the case may be, by the greater

evidence or, as it is sometimes called, the

of the

3. The evidence which you are to consider in

consists of the testimony of the witnesses

exhibits admitted into evidence by the court]

facts admitted or agreed to by counsel] [and

which the court instructs you to accept as

The production of evidence in court is

rules of law. From time to time it has

judge to rule on the evidence. You must

yourselves with the reasons for these

not have been ruled could

answered.
UJI 13-308. Circumstantial evidence. Circumstantial facts or evidence. inference of

proved.
UJI 13-821. Capacity to make or contract; his person or incompetency. affairs.

UJI 13-822. Undue influence; con- improper.

tracts. unfairly to prevent understanding

UJI 13-823. alone is not Mental weakness; valid, but, in fraudulent influence], as misrepresentation; into account undue influence. the plaintiff.
UJI 13-1801.

should not consider what would or would the answers to questions which the court not be

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

5. A person can enter into a binding contract has sufficient understanding or capacity to communicate responsible decisions concerning management of his

6. Undue influence is improper. Influence is not judgment.

The term "undue influence" means that one and improperly influenced another so as that person from exercising a free and

7. [Old age] [Illness] [Weakness of mind] enough to establish that a contract is not considering the issue of [fraud] [undue defined in these instructions, you may take evidence, if any, of the mental impairment of

8. You are not to engage in any discussion of

damages
Liability must be
is liability
determined before
instructions.
damages.
on damages
to whether the
be awarded.
UJI 13-827.
plaintiff on any
Contracts;
of money
measure of
was lost by
damages; general
reasonably could
instruction.
for damages:
between the rent
ranch,
unable to
as a result
the undue
Land's age
weakness.
defendant on any
defendant what
defendant
plaintiff
damages is:
to Robert F.

unless you have first determined that there
as elsewhere covered in these

The fact that you are given instructions
is not to be taken as any indication as
court thinks damages should or should not

9. If you should decide in favor of the
of his claims, then you must fix the amount
damages which will restore to plaintiff what
defendant's actions and what plaintiff
have expected to gain. The plaintiff's claim

(1) Damages for the difference
paid and the fair rental value of the
arising out of Robert F. Land's being
enter into a binding lease contract,
either of his mental incapacity or
influence of defendant, together with
and mental

If you should decide in favor of the
of his claims, then you must restore to
was lost by plaintiff's actions and what
reasonably could have expected to gain if
had not acted. The defendant's claim for

(1) Damages for moving his livestock

recover in
damages to

Land's ranch, which amount he should
the event that he has to pay any
plaintiff.

who has
damages, if any,
incurred by
party.

Your verdict then should be for the party
incurred the greater total amount of
less the total amount of damages, if any,
the other

shall recover
find.

If your verdict is that neither party
damages against the other, you should so

which, at
parties could
consequence of any

Any damages found by you must be damages
the time of making the contract, the
reasonably have expected to be a
default.

have been
determine. Your
upon
conjecture.

Whether any of these elements of damages
proved by the evidence is for you to
verdict must be based upon proof and not
speculation, guess or

prejudices against
and is not a
damages.

Further, sympathy for a person, or
any party, should not affect your verdict
proper basis for determining

UJI 13-2004.
by

10. A witness may be discredited or impeached
by contradictory evidence or inconsistent
evidence that at other times the witness has
statements, under oath or otherwise, which

Witness impeached.
conduct [or by
made material

are
the witness]
convicted of a
reputation of a
bad] [or by
witness].

impeached or
province to give the
credit as you may
deserves.
unsound.

UJI 13-213.
Expert testimony.
conclusion. An

A witness
expert in any
permitted to
witness is
expert may
opinion.

received in
weight as you
entirely if you

UJI 13-2001.
duties is vital

inconsistent with the present testimony of
[or by evidence that the witness has been
crime] [or by evidence that the general
witness for truth, honesty or integrity is
specific acts of wrongdoings of the

If you believe any witness has been
discredited, it is your exclusive
testimony of that witness only such
think it

conclude the opinion is

11. The rules of evidence do not ordinarily
witness to testify as to an opinion or
expert witness is an exception to this rule.
who, by education and experience, has become
art, science, profession or calling may be
state an opinion as to a matter in which the
versed and which is material to the case. An
also state the reasons for such

You should consider each expert opinion
evidence in this case and give it such
think it deserves. You may reject it

12. Faithful performance by you of your

Performance of to the administration of
justice.
your
duties.

UJI 13-2002. Duty 13. The law of this case is contained in
these
to follow instructions and it is your duty to follow
them. You must them. You must
instructions. consider these instructions as a whole, not
picking out one instruction, or parts thereof, and
disregarding others.

UJI 13-2005. Jury 14. You are the sole judges of all disputed
questions of fact in this case. It is your duty to
sole judges of determine the true
facts from the evidence produced here in open
the facts. court. Your
guess or
verdict should not be based on speculation,
conjecture.

these You are to apply the law, as stated in
instructions, to the facts as you find
them, and, in this way, decide the case. Neither
sympathy nor prejudice should influence your
verdict.

UJI 13-2003. Jury 15. You alone are the judges of the
credibility of the witnesses and of the weight to be given to
sole judges of the testimony of each of them. In determining the credit to
witnesses. be given any witness, you may take into account his
ability and opportunity to observe, his memory, his
manner while testifying, any interest, bias or prejudice
he may have and the reasonableness of his testimony,
considered in light of all the evidence in the
case.

UJI 13-2007. governing this Closing arguments. or

These summaries arriving at carefully. You may However, remarks or course of the or as the law

instructions. UJI 13-2008. No have first damages unless liability. liability.

UJI 13-1903. Jury duty of the duty to consult. decide the case evidence. In hesitate to opinion, if surrender your of evidence jurors, or Remember that

16. After these instructions on the law case, the lawyers may make closing arguments, statements, on the evidence and the law. can be of considerable assistance to you in your decision and you should listen give them such weight as you think proper. neither these final discussions nor any other arguments of the attorneys made during the trial are to be considered by you as evidence correct statements of the law, if contrary to given to you in these

17. You are not to discuss damages unless you determined that there is

18. In deliberating on this case, it is the jurors to consult with one another and to only after an impartial consideration of the the course of your deliberations, do not re-examine your own views and change your convinced it is erroneous; but do not honest conviction as to the weight or effect solely because of the opinion of your fellow for the mere purpose of returning a verdict. you are not partisans but are judges - judges

of the
truth from
case.
UJI 13-2009.
before commencing
Verdict of ten.
your members as

facts. Your sole interest is to ascertain the
the evidence in the
19. Upon retiring to the jury room, and
your deliberations, you will select one of
foreman.

upon a
proper form and
with your

When as many as ten of you have agreed
verdict, your foreman must sign the
you will all then return to open court
verdict.

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..

UJI 13-828A.
complaint in the sum
Verdict
for of

20. We find for the plaintiff on the

plaintiff
.....
on complaint.
UJI 13-828B.
complaint.
Verdict

.....
Foreman
We find for the defendant on the

for
defendant
.....
on complaint.

.....
Foreman
We find for the defendant on the

UJI 13-828C.
counterclaim in the
Verdict for

sum of \$

..
defendant
.....
on counter-
claim.

.....
Foreman

UJI 13-828D.
counterclaim.
Verdict

We find for the plaintiff on the

for
plaintiff
.....
on counter-
claim.

.....

Foreman

UJI 13-828E.
recover.
Verdict

We find that neither party should

for
neither
.....
party.

.....

Foreman

Chapter 9 Federal Employers' Liability Act Instruction

- 13-901. Introduction.
- 13-901. Special F.E.L.A. voir dire of jurors by court.
- 13-902. Special F.E.L.A. statement of the case issues; claims; formula.
- 13-903. Burden of proof and greater weight of evidence, meaning of.
- 13-904. The rule of liability; interstate commerce not an issue.
- 13-905. The rule of liability; interstate commerce an issue.
- 13-906. A railroad acts through its employees.
- 13-907. Scope or course of employment.
- 13-908. Negligence; definition.
- 13-909. Contributory negligence; definition.
- 13-910. Ordinary care.

- 13-911. Employee's conduct the sole cause.
- 13-912. Duty of employer as to place of work.
- 13-913. Duty to provide safe tools, etc.
- 13-914. Duty to provide sufficient employees.
- 13-915. "Cause"; explained.
- 13-916. Amount of damages; injury; not death.
- 13-917. Assumption of risk - No instruction to be given.
- 13-918. Verdict for plaintiff; comparative negligence.
- 13-919. Verdict for plaintiff.
- 13-920. Verdict for defendant.
- 13-921. Special interrogatories.

13-901. 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,

(Name 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.

ANNOTATIONS

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 sustained damages from personal injuries. [The plaintiff, as personal representative, claims damages because of the death of

.....] Plaintiff also claims that one or more of the

(Name of deceased workman)

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 13-302 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 workmen 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 work, which would have been given to him; and

(2) The plaintiff failed to heed the whistle of the oncoming train and to exercise ordinary care to remove himself 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 himself] [plaintiff's decedent] was guilty of some negligence and that his negligence contributed to his [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 13-302, 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 13-302 can be utilized.

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

Idzajt v. Pennsylvania R.R., 47 F.R.D. 25 (D.C. Pa. 1969). See also UJI 13-302.

ANNOTATIONS

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.

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.

ANNOTATIONS

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 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.

Committee comment. - This instruction is based upon the first paragraph of Section 1 of the act (45 U.S.C.A. § 51).

ANNOTATIONS

"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).

13-905. The rule of liability; interstate commerce an issue.

When an employee of a railroad is [injured] [killed] while engaged in his 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 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.

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 his employment at the time of his 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 second paragraph of this instruction is based upon the second paragraph of Section 1 of the act (45 U.S.C.A. § 51). This second paragraph of Section 1 was added by amendment in 1939 to broaden the scope of the act, as it pertains to "interstate commerce". See, for instance, *Missouri Pac. Ry. v. Fisher*, 206 Ark. 705, 177 S.W.2d 725 (1944) and *Wright v. New York Cent. Ry.*, 263 App. Div. 461, 33 N.Y.S.2d 531, aff'd, 228 N.Y. 719, 43 N.E.2d 97, cert. denied, 317 U.S. 668, 63 S. Ct. 73, 87 L. Ed. 537 (1942), where the employees were covered by the provisions of the act, even though actually engaged in intrastate operations at the time of their injuries, because, at other times or on other days, their employment involved interstate commerce.

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 employment with the railroad, is the act or omission of the railroad.

DIRECTIONS FOR USE

This instruction shall be used in every case.

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 his 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 his employment in order to make the railroad liable and, in this respect, are no different from New Mexico law, as embodied in this instruction and in UJI 13-409, which it follows closely. However, note that scope or course of employment is a question of substantive law and, therefore, governed ultimately by decisions of the Supreme Court of the United States.

ANNOTATIONS

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

13-907. Scope or course of employment.

For an employee to recover damages he must have been doing something he was employed to do or which was reasonably incidental to his employment.

DIRECTIONS FOR USE

This instruction should be given only when the scope or course of employment is an issue.

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).

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 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 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.

Committee comment. - UJI 13-1601 is the basic instruction defining negligence and can be used in F.E.L.A. cases. Negligence is a substantive matter, governed by federal cases, but the definition found in UJI - Civil is in accord with that found in federal decisional law.

ANNOTATIONS

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

Virginia Jury Instructions § 40.06.

13-909. Contributory negligence; definition.

In this case, contributory negligence means negligence on the part of the [plaintiff] [decedent] that contributed, in some degree, to cause damages of which plaintiff complains.

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."

ANNOTATIONS

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 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.

Committee comment. - UJI 13-1603, defining ordinary care, is customarily used in every case where UJI 13-1601 is also used. Here again, although what is "ordinary

care" is a substantive question, governed by federal decisional law and F.E.L.A. cases, the definition of "ordinary care" found in federal cases will not vary from UJI 13-1603.

ANNOTATIONS

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

13-911. Employee's conduct the sole cause.

There can be no recovery of damages by the plaintiff if the [plaintiff's] [decedent's] conduct was the sole cause of the injuries.

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).

ANNOTATIONS

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).

ANNOTATIONS

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).

ANNOTATIONS

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.

ANNOTATIONS

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).

ANNOTATIONS

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 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.

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.

ANNOTATIONS

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).

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 his employment in any case where either his 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 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.

Committee comment. - 45 U.S.C.A. § 53 is the basis for this instruction, which would seem to be the logical procedure to follow.

ANNOTATIONS

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.

13-919. Verdict for plaintiff.

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

.....
.

Foreman

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.

13-920. Verdict for defendant.

We find for the defendant.

.....
.

Foreman

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.

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].

.....
.

Foreman

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.

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.

Chapter 10

Defamation

Instruction

- 13-1001. Defamation: Defined.
- 13-1002. Defamation action: Prima facie case; general statement of elements.
- 13-1003. Publication: Defined.
- 13-1004. Statement of fact: Fact defined; opinion contrasted.
- 13-1005. Concerning the plaintiff: Defined.
- 13-1006. Falsity: Defined.
- 13-1007. Defamatory communication: Defined.
- 13-1008. Defamatory meaning understood.
- 13-1009. Wrongful act: Defined.
- 13-1010. Actual injury and compensatory damages.
- 13-1011. Punitive damages.
- 13-1012. Qualified privilege: Abuse of qualified privilege.
- 13-1013. Defense of truthfulness.
- 13-1014. Damages; mitigation - No instruction submitted.

Appendix 1. Chart of plaintiff's prima facie case.

Appendix 2. Defamation: public official v. media.

COMPILER'S ANNOTATIONS

Rule 13-921 Special interrogatories

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.

ANNOTATIONS

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).

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), 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]

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(C), 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*, U.S. , 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 that he was defamed 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 13-1015.

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*, U.S. , 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 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 his action and the defendant either has raised no affirmative defense or has failed to prove the elements of his defense, or defenses.

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

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.

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.

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).

ANNOTATIONS

Mere statement of opinion. - A newspaper article which stated that the plaintiff, a public official, had spent "most of his career in an overseas agency closely linked to brutal police torture in Latin America," and which quoted a source to the effect that the plaintiff must have known what was going on, was not defamatory. The statement that the plaintiff must have known what was going on fell within the category of opinion rather than fact. The source identified his factual premises, based a conclusion on those premises, and specifically disclaimed any knowledge that the plaintiff was personally involved. *Saenz v. Morris*, 106 N.M. 530, 746 P.2d 159 (Ct. App. 1987).

13-1005. Concerning the plaintiff: Defined.

To support a claim for defamation, the communication must be concerning the plaintiff. The communication is concerning the plaintiff if the person to whom it was communicated reasonably understood that it was intended to refer to the plaintiff.

[The communication may be concerning the plaintiff even though it is equally applicable to other unnamed persons.]

[The communication may be concerning the plaintiff where it refers to a group if the circumstances indicate that the communication was reasonably understood to refer to the plaintiff.]

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.

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.

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).

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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).

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:

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[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 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]. 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.

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

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.

ANNOTATIONS

Punitive damages not recoverable absent actual malice. - Punitive damages are not recoverable in actions by private persons against a media defendant if the defendant was merely negligent in failing to ascertain the falsity of the defamatory communication, and in the absence of proof of actual malice. *Marchiondo v. New Mexico State Tribune Co.*, 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981).

What damages available. - The law restricts compensation to actual and special damages. Punitive damages are recoverable only if there is proof that the publication was made with actual malice (knowledge of falsity or reckless disregard of the truth). *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

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 his 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*.

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.

ANNOTATIONS

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 STATUTES 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

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

13-1001. Defamation is a wrongful injury to a person's reputation.

Defamation:

Defined.

13-1002. (A) The plaintiff claims that the following communication

Defamation was defamatory and entitles the plaintiff to recover

action: Prima damages:

facie case;

**general statement Senator Jehosaphatt may have received \$20,000 from
of elements. 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.

weight of the element of his claim by the greater weight of the evidence.

13-304. Burden of It is a general rule in civil cases that a party seeking proof; greater a recovery has the burden of proving every essential

evidence; clear

and convincing To prove by the greater weight of the evidence means to evidence. 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. To support a claim for defamation, the communication by Statement of defendant must contain a statement of fact.

fact: Factdefined;

opinioncontrasted. 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: To support a claim for defamation, the communication must Defined. 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. To support a claim for defamation, a communication must Defamatory be defamatory.

communication:

Defined.

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. 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 To support a claim for defamation, the defendant must act: Defined. 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.

determined before elsewhere covered in these instructions.

13-1801. You are not to engage in any discussion of damages unless Liability must be you have first determined that there is liability, as

damages. 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 If you should decide in favor of the plaintiff on the injury and question of liability, you must then fix the amount of compensatory money which will reasonably and fairly compensate damages. 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 If you find that plaintiff should recover actual damages, 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 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. think it deserves.

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

13-2001. Faithful performance by you of your duties is vital to Performance of the administration of justice. your duties.

13-2002. Duty to The law of this case is contained in these instructions follow and it is your duty to follow them. You must consider instructions. these instructions as a whole, not picking out one instruction or parts thereof, and disregarding others.

13-2003. Jury You alone are the judges of the credibility of the sole judges of witnesses and of the weight to be given to the testimony witnesses. of each of them. In determining the credit to be given to the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice that he may have and the reasonableness of his testimony, considered in light of all the evidence in the case.

13-1903. Jury In deliberating on this case, it is your duty, as the duty to consult. 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 You are the sole judges of all disputed questions of fact sole judges of in this case. It is your duty to determine the true facts the 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 The jury acts as a body. Therefore, on every question jurors to which the jury must answer it is necessary that all jurors participate. 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 After these instructions on the law governing this case, arguments. 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 You are not to discuss damages unless you have first damages unless determined that there is liability. liability.

13-2009. Verdict Upon retiring to the jury room, and before commencing of your deliberations, you will select one of your members as foreman.

When as many as five of you have agreed upon a verdict, your foreman must sign the appropriate form and you will all then return to open court.

13-2201. Verdict We find for the plaintiff in the sum of \$. for plaintiff; single parties.

13-2202. Verdict We find for the defendant. for defendant; single parties.

Chapter 11

Medical Malpractice

Instruction

- 13-1101. Introduction.
- 13-1101. Duty of doctor or other health care provider.
- 13-1102. Duty of specialist.
- 13-1103. Duty to inform patient of need for another doctor.
- 13-1104A. Duty to inform.
- 13-1104B. Duty to inform; evidence.
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- 13-1110. Duty of patient.
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- 13-1112. Doctor not guarantor; poor results not breach of duty.
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- 13-1115. Termination of physician-patient relation; abandonment.
- 13-1116A. Proximate cause; failure to inform; condition treated.
- 13-1116B. Proximate cause; failure to inform; condition not treated.
- 13-1117. Proximate cause; failure to warn - Withdrawn.
- 13-1118. Res ipsa loquitur - No instruction drafted.
- 13-1119. Duty of hospital; patient care.
- 13-1120. Hospital acts through employees.
- 13-1121. Hospital liability; loaned servant exception.
- 13-1122. Hospital liability where orders followed.
- 13-1123. Hospital not guarantor; poor result not breach of duty.
- 13-1124. Alternative method; hospital.
- 13-1125. Special Interrogatory No. 1 - Future medical care and benefits.
- 13-1126. Special Interrogatory No. 2 - Past medical care and related benefits.

Appendix 1. Malpractice; informed consent.

Appendix 2. Battery/no consent; liability of doctor for negligence of hospital employee.

13-1101. 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 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 out as a specialist, then UJI 13-1102 shall be used instead of UJI 13-1101.

[As amended, effective January 1, 1987.]

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.

ANNOTATIONS

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 laymen 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.

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.

75 Am. Jur. 2d Trial §§ 668, 691, 1018.

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 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 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.]

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

"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 his condition requires treatment which is available from specialists. *Rahn v. United States*, 222 F. Supp. 775 (S.D. Ga. 1963).

13-1104A. Duty to inform.

In treating his 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 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 patient every risk of proposed treatment no matter how small or remote. [A doctor has no duty to discuss risks which he can reasonably expect to be obvious or known to his 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.]

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

"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 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.]

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.

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.

ANNOTATIONS

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.

ANNOTATIONS

"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.

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.

ANNOTATIONS

Compiler's notes. - 41 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 79, 87 and 110.

JIMI 7-68.1.

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

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).

13-1109A. Battery; no consent.

Every adult of sound mind has a right to determine what shall be done with his 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 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.

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.

13-1109B. Battery; validity of consent.

For a consent to be valid, the patient [or the person giving consent on his 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.

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".).

13-1109C. Battery; damages.

To recover damages for battery the patient need not prove that he 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.

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.

ANNOTATIONS

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.

13-1110. Duty of patient.

Every patient has a duty to exercise ordinary care for his 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.]

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

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

COMPILER'S ANNOTATIONS

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).

ANNOTATIONS

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 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 to be the best thing to do, and if his choice and manner of action are the same as might have been followed by a reasonably well-qualified doctor under the same conditions, then he has done all that the law requires of him, 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.

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.

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.

ANNOTATIONS

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).

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 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 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.]

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.

13-1116B. Proximate cause; failure to inform; condition not treated.

A doctor who fails in his 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.]

Committee comment. - See Committee Comment, UJI 13-1116A.

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

COMPILER'S 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.

ANNOTATIONS

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.

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]

.....

Foreman

DIRECTIONS FOR USE

This interrogatory should only be given where evidence has been presented to the jury of future medical expenses.

Committee comment. - See Section 41-5-7 NMSA 1978.

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 \$.....

.....

Foreman

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

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

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

UJI 13-301. The time has now come when the court is to give you Preliminary formal instructions on the law governing this case and statement. 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. In this civil action the plaintiff seeks compensation Statement of from the defendant for damages which plaintiff claims theories. were proximately caused by the doctor's malpractice.

UJI 13-302B. To establish the claim of malpractice on the part of Statement of Dr. James, the plaintiff has the burden of proving at factual conten- least one of the following contentions:

tions. 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. The defendant denies the contentions of the plaintiff. Denial.

UJI 13-302F. After considering the evidence and these instructions Questions as a whole, the preliminary questions presented for presented for the you to answer on the special verdict form are as jury. 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. It is a general rule in civil cases that a party Burden of proof; seeking a recovery has the burden of proving every greater weight of essential element of his claim by the greater weight the evidence; of the evidence. balanced evidence is not sufficient.

clear and To prove by the greater weight of the evidence means convincing to establish that something is more likely true than evidence. 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

UJI 13-305. A proximate cause of an injury is that which in a Proximate cause. 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 The defendant, holding himself out as a specialist in of specialist. 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. any of the jurors.

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 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

UJI 13-1112. A doctor does not guarantee a good medical result. An Doctor not unintended incident of treatment is not, in itself, guarantor. evidence of any wrongdoing by the doctor.

UJI 13-1104A. In treating his patient, a doctor is under the duty Duty to inform. 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 patient every risk of proposed treatment no matter how small or remote.

UJI 13-1104B. What is customarily disclosed by reasonably Duty to inform; well-qualified doctors of the same field of medicine evidence. 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. A doctor has a duty to obtain a patient's informed Informed consent. 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. A doctor who fails in his duty to communicate proximate inherent and potential hazards is liable for harm to causation; the patient resulting from the operation if a reasonably prudent person would not have consented to the operation had he known of the inherent and potential hazards.

UJI 13-1801. You are not to engage in any discussion of damages liability before unless you have first determined that there is damages 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. If you should decide there is liability, you must measure of damages. 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, 1. The value of lost earnings and the present 13-1804, 13-1805, 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. basis for determining damages.

Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper

UJI 13-1821. If you have found that plaintiff is entitled to Future damages. 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. In fixing the amount you may award for damages Future damages; arising in the future, you must reduce the total of discount. 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. The rules of evidence do not ordinarily permit a Expert testimony. 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 The evidence which you are to consider in this case of evidence. 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. Faithful performance by you of your duties is vital Performance of to the administration of justice. your duties.

UJI 13-2002. Duty The law of this case is contained in these to follow instructions and it is your duty to follow them. You

instructions. must consider these instructions as a whole, not picking out one instruction, or parts thereof, and disregarding others.

UJI 13-2003. Jury You alone are the judges of the credibility of the sole judges of witnesses and of the weight to be given to the witnesses. testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice that he may have and the reasonableness of his testimony, considered in light of all the evidence of the case.

UJI 13-2004. A witness may be discredited or impeached by Witness impeached. 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 You are the sole judges of all disputed questions of sole judges of fact in this case. It is your duty to determine the facts. true facts from the evidence produced here in open court. Your verdict should not be based on speculation, guess or conjecture. prejudice should influence your verdict.

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

UJI 13-2006. All The jury acts as a body. Therefore, on every question jurors to which the jury must answer it is necessary that all participate. jurors participate regardless of the vote on another question. Before a question can be answered, at least ten of you must agree upon the answer; however, the same ten need not agree upon each answer.

UJI 13-2007. After these instructions on the law governing this Closing arguments. case, the lawyers may make closing arguments, or statements, on the evidence and the law. These summaries can be of considerable assistance to you in arriving at your decision and you should listen carefully. You may give them such weight as you think proper. However, neither these final discussions nor

any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in these instructions.

UJI 13-2009. Upon retiring to the jury room, and before commencing Verdict of ten. your deliberations, you will select one of your members as foreman.

When as many as ten of you have agreed upon a verdict, your foreman must sign the appropriate form and you will all then return to open court.

UJI 13-2220. On the questions submitted, the jury finds as follows:

Comparative

negligence; Question No. 1: Did Dr. James commit malpractice?

special verdict

form.

Answer:.....

(Yes or No).....

If the answer to Question No. 1 is "No", you are not to answer further questions. Your foreman 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 foreman 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 foreman 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 Jane Doe to be \$

...

UJI 13-1125. Question No. 4: Do you find that plaintiff is in need Future medical of future medical care and related benefits?

care.

Answer:.....

(Yes or No).....

.....

.....
Foreman

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

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

UJI 13-301. The time has now come when the court is to give you Preliminary formal instructions on the law governing this case and statement. 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. In this civil action the plaintiff seeks compensation Statement of from the defendant Dr. Louis Paul for battery, and theories. 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. To establish the claim of battery on the part of Dr. Statement of Paul, the plaintiff has the burden of proving that the factualcontention. 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. As to all claims, the defendants deny the contentions Denial. of the plaintiff.

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

UJI 13-302F. After considering the evidence and these instructions Questions as a whole, the preliminary question presented for you presented for the to answer on the special verdict form on the claim of jury. 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 batteryclaim. 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.

the evidence; of the evidence.

UJI 13-304. It is a general rule in civil cases that a party Burden of proof; seeking a recovery has the burden of proving every greater weight of essential element of his claim by the greater weight

clear and To prove by the greater weight of the evidence means convincing to establish that something is more likely true than evidence. 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. Every adult of sound mind has a right to determine Battery; no what shall be done with his own body. A doctor who consent. performs an operation upon a patient without the patient's prior consent commits a battery, for which he 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. For a consent to be valid, the patient must know and Battery; validity agree to the specific operation or procedure which the of consent. doctor performs.

UJI 13-1109C. To recover damages for battery, the patient need not Battery; damages. prove that he was physically harmed by the operation. Damages may be awarded solely for the unauthorized touching.

UJI 13-1119. Duty A hospital has a duty to use ordinary care in of hospital; furnishing services for the patient. Ordinary care patient 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. A hospital acts only through its employees, such as Hospital acts nurses.

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

UJI 13-1123. A hospital does not guarantee a good medical result. Hospital; not An unintended incident of treatment is not, in itself, guarantor; poor evidence of any wrongdoing by the hospital. result not breach of duty.

UJI 13-305. A proximate cause of an injury is that which in a Proximate cause. 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. A doctor is liable for the negligence of a nurse if: Liability of (1) the doctor has the right to control the manner in doctor for which the details of the particular activity giving negligence of rise to the injury is performed; and (2) the others. 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. You are not to engage in any discussion of damages Liability before unless you have first determined that there is damages. liability, as elsewhere covered in these instructions. court thinks damages should or should not be awarded.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the

UJI 13-1802. 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, 1. The value of lost earnings and the present cash value of earning capacity to be lost in the future.

13-1804, 13-1805, 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. If you have found that plaintiff is entitled to future 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. In fixing the amount you may award for future damages arising in the future, you must reduce the total of

discount. 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. The rules of evidence do not ordinarily permit a Expert testimony. 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 The evidence which you are to consider in this case of evidence. 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. Faithful performance by you of your duties is vital Performance of to the administration of justice.

your duties.
disregarding others.

UJI 13-2002. Duty The law of this case is contained in these to follow instructions and it is your duty to follow them. You instructions. must consider these instructions as a whole, not picking out one instruction, or parts thereof, and

UJI 13-2003. Jury You alone are the judges of the credibility of the sole judges of witnesses and of the weight to be given to the witnesses. testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account his ability and opportunity to

observe, his memory, his manner while testifying, any interest, bias or prejudice that he may have and the reasonableness of his testimony, considered in light of all the evidence of the case.

UJI 13-2004. A witness may be discredited or impeached by Witness impeached. 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 You are the sole judges of all disputed questions of sole judges of fact in this case. It is your duty to determine the facts. 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 The jury acts as a body. Therefore, on every question jurors to which the jury must answer it is necessary that all participate. jurors participate regardless of the vote on another question. Before a question can be answered, at least ten of you must agree upon the answer; however, the same ten need not agree upon each answer.

UJI 13-2007. After these instructions on the law governing this Closing arguments. case, the lawyers may make closing arguments, or statements, on the evidence and the law. These summaries can be of considerable assistance to you in arriving at your decision and you should listen carefully. You may give them such weight as you think proper. However, neither these final discussions nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in these instructions.

UJI 13-2009. Upon retiring to the jury room, and before commencing Verdict of ten. your deliberations, you will select one of your members as foreman.

When as many as ten of you have agreed upon a

verdict, your foreman must sign the appropriate form and you will all then return to open court.

Special Verdict Form - Battery

UJI 13-2220. On the questions submitted, the jury finds as follows:

Special verdict

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 foreman 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 plaintiff Richard Roe for battery by defendant Dr. Louis Paul to be \$. . .

.....

.....

.....

.....

Foreman

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 foreman 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 foreman 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 foreman 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 Richard Roe as a result of negligence of the nurse to be \$.....

UJI 13-1140. Question No. 4: Do you find that plaintiff Richard Future medical Roe is in need of future medical care and related benefits?

care. Answer:.....
(Yes or No).....

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

Answer:.....
(Yes or No).....

.....

.....
Foreman

Chapter 12

Motor Vehicles

Instruction

- 13-1201. Introduction.
- 13-1201. Duty of operator using highway.
- 13-1202. Duty of lookout and control.
- 13-1203. Proper lookout; definition.
- 13-1204. Right-of-way at intersection; no traffic controls.
- 13-1205. Right-of-way not absolute.
- 13-1206. Right to assume driver will obey the law.
- 13-1207. Duty of passenger.

- 13-1208. Joint enterprise; imputation of negligence.
- 13-1209. Negligence of driver not attributable to passenger.
- 13-1210. Family purpose doctrine.
- 13-1211. Pedestrians; crossing at other than crosswalks - No instruction drafted.
- 13-1212. Emergency vehicles - No instruction drafted.
- 13-1213. Motor vehicles; railroad crossings - No instruction drafted.

13-1201. 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.]

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

ANNOTATIONS

Library references. - 61A C.J.S. Motor Vehicles §§ 532, 537, 539 to 542, 545 to 550.

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 vehicle] so as to avoid placing himself 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.]

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

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 his 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 his 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.]

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 §§ 553, 547, 548, 556.

ANNOTATIONS

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 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.]

13-1206. Right to assume driver will obey the law.

A driver has the right to assume that other drivers will obey the law unless the driver sees, or by the exercise of ordinary care should have seen, that the driver of the other vehicle will not obey the law or is unable to avoid a collision.

[As amended, effective January 1, 1987.]

Committee comment. - Drivers of vehicles have the right to assume that other drivers will obey the law. See *Williams v. Cobb*, 90 N.M. 638, 567 P.2d 487 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), and *Barbieri v. Jennings*, 90 N.M. 83, 559 P.2d 1210 (Ct. App. 1976), cert. denied, 90 N.M. 7, 558 P.2d 619 (1977).

ANNOTATIONS

Instruction held not reversible error. - It is not reversible error not to give the following instruction: "You are instructed that travelers using the public highways and streets have the right to assume that other travelers will exercise reasonable care and

caution to avoid placing the lives or safety of others in peril and will obey applicable traffic regulations and rules of the road. A motorist is not bound to anticipate negligence or gross negligence on the part of another motorist, in the absence of anything to indicate otherwise, and the care and diligence of a motorist is to be measured in view of the assumption that other motorists will not drive in a negligent or grossly negligent manner. But this assumption does not apply where a motorist sees, or in the exercise of ordinary care and prudence should see, that another motorist will not obey the traffic rules or regulations". *Kinney v. Luther*, 97 N.M. 475, 641 P.2d 506 (1982).

13-1207. Duty of passenger.

A passenger has a duty to use ordinary care for his own safety. A passenger may not sit idly by and permit himself to be driven carelessly, to his injury, where there are dangers which are known to him or which reasonably should be known to him.

If you find that circumstances existed in this case which would cause a passenger, exercising ordinary care for his 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.]

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

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

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

61A C.J.S. Motor Vehicles § 543.

13-1210. Family purpose doctrine.

If you find the motor vehicle operated bywas furnished by

(Name of operator)

its owner for general family use and convenience, then the owner is liable for the negligent operation of the vehicle by a member of the family.

To hold the defendant liable, you must find that the driver [had authority to drive the motor vehicle] [and] [was using the motor vehicle for the pleasure or convenience of the family, or a member of it].

This rule applies even though the motor vehicle was purchased by, or registered in the name of, the minor child or where the expense is paid by such minor child, so long as that child is a member of the household and under the general care and control of the parents, who are considered under the law to be the owners.

DIRECTIONS FOR USE

The bracketed material is to be used as justified by the evidence.

The third paragraph is to be used only when a minor child is involved under one or more of the factual situations presented in that paragraph.

[As amended, effective January 1, 1987.]

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).

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

ANNOTATIONS

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.

ANNOTATIONS

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

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 Instruction

- 13-1301. Introduction.
- 13-1301. Trespasser; definition.
- 13-1302. Licensee; definition.
- 13-1303. Business visitor; business invitee; invitee; definition.
- 13-1304. Status of party not an issue.
- 13-1305. Duty to trespasser; artificial condition on premises.
- 13-1306. Duty to trespasser; activity of owner.
- 13-1307. Duty to trespasser; natural conditions.
- 13-1308. Duty to licensee.

- 13-1309. Duty to business visitor (invitee) arising from a condition of the premises.
- 13-1310. Duty to business visitor; known or discoverable danger.
- 13-1311. Duty to licensee-business visitor limited in scope.
- 13-1312. Trespassing children (attractive nuisance)
- 13-1313. Leased premises; latent defect.
- 13-1314. Landlord's duty regarding repairs.
- 13-1315. Place reserved for common use.
- 13-1316. Duty where property abuts sidewalk.
- 13-1317. Sidewalks and streets; duty of city.
- 13-1318. Slip and fall; business visitor; dangerous condition not created by proprietor.
- 13-1319. Slip and fall; business visitor; dangerous condition caused by proprietor or actual knowledge shown.

13-1301. 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.]

COMPILER'S ANNOTATIONS

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

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).

ANNOTATIONS

No duty owed motorcyclist who has right to use trails. - Where a traveler has a right to ride a motorcycle over the trails on a landowner's property, the landowner has no duty to maintain the trails and has no duty to warn of dangerous trail conditions not created by the landowner. Moore v. Burn Constr. Co., 98 N.M. 190, 646 P.2d 1254 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62 Am. Jur. 2d Premises Liability §§ 37, 51, 58 to 60.

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).

ANNOTATIONS

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).

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 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 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 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 land safe for a trespasser, unless and until he knows or reasonably should know that the trespasser is on his land.

DIRECTIONS FOR USE

The bracketed language should be used as appropriate.

[As amended, effective January 1, 1987.]

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

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 land, he 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 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 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 activities so as to avoid injury to a trespasser, unless and until he knows or should know that the trespasser is on his land.

DIRECTIONS FOR USE

The bracketed language should be included as appropriate.

[As amended, effective January 1, 1987.]

ANNOTATIONS

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 § 74.

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 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.]

ANNOTATIONS

COMPILER'S 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.

13-1308. Duty to licensee.

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

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

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

In such case, he 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.]

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

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).

ANNOTATIONS

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62 Am. Jur. 2d Premises Liability § 65.

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 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.]

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

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 was not invited and that he would not reasonably be expected to use, or if he was using the premises for a purpose other than that for which he was invited and for which he

would not reasonably be expected to use them, then the defendant only owed him 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.]

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

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 §§ 62, 64.

13-1312. Trespassing children (attractive nuisance).

[owner] [occupant] has a duty to prevent injury to a trespassing child resulting fromartificial 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 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.]

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

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 § 137.

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 notes. - The duty and its limits, expressed in the foregoing instruction, have been noted in *Barham v. Baca*, 80 N.M. 502, 458 P.2d 228 (1969); *Mitchell v. C & H Transp. Co.*, 90 N.M. 471, 565 P.2d 342 (1977); *Torres v. Piggly Wiggly Shop Rite Foods, Inc.*, 93 N.M. 408, 600 P.2d 1198 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 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).

ANNOTATIONS

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).

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).

ANNOTATIONS

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.).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62 Am. Jur. 2d Premises Liability §§ 250, 253.

63 C.J.S. Municipal Corporations § 781 et seq.; 65A C.J.S. Negligence § 275.

13-1317. Sidewalks and streets; duty of city.

A city has a duty to use ordinary care to maintain [streets] [sidewalks] in a safe condition.

[As amended, effective January 1, 1987.]

Committee comment. - A city is liable for its failure to use ordinary care in the maintenance of its streets and sidewalks, irrespective of actual or constructive notice. *Cardoza v. Town of Silver City*, 96 N.M. 130, 628 P.2d 1126 (Ct. App. 1981). See also NMSA 1978, § 41-4-11.

In order to impose liability on a municipality for failure to maintain a street or sidewalk or for failure to provide traffic signals, it must be shown that the municipality's failure created a dangerous condition. *Blackburn v. State*, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982). See also *Rickerson v. State*, 94 N.M. 473, 612 P.2d 703 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980).

ANNOTATIONS

Landowner has no duty to maintain a public road. See *Moore v. Burn Constr. Co.*, 98 N.M. 190, 646 P.2d 1254 (Ct. App.).

Negligent maintenance of street. - A municipality is liable for damages for negligent maintenance of any existing street. *Cardoza v. Town of Silver City*, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Violation of duty establishes liability. - A violation of the duty stated in this instruction establishes municipal liability, irrespective of actual or constructive notice. *Cardoza v. Town of Silver City*, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Law reviews. - For annual review of New Mexico law relating to torts, see 13 N.M.L. Rev. 473 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, School and State Tort Liability § 133.

Liability of abutting owner or occupant for condition of sidewalk, 88 A.L.R.2d 331.

63 C.J.S. Municipal Corporations § 944.

13-1318. Slip and fall; business visitor; dangerous condition not created by proprietor.

The defendant was not an insurer of the safety of the plaintiff, but he did owe him the duty to exercise ordinary care to keep his premises in a safe condition for the plaintiff's use. In performing this duty, the defendant had the duty to make reasonable inspections of his premises and the duty to exercise ordinary care to correct, or to warn the plaintiff of the presence of, any dangerous condition existing on his premises, of which he had knowledge or of which he would have had knowledge had he performed his 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 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.]

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

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 did owe him 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 employees, or if the defendant had actual knowledge of such a condition, although not caused by him or his employees, then, in either event, it was his 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 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.]

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

"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 § 29.

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

Instruction

- 13-1401. Introduction.
- 13-1401. Issues; complaint; answer; burden of proof - No instruction drafted.
- 13-1402. Duty of the supplier.
- 13-1403. Foreseeable risk of injury; misuse.
- 13-1404. Ordinary care.
- 13-1405. Ordinary care; evidence.
- 13-1406. Strict products liability; care not an issue.
- 13-1407. Strict products liability; unreasonable risk of injury.
- 13-1408. Strict liability; evidence.
- 13-1409. Strict products liability; misrepresentation - No instruction drafted.
- 13-1410. Particular duties of the manufacturer.
- 13-1411. Supplier regarded as manufacturer.
- 13-1412. Obvious or known danger; design and safety device.
- 13-1413. Manufacturer and lessor; duty to inspect; imputed knowledge.
- 13-1414. Supplier who is not the manufacturer; no duty to inspect.
- 13-1415. Duty of the supplier; warning.
- 13-1416. Duty of the supplier; directions for use.
- 13-1417. Warning or directions; means of communication.

- 13-1418. Warning or directions; adequacy.
- 13-1419. Unavoidably unsafe products.
- 13-1420. Res ipsa loquitur.
- 13-1421. Liability per se; statute or ordinance.
- 13-1422. Changed or altered product.
- 13-1423. Strict products liability; component part.
- 13-1424. Proximate cause; independent intervening cause.
- 13-1425. Warning or directions; proximate cause.
- 13-1426. Strict products liability; misrepresentation; proximate cause - No instruction drafted.
- 13-1427. Affirmative defenses - No instruction drafted.
- 13-1428. Creation and breach of express warranty.
- 13-1429. Creation of implied warranty of merchantability.
- 13-1430. Breach of implied warranty of merchantability.
- 13-1431. Creation of implied warranty of fitness for particular purpose.
- 13-1432. Breach of implied warranty of fitness for particular purpose.
- 13-1433. Exclusion of implied warranties.

13-1401. 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 had already 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). In New Mexico, as in other jurisdictions, unresolved questions remain concerning the proper theory for recovery of damages for commercial or economic loss other than physical damage to property. 2 Frumer and Friedman, *Products Liability* § 16A(4)(f) (1976) and compare *Santor v. A. & M. Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965) with *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). As these conflicting authorities illustrate, some courts have felt that commercial-law warranties function better than theories of negligence or strict liability where solely economic loss is involved.

Having drafted the instructions of this chapter for the usual case, the committee has found it unnecessary to resolve this issue. If court and counsel have a case involving damage to property or economic loss, slight modifications will permit use of the instructions of this chapter. These instructions are to be used in cases of physical damage to property. Restatement (Second) of Torts § 402A extends to any "physical harm", and there appears to be virtual unanimity among the courts adopting § 402A that a supplier is strictly liable for property damage resulting from a defective product. E.g., *Seely v. White Motor Co.*, supra. Where purely economic loss is at issue, the trial court must make its prediction in the absence of a decision from the New Mexico Supreme Court.

The federal district court has predicted that economic loss is not recoverable in strict liability in New Mexico; this prediction was affirmed by the United States Court of Appeals for the Tenth Circuit absent a contrary holding from the New Mexico Supreme Court. *Colonial Park Country Club v. Joan of Arc*, 746 F.2d 1425 (10th Cir. 1984).

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.

[As amended, effective January 1, 1987.]

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).

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).

ANNOTATIONS

Instruction (former UJI Civ. 14.1) supported by evidence. See Salinas v. John Deere Co., 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984).

13-1402. Duty of the supplier.

The supplier of a product has a duty to use ordinary care to avoid a foreseeable risk of injury caused by a condition of the product or manner in which it is used. This duty is owed [to persons who can reasonably be expected to use the product] [and] [to persons who can reasonably be expected to be in the vicinity during the use of the product.]

[The supplier's duty to use ordinary care continues after the product has left his 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.

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 his duty to warn extends only to risks of injury known to him. 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 he has supplied the product, he 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.

ANNOTATIONS

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 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 his 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.

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).

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).

Treatises 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 that an actor is liable for the foreseeable results of his 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). 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 674, 676-7 (1977).

ANNOTATIONS

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 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.

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).

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.

ANNOTATIONS

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.

ANNOTATIONS

Article must be unreasonably dangerous. - In order to invoke the doctrine of strict liability, it must be shown that the article was in an unreasonably dangerous condition. *Bassham v. Owens-Corning Fiber Glass Corp.* 327 F. Supp. 1007 (D.N.M. 1971).

And negligence limited to issue of causation. - In a products liability case, where defendant alleged plaintiff's negligence not as an affirmative defense but rather as a denial of causation, the trial court's instruction that the jury should find for the defendant either if plaintiff had not proved his case or if defendant had proved that plaintiff drove negligently was reversible error since defendant's defense should only have prevailed if plaintiff's negligent driving had caused the accident; but the court's instruction allowed the defendant to prevail regardless of the cause of the accident. When the issue is causation in that either plaintiff's conduct or the product defect caused the injuries,

questions of negligence are irrelevant. *Bendorf v. Volkswagenwerk Aktiengesellschaft*, 88 N.M. 355, 540 P.2d 835 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Liability of supplier of defective product. - If defendant car wash was found to be the supplier of a defective product that caused injury to plaintiff, car wash could be held strictly liable for the product manufactured and installed at the car wash by codefendant. *Trujillo v. Berry*, 106 N.M. 86, 738 P.2d 1331 (Ct. App. 1987).

Instruction supported by evidence. See *Salinas v. John Deere Co.*, 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984).

Law reviews. - For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico", see 11 N.M.L. Rev. 359 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Applicability of doctrine of strict liability in tort to injury resulting from x-ray radiation, 16 A.L.R.4th 1300.

Bystander recovery for emotional distress at witnessing another's injury under strict products liability or breach of warranty, 31 A.L.R.4th 162.

Products liability: electricity, 60 A.L.R.4th 732.

Products liability: overhead garage doors and openers, 61 A.L.R.4th 94.

Products liability: building and construction lumber, 61 A.L.R.4th 121.

Products liability: scaffolds and scaffolding equipment, 74 A.L.R.4th 904.

Products liability: bicycles and accessories, 76 A.L.R.4th 117.

Products liability: exercise and related equipment, 76 A.L.R.4th 145.

Products liability: trampolines and similar devices, 76 A.L.R.4th 171.

Products liability: competitive sports equipment, 76 A.L.R.4th 201.

Products liability: skiing equipment, 76 A.L.R.4th 256.

13-1407. Strict products liability; unreasonable risk of injury.

An unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable. This means that a product does not present an unreasonable risk of injury simply because it is possible to be harmed by it.

[The design of a product need not necessarily adopt features which represent the ultimate in safety. You should consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive.]

Under products liability law, you are not to consider the reasonableness of acts or omissions of the supplier. You are to look at the product itself and consider only the risks of harm from its condition or from the manner of its use at the time of the injury. [The question for you is whether the product was defective, even though the supplier could not have known of such risks at the time of supplying the product.]

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 foreseeable user. California would instruct that the supplier is liable to a person injured while using a product in an intended way as a result of a "defect" in the product.

The committee, however, is in sympathy with the approach that "[a] product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of the trial* outweighed the benefit of the way the product was so designed and marketed". P. Keeton, *Product Liability and the Meaning of a Defect*, 5 St. Mary's L.J. 30, 37-8 (1973) (original emphasis). Dean Keeton maintains there is no way to avoid a risk-benefit calculation in products liability cases. *Id.* at 39. The way to remedy the problem inherent in foreseeability is to supply knowledge as a matter of law, even if the defect was scientifically unknowable at the time of manufacture, and to allow the jury to decide if the ordinary man 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 man 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.

ANNOTATIONS

Law reviews. - For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico," see 11 N.M.L. Rev. 359 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Applicability of doctrine of strict liability in tort to injury resulting from x-ray radiation, 16 A.L.R.4th 1300.

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).

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:

Under the "products liability" claim, a supplier in the business of putting a product on the market may be liable for a misrepresentation of the product's
.....

([Condition] [character] [quality] or other proper description)

An unreasonable risk of injury is presented by an untrue misrepresentation by advertising, labels or otherwise, made to that class of persons who can reasonably be expected to use the

product. The supplier is liable for harm proximately caused by a misrepresentation justifiably relied upon.

This rule applies even though the misrepresentation was innocently made and all possible care has been used by the supplier in publishing his advertising, labels or other representations. The liability of the supplier is to persons whom the supplier can reasonably expect to use the product.

13-1410. Particular duties of the manufacturer.

The manufacturer of a product must use ordinary care in:

- (1) [formulating] [designing] the product;**
- (2) making the product;**
- (3) [inspecting] [testing] the product; and**
- (4) packaging the product.**

[A manufacturer need not necessarily design into the product or adopt features which represent the ultimate in safety. You should consider a manufacturer's ability to eliminate a danger without seriously impairing the usefulness of the product or without making it unduly expensive.] Ordinary care requires a product that is reasonably safe for foreseeable use in light of all the circumstances.

In [designing] [testing] [packaging] a product, the manufacturer has the duty to possess and apply the knowledge available to reasonably prudent manufacturers.

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).

ANNOTATIONS

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).

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 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 own if he 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 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 himself out as the manufacturer. This instruction must not be given if plaintiff's case is based solely upon strict liability.

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 is in the chain of distribution, the supplier's "status" with respect to manufacture of the product is irrelevant.

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 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 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.

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

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

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 his 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 man is a submissible issue. This instruction is not to be given if the defendant is the manufacturer or lessor of the product.

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.

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 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.

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, 175-6, 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.

ANNOTATIONS

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). 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).

Manufacturer's duty to warn of specific nature and extent of danger. - A claim that there is no duty to warn based on the user's general knowledge of the danger of a product mistakes the danger involved and, thus, the warning that is required. The manufacturer's duty is to warn of the specific nature and extent of the danger. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Rationale for knowledgeable user exception contained in this section is that knowledge of the danger is equivalent to prior notice; that no one needs notice of that which he already knows. Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

"Knowledge" in radiation treatment cases means actual knowledge of the nature and extent of the danger of excessive radiation. Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Products liability: overhead garage doors and openers, 61 A.L.R.4th 94.

Products liability: bicycles and accessories, 76 A.L.R.4th 117.

Products liability: exercise and related equipment, 76 A.L.R.4th 145.

Products liability: trampolines and similar devices, 76 A.L.R.4th 171.

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 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.

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

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). 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).

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).

ANNOTATIONS

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).

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.

ANNOTATIONS

Unavoidably unsafe product is neither defective nor unreasonably dangerous if warning is "proper." Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

When instruction properly given. - Irrespective of which party tenders the evidence, this instruction is properly given when there is evidence: (1) that a product cannot be made safe for its intended and ordinary use even when properly prepared and labeled; (2) that use of the product involves a medically recognizable risk of injury; and (3) that the injury complained of results from the intended use of the product. Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Jury to balance benefits and risks. - Under this instruction, the jury must determine whether the benefits outweigh the risks in using the product, in order to decide if the product unreasonably exposes the user to a risk of injury. Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Carrier's "public duty" exception to absolute or strict liability arising out of carriage of hazardous substances, 31 A.L.R.4th 658.

Products liability: building and construction lumber, 61 A.L.R.4th 121.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 A.L.R.4th 346.

Products liability: what is an "unavoidably unsafe" product, 70 A.L.R.4th 16.

13-1420. Res ipsa loquitur.

Plaintiff relies in part upon the doctrine of "res ipsa loquitur" which is a Latin phrase and means "the thing speaks for itself." Plaintiff relies upon this doctrine

to prove that the claimed defective condition of the product existed at the time the product was supplied by defendant [and that the defective condition was the result of a failure to use ordinary care]. In order for the jury to find that plaintiff has proved [this] [these] element[s] of his claim by reliance upon "res ipsa loquitur", plaintiff has the burden of proving:

1. that a defective condition existed at the time he 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 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.

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.

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 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 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.

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

Compiler's notes. - 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.

COMPILER'S ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

Law reviews. - For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico," see 11 N.M.L. Rev. 359 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Products liability: overhead garage doors and openers, 61 A.L.R.4th 94.

13-1424. 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.

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.

ANNOTATIONS

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. Affirmative defenses.

No instruction drafted.

Committee comment. - Prior to the adoption of comparative negligence in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1918), 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).

ANNOTATIONS

Since the adoption of comparative negligence and the principle that each person is responsible for his 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.*, 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.

13-1428. Creation and breach of express warranty.

A supplier's [description] [statement of fact] about [goods] [a product] which he 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 salesman'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.

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).

ANNOTATIONS

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.

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 is selling or holds himself 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.

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

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.

ANNOTATIONS

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).

ANNOTATIONS

Hospital's reliance on purchased prosthesis extends to surgeon. - Where a hospital purchases a prosthesis from a manufacturer and supplies that prosthesis to a surgeon for use, the warranty of fitness for a particular purpose does not require that the manufacturer have actual knowledge that the prosthesis will be implanted in a particular patient nor that the surgeon will rely on the manufacturer's skill or judgment. Evidence that the hospital purchased the prosthesis from the manufacturer for use as an implant is evidence of the hospital's reliance; the hospital's reliance extends to the surgeon, who is in the distributive chain. *Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

13-1432. Breach of implied warranty of fitness for particular purpose.

A supplier breaches the implied warranty of fitness for a particular purpose if the [goods] [products], though not defective, are unsuitable for the particular purpose for which they were purchased.

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).

ANNOTATIONS

Unlike products liability, implied warranty of fitness for particular purpose requires no defect. *Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

13-1433. Exclusion of implied warranties.

[Implied warranties do not exist if the seller has excluded them by understandable language which would alert the reasonably prudent buyer that warranties are excluded. Thus, if, in discussing the [goods] [products], the seller tells the buyer that the [goods] [products] are being sold "as is" or "with all faults," there is no implied warranty.]

[A supplier may exclude the implied warranty of merchantability, or any particular element of that warranty, by using understandable language which mentions merchantability.]

[General language is sufficient to exclude the implied warranty of fitness for particular purpose. For example, the warranty is excluded by a conspicuous statement that: "There are no warranties which extend beyond the description on the face of the document".]

[If a buyer of [goods] [products] is given an opportunity to examine the [goods] [products] before agreeing to buy and refuses to examine the [goods] [products], or if he 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.

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.

Chapter 15

Statutes and Ordinances

Instruction

- 13-1501. Introduction.
- 13-1501. Violation of statute.
- 13-1502. Violation of ordinance.
- 13-1503. Violation of statute; excuse or justification.
- 13-1504. Violation of ordinance; excuse or justification.
- 13-1505. Violation of law; proximate cause.

13-1501. 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 in force in this state, at the time of the occurrence in question, a certain statute which provided that:

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

If you find from the evidence that conducted himself in violation of this statute, then you are instructed that such conduct constituted negligence as a matter of law.

DIRECTIONS FOR USE

In order to facilitate the use of the instruction by the trial court and to have the same printed in advance, the instruction on the same subject matter in the first edition is now split into two separate instructions. This 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.

UJI 13-1503 is to be used when there is evidence of excuse or justification in the violation of the statute. If there is such evidence, then UJI 13-1503 should be given rather than UJI 13-1501.

UJI 13-1505 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. It will find its greatest utility in motor vehicle cases. A minor driver is held to the standard of an adult driver in motor vehicle cases. *Adams v. Lopez*, 75 N.M. 503, 407 P.2d 50 (1965).

The blank line in the third paragraph of the instruction is 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.

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. Hagemeyer*, 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).

ANNOTATIONS

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) (specified statute repealed but not the legal principle).

Library references. - 57 Am. Jur. 2d Negligence §§ 245, 246, 258, 270.

Compiler's notes. - 65A C.J.S. Negligence §§ 252, 281.

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 in force in the city of, at the time of the occurrence in question, a certain ordinance which provided:

(Quote or paraphrase the applicable part of the ordinance in question.)

If you find from the evidence that acted in violation of this ordinance, then you are instructed that such conduct constituted negligence as a matter of 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.

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.

Committee comment. - See the committee comment to UJI 13-1501.

ANNOTATIONS

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; excuse or justification.

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

(Quote or paraphrase the applicable statute in question.)

If you find from the evidence that acted in violation of this statute, 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 a statute, the violator must sustain the burden of showing that 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

When the trial court determines, as a matter of law, that there is sufficient evidence of excuse or justification for the issue to go to the jury, this instruction should be given. Absent such evidence, the "per se" rule applies and is covered by UJI 13-1501.

The directions for use to UJI 13-1501 otherwise are applicable here and will not be repeated.

Committee comment. - 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. Hagemeyer*, 75 N.M. 70, 400 P.2d 945 (1963).

ANNOTATIONS

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. Violation of ordinance; excuse or justification.

There was in force in the city, at the time of the occurrence in question, a certain ordinance which provided:

(Here quote or paraphrase the applicable part of the ordinance in question.)

If you find from the evidence that defendant conducted himself in violation of this ordinance, 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 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

This instruction is to be used when a violation of an ordinance is involved and the court finds there is sufficient evidence of excuse or justification for that issue to go to the jury. Absent such evidence, the "per se" rule applies and, therefore, the violation of the ordinance is covered by UJI 13-1502.

Reference should be made to directions for use to UJI 13-1501, 13-1502, and 13-1503.

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

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

Compiler's notes. - 65 C.J.S. Negligence § 105.

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

Chapter 16 Tort Law - Negligence Instruction

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- 13-1623. Res ipsa loquitur.
- 13-1624. Intentional torts; assault and battery - No instruction submitted.
- 13-1625. Fraud - No instruction submitted.
- 13-1626. Invasion of privacy - No instruction submitted.
- 13-1627. Explosives; ultrahazardous activities; absolute liability.

13-1601. 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.

COMPILER'S 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.

ANNOTATIONS

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 or to another and which such a person, in the exercise of ordinary care, would not do.

A failure to act, to be "negligence", must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to himself or to another.

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.

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

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 notes. - 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 his 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.

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

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 his own safety and the safety of his 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.

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

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 has reached the stage of maturity showing him capable of using the judgment of a reasonably prudent adult, his 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).

Library references. - Colorado Jury Instructions 9:4.

Pattern Jury Instructions for Kansas, 2d ed., 4.03.

Illinois Pattern Jury Instructions, 10.05.

Missouri Approved Jury Instructions, 11.04.

Virginia Jury Instructions, Chapter 15.

65A C.J.S. Negligence §§ 285, 289.

ANNOTATIONS

Question of child's negligence not susceptible of summary judgment. - Questions of negligence or contributory negligence on the part of children are not usually susceptible of summary judgment adjudication or of determination as a matter of law because the test is a subjective one which depends upon the particular child's age, mental capacity and experience. *Phillips v. Smith*, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

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).

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).

ANNOTATIONS

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence § 362.

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

65A C.J.S. Negligence § 145.

13-1607. 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.

ANNOTATIONS

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).

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 his 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).

ANNOTATIONS

COMPILER'S 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 part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence or the appearance of an imminent danger to himself or another, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments.

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

If, at that moment, he does what appears to him to be the best thing to do and if his choice and manner of action are the same as might have been followed by any reasonably prudent person under the same conditions, then he has done all that the law requires of him, 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.

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

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 man is not 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.

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.

13-1619. Malicious, willful or wanton misconduct.

"Malicious, willful or wanton" misconduct is an act which shows actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to, or conscious disregard for, a person's own safety and the safety of others.

DIRECTIONS FOR USE

Use this instruction in all cases in which any instruction is used containing the phrase "malicious, willful and wanton".

It is the intent of this definition to encompass fraudulent actions, bad faith, gross negligence, recklessness, etc. Reference is made to the damages instruction, UJI 13-1827.

Committee comment. - In addition to providing a basis for punitive damages, the issue of willful and wanton misconduct may arise elsewhere in tort liability of owners and occupiers of land. See UJI 13-1311. Where willful and wanton misconduct arises in comparative negligence cases, no special definition should be required. See Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 201, 638 P.2d 406, 413 (Ct. App. 1982) (cert. quashed).

ANNOTATIONS

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.

Insurer's tort liability for consequential or punitive damages for wrongful failure or refusal to defend insured, 20 A.L.R.4th 23.

Civil liability for insulting or abusive language - modern status, 20 A.L.R.4th 773.

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 his 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 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.

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).

ANNOTATIONS

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 person relying on the principle of *res ipsa loquitur* does not need to establish by a preponderance of the evidence that he did not participate or contribute to the accident by his failure to use due care before being entitled to invoke and rely on the doctrine. *Chapin v. Rogers*, 80 N.M. 684, 459 P.2d 846 (Ct. App. 1969).

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.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

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 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.

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.

ANNOTATIONS

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.

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.

Chapter 17 Uniform Commercial Law (U.C.C.) Instruction

- 13-1701. Introduction.
- 13-1701. Statement of issues; burden of proof.
- 13-1702. Statement of issues; counterclaim; burden.
- 13-1703. Meaning and effect of U.C.C. words and phrases.
- 13-1704. Measure of damages; general instruction.
- 13-1705. Verdicts in U.C.C. cases.

Appendix 1. U.C.C. complaint; without counterclaim.

Appendix 2. U.C.C. complaint; with counterclaim.

Appendix 3. U.C.C.; counterclaim.

13-1701. Introduction.

The variety and number of potential issues present in the various articles of the Uniform Commercial Code render it impractical, within any reasonable limits, to attempt to draft individual instructions. The five instructions given here present a usable format into which the great mass of detail contained in the code can be incorporated into understandable jury instructions. It is the responsibility of the bench and bar to endeavor to make the language of the code as simple as the factual issues necessary to the application of the legal principles permit. This is to say that, most commonly, a copying of the code provisions will not likely be comprehensible to a jury. Since the code uses such words as "buyer," "seller," "maker," "payee," "endorser," etc., in UJI 13-1703. "Meaning and effect of U.C.C. words and phrases," it is suggested that the words "plaintiff," "defendant," etc., not be used, but rather that the parties be identified as "buyer," "seller," etc. If it is necessary to use instructions from UJI 13-801 et seq., on contracts, or from other UJI Civil chapters, those instructions should be similarly modified, if incorporated into a U.C.C. case.

The U.C.C.'s substantive law encompasses, in many instances, a number of remedies for the same wrong with different or additional elements of damages depending on the particular remedy. Neither these example instructions nor the appendices thereto are intended to imply that a particular fact situation is restricted to the remedy or damages there set out. The mechanism given in this chapter is no substitute for a working knowledge of the U.C.C.

With regard to economic loss, reference is made to the chapter herein on products liability and particularly to UJI 13-1428 through 13-1433.

13-1701. Statement of issues; burden of proof.

This is a case under the Uniform Commercial Code where the plaintiff, the seller, claims to be entitled to money damages from the defendant, the buyer.

(NOTE: Here summarize the basic facts not controverted, otherwise insert a general statement as to the subject matter, such as:

Plaintiff, Seller, contracted to sell to defendant, Buyer, 200 choice Hereford steers of average weight, not over 450 pounds, at 70 cents per pound to be delivered at the Plains Feed Yards on May 19, 1978. Buyer told Seller he could not be there that day because he was receiving cattle in Arizona. Buyer first saw the cattle on May 29, 1978, and observed that the cattle averaged 550 pounds and that 10 head were of mixed breed. Buyer telephoned Seller that he was rejecting the cattle and to come and get them. Seller picked up the cattle and took them to the Plains Livestock Auction where

they were sold for 60 cents per pound rather than the 70 cents stated in the contract. Seller had in previous times sold many cattle to Buyer.)

Plaintiff, the seller, in the complaint claims:

(NOTE: Here summarize evidence supporting the claim, such as:

1. For the cattle to be overweight by 100 pounds was permissible under the contract, as shown by the course of dealing between the parties, so that Buyer's rejection was wrongful, resulting in the following:

(a) damages to Seller in the amount of \$11,000, such being the difference between the market price and the unpaid contract price, and

(b) incidental damages to Seller consisting of

(1) sales commission and yardage at Plains Livestock Auction in the amount of \$600, and

(2) feed at Plains Feed Yards of \$3,000 for ten (10) days.)

Defendant, the buyer, denies the plaintiff's claims in the complaint and asserts the following defenses:

(NOTE: Here set forth, in simple form, such affirmative defenses as are supported by the evidence, such as:

1. Buyer could rightfully reject all of the 200 head of steers because they did not conform to the contract in that

(a) the cattle averaged 550 pounds when the cattle contracted for were not to average over 450 pounds, and

(b) ten head were of obviously mixed breed when the cattle contracted for were to be all choice Herefords.)

Each party has the burden of proving a claim or defense relied on.

DIRECTIONS FOR USE

This instruction is to be used where there is neither a counterclaim nor an issue of recoupment.

Committee comment. - See UJI 13-1702, Committee Comment. See Major v. Bishop, 462 F.2d 1277 (10th Cir. 1972).

13-1702. Statement of issues; counterclaim; burden.

This is a case under the Uniform Commercial Code in which each party claims to be entitled to money damages from the other.

(NOTE: Here summarize the basic facts not controverted, otherwise insert a general statement as to the subject matter, such as:

Plaintiff, Seller, manufactured pumps for use in agriculture. Defendant, Buyer, was established in this field, so the parties entered into an agreement for defendant to purchase pumps from plaintiff with plaintiff placing defendant's name on each pump. In the latter part of 1976, defendant sent plaintiff a "purchase order," being plaintiff's Exhibit 1, for 700 pumps of which 345 were delivered to, and paid for by, defendant. Defendant admits its refusal to accept and pay for 355 pumps, contending that such did not conform to the contract causing defendant to suffer damages.)

Plaintiff, the seller, in the complaint alleges:

(NOTE: Here state briefly plaintiff's claims supported by the evidence, such as:

1. That in accordance with the purchase order, plaintiff shipped the last 355 pumps to defendant who wrongfully refused to accept and pay for them, resulting in the following:

(a) damage to plaintiff of \$8,875, such being the difference between the market price and the unpaid contract price, and

(b) incidental damage to plaintiff of \$1,500, such being the freight charges paid by plaintiff in shipping the pumps to and from defendant's place of business.)

Defendant, the buyer, denies the plaintiff's claims in the complaint and asserts the following defenses:

(NOTE: Here set forth, in simple form, such affirmative defenses as are supported by the evidence, such as:

1. The pumps were to be shipped in installments, but the last 355 pumps did not conform to the contract because the bearings were of a quality inferior to that required by the contract, resulting in a nonconformity which substantially impaired the value of that installment and which nonconformity could not be cured. As a result, defendant could rightfully reject the 355 pumps.)

Defendant, the buyer, in the counterclaim claims:

(NOTE: Specify evidence supporting the claim, such as:

1. The defendant "covered," that is, bought pumps to replace those shipped by plaintiff, resulting in damage to defendant of \$5,500, such being the difference in the plaintiff's contract price and the market price defendant had to pay for replacement pumps, and
2. Incidental damages to defendant of \$1,250, such being for engineering tests incurred by the defendant's inspection of the pumps, and
3. Consequential damages to defendant of \$5,750, such being for loss of profits arising out of defendant's losing a customer who will not make future purchases from defendant because defendant was unable to deliver the machinery using the pumps sold by plaintiff, all of which plaintiff at the time of contracting had reason to know and which plaintiff could not have reasonably prevented by "cover" or otherwise.)

The plaintiff, the seller, denies the defendant's claims in the counterclaim and asserts the following defenses:

(NOTE: Here set forth, in simple form, affirmative defenses as are supported by the evidence, such as:

1. Defendant delayed for twenty (20) days, an unreasonable time, to notify plaintiff that the bearings might be defective, and as a result is barred from any recovery against plaintiff.)

Each party has the burden of proving a claim or defense relied on.

DIRECTIONS FOR USE

This style of instruction is applicable when a counterclaim is pleaded and the issues are for jury determination.

Committee comment. - This instruction tracks UJI 13-801. Statement of issues; counterclaim; burden. The U.C.C. does not displace the procedural principles which determine when a question is one of law which may be determined by the court and when it is one of fact which must be determined by the jury. 1 Anderson, Uniform Commercial Code § 1-1-3:45 (2d ed. 1970). "Burden of establishing" in the U.C.C., § 1-201(8), is almost identical with that in the last clause of the second paragraph of UJI 13-306. Burden of proof; greater weight of the evidence; clear and convincing evidence. Throughout the U.C.C., the burden of proof is specifically designated. A partial listing includes §§ 2-202, 2-313, 2-314, 2-315, 2-326, 2-401, 2-403, 2-508, 2-606, 2-607, 2-608, 2-614, 2-702, 2-706, 2-709, 2-711, 2-714, 9-301, 9-306, 9-307, 9-312, 9-313, 9-401, 9-402, 9-504.

ANNOTATIONS

It should be noted that the U.C.C. does not affect the principles of law and equity, unless specifically displaced by the statute. U.C.C. § 1-103. Thus, UJI 13-801 et seq. on

contracts can be used relative to capacity to contract, fraud, misrepresentation and duress. The general New Mexico law on principal and agent is also applicable to the U.C.C.

13-1703. Meaning and effect of U.C.C. words and phrases.

In this case the plaintiff is the ["seller"] ["buyer"] and the defendant is ["buyer"] ["seller"].

Certain words and phrases used in the claims and defenses have technical meaning, which you must use in determining the issues. The meaning and effect of these words and phrases, as between the seller and buyer, are determined by law to be as follows:

(NOTE: Here insert all instructions from the U.C.C., and from other applicable law, which are necessary for the jury understanding of the issues, such as:

1. This is an "installment contract" which authorizes the delivery of goods in separate lots, to be separately accepted. (UCC § 2-612(1).)
2. The pumps conform to the contract when they are in accordance with the obligations of the contract. (UCC § 2-106(2).)
3. A buyer may reject any installment which is nonconforming, if the nonconformity substantially impairs the value of that installment and cannot be cured. (UCC § 2-612(2).)
4. The buyer accepted the pumps if he failed to make an effective rejection, but such acceptance did not occur until the buyer had a reasonable opportunity to inspect them. (UCC § 2-606(1)(b).)
5. Buyer's rejection of the pumps had to be made within a reasonable time after their delivery, by the buyer seasonably notifying the seller. (UCC § 2-602.)
6. What is a reasonable time after delivery of the pumps for the buyer to reject them depends on the nature, purpose and circumstances. (UCC § 1-204(2).)
7. The buyer seasonably notifies the seller when it is done within a reasonable time. (UCC § 1-204(3).)
8. The seller was notified of the rejection if the buyer took such steps as may be reasonably required to inform the seller in ordinary course of the rejection, whether or not the seller actually came to know it. (UCC § 1-201(26).)
9. If the seller breached the contract by delivering pumps which did not conform to the contract of purchase, the buyer could "cover" by making, in good faith and without

unreasonable delay, any reasonable purchase of pumps in substitution for those due from the seller. If you find that the buyer "covered," the buyer may recover from the seller, as damages, the difference between the cost of "cover" and the contract price, together with any incidental or consequential damages. (UCC § 2-712.)

10. The buyer's incidental damages, resulting from a breach of the contract by the seller, may include expenses reasonably incurred in inspection of the pumps if they were rightfully rejected. (UCC § 2-715(1).)

11. The buyer's consequential damages, resulting from a breach of the contract by the seller, may include any loss resulting from general or particular requirements and needs of the buyer which the seller at the time of contracting had reason to know and which could not reasonably be prevented by the buyer covering or otherwise. (UCC § 2-715(2)(a).)

12. The measure of damages to the seller for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for delivery of the pumps and the unpaid contract price, together with any incidental damages. (UCC § 2-708(1).)

13. The seller's incidental damages may include any commercially reasonable charges incurred in the transportation in connection with the return of the pumps, resulting from the buyer's breach. (UCC § 2-710.)

DIRECTIONS FOR USE

The parenthesized citations are inserted here only for lawyer informational purposes and are not to be placed on instructions that go to the jury.

Only those portions of the U.C.C. that are supported by the evidence should be used as there are a wide variety of remedies available to both seller and buyer under varying circumstances.

If accurate and appropriate synonyms for words used in the U.C.C. can be substituted for the technical code verbiage, then it would undoubtedly be helpful to the jury to make such change. In some cases, it might be clearer to the jury to group together the instructions applicable to each party. Damages here are proved at the end in the illustration, but this may not be the best place, nor is it required in this sequence.

The U.C.C. definitions used in the foregoing illustration will seldom be all required nor be so limited. However, the definitions given and the effect of the phrases may well be numbered as shown in the illustration for ease of identification.

Committee comment. - McCasland v. Prather, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978) (U.C.C. law involving a "requirements" contract with a trial court dismissal for failure to state a claim).

13-1704. Measure of damages; general instruction.

If you should decide in favor of the plaintiff, the seller, on any of his claims and against the defendant, the buyer, on his defenses, if any, to such claim, then you must fix the amount of money damages which will put the plaintiff in as good a position as defendant's performance would have done. The elements of damage claimed by plaintiff in the complaint are:

(NOTE: Here insert the plaintiff's elements of damage as shown by the evidence, such as:

1. Damages for the buyer's refusal to accept and pay for 355 pumps; and
2. Incidental damages for freight on the pumps from buyer's place of business to seller's place of business.)

If you should decide in favor of the defendant, the buyer, on any of his claims and against the plaintiff, the seller, on his defenses, if any, to such claim, then you must fix the amount of money damages which will put the defendant in as good a position as plaintiff's performance would have done. The elements of damage claimed by defendant in the counterclaim are:

(NOTE: Here insert the defendant's elements of damage as shown by the evidence, such as:

1. The cost to "cover";
2. Incidental damages for engineering tests; and
3. Consequential damages for loss of profits arising out of defendant's loss of a customer.)

If your verdict is that neither party shall recover damages against the other, you should so find.

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 prejudices against any party, should not affect your verdict and is not a proper basis for determining damages.

DIRECTIONS FOR USE

The elements and methods of arriving at damages are those usually stated in UJI 13-1703. Meaning and effect of U.C.C. words and phrases. When used there, these words and phrases need not be repeated here.

Careful study of applicable U.C.C. provisions is required in order to draft an instruction which comports with the evidence adduced at trial, in order to determine the items of damage to be inserted in the basic format of this instruction for proper guidance of the jury in its deliberation.

Committee comment. - This instruction closely resembles UJI 13-827, Contracts; measure of damages; general instruction, but does not track it completely. This is to say that damages may arise not only by breach of contract but also by operation of the law in the U.C.C., because acts may occur in breach of the U.C.C. which are not mentioned in the contract.

ANNOTATIONS

In UJI 13-827, the phrase "you must fix the amount of money damages which will restore to ... what was lost by ... breach, and what ... reasonably could have expected to gain" is used with respect to both plaintiff and defendant. The U.C.C. is more specific. For example, in U.C.C. § 2-708(1), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price and the unpaid contract price, together with incidental damages as provided in § 2-710. Under § 2-708(2), the seller's lost profit is recoverable only if the measure of damages in § 2-708(1) is inadequate to put seller in as good a position as buyer's performance would have done. A seller cannot recover consequential damages. 2 Anderson, Uniform Commercial Code § 2-708:15 (2d ed. 1970). However, the buyer's index of damages appears in U.C.C. § 2-711 and, in addition, the buyer may recover both incidental and consequential damages in U.C.C. § 2-715. Thus, the "could have expected to gain" phrase of UJI 13-827 is not applicable to seller's damages for buyer's breach. The phrase "as good a position as ... performance would have done" would appear to be applicable equally to both seller and buyer. Admissibility of evidence of lost profits would have to rest with the court.

13-1705. Verdicts in U.C.C. cases.

A. Verdict for plaintiff on the complaint.

We find for the plaintiff on the complaint in the sum of
\$.....

.....
..

Foreman

B. Verdict for defendant on the complaint.

We find for the defendant on the complaint.

.....
..

Foreman

C. Verdict for defendant on the counterclaim.

**We find for the defendant on the counterclaim in the sum of
\$.....**

.....
..

Foreman

D. Verdict for plaintiff on the counterclaim.

We find for the plaintiff on the counterclaim.

.....
..

Foreman

E. Verdict for neither party.

We find that neither party should recover.

.....
..

Foreman

DIRECTIONS FOR USE

UJI 13-1705A through 13-1705E will each be given to the jury when there is a counterclaim and all of the issues on both the complaint and the counterclaim are for jury determination. In the event plaintiff recovers some or all of his damages on the complaint and defendant does likewise on his counterclaim, then the trial court will enter judgment for the difference in favor

of the party recovering the greater amount.

APPENDICES

APPENDIX 1. U.C.C. COMPLAINT; WITHOUT COUNTERCLAIM.

Plaintiff, Seller, by written contract, sold to defendant, Buyer, 200 choice Hereford steers of average weight, not over 450 pounds, at 70 cents per pound to be delivered to Buyer at Plains Feed Yards on May 19, 1978, where Buyer was intending to put them on feed. Buyer told Seller that he could not be there at that time because he was receiving 600 head of other cattle in western Arizona. Seller and Buyer had done business for years and Buyer had previously accepted cattle 50 to 60 pounds overweight. Seller trucked the cattle to the feed yard and left them on May 19, 1978. Ten days later Buyer arrived at the feed yard and observed that the cattle averaged 550 pounds and that 5%, i.e., 10 head, were of mixed breed. Buyer immediately telephoned Seller that the cattle were being rejected and to come and get them, which Seller did. Seller sold the cattle at Plains Livestock Auction for 60 cents per pound average.

Seller sues for:

(1) Difference in contract price and market price, i.e.,

$\$0.70 \times 550 \times 200 = \$77,000$

$\$0.60 \times 550 \times 200 = 66,000$

\$11,000;

(2) Incidental damages of \$3.00 per head sales commission and yardage at the Plains Livestock Auction, totaling \$600.00; and

(3) Incidental damages of \$1.50 per day per animal for ten (10) days' feed at Plains Feed Yards, totaling \$3,000.00.

A suggested set of instructions, in recommended sequence, in outline form, illustrates the format as follows:

1. 13-1701. Statement of issues; burden of proof.
2. 13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.
3. 13-1703. Meaning and effect of U.C.C. words and phrases.
4. 13-1801. Liability must be determined before damages.
5. 13-1704. Measure of damages; general instruction.
6. 13-2004. Witness impeached.
7. 13-2001. Performance of your duties.
8. 13-2002. Duty to follow instructions.
9. 13-2005. Jury sole judges of the facts.
10. 13-307. Rules of evidence.
11. 13-2003. Jury sole judges of witnesses.
12. 13-2007. Closing arguments.
13. 13-2008. No damages unless liability.
14. 13-1903. Jury duty to consult.
15. 13-2009. Verdict of ten.
16. 13-1705A. Verdict for plaintiff on the complaint.
- 13-1705B. Verdict for defendant on the complaint.

APPENDIX 2. U.C.C. COMPLAINT; WITH COUNTERCLAIM.

The plaintiff, Buyer, was shopping for a used, four-door Datsun in February of 1978 which was about the time of the yearly model change. The defendant, Seller, stated that he had just repossessed a 1978 Datsun 810 which was like new. Buyer bought it for \$4,250 paying \$850 down and signing a note for \$3,400, with a security agreement on the car. When the title certificate with Seller's lien on it was received by Buyer, it showed that it was a 1977 Datsun 810. Buyer immediately contacted Seller, canceled the contract and asked for his money to be returned and for cancellation of his note and release of the security agreement. Seller refused, and since Buyer had not made his first payment, told Buyer that he was accelerating the unpaid balance and asked for judgment for the balance of the note, plus \$347 interest, 15% attorney fees and court costs.

A suggested set of instructions, in recommended sequence, in outline form, illustrates the format as follows:

1. 13-1702. Statement of issues; counterclaim; burden.
2. 13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.
3. 13-1703. Meaning and effect of U.C.C. words and phrases.
4. 13-1801. Liability must be determined before damages.
5. 13-1704. Measure of damages; general instruction.
6. 13-2004. Witness impeached.
7. 13-2001. Performance of your duties.
8. 13-2002. Duty to follow instructions.
9. 13-2005. Jury sole judges of the facts.
10. 13-307. Rules of evidence.
11. 13-2003. Jury sole judges of witnesses.
12. 13-2007. Closing arguments.

13. 13-2008. No damages unless liability.
14. 13-1903. Jury duty to consult.
15. 13-2009. Verdict of ten.
16. 13-1705A. Verdict for plaintiff on the complaint.
- 13-1705B. Verdict for defendant on the complaint.
- 13-1705C. Verdict for defendant on the counterclaim.
- 13-1705D. Verdict for plaintiff on the counterclaim.
- 13-1705E. Verdict for neither party.

Instructions

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

<p>UJI 13-1702. Commercial Code in Statement of money damages issues; other. counterclaim; Seller, told burden. 1978 Datsun was like new. \$850 down and Exhibit 1, with 2, on the certificate with 1, it showed</p>	<p>1. This is a case under the Uniform which each party claims to be entitled to from the Plaintiff, Buyer, claims that defendant, him that the car he was purchasing was a 810 which had just been repossessed and Buyer bought the car for \$4,250, paying signing a note for \$3,400, defendant's a security agreement, defendant's Exhibit car. When Buyer received the title Seller's lien on it, plaintiff's Exhibit</p>
--	---

learning this,
money and note
refused to make
accelerated,
asked for
court costs.

claims:
described the car
description was
bargain and
seller to the
when in fact
following:

amount of
and
amount of
by
note for that
amount.

claims in
defense:
car was like
which did not

that it was a 1977 model. Buyer, on
cancelled the contract, asking for his
to be returned. Seller refused. Buyer
the first payment on his note, and Seller
that is, declared all of the note due and
\$347 interest, plus 15% attorney fees and
Plaintiff, Buyer, in the complaint

1. That the defendant, Seller,
as being a 1978 Datsun 810, which
a part of the basis of the parties'
created an express warranty from the
buyer that the car was a 1978 model,
it was a 1977 model, resulting in the

- a. Damage to plaintiff in the
\$850, being the down payment,
- b. Damage to plaintiff in the
\$3,400, which should be paid
cancellation of plaintiff's
same

Defendant, Seller, denies the plaintiff's
the complaint and asserts the following

1. Defendant told plaintiff that the
the 1978 model and worth the same,
create a warranty of any

kind.

claims:

payment,

accelerate the

of \$3,400

attorney fees

totaling

claims in the

defense:

the contract

held

claim or

on.

UJI 13-304.

civil cases,

Burden of proof;

asserting an

greater weight of

the

the evidence;

or affirmative

clear and

weight of the

convincing

preponderance

evidence.

evidence.

UJI 13-1703.

and the

Meaning and

"seller".

Defendant, Seller, in the counterclaim

1. Plaintiff failed to make the first

which authorized defendant to

unpaid balance, resulting in damages

principal plus interest of \$347 and

of \$562.50, as provided by the note,

\$4,309.50.

The plaintiff denies the defendant's

counterclaim and asserts the following

1. Plaintiff justifiably cancelled

and the note should be cancelled and

unenforceable.

Each party has the burden of proving a

defense relied

2. It is a general rule, applicable in all

that a party seeking a recovery or a party

affirmative defense has the burden of proving

propositions necessary to support his claim

defense, as the case may be, by the greater

evidence or, as it is sometimes called, the

of the

3. In this case the plaintiff is the "buyer"

defendant is the

effect of
U.C.C.

words and phrases.
claims and

meaning and effect
the seller and

follows:

U.C.C. §
with cash of
2-201(3)(c).
\$3,400, it was

sale in writing.

U.C.C. §
the seller,
2-313(1)(b).
the basis of

warranty that the
description.

circumstances.

U.C.C. § 1-201(3).
means an

found in their

U.C.C. § 2-313(2).
creation of an

formal words

that he

warranty, but

the goods or

the seller's

does not

Certain words and phrases are used in the
defenses to be decided by you. The
of these words and phrases, as between
buyer, are determined by law to be as

1. Since the buyer paid for the car
\$850 and delivery of his note for
unnecessary to have the contract of

2. Any description of the car made by
which description was made a part of
the bargain, created an express
car conformed to the

language or by implication from the

3. A part of the basis of the bargain
agreement of the parties in fact as

4. It is not necessary to the
express warranty that the seller use
such as "warrant" or "guarantee" or
have a specific intention to make a
an affirmation merely of the value of
a statement purporting to be merely
opinion or commendation of the goods

warranty.
U.C.C. § 2-711(1).
express warranty
purchasing a 1978
what he had
on the
receive back his
cancellation.
U.C.C. § 3-109.
note to
interest of
totaling
buyer an

Datsun.
UJI 13-1801.
Liability must be
is liability,
determined before
instructions.
damages.

UJI 13-1704.
plaintiff, the
Measure of
defendant, the
damages; general
claim, then you
instruction.
will put the
defendant's performance
claimed by
are:

create a

5. If you find that there was an
by the seller that buyer was
Datsun, then the buyer could recover
paid, that is, the \$850 he had paid
purchase price and, in addition,
\$3,400 note for

6. Seller could accelerate the \$3,400
make it all due and payable, plus the
\$347 and \$562.50 attorney fees,
\$4,309.50, if seller had not given
express warranty that it was a 1978

4. 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.

5. If you should decide in favor of the
buyer, on any of his claims and against the
seller, on his defenses, if any, to such
must fix the amount of money damages which
plaintiff in as good a position as
would have done. The elements of damage
plaintiff in the complaint

1. Damage to plaintiff for return of

the down
and
be paid by
note.
defendant, the
the
any, to such
money damages
position as
The elements
counterclaim are:
accrued interest
executed by buyer.
shall recover
find.
have been
determine. Your
upon
conjecture.
prejudices against
and is not a
damages.
UJI 13-2004.
Witness impeached.
conduct [or by

payment on the car,

2. Damage to plaintiff which should
cancellation of his

If you should decide in favor of the
seller, on any of his claims and against
plaintiff, the buyer, on his defenses, if
claim, then you must fix the amount of
which will put the defendant in as good a
plaintiff's performance would have done.
of damage claimed by defendant in the

1. The amount of the principal,
and attorney fees in the note

If your verdict is that neither party
damages against the other, you should so
Whether any of these elements of damages
proved by the evidence is for you to
verdict must be based upon proof and not
speculation, guess or
Further, sympathy for a person, or
any party, should not affect your verdict
proper basis for determining

6. A witness may be discredited or impeached
by
contradictory evidence or inconsistent

made material evidence that at other times the witness has
are statements, under oath or otherwise, which
the witness] inconsistent with the present testimony of
convicted of a [or by evidence that the witness has been
reputation of a crime] [or by evidence that the general
bad] [or by witness for truth, honesty or integrity is
witness]. specific acts of wrongdoing of the

impeached or If you believe that any witness has been
province to give the discredited, it is your exclusive
credit as you may testimony of that witness only such
deserves. think it

UJI 13-2001. 7. Faithful performance by you of your duties
is vital to the administration of
Performance of justice.
your
duties.

one instruction, or parts thereof, and
disregarding others.

UJI 13-2002. Duty 8. The law of this case is contained in
these instructions and it is your duty to follow
to follow them. You must consider these instructions as a whole, not
instructions. picking out
picking out

UJI 13-2005. Jury 9. You are the sole judges of all disputed
questions of fact in this case. It is your duty to
sole judges of determine the true facts from the evidence produced here in open
determine the true the facts. court. Your
court. Your verdict should not be based on speculation,
guess or

conjecture.

these
them and, in
sympathy nor
verdict.

UJI 13-307. Rules
this case
of evidence.
and the
[and any
as true].

governed by
been my duty,
must not
these rulings.
would not have
court ruled

answered.
UJI 13-2003. Jury
credibility of the
sole judges of
the testimony
witnesses.
be given any
ability and
manner while
that he may
considered

You are to apply the law, as stated in
instructions, to the facts as you find
this way, decide the case. Neither
prejudice should influence your
10. The evidence which you are to consider in
consists of the testimony of the witnesses
exhibits admitted into evidence by the court
facts which the court instructs you to accept

The production of evidence in court is
rules of law. From time to time it has
as judge, to rule on the evidence. You
concern yourselves with the reasons for
You should not consider what would or
been the answer to questions which the
could not be

11. You alone are the judges of the
witnesses and of the weight to be given to
of each of them. In determining the credit to
witness, you may take into account his
opportunity to observe, his memory, his
testifying, any interest, bias or prejudice
have and the reasonableness of his testimony,
in light of all the evidence in the

case.

UJI 13-2007. governing this Closing arguments. or

These summaries arriving at carefully. You may However, remarks or course of the nor as the law

instructions.

UJI 13-2008. No have first damages unless liability. liability.

UJI 13-1903. Jury duty of the duty to consult. decide the case evidence. In hesitate to opinion, if surrender your of evidence jurors, or Remember that

12. After these instructions on the law case, the lawyers may make closing arguments, statements, on the evidence and the law. can be of considerable assistance to you in your decision and you should listen give them such weight as you think proper. neither these final discussions nor any other arguments of the attorneys made during the trial are to be considered by you as evidence correct statements of the law, if contrary to given to you in these

13. You are not to discuss damages unless you determined that there is

14. In deliberating on this case, it is the jurors to consult with one another and to only after an impartial consideration of the the course of your deliberations, do not reexamine your own views and change your convinced it is erroneous, but do not honest conviction as to the weight or effect solely because of the opinion of your fellow for the mere purpose of returning a verdict.

the facts.
from the
case.
UJI 13-2009.
before commencing
Verdict of ten.
your members as

you are not partisans but judges - judges of
Your sole interest is to ascertain the truth
evidence in the
15. Upon retiring to the jury room, and
your deliberations, you will select one of
foreman.

upon a
proper form and
court.

When as many as ten of you have agreed
verdict, your foreman must sign the
you will all then return to open

UJI 13-1705A.
complaint in the sum
Verdict for
..
plaintiff

16. We find for the plaintiff on the
of \$.

on the com-
.

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plaint.
UJI 13-1705B.
complaint.
Verdict
for

Foreman
We find for the defendant on the

defendant

on the com-
.

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plaint.
UJI 13-1705C.
counterclaim in the
Verdict for
.
defendant

Foreman
We find for the defendant on the
sum of \$.

on the counter- . . .
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.
claim. Foreman
UJI 13-1705D. We find for the plaintiff on the
counterclaim.
Verdict
for

plaintiff

on the counter-
.
.

.
claim. Foreman
UJI 13-1705E. We find that neither party should
recover.
Verdict
for

neither party
.
.

.
Foreman

APPENDIX 3. U.C.C.; COUNTERCLAIM.

Plaintiff, Seller, manufactured specialty pumps primarily for use in agriculture. Defendant, Buyer, used these pumps in manufacturing a water measuring device. Plaintiff was to place defendant's name on the pumps to make it appear that such were products of defendant. Defendant sent plaintiff a purchase order for 700 of the pumps and bought and paid for the first 345, which were installed in defendant's measuring device and sold or lent to numerous agriculture products dealers for demonstration. The first 345 pumps delivered under the purchase order were satisfactory, having an imported bearing that could withstand the high pressure and volume of water necessary to give durability to defendant's device. However, the last 355 pumps

used an American-made bearing that defendant believed was inferior but which plaintiff contended was as good or better than the imported bearing. Defendant sent some of the 355 pumps to a laboratory for testing which cost \$1,250, and it took twenty (20) days for the tests, whereupon defendant notified plaintiff of his rejection of all 355 pumps the day after he received the laboratory report. Plaintiff paid \$1,500 as freight on the returned pumps. Defendant "covered" by ordering pumps from a German concern but, with the additional freight and devaluation of the dollar, the pumps cost \$5,500 more than the plaintiff's pumps. Defendant had been working hard to sell his device to a South American government agency, but, when that agency found out that the device was assembled rather than manufactured in toto by defendant, the defendant lost the contract, costing him \$5,750 in lost profits.

A suggested set of instructions, in recommended sequence, in outline form, illustrates the format as follows:

1. 13-1702. Statement of issues; counterclaim; burden.
2. 13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.
3. 13-1703. Meaning and effect of U.C.C. words and phrases.
4. 13-1801. Liability must be determined before damages.
5. 13-1704. Measure of damages; general instruction.
6. 13-2004. Witness impeached.
7. 13-2001. Performance of your duties.
8. 13-2002. Duty to follow instructions.
9. 13-2005. Jury sole judges of the facts.
10. 13-307. Rules of evidence.
11. 13-2003. Jury sole judges of witnesses.
12. 13-2007. Closing arguments.

13. 13-2008. No damages unless liability.
14. 13-1903. Jury duty to consult.
15. 13-2009. Verdict of ten.
16. 13-1705A. Verdict for plaintiff on the complaint.
- 13-1705B. Verdict for defendant on the complaint.
- 13-1705C. Verdict for defendant on the counterclaim.
- 13-1705D. Verdict for plaintiff on the counterclaim.
- 13-1705E. Verdict for neither party.

Instructions

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

<p>UJI 13-1702. Commercial Code in Statement of money damages issues; other. counterclaim; use in burden. established in this agreement for plaintiff with each pump. In plaintiff a Exhibit 1, for and paid for</p>	<p>1. This is a case under the Uniform which each party claims to be entitled to from the Plaintiff, Seller, manufactured pumps for agriculture. Defendant, Buyer, was field, so the parties entered into an defendant to purchase pumps from plaintiff placing defendant's name on the latter part of 1976, defendant sent "purchase order", being plaintiff's 700 pumps, of which 345 were delivered to</p>
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refusal to accept such pumps did defendant to damages. claims: purchase order, to defendant pay for them, following: \$8,875, such the market price, and plaintiff of freight charges the pumps to business. claims in defense: in did not bearings were required by the nonconformity which

by defendant. Defendant admits its and pay for 355 pumps, contending that not conform to the contract, causing suffer

Plaintiff, Seller, in the complaint

1. That, in accordance with the plaintiff shipped the last 355 pumps who wrongfully refused to accept and resulting in the

a. Damage to plaintiff of being the difference between price and the unpaid contract

b. Incidental damage to \$1,500, such being for paid by plaintiff in shipping and from defendant's place of

Defendant, Buyer, denies the plaintiff's the complaint and asserts the following

1. That the pumps were to be shipped installments, but the last 355 pumps conform to the contract because the of a quality inferior to that contract, resulting in a substantially impaired the value of

that
could not be
could
pumps.
claims:
bought
plaintiff,
\$5,500, such
plaintiff's contract
had to pay
pumps;
\$1,250,
incurred by the
and
of \$5,750,
arising out of
will not make
because defendant
using the
plaintiff at
know and
reasonably
otherwise.
claims in the

installment and which nonconformity
cured. That, as a result, defendant
rightfully reject the 355

Defendant, Buyer, in the counterclaim

1. The defendant "covered", that is,
pumps to replace those shipped by
resulting in damage to defendant of
being the difference in the
price and the market price defendant
for replacement
2. Incidental damages to defendant of
such being for engineering tests
defendant's inspection of the pumps;
3. Consequential damages to defendant
such being for loss of profits
defendant's losing a customer who
future purchases from defendant
was unable to deliver the machinery
pumps sold by plaintiff, all of which
the time of contracting had reason to
which plaintiff could not have
prevented by "cover" or

The plaintiff denies the defendant's

defense:
(20) days,
plaintiff that the
result, is
plaintiff.
claim or
on.

UJI 13-304.
civil cases,
Burden of proof;
asserting an
greater weight of
the
the evidence;
or affirmative
clear and
weight of the
convincing
preponderance
evidence.
evidence.
UJI 13-1703.
and the
Meaning and
"buyer".
effect of
U.C.C.

follows:
words and phrases.
claims and
meaning and effect
the seller and

U.C.C. § 2-612(1).
which

counterclaim and asserts the following
1. That defendant delayed for twenty
an unreasonable time, to notify
bearings might be defective and, as a
barred from any recovery against
Each party has the burden of proving a
defense relied

2. It is a general rule, applicable in all
that a party seeking a recovery or a party
affirmative defense has the burden of proving
propositions necessary to support his claim
defense, as the case may be, by the greater
evidence or, as it is sometimes called, the
of the

3. In this case the plaintiff is the "seller"
defendant is the

buyer, are determined by law to be as

Certain words and phrases are used in the
defenses to be decided by you. The
of these words and phrases, as between

1. This is an "installment contract"

separate lots,

accepted.

U.C.C. § 2-106(2).
when they

obligations of the

U.C.C. § 2-612(2).
which is

substantially

and cannot

cured.

U.C.C. §
failed to
2-606(1)(b).
acceptance

reasonable

them.

U.C.C. § 2-602.
to be made

delivery by

seller.

U.C.C. § 1-204(2).
delivery of

them depends on

circumstances.

U.C.C. § 1-204(3).
seller when

time.

U.C.C. §1-201(26).
rejection if

reasonably

authorizes the delivery of goods in
to be separately

2. The pumps conform to the contract
are in accordance with the
contract.

3. A buyer may reject any installment
nonconforming, if the nonconformity
impairs the value of that installment
be

4. The buyer accepted the pumps if he
make an effective rejection, but such
did not occur until the buyer had a
opportunity to inspect

5. Buyer's rejection of the pumps had
within a reasonable time after their
the buyer, seasonably notifying the

6. What is a reasonable time after
the pumps for the buyer to reject
the nature, purpose and

7. The buyer seasonably notifies the
it is done within a reasonable

8. The seller was notified of the
the buyer took such steps as may be
required to inform the seller, in

ordinary course,
seller
it.
U.C.C.

§ 2-712.
contract by
conform to the
"cover" by
unreasonable
pumps in
seller. If you
buyer may
the
"cover" and the
incidental or
damages.
U.C.C. § 2-715(1).
resulting
seller, may
in inspection
rejected.
U.C.C. §
damages, resulting
2-715(2) (a).
seller, may
general or
the buyer
contracting had

of the rejection, whether or not the
actually came to know

9. If the seller breached the
delivering pumps which did not
contract of purchase, the buyer could
making, in good faith and without
delay, any reasonable purchase of
substitution for those due from the
find that the buyer "covered", the
recover from the seller, as damages,
difference between the cost of
contract price, together with any
consequential

10. The buyer's incidental damages,
from a breach of the contract by the
include expenses reasonably incurred
of the pumps, if they were rightfully

11. The buyer's consequential
from a breach of the contract by the
include any loss resulting from
particular requirements and needs of
which the seller at the time of

reasonably be
otherwise.
U.C.C. § 2-708(1).
seller for
buyer is the
at the time
and the unpaid
incidental

U.C.C. §2-710.
may include
incurred in
the return
buyer's breach.
determined before
instructions.

UJI 13-1801.
damages
Liability must be
is liability,
damages.

UJI 13-1704.
plaintiff, the
Measure of
defendant,
damages; general
claim, then
instruction.
which will put
defendant's
damage

reason to know and which could not
prevented by the buyer, covering or
12. The measure of damages to the
nonacceptance or repudiation by the
difference between the market price
and place for delivery of the pumps
contract price, together with any
damages.

13. The seller's incidental damages
any commercially reasonable charges
the transportation in connection with
of the pumps, resulting from the

as elsewhere covered in these

4. You are not to engage in any discussion of
damages
unless you have first determined that there
is liability,
damages.

5. If you should decide in favor of the
seller, on any of his claims and against the
the buyer, on his defenses, if any, to such
you must fix the amount of money damages
the plaintiff in as good a position as
performance would have done. The elements of
claimed by plaintiff in the complaint

are:
accept and
and
the pumps
seller's place
business.
defendant, the
the plaintiff,
such claim,
damages which
position as
The elements
counterclaim are:
"cover";
tests; and
profits,
customer.
shall recover
find.
have been
determine. Your
upon
conjecture.
prejudices against

1. Damages for the buyer's refusal to pay for 355 pumps,
2. Incidental damages for freight on from buyer's place of business to of

If you should decide in favor of the buyer, on any of his claims and against the seller, on his defenses, if any, to then you must fix the amount of money will put the defendant in as good a plaintiff's performance would have done. of damage claimed by defendant in the

1. The cost of
2. Incidental damages for engineering
3. Consequential damages for loss of arising out of defendant's loss of a

If your verdict is that neither party damages against the other, you should so Whether any of these elements of damages proved by the evidence is for you to verdict must be based upon proof and not speculation, guess or Further, sympathy for a person, or

and is not a

damages.

UJI 13-2004.

by

Witness impeached.
conduct [or by

made material

are

the witness]

convicted of a

reputation of a

bad] [or by

witness].

impeached or

province to give the

credit as you may

deserves.

UJI 13-2001.

is vital to

Performance of
justice.

your

duties.

UJI 13-2002. Duty
these

to follow
them. You must
instructions.
picking out

disregarding others.

UJI 13-2005. Jury
questions of

any party, should not affect your verdict

proper basis for determining

6. A witness may be discredited or impeached

by contradictory evidence or inconsistent

evidence that at other times the witness has

statements, under oath or otherwise, which

inconsistent with the present testimony of

[or by evidence that the witness has been

crime] [or by evidence that the general

witness for truth, honesty or integrity is

specific acts of wrongdoing of the

If you believe that any witness has been

discredited, it is your exclusive

testimony of that witness only such

think it

7. Faithful performance by you of your duties

the administration of

8. The law of this case is contained in

instructions and it is your duty to follow

consider these instructions as a whole, not

one instruction, or parts thereof, and

9. You are the sole judges of all disputed

sole judges of
determine the true
the facts.
court. Your
guess or

fact in this case. It is your duty to
facts from the evidence produced here in open
verdict should not be based on speculation,
conjecture.

these
them and, in
sympathy nor
verdict.
answered.

You are to apply the law, as stated in
instructions, to the facts as you find
this way, decide the case. Neither
prejudice should influence your
which the court ruled could not be

UJI 13-307. Rules
this case
of evidence.
and the
and any facts
true. The
by rules of
as judge, to
yourselves with
consider
to questions

10. The evidence which you are to consider in
consists of the testimony of the witnesses
exhibits admitted into evidence by the court
which the court instructs you to accept as
production of evidence in court is governed
law. From time to time it has been my duty,
rule on the evidence. You must not concern
the reasons for these rulings. You should not
what would or would not have been the answer

UJI 13-2003. Jury
credibility of the
sole judges of
the testimony
witnesses.
be given any
ability and

11. You alone are the judges of the
witnesses and of the weight to be given to
of each of them. In determining the credit to
witness, you may take into account his
opportunity to observe, his memory, his

manner while
that he may
considered
case.

UJI 13-2007.
governing this
Closing arguments.
or

These summaries
arriving at
carefully. You may
However,
remarks or
course of the
nor as
the law

instructions.
UJI 13-2008. No
side unless
damages unless
liability of that
liability.

UJI 13-1903. Jury
duty of the
duty to consult.
decide the case
evidence. In
hesitate to
opinion, if
surrender your

testifying, any interest, bias or prejudice
have and the reasonableness of his testimony,
in light of all the evidence in the

12. After these instructions on the law
case, the lawyers may make closing arguments,
statements, on the evidence and the law.

can be of considerable assistance to you in
your decision and you should listen
give them such weight as you think proper.
neither these final discussions nor any other
arguments of the attorneys made during the
trial are to be considered by you as evidence
correct statements of the law, if contrary to
given to you in these

13. You are not to discuss damages for either
you have first determined that there is
party.

14. In deliberating on this case, it is the
jurors to consult with one another and to
only after an impartial consideration of the
the course of your deliberations, do not
reexamine your own views and change your
convinced it is erroneous, but do not

of evidence
jurors, or
Remember that
the facts.
from the
case.

honest conviction as to the weight or effect
solely because of the opinion of your fellow
for the mere purpose of returning a verdict.
you are not partisans but judges - judges of
Your sole interest is to ascertain the truth
evidence in the

UJI 13-2009.
before commencing
Verdict of ten.
your members as

15. Upon retiring to the jury room, and
your deliberations, you will select one of
foreman.

upon a
proper form and
court.

When as many as ten of you have agreed
verdict, your foreman must sign the
you will all then return to open

UJI 13-1705A.
complaint in the sum
Verdict for

16. We find for the plaintiff on the
of \$.

.
plaintiff
on the com-
.

.
.

.
plaint.
UJI 13-1705B.
complaint.
Verdict
for

Foreman
We find for the defendant on the

defendant
on the com-
.

.

.
plaint.

Foreman

UJI 13-1705C.
counterclaim in the
Verdict for
..
defendant

We find for the defendant on the
sum of \$.

on the counter-
.

.
.

.
claim.
UJI 13-1705D.
counterclaim.
Verdict
for

Foreman
We find for the plaintiff on the

plaintiff

on the counter-
.

.
.

.
claim.
UJI 13-1705E.
recover.
Verdict

Foreman
We find that neither party should

for neither
.

.
.

.
party.

Foreman

Chapter 18 Damages Instruction

13-1801. Introduction.

13-1801. Liability must be determined before damages.

Part A. PERSONAL INJURY DAMAGES; ELEMENTS

13-1802. Measure of damages; general.

- 13-1803. Earnings.
- 13-1804. Medical expense.
- 13-1805. Nonmedical expense.
- 13-1806. Nature, extent, duration.
- 13-1807. Pain and suffering.
- 13-1808. Aggravation of preexisting condition.
- 13-1809. Loss of earning capacity by minor.
- 13-1810. Loss of services of wife.
- 13-1811. Mitigation.

Part B. PROPERTY DAMAGES; ELEMENTS

- 13-1812. Personal property; no salvage value.
- 13-1813. Personal property; costs of repair.
- 13-1814. Personal property; before and after rule.
- 13-1815. Personal property depreciation and repairs depreciation vs. before and after rule; unrepaired.
- 13-1816. Personal property; repairs vs. before and after rule.
- 13-1817. Personal property; repairs plus depreciation.
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Part C. MISCELLANEOUS DAMAGES

- 13-1821. Future damages; extent and amount.
- 13-1822. Future damages; discount to present cash value.
- 13-1823. Admitted liability.

- 13-1824. No allocation of damages among joint defendants.
- 13-1825. Uniform contribution; settlement with one defendant.
- 13-1826. Vicarious liability; punitive damages.
- 13-1827. Exemplary or punitive damages.
- 13-1828. Vicarious liability; indemnity between tortfeasors.
- 13-1829. Indemnity between active and passive tortfeasors.

Part D. WRONGFUL DEATH

- 13-1830. Measure of damages; wrongful death.
- 13-1831. Mortality tables.

13-1801. 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.

In drafting damages instructions, again it is recommended that the instructions be personalized. Modification will be required of the pronouns for change of sex or where the parties are multiple, as the instructions in this chapter are drafted in the singular masculine.

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.

ANNOTATIONS

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 7.

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 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.

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

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.

ANNOTATIONS

Evidence sufficient for instruction. - Testimony of plaintiff in a personal injury case that since the accident she had not been able to perform her usual occupation of housework for pay because of headaches and pain, along with that of experts who testified that they found objective evidence of pathology, was sufficient evidence to justify the instruction on loss of future earning capacity. *Selgado v. Commercial Whse. Co.*, 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974).

Earnings of crime victims. - Earnings are properly includable within "actual damages" to be awarded crime victims, as contemplated by 31-17-1A(2) NMSA 1978. *State v. Lack*, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages § 356.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

13-1804. Medical expense.

The reasonable expense of necessary medical care, treatment and services received [including prosthetic devices and cosmetic aids] [and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future].

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. - Under New Mexico law, a married man is responsible for the medical care rendered to his wife and children. Therefore, it is not a proper element in a suit by a wife alone or by minors attempting to sue in their own right.

This instruction was cited 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.

ANNOTATIONS

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 have disabled him to some extent requiring 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.

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

ANNOTATIONS

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

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 plaintiffs 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.

ANNOTATIONS

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).

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.

ANNOTATIONS

Proper denial of instructions. - This instruction was applicable to plaintiff's claim of aggravation of a preexisting ailment or condition, but her first request for an instruction on aggravation was not limited thereto, and her second request did not include the claim of aggravation. So that, although the two requests, at least in part, were repetitious, neither request was correct and both were properly denied. *Britton v. Boulden*, 87 N.M. 474, 535 P.2d 1325 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages § 360.

13-1809. Loss of earning capacity by minor.

The present cash value of earning capacity reasonably certain to be lost in the future after the plaintiff has reached the age of eighteen (18) years.

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 himself is also suing for his pain and suffering and there is proper evidence that his earning capacity will be impaired 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).

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

Parents may not recovery 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).

Library references. - 41 C.J.S. Husband and Wife § 445.

ANNOTATIONS

Single person may recover for loss of own household services. - Where a single person suffers the loss of capacity to perform household services for one's self, that person is also entitled to recover the reasonable value of loss of household services. *McNeely v. Henry*, 100 N.M. 794, 676 P.2d 1359 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages § 101.

Pecuniary value of services rendered by deceased without legal obligation as element of damages for his death, 53 A.L.R. 1102.

When must loss-of-consortium claim be joined with underlying personal injury claim, 60 A.L.R.4th 1174.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 A.L.R.4th 309.

25A C.J.S. Damages § 176(10).

13-1811. 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 damages. Damages caused by his 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 his damages which were incurred after the injury and not before.

UJI 13-1603. Ordinary care, must be given when this instruction is used.

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

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.

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.

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.

ANNOTATIONS

Correct measure of damages. - The difference between the "before" and "after" fair market values of a business enterprise correctly measures the damages resulting from the destruction of or injury to the enterprise. *Duke City Lumber Co. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975).

Basis of market value determination. - The market value, or fair market value, of a business enterprise, or of any other property, is not dependent upon the owner's financial capacity to operate or improve the enterprise or property, but is rather what a willing buyer would pay and a willing seller would accept for it in its condition at the time and place in question. *Duke City Lumber Co. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages § 357.

13-1815. Personal property depreciation and repairs depreciation vs. before and after rule; unrepaired.

In determining property damage, you may award only the smaller of two figures which are calculated as follows:

One figure is the reasonable expenses of necessary repair to the property damaged plus the decrease, if any, in the fair market value of the repaired property as compared to its fair market value before the occurrence; and

The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

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.

ANNOTATIONS

Cost of obtaining new financing in order to rebuild. - See *Topmiller v. Cain*, 99 N.M. 311, 657 P.2d 638 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages § 357.

13-1816. Personal property; repairs vs. before and after rule.

In determining property damages, you may award only the smaller of two figures which are calculated as follows:

One figure is the reasonable expense of necessary repairs to the property; and

The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

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.

ANNOTATIONS

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.

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 he did, in fact, rent other property. 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).

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

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.

ANNOTATIONS

Insufficient proof of damages. - Where an owner presented no evidence of actual loss in value or of increased costs resulting from the interference with his property through a wrongful lis pendens filing, the property owner's damages cannot be quantified this way, and the trial court did not abuse its discretion in awarding only nominal damages. Ruiz v. Varan, 110 N.M. 478, 797 P.2d 267 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 132 to 136.

13-1820. Mitigation of damages to property.

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that a person who is damaged must exercise ordinary care to minimize existing damages and to prevent further damages. Plaintiff may not recover for losses which could have been prevented by reasonable efforts on his part.

DIRECTIONS FOR USE

Change will need to be made in the use of the pronoun, when the evidence requires.

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.

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

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.

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.

ANNOTATIONS

Computation of present value of workmen's compensation award. - In computing the present value of a workmen's compensation award as a factor in determining attorneys fees, the five percent discount rate mentioned in 52-1-30B NMSA 1978 (now repealed) in calculating lump sum awards should be considered as a minimum level in the range of discount figures and not the ceiling. In computing the discount, the formula referred to in this instruction is an appropriate standard. *Jennings v. Gabaldon*, 97 N.M. 416, 640 P.2d 522 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 108, 349.

Reduction of allowance for future pain and suffering to present worth, 28 A.L.R. 1177.

Duty to instruct, and effect of failure to instruct, jury as to reduction to present worth of damages for future loss on account of death or personal injury, 77 A.L.R. 1439; 154 A.L.R. 796.

Rate of discount to be considered in computing present value of future earnings or benefits lost on account of death or personal injury, 105 A.L.R. 234.

Effect of anticipated inflation on damages for future losses-modern cases, 21 A.L.R.4th 21.

25A C.J.S. Damages § 194.

13-1823. Admitted liability.

The defendant has admitted liability for any damage which may have proximately resulted from the occurrence. You need only decide [what damages to plaintiff resulted from this occurrence and] what damages plaintiff should recover for these injuries.

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.

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

25A C.J.S. Damages § 189.

13-1825. Uniform contribution; settlement with one defendant.

Evidence has been introduced that plaintiff voluntarily settled his claim against and has released

(Name of released defendant)
defendant)

(Name of released

from further liability by reason of the occurrence giving rise to this lawsuit.

If you find in favor of plaintiff and against the defendant

....., then you should assess the full amount of damages which

(Name of remaining defendant)

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)

This instruction is to be used only where a joint tortfeasor has been released in conformity with the Uniform Contribution Among Tortfeasors Act, 41-3-1 NMSA 1978 et seq. Some adaptation of the instruction will be needed when there are more than two joint tortfeasors involved.

The instruction is not appropriate for use with a "covenant not to sue," nor with a release which does not discharge the remaining parties pro rata in accordance with the act.

The adjustment of the judgment rendered by the jury, by reason of the release, should be made following verdict by the court on the basis of the terms and conditions of the release and the act.

This instruction stands alone and is not an element of UJI 13-1802 but is to be used when circumstances justify.

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 §§ 4, 13.

ANNOTATIONS

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 13-301 et seq. The instruction will not be used unless specification of ratification is supported in the evidence and reasonable inference can be made therefrom.

ANNOTATIONS

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. Exemplary or punitive damages.

In the event you find that plaintiff should recover either actual or nominal damages, and if you further find that the acts of defendant were [willful, wanton, malicious, reckless, grossly negligent, fraudulent and in bad faith], then you may award exemplary or 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 exemplary or 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

Bracketed words should be selected as supported by the evidence. UJI 13-1619 provides a definition for some of the bracketed words. Separate verdicts must be used for punitive damages when there is more than one defendant. UJI 13-1826 applies to vicarious liability of the employer.

Committee comment. - This instruction is intended to be an all-purpose instruction, usable in pure tort, tort arising out of contract, libel and slander or any other appropriate matter.

Either actual or nominal damages must be awarded before punitive damages can be had. *Hudson v. Otero*, 80 N.M. 668, 459 P.2d 830 (1969) (store owner bullwhipped thief); *Montoya v. Moore*, 77 N.M. 326, 422 P.2d 363 (1967) (fraud in obtaining release from an insured); *Crawford v. Taylor*, 58 N.M. 340, 270 P.2d 978 (1954) (interference by hospital superintendent hindering anesthetist's performance of her employment).

Originally, punitive damages were given to punish and to make an example of a wrongdoer. *Colbert v. Journal Publishing Co.*, 19 N.M. 156, 142 P. 146 (1914) (newspaper libels citizen). *Cosgriff v. Miller*, 10 Wyo. 190, 68 P. 206, 98 Am. St. R. 977 (1902), cited in the *Colbert* case, *supra*, is lucid on the reasons. Punitive damages are to be given when actual or nominal damages are inadequate to satisfy the wrong committed. *Montoya v. Moore*, *supra*.

The words "willful", "wanton", etc., are in the disjunctive. *Curtiss v. Aetna Life Ins. Co.*, 90 N.M. 105, 560 P.2d 169 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976) (oral contract for accident, health or life insurance); *State Farm Gen. Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974) (interpleader of seller and buyer to determine who gets fire insurance proceeds); *Bank of N.M. v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967) (bank breaching oral contract to loan money); *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966) (wrongful dishonor of partnership checks which account was offset for partner's debt). Fraudulent acts regarding rescission under U.C.C. will support punitive damages. *Grandi v. LeSage*, 74 N.M. 799, 399 P.2d 285 (1965) (gelded horse represented as a stallion). Fraud in breaching contract to pay for alfalfa supports punitive damages. *Whitehead v. Allen*, 63 N.M. 63, 313 P.2d 335 (1957). Where repossessed car sold as new vehicle, punitive damages allowed where fraud is aggravated, wanton or maliciously intentional. *Stewart v. Potter*, 44 N.M. 460, 104 P.2d 736 (1940).

New Mexico's courts do not distinguish between pure tort and contract in the application of punitive damages. One who pleads guilty to driving while intoxicated and reckless driving finds that guilty plea allows imposition of punitive damages. *Svejcar v.*

Whitman, 82 N.M. 739, 487 P.2d 167 (Ct. App. 1971). Willful and maliciously motivated assault and battery by state policeman in breaking plaintiff's leg while evicting him from bar will support punitive damages. Mead v. O'Connor, 66 N.M. 170, 344 P.2d 478 (1959). Speeding car in village kills pedestrian; defense of contributory negligence denied where punitive damages alleged. Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24, rehearing denied, 46 N.M. 492, 131 P.2d 981 (1942). Malice in libel supports punitive damages. Henderson v. Dreyfus, 26 N.M. 541, 191 P. 442 (1919).

While punitive damages do not have to be in reasonable proportion to actual damages, such "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) (assault and battery by employer). 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); Galindo v. Western States Collection Co., 82 N.M. 149, 477 P.2d 325 (1970) (wrongful garnishment showing a reckless and wanton disregard of defendant's rights); Eslinger v. Henderson, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969) (slander by accusing of stealing \$7 and profaning name); Montoya v. Moore, supra. Accord, 41-2-3 NMSA 1978, on wrongful death.

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. Fredenburgh v. Allied Van Lines, 79 N.M. 593, 446 P.2d 868 (1968).

Punitive damages against more than one defendant must be separately stated. Vickrey v. Dunivan, 59 N.M. 90, 279 P.2d 853 (1955).

See also Samedan Oil Corp. v. Neeld, 91 N.M. 599, 577 P.2d 1245 (1978) (where Justice Federici sets forth the prerequisites for a punitive damage award); Curtiss v. Aetna Life Ins. Co., 90 N.M. 105, 560 P.2d 169 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

ANNOTATIONS

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 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 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).

And 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 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.

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.

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.

ANNOTATIONS

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. Flinkote 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); *Lujan 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).

ANNOTATIONS

Library references. - 25A C.J.S. Death § 90.

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).

Law reviews. - For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 127 to 129.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 16 A.L.R.4th 589.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent, 61 A.L.R.4th 251.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 A.L.R.4th 309.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child, 61 A.L.R.4th 413.

Recovery of damages for loss of consortium resulting from death of child-modern status, 77 A.L.R.4th 411.

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 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.

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

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

Instruction

13-1901. Two or more plaintiffs.

13-1902. Two or more defendants.

13-1903. Jury duty to consult.

13-1904. Jury deadlocked.

Part B. NO INSTRUCTIONS DRAFTED

13-1905. Dead man statute - No instruction drafted.

13-1906. Entrustments - No instruction 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 his 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.]

ANNOTATIONS

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 747.

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

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 he 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 foreman if they are able to reach a verdict. If they are not, he should then give this instruction and return them to the jury room for further deliberations.

[As amended, effective January 1, 1987.]

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

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 notes. - The trial court and counsel will be required to draft applicable instructions for the particular case.

Chapter 20

Duties of Jurors

Instruction

- 13-2001. Introduction.
- 13-2001. Performance of your duties.
- 13-2002. Duty to follow instructions.
- 13-2003. Jury sole judges of witnesses.
- 13-2004. Witness impeached.
- 13-2005. Jury sole judges of the facts.
- 13-2006. All jurors to participate.
- 13-2007. Closing arguments.
- 13-2008. No damages unless liability.
- 13-2009. Verdict of

13-2001. 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.

ANNOTATIONS

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.

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.

ANNOTATIONS

Presumption that jurors considered instructions as a whole. - In the absence of proof to the contrary, jurors will be presumed to have considered instructions as a whole. *Armstrong v. Industrial Elec. & Equip. Serv.*, 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981); *Lamkin v. Garcia*, 106 N.M. 60, 738 P.2d 932 (Ct. App. 1987).

Standard of review for sufficiency of instructions. - The standard for the reviewing court in determining the sufficiency of instructions is whether all of the instructions, when read and considered together, fairly present the issues and the law applicable thereto. *Armstrong v. Industrial Elec. & Equip. Serv.*, 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 896.

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 his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice that he may have and the reasonableness of his 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.

The pronouns in this instruction will need to be changed under certain circumstances.

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

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. - 75 Am. Jur. 2d Trial § 855.

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.

ANNOTATIONS

Unambiguous instruction does not require reversal. - Instruction which informed jury as to permissible methods of impeachment and stated that if jury believed a witness had been impeached, jury could take impeachment into consideration in determining

weight and credibility of witness's testimony, was not ambiguous and did not require a reversal. *State v. Madrid*, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

But refusal to give instruction may require reversal. - The Uniform Jury Instructions are to be given when justified by the facts, and the refusal to give such instructions when accompanied by the slightest prejudice to a party is reversible error. *Tobeck v. United Nuclear-Homestake Partners*, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973).

However may introduce false issues if given without evidentiary support. - To have given the requested instruction, which included impeachment methods for which there was no evidentiary support, would have introduced false issues and would have misled the jury. *Tobeck v. United Nuclear-Homestake Partners*, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial §§ 644, 860 to 863.

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

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).

ANNOTATIONS

Findings by juror no bar to future participation. - The one juror who has found both parties negligent cannot be kept from active participation in the assessment of damages. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 1011.

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.

ANNOTATIONS

This instruction is sufficient to advise jury of their duty to decide the case upon the evidence presented, not upon argument of counsel. *Romero v. Melbourne*, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 708.

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.

13-2009. Verdict of

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreman.

[In this case special interrogatories will be given to you together with verdicts and the instructions. It will be necessary for you to answer the appropriate interrogatories.]

When as many as [ten] [five] of you have agreed upon a verdict [and your answers to interrogatories], your foreman must sign the appropriate form [forms] and you will all then return to open court.

DIRECTIONS FOR USE

Under the laws of New Mexico, a civil verdict need not be unanimous and concurrence of five in a six-man jury and ten in a twelve-man jury is sufficient. The jury must be so instructed before beginning their deliberations.

The portion of the above instruction in brackets is to be used only in cases in which special interrogatories are given.

If this is the last instruction to the jury, then it can be followed with the usual terminology advising the jury of the number of forms of verdict submitted to them for consideration, such as:

"The court now hands you two forms of verdict" The forms should then be read to the jury.

Committee comment. - The instruction, herein presented, is simple, concise and meaningful to a jury.

ANNOTATIONS

Suggested forms of verdict are set forth under Chapter 22 of this pamphlet.

This instruction was cited 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; 89 C.J.S. Trial § 494.

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. - 75 Am. Jur. 2d Trial § 884.

Chapter 21

No Instructions to Be Given

Instruction

13-2101. Introduction.

13-2101. Assumption of risk - No instruction to be given.

13-2102. Child; care required for safety of - No instruction to be given.

13-2103. Decedent; presumption of due care - No instruction to be given.

- 13-2104. Failure of party to produce evidence or witness - No instruction to be given.
- 13-2105. Failure of party to testify - No instruction to be given.
- 13-2106. Flight from accident not negligence - No instruction to be given.
- 13-2107. Foreseeability as negligence - No instruction to be given.
- 13-2108. Highest degree of care - No instruction to be given.
- 13-2109. Hospital and business records - No instruction to be given.
- 13-2110. Inherently improbable testimony - No instruction to be given.
- 13-2111. Jury to consider all the evidence - No instruction to be given.
- 13-2112. Loss of consortium; damages - No instruction to be given.
- 13-2113. Negligence of outside agency - No instruction to be given.
- 13-2114. Number of witnesses - No instruction to be given.
- 13-2115. One witness against many - No instruction to be given.
- 13-2116. Oral admissions - No instruction to be given.
- 13-2117. Party competent as a witness - No instruction to be given.
- 13-2118. Reliance on personal observations - No instruction to be given.
- 13-2119. Remarks of judge - No instruction to be given.
- 13-2120. Unavoidable accident - No instruction to be given.
- 13-2121. Witness; credibility of special - No instruction to be given.
- 13-2122. Witness; need not be believed - No instruction to be given.
- 13-2123. Witness; willfully false - No instruction to be given.
- 13-2124. Last clear chance - No instruction to be given.
- 13-2125. Contributory malicious, willful or wanton misconduct - No instruction to be given.

13-2101. 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 man" standard of contributory negligence. A voluntary exposure to a known danger will preclude recovery.

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:

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.

ANNOTATIONS

Assumption of risk subject to comparative negligence rule. - Assumption of risk, as a form of negligence, and other liability concepts based on, or related to, negligence of either plaintiff, defendant or both, are subject to the newly adopted comparative negligence rule. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence § 278.

Motor vehicle passenger's contributory negligence or assumption of risk where accident resulted from driver's drowsiness, physical defect, or illness, 1 A.L.R.4th 556.

13-2102. Child; care required for safety of.

No instruction to be given.

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. He must not only offer some evidence to rebut the presumption, but he also must prove that the decedent was guilty of contributory negligence by a preponderance of the evidence.

ANNOTATIONS

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 Civ. 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.

Library references. - 25A C.J.S. Death § 90.

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

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

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).

Library references. - 13 C.J.S. Carriers § 769.

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

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).

ANNOTATIONS

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 §§ 401, 445.

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).

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.

ANNOTATIONS

Contributory negligence and independent intervening cause are questions for jury, unless, as a matter of law, there is no evidence upon which to submit the issue to the jury. *City of Belen v. Harrell*, 93 N.M. 601, 603 P.2d 711 (1979).

Suicide not necessarily intervening cause. - It cannot be said that in every case suicide is an independent intervening cause as a matter of law. *City of Belen v. Harrell*, 93 N.M. 601, 603 P.2d 711 (1979).

When defendant not entitled to instruction. - Defendant who failed to stop at an intersection and struck plaintiff's car was not entitled to an instruction relating to

negligence of an outside agency on grounds that the stop sign for defendant's street was turned sideways where the record showed that, prior to collision, defendant did not see the stop sign because he was looking to the left, away from the sign. *Williams v. Cobb*, 90 N.M. 638, 567 P.2d 487 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Negligence § 192.

13-2114. Number of witnesses.

No instruction to be given.

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.

ANNOTATIONS

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).

ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

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).

ANNOTATIONS

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:

ANNOTATIONS

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.

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.

ANNOTATIONS

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.

ANNOTATIONS

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

Instruction

- 13-2201. Introduction.
- 13-2201. Verdict for plaintiff; single parties.
- 13-2202. Verdict for defendant; single parties.
- 13-2203. Verdict for plaintiff; multiple defendants.
- 13-2204. Verdict for defendants; multiple parties.
- 13-2205. Verdict for plaintiff; separate liability.

- 13-2206. Verdict for defendant; separate liability.
- 13-2207. Verdict for plaintiff; counterclaim.
- 13-2208. Verdict for defendant; counterclaim.
- 13-2209. Verdict for neither party; counterclaim.
- 13-2210. Verdict for both parties; for plaintiff on complaint; for defendant on counterclaim.
- 13-2211. Verdict for cross-claimant.
- 13-2212. Verdict for cross-defendant.
- 13-2213. Verdict for third-party plaintiff.
- 13-2214. Verdict for third-party defendant.
- 13-2215. Verdict against one of multiple defendants where liability was alleged as joint and several.
- 13-2216. Verdict under Uniform Contribution Among Tortfeasors Act.
- 13-2217. Special interrogatories.
- 13-2218. Comparative negligence; no comparison among defendants or non-parties; general verdict.
- 13-2219. Comparative negligence; comparison among defendants or non-parties; general verdict.
- 13-2220. Comparative negligence; special verdict.
- 13-2221. Comparative negligence; verdict form.

13-2201. 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.

COMPILER'S ANNOTATIONS

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
\$.....

.....
.....

Foreman

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 foreman 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.

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

88 C.J.S. Trial § 322.

13-2202. Verdict for defendant; single parties.

We find for the defendant.

.....
...

Foreman

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.

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 foreman.

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.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

ANNOTATIONS

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.

.....
...

Foreman

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 foreman.

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 Civ. damage instruction 13-1825 is used.

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.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

13-2204. Verdict for defendants; multiple parties.

We find for all the defendants.

.....
...

Foreman

DIRECTIONS FOR USE

See directions for use, UJI 13-2202 and 13-2203.

Committee comment. - See Committee Comments, UJI 13-2202 and 13-2203.

13-2205. Verdict for plaintiff; separate liability.

**We find for the plaintiff in the sum of
\$..... and against the defendant**

.....
...

Foreman

DIRECTIONS FOR USE

See UJI 13-2201.

Committee comment. - See UJI 13-2201.

13-2206. Verdict for defendant; separate liability.

We find for the defendant and against the
plaintiff

.....
...

Foreman

DIRECTIONS FOR USE

See UJI 13-2202 and 13-2203.

Committee comment. - See UJI 13-2202 and 13-2203.

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.

.....
...

Foreman

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".

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.

ANNOTATIONS

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

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.

.....
...

Foreman

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.

Committee comment. - See UJI 13-2207.

Library references. - 89 C.J.S. Trial §§ 485, 487 et seq.

ANNOTATIONS

88 C.J.S. Trial § 322.

13-2209. Verdict for neither party; counterclaim.

We find neither party should recover.

.....
...

Foreman

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.

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

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.

.....
...

Foreman

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.

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

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
.....

.....
...

Foreman

DIRECTIONS FOR USE

Use this verdict form (in addition to others) on a straight, simple cross-claim case.

Committee comment. - Usually the cross-claim situation involves a claim for judgment over.

13-2212. Verdict for cross-defendant.

We find for the defendant on the cross-claim.

.....
...

Foreman

DIRECTIONS FOR USE

This type of form will be used when no dollar amount is involved.

Committee comment. - In indemnification claims, usually a dollar amount is not claimed.

13-2213. Verdict for third-party plaintiff.

We find for the third-party plaintiff.

.....
...

Foreman

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.

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.

ANNOTATIONS

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.

13-2214. Verdict for third-party defendant.

We find for the third-party defendant.

.....
...

Foreman

DIRECTIONS FOR USE

When UJI 13-2213 is used, then UJI 13-2214 will also be used.

Committee comment. - Reference is to Committee Comment to UJI 13-2213.

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.

.....
...

Foreman

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.

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.

ANNOTATIONS

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.

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].

.....
...

Foreman

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.

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

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:

.....
...

Foreman

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 foreman, but a signature of the foreman is required at the end of all of the questions and answers.

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.

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

COMPILER'S 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).

ANNOTATIONS

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 foreman 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 foreman 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 foreman 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.]

.....

Foreman

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.

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).

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 \$.....

.....

Foreman

COMPILER'S ANNOTATIONS

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.