CHAPTER 41
TORTS

ARTICLE 1
SETTLEMENTS, RELEASES AND STATEMENTS

41-1-1. Settlements, releases and statements of injured patients; acknowledgment required; notice.

A. No person whose interest is or may become adverse to a person injured who is either under the care of a person licensed to practice the healing arts, or confined to a hospital or sanitarium as a patient shall, within fifteen days from the date of the occurrence causing the person's injury:

(1) negotiate or attempt to negotiate a settlement with the injured patient; or

(2) obtain or attempt to obtain a general release of liability from the injured patient; or

(3) obtain or attempt to obtain any statement, either written or oral[,] from the injured patient for use in negotiating a settlement or obtaining a release.

B. Any settlement agreement entered into, any general release of liability or any written statement made by any person who is under the care of a person licensed to practice the healing arts or is confined in a hospital or sanitarium after he incurs a personal injury, which is not obtained in accordance with the provisions of Section 2 [41-1-2 NMSA 1978] of this act, requiring notice and acknowledgment, may be disavowed by the injured person within fifteen days after his discharge from the care of the persons licensed to practice the healing arts or his release from the hospital or sanitarium, whichever occurs first, and such statement, release or settlement shall not be evidential in any court action relating to the injury.

C. Any settlement agreement, any release of liability or any written statement shall be void unless it is acknowledged by the injured party before a notary public who has no interest adverse to the injured person.

History: 1953 Comp., § 21-11-1, enacted by Laws 1971, ch. 70, § 1.

Section's restrictions on care of injured person. - While this section does not state that the care of an injured person by one licensed to practice the healing arts must be actual and continuous, nor does it limit the time within which the care must be provided, this section is restrictive in that care must be provided in good faith and must be reasonably required. Bolles v. Smith, 92 N.M. 524, 591 P.2d 278 (1979).

Effect of acknowledgment requirement. - The statutory requirement of an acknowledgment does not impair the obligation of the contract; the acknowledgment is an integral part of the contract. It is a "restrictive safeguard," but does not prohibit a defendant from obtaining a valid release, nor does it restrain the freedom of the parties to contract. Mitschelen v. State Farm Mut. Auto. Ins. Co., 89 N.M. 586, 555 P.2d 707 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Settlement of lawsuit by attorney with specific authority to settle is binding on the client. Gonzales v. Atnip, 102 N.M. 194, 692 P.2d 1343 (Ct. App. 1984).

For attorney to bind client to settlement agreement, he must have specific authority to do so, unless there is an emergency or some overriding reason for enforcing the settlement despite the attorney's lack of specific authority. Bolles v. Smith, 92 N.M. 524, 591 P.2d 278 (1979).

Effect of rejection of settlement agreement. - An oral settlement agreement entered into by an injured person's attorney on the injured person's behalf cannot be enforced where it was rejected by the injured prior to its approval by the court or its dismissal under Rule 41(a)(1) or (2), N.M.R. Civ. P., (now see Rule 1-041). Bolles v. Smith, 92 N.M. 524, 591 P.2d 278 (1979).

Settlements subject to rescission. - Any settlement procured by the fraud, artifice or overreaching of the insurer's agent is subject to rescission even if not disavowed in a timely fashion, pursuant to Subsection B. Ponce v. Butts, 104 N.M. 280, 720 P.2d 315 (Ct. App. 1986).

Generally as to notary public. - Acknowledgment before a notary public is part of the release and necessary to its validity. Mitschelen v. State Farm Mut. Auto. Ins. Co., 89 N.M. 586, 555 P.2d 707 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Effect of noncompliance with Subsection C. - Noncompliance with Subsection C renders the settlement agreement and any release of liability invalid. Catalano v. Lewis, 90 N.M. 215, 561 P.2d 488 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

A release cannot be set aside for mistake, e.g., on the ground that plaintiff's injury was more serious than originally believed. Ponce v. Butts, 104 N.M. 280, 720 P.2d 315 (Ct. App. 1986).

Release invalid when not acknowledged by claimant. - A release of liability with respect to bodily injury claims prepared by an insurer and signed without acknowledgment by a claimant while under a doctor's care is invalid. Bolles v. Smith, 92 N.M. 524, 591 P.2d 278 (1979).

Oppressive conduct by insured not condoned. - With the Release Act (41-1-1, 41-1-2 NMSA 1978), the legislature has not expressed condonation of oppressive conduct on the part of the insured; the insurer is protected by law if it can prove the insured

fabricated a claim. Mitschelen v. State Farm Mut. Auto. Ins. Co., 89 N.M. 586, 555 P.2d 707 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7 Am. Jur. 2d Attorneys at Law §§ 156, 157; 15A Am. Jur. 2d Compromise §§ 3, 20, 23, 41; 66 Am. Jur. 2d Release §§ 1, 20.

Discretion of court to vacate its approval of release in respect to minor, 8 A.L.R.2d 460.

Avoidance of release of personal injury claims on ground of fraud or mistake as to extent or nature of injuries, 71 A.L.R.2d 82.

Release of one responsible for injury as affecting liability of physician or surgeon for negligent treatment of injury, 39 A.L.R.3d 260.

Insurer's tort liability for acts of adjuster seeking to obtain settlement or release, 39 A.L.R.3d 739.

Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686.

15A C.J.S. Compromise §§ 34, 35, 48, 53; 25 C.J.S. Damages § 81; 37 C.J.S. Fraud §§ 41, 93; 76 C.J.S. Release §§ 1 to 37.

41-1-2. Settlements, releases and statements; applicability.

The provisions of this act [41-1-1, 41-1-2 NMSA 1978] relating to settlements, releases and statements obtained, by a person whose interest is or may become adverse, from a patient confined in a hospital or sanitarium or being treated by a person licensed to practice the healing arts, shall not apply, if at least five days prior to obtaining the settlement, release or statement, the injured party has signified in writing, by a statement acknowledged before a notary public, who has no interest adverse to the injured party, his willingness that a settlement, release or statement be given.

History: 1953 Comp., § 21-11-2, enacted by Laws 1971, ch. 70, § 2.

Severability clauses. - Laws 1971, ch. 70, § 3, provides for the severability of the act if any part or application thereof is held invalid.

For attorney to bind client to settlement agreement, he must have specific authority to do so, unless there is an emergency or some overriding reason for enforcing the settlement despite the attorney's lack of specific authority. Bolles v. Smith, 92 N.M. 524, 591 P.2d 278 (1979).

ARTICLE 2
WRONGFUL DEATH; ACTIONS FOR DAMAGES

41-2-1. [Death by wrongful act or neglect; liability in damages.]

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

History: Laws 1882, ch. 61, § 2; C.L. 1884, § 2309; Laws 1891, ch. 49, § 1; C.L. 1897, § 3214; Code 1915, § 1821; C.S. 1929, § 36-102; 1941 Comp., § 24-101; 1953 Comp., § 22-20-1.

Cross-references. - For action to be brought by personal representative, see 41-2-3 NMSA 1978.

For survival of action, see 37-2-1 NMSA 1978.

For nonliability to suit and defenses denied employers under Workmen's Compensation Law, see 52-1-8 NMSA 1978.

Applicability of Missouri prior construction. - This statute (41-2-1 to 41-2-4 NMSA 1978), having been adopted from Missouri, the rule that a statute adopted or borrowed from another state is presumed to include its prior construction by the courts of that state is applicable thereto. White v. Montoya, 46 N.M. 241, 126 P.2d 471 (1942).

Applicability of saving clause for infants. - The statute providing a saving clause for infants (37-1-10 NMSA 1978) is not applicable to the death by wrongful act statute. Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952).

Constitutionality where recovery against carrier employee precluded. - Having thus afforded a fixed penalty against the carrier for wrongful death, it is not a denial of the equal protection of the law for the legislature to provide that such sum should be exclusive of all other liability for wrongful death, thereby precluding recovery against the negligent employee. Schloss v. Matteucci, 260 F.2d 16 (10th Cir. 1958).

Construction of section. - This section is a derogation of common law and must be strictly construed. Cain v. Bowlby, 114 F.2d 519 (10th Cir.), cert. denied, 311 U.S. 710, 61 S. Ct. 319, 85 L. Ed. 462 (1940).

Purpose of section. - This section has to some degree an objective of public punishment, and was designed in part at least to act as a deterrent to the negligent conduct of others, and thereby promote public safety and welfare. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Negligence made costly. - The statutes (41-2-1 to 41-2-4 NMSA 1978) allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb by making negligence that causes death costly to the wrongdoer. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970); Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

The authority to recover damages for wrongful death granted by statutes has for its purpose more than compensation. It is designed as well to promote the safety of life and limb by making it costly for the wrongdoer. Tauch v. Ferguson-Steere Motor Co., 62 N.M. 429, 312 P.2d 83 (1957).

No interspousal immunity. - There is no immunity from tort liability between spouses by reason of that relationship. Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975).

This section applies where injury sued upon resulted in death. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Effect on nonresident alien illegally present. - The word "person" in this section includes a nonresident alien who is present illegally in the state of New Mexico. Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Generally, as to torts against Indians. - The cause of action which an Indian acquires when a tort is committed against him is property which he may acquire or become invested with, particularly if the tort is committed outside of an Indian reservation by a state citizen who is not an Indian, and where such Indian is killed as a result of such tort, the cause of action survives. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Probate court jurisdiction over Indians. - A New Mexico probate court has jurisdiction to appoint an administrator for a deceased reservation Indian to enforce the right of action created by this section. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Survival of kindred not required. - A right of action under the Wrongful Death Act (41-2-1 to 41-2-4 NMSA 1978) is not dependent or conditioned upon the survival of any kindred. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Effect of intervention by widow and child. - Permitting persons claiming to be the decedent's widow and child to intervene is not reversible error where defendants' counsel insisted that the parties claiming injury should be definitely named in the complaint, and that the injured parties were the surviving widow and children. The error

was invited and defendants were in no position to complain. Hall v. Stiles, 57 N.M. 281, 258 P.2d 386 (1953).

Scope of "personal representative". - Temporary, special and ancillary administrators are included in the term "personal representative" as used in wrongful death statutes, and the term includes an administrator de bonis non when regular administrator refuses to sue. Henkel v. Hood, 49 N.M. 45, 156 P.2d 790 (1945).

Cause of action in personal representative. - The cause of action under the Wrongful Death Act is in the personal representative. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

And is exclusive. - Actions under the Wrongful Death Act may be brought by the personal representative of the deceased person only. Hall v. Stiles, 57 N.M. 281, 258 P.2d 386 (1953).

Effect of designation. - Where a statute gives the cause of action and designates the persons who may be sued, they alone are authorized to be sued. Ickes v. Brimhall, 42 N.M. 412, 79 P.2d 942 (1938).

Administrator may file suit under this section to recover damages for wrongful death. Romero v. Atchinson, T. & S.F. Ry., 11 N.M. 679, 72 P. 37 (1903).

Representative to serve as trustee. - The personal representative who makes a recovery under this section serves as a trustee, a "statutory trustee," for discoverable and identifiable beneficiaries in the line of named kinship or descent. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963).

Conflict of laws. - It is unimportant that the community administrator would not have had power to bring suit in Texas, as power of personal representative in New Mexico is measured by the laws of this state, since the law of Texas is looked to only to determine whether the party meets the broad definition of "personal representative." Henkel v. Hood, 49 N.M. 45, 156 P.2d 790 (1945).

Wrongful death and estate functions contrasted. - Wrongful death suit under this act has no relation to the estate, it being incidental that a "personal representative" is named to bring suit and it is not because this would fall within his duties as such, but because someone must be named and our legislature has fixed upon such person as the one to sue. Henkel v. Hood, 49 N.M. 45, 156 P.2d 790 (1945).

Source of personal representative authority. - Since character of "personal representative" under wrongful death statute is entirely foreign to and unconnected with his character as estate administrator, his authority to bring the action flows entirely from the wrongful death statute itself and not from the probate or other estate laws. Henkel v. Hood, 49 N.M. 45, 156 P.2d 790 (1945).

Effect on damages to wife's executor and husband. - The provisions of 41-2-3 NMSA 1978 when considered with this section warrant the allowance to the personal representative of the decedent, damages prior to death, provided they are not the same as those for which the husband, individually, has a right of recovery. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Authority for damages between injury and death. - The right of the administrator to recover damages sustained by decedent between the date of the injury and the date of death falls within the provisions of the Wrongful Death Act, provided these damages are not the same as those for which the husband, individually, has a right of recovery. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

This section is a survival statute under which the cause of action arises at time of death. State ex rel. De Moss v. District Court, 55 N.M. 135, 227 P.2d 937 (1951).

The death by wrongful act statute is a "survival" statute and consequently, the cause of action arises when the tort is committed (now at death), thus barring an action therefor at the end of one year (now three years) thereafter. Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952).

Scope of considerations. - The age, earning capacity, health, habits and probable duration of life are all things to be considered in determining the quantum of damages for death, and an award of $7,500 for a man forty-five years of age, educated, in good health, and capable of earning $200 a month, is not excessive. Duncan v. Madrid, 44 N.M. 249, 101 P.2d 382 (1940).

In death actions, the age, occupation, earning capacity, rate of wages, health, habits and probable duration of the life are proper elements of inquiry. Hall v. Stiles, 57 N.M. 281, 258 P.2d 386 (1953).

Value is present worth. - The worth of the life of the deceased is not all that she would earn in her lifetime, but the present worth, taking into consideration the earning power of money. Mares v. New Mexico Pub. Serv. Co., 42 N.M. 473, 82 P.2d 257 (1938).

The value of a husband's household services is an evidentiary item admissible in establishing the present worth of a husband's life. Corlett v. Smith, 107 N.M. 707, 763 P.2d 1172 (Ct. App. 1988).

Pain, suffering and medical expenses included. - Personal representative of decedent, who was the administratrix of decedent's estate, could recover, under Wrongful Death Act for decedent's conscious pain and suffering and medical and related care between the injury and death. 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).

Exception to coverage of section. - While this section, if standing alone, would apply to all deaths resulting from negligence of corporations and individuals, 41-2-4 NMSA 1978 is an exception thereto. White v. Montoya, 46 N.M. 241, 126 P.2d 471 (1942).

Right of recovery provided for wrongful death of viable fetus. - The legislature in enacting this section intended that a viable fetus be included within the word "person" in this section and, therefore, it intended to provide a right of recovery for the wrongful death of a viable fetus. Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980).

Missouri views often followed. - The New Mexico supreme court has often followed the views of the Missouri supreme court in its interpretations of this section. Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

Effect of post-borrowing construction. - This statute was originally taken from Missouri and while a case decided long after the statute was adopted by New Mexico is entitled to respectful consideration, it is not controlling. Cain v. Bowlby, 114 F.2d 519 (10th Cir.), cert. denied, 311 U.S. 710, 61 S. Ct. 319, 85 L. Ed. 462 (1940).

Common carrier action exclusive. - Right of action for wrongful death caused by common carrier is exclusive of right of action for wrongful death caused by person or corporation other than common carrier. Mallory v. Pioneer S.W. Stages, Inc., 54 F.2d 559 (10th Cir. 1931).

Nature of remedy in 41-2-4 NMSA 1978. - The remedy provided in 41-2-4 NMSA 1978 is exclusive. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

Effect on manufacturer of "public conveyance". - The manufacturer of a "public conveyance" can be held liable for damages where the passengers died as a result of defects in the conveyance, and the remedy provided by 41-2-4 NMSA 1978 against the "owner" of a defective "public conveyance" does not provide the only remedy. Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

Recovery against "employee-driver" of "public conveyance". - Recovery may not be had under either this section or 41-2-4 NMSA 1978 of the wrongful death statutes against the "employee-driver" of a "public conveyance." Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

Scope of limitation. - This statute creates a new right and its limitation is not on the remedy alone, but on the right itself, as well. Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952).

Effect of limitation. - New Mexico Wrongful Death Act creates a cause of action which did not exist at common law and the limitation provisions thereof are not only a limitation on the remedy, but also on the right to institute such an action. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

When action barred. - Not only the remedy but the right to maintain suit is barred where damages are sought for wrongful death on account of alleged negligence of relator in performing surgery on decedent and complaint is filed more than one year (now three years) after death occurred. State ex rel. De Moss v. District Court, 55 N.M. 135, 227 P.2d 937 (1951).

Cause of action for wrongful death is barred where action is brought within one year (now three years) from the date of the wrongful death, but more than one year after the tort is committed. Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952).

Presumption of due care. - In death action, deceased is presumed to have used due care and not to have been guilty of contributory negligence. Hogsett v. Hanna, 41 N.M. 22, 63 P.2d 540 (1936).

When writ of prohibition made absolute. - In malpractice case against surgeon supreme court will make absolute its alternative writ of prohibition where principal witness is dead, trial would be expensive and regardless of the verdict the professional reputation of the defendant would be damaged, judgment would be reversed and case remanded with instructions to dismiss it. State ex rel. De Moss v. District Court, 55 N.M. 135, 227 P.2d 937 (1951).

Suit by third person against insurer barred. - Injured third person cannot proceed directly against insurer or join insurer and insured as defendants in the absence of contractual or statutory provisions. Chavez v. Pino, 86 N.M. 464, 525 P.2d 391 (Ct. App. 1974).

Law of the place of the wrong governs the right of action for death. McKenzie v. K.S.N. Co., 79 N.M. 314, 442 P.2d 804 (Ct. App. 1968).

Burden of proof. - In a wrongful death claim, the burden is on the plaintiff to prove that the claimed wrongful act was the proximate cause of the death. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

The burden of establishing a timely presentment of a claim against an estate, pursuant to 45-3-803 NMSA 1978, rests upon the claimant, and nothing in the statutes allowing recovery for wrongful death, 41-2-1 to 41-2-4 NMSA 1978, expresses a legislative intent to create an exception. Corlett v. Smith, 106 N.M. 207, 740 P.2d 1191 (Ct. App. 1987).

Where second vehicle involved. - Where there is absolutely no evidence in the record to show that decedent was alive at the time his body was run over by the second vehicle, and no evidence to show this act by second driver in any way contributed to the death, the burden was on plaintiff to not only show second driver was negligent, but that her negligence was the proximate cause, or at least a concurring proximate cause, of the death. Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Where failure to remove body not proximate cause. - In the absence of any evidence to show death resulted from the body being run over by the second vehicle, first driver's failure to remove the body from the highway cannot possibly be said to have proximately caused this injury (death). Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Where no liability for death. - Defendants, who owned and operated a heavy construction business and maintained a pond on their premises, were not guilty of wrongful acts where a nine-year-old boy, who had the capacity to comprehend and avoid the danger he incurred, got on a raft in the pond, jumped in for a swim and drowned. Mellas v. Lowdermilk, 58 N.M. 363, 271 P.2d 399 (1954).

Last clear chance doctrine held improper. - In a case of head-on collision between decedent's automobile and a commercial truck-trailer on a two-lane highway, and both drivers had the potential of sighting the other for a distance of more than 600 feet before meeting, the possibility that the collision might have been avoided had the defendant continued in his proper lane or had turned right instead of left was of no legal significance. The concept of a last clear chance is negatived by either the existence of a sudden emergency or by the existence of equal opportunity to act, and it was error for the trial court to instruct the jury on the doctrine of last clear chance. Darter v. Greiner, 301 F.2d 772 (10th Cir. 1962).

Effect on action for loss of consortium. - The Wrongful Death Act does not apply to common-law remedies that heretofore existed and were not repealed by the act; therefore, the statute of limitations applicable to the wrongful death action is not applicable to the husband's common-law right of action for loss of consortium. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Inapplicability of 37-1-14 NMSA 1978. - Provisions of 37-1-14 NMSA 1978, concerning limitations of actions, are inapplicable to the Wrongful Death Act. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Law reviews. - For comment, "Attractive Nuisance - Liability of the United States for Accidental Drowning of Infant Trespassers in Middle Rio Grande Project Irrigation Ditches," see 10 Nat. Resources J. 137 (1970).

For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M.L. Rev. 271 (1976).

For note, "Torts - Wrongful Death - A Viable Fetus Is a 'Person' Under the New Mexico Wrongful Death Statute: Salazar v. St. Vincent Hospital," see 12 N.M.L. Rev. 843 (1982).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For annual survey of New Mexico Law of Torts, see 20 N.M.L. Rev. 407 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22A Am. Jur. 2d Death §§ 1 to 41, 158 to 161, 215 to 385.

Exemplary damages for assault as affected by death of party assaulted or assailant, 16 A.L.R. 792, 123 A.L.R. 1115.

Compensation from other sources as precluding recovery for death, 18 A.L.R. 686, 95 A.L.R. 575.

Husband and wife, personal relations of, or marital misconduct of either spouse, as affecting action for death of spouse, 18 A.L.R. 1409, 90 A.L.R. 920.

Liability for death of, or injury to, one seeking to rescue another, 19 A.L.R. 4, 158 A.L.R. 189, 166 A.L.R. 752.

Right of parent who consents to or acquiesces in employment of child under statutory age to recover for latter's injury or death while in such employment, 23 A.L.R. 635, 40 A.L.R. 1206.

Contributory negligence of custodian of child as affecting right of parent to recover for its death or injury, 23 A.L.R. 655.

Release by, or judgment in favor of, person injured as barring action for his death, 39 A.L.R. 579.

Natural parent's right to recover for death of adopted child, 56 A.L.R. 1349.

Contractual relationship as affecting right of action for death, 80 A.L.R. 880, 115 A.L.R. 1026.

Municipal corporation or other governmental unit as within the term "corporation," "person," or other term employed in death statute descriptive of party against whom action may be maintained, 115 A.L.R. 1287.

Effect of existence of nearer related but nondependent member upon right to sue under death statute in behalf of remotely related but dependent member of same class, 162 A.L.R. 704.

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

Marriage of child as affecting right of recovery by parents in death action, 7 A.L.R.2d 1380.

Civil liability for death by suicide, 11 A.L.R.2d 751, 58 A.L.R.3d 828.

Liability of parent or person in loco parentis for wrongful death of minor child, 19 A.L.R.2d 423, 41 A.L.R.3d 904.

Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for death, 25 A.L.R.2d 1215.

Husband or his estate, action against, for causing death of wife, or vice versa, 28 A.L.R.2d 662.

Municipal liability for injury resulting in death, notice of claim as condition of, 51 A.L.R.2d 1128.

Officers, personal liability of peace officer or his bond for negligence causing death, 60 A.L.R.2d 873.

Action for death of adoptive parent, by or for benefit of adopted child, 94 A.L.R.2d 1237, 97 A.L.R.3d 347.

Right of action for death of woman who consented to abortion, 36 A.L.R.3d 630.

Right to recover for death of child resulting from prenatal injury, 40 A.L.R.3d 1222.

Action against parent by or on behalf of unemancipated minor child for wrongful death of other parent, 87 A.L.R.3d 849.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 A.L.R.3d 926.

Liability of swimming facility operator for injury or death inflicted by third person, 90 A.L.R.3d 533.

Liability of one negligently causing fire for injuries sustained by person other than firefighter in attempt to control fire or to save life or property, 91 A.L.R.3d 1202.

Modern status of interspousal tort immunity in personal injury and wrongful death actions, 92 A.L.R.3d 901.

Validity of release of prospective right to wrongful death action, 92 A.L.R.3d 1232.

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 civilian skydiver's or parachutist's injury or death, 95 A.L.R.3d 1280.

Liability of one who sells gun to child for injury to third party, 4 A.L.R.4th 331.

Employer's right of action for loss of services or the like against third person tortiously killing or injuring employee, 4 A.L.R.4th 504.

Liability of labor union for injury or death allegedly resulting from unsafe working conditions, 14 A.L.R.4th 1161.

Negligence of one parent contributing to injury or death of child as barring or reducing damages recoverable by other parent for losses suffered by other parent as result of injury or death of child, 26 A.L.R.4th 396.

Judgment in favor of, or adverse to, person injured as barring action for his death, 26 A.L.R.4th 1264.

Loss of enjoyment of life as a distinct element or factor in awarding damages for bodily injury, 34 A.L.R.4th 293.

Handgun manufacturer's or seller's liability for injuries caused to another by use of gun in committing crime, 44 A.L.R.4th 595.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor, 46 A.L.R.4th 220.

Excessiveness or adequacy of damages resulting in death of homemaker, 47 A.L.R.4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 A.L.R.4th 134.

Effect of statute limiting landowner's liability for personal injury to recreational user, 47 A.L.R.4th 262.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons, 48 A.L.R.4th 229.

Strict liability of landlord for injury or death of tenant or third person caused by defect in premises leased for residential use, 48 A.L.R.4th 638.

Primary liability of private chain franchisor for injury or death caused by franchise premises or equipment, 54 A.L.R.4th 1142.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering. 55 A.L.R.4th 186.

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.

Liability for injury or death allegedly caused by activities of hospital "rescue team,", 64 A.L.R.4th 1200.

Recovery in death action for failure to diagnose incurable disease which caused death, 64 A.L.R.4th 1232.

Tort liability of college, university, fraternity, or sorority for injury or death of member or prospective member by hazing or initiation activity, 68 A.L.R.4th 228.

Tort liability for window washer's injury or death, 69 A.L.R.4th 207.

Effect of death of beneficiary, following wrongful death, upon damages, 73 A.L.R.4th 441.

When is death "instantaneous" for purposes of wrongful death or survival action, 75 A.L.R.4th 151.

Admissibility of evidence, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs on issue of life expectancy, 86 A.L.R.4th 1135.

Admiralty jurisdiction: maritime nature of tort-modern cases, 80 A.L.R. Fed. 105.

Recovery of prejudgment interest in actions under the Federal Employers' Liability Act or Jones Act, 80 A.L.R. Fed. 185.

Monetary remedies under § 23 of Consumer Product Safety Act (15 USCS § 2072), 87 A.L.R. Fed. 587.

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

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.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx § 688) or doctrine of unseaworthiness-modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of award of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS § 51 et seq.)-modern cases, 97 A.L.R. Fed. 189.

25A C.J.S. Death §§ 13 to 25, 95 to 129.

41-2-2. Limitation of actions.

Every action instituted by virtue of the provisions of this and the preceding section [41-2-1 NMSA 1978] must be brought within three years after the cause of action accrues. The cause of action accrues as of the date of death.

History: Laws 1882, ch. 61, § 9; C.L. 1884, § 2316; Code 1915, § 1822; C.S. 1929, § 36-103; 1941 Comp., § 24-102; Laws 1953, ch. 30, § 1; 1953 Comp., § 22-20-2; Laws 1961, ch. 202, § 1.

Compiler's note. - Laws 1887, ch. 2, § 7, repealed §§ 2315, 2316, 1884 Comp. Both the 1887 act and § 2315 related to injuries to livestock by railroads. Laws 1889, ch. 75, repealed the act of 1887 in its entirety including its repealing clause. In Gallegos v. Atchison, T. & S.F. Ry., 28 N.M. 472, 214 P. 579 (1923), the latter repeal was held to have revived this section, and the court incidentally also held that this section applies to 41-2-4 NMSA 1978.

The 1915 Code compilers substituted "this and the preceding section" for "this act." Laws 1882, ch. 61, is presently compiled as 41-2-1 to 41-2-4 and 30-32-4 NMSA 1978.

1953 amendment prospective only. - Where decedent dies in 1952 while one year period for bringing suit is in effect, that one year limitation governs, and not the 1953 amendment of three years, which is prospective only. Wall v. Gillett, 61 N.M. 256, 298 P.2d 939 (1956).

Scope of 1961 amendment. - The 1961 amendment simply provides that the limitation period begins running, as to the personal representative's cause of action, upon the death of the injured person. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Effect of 1961 amendment. - The 1961 amendment did not change the character of this section as a survival statute. 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).

Effect of reviving repealed section. - This section, although specifically repealed by Laws 1887, ch. 2, § 7, was revived by Laws 1889, ch. 75, which repealed the latter act. The fact that § 5426, 1915 Code, prohibits such revivor unless so provided did not affect the instant action for damages, which was brought before the latter law went into effect. Gallegos v. Atchinson, T. & S.F. Ry., 28 N.M. 472, 214 P. 579 (1923).

Nature of wrongful death provisions. - New Mexico Wrongful Death Act (41-2-1 to 41-2-4 NMSA 1978) creates a cause of action which did not exist at common law and the limitation provisions thereof are not only a limitation on the remedy, but also on the right to institute such an action. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Of the limitation. - The limitation provision applicable to actions for wrongful death is not only a limitation on the remedy but also on the right to institute such action. Wall v. Gillett, 61 N.M. 256, 298 P.2d 939 (1956).

When cause of action arises. - Section 41-2-1 NMSA 1978 is a survival statute under which the cause of action arises at time of death. State ex rel. De Moss v. District Court, 55 N.M. 135, 227 P.2d 937 (1951).

Effect of statute of limitations. - Not only the remedy by the right to maintain suit was barred where damages were sought for wrongful death on account of alleged negligence of relator in performing surgery on decedent and complaint was filed more than one year (now three years) after death occurred. State ex rel. De Moss v. District Court, 55 N.M. 135, 227 P.2d 937 (1951).

The statute of limitations in effect at the time of death governed the right to prosecute a wrongful death action and the defendant was exempt from all claims after the expiration of the time fixed. Wall v. Gillett, 61 N.M. 256, 298 P.2d 939 (1956).

Limitation period for claim of malpractice resulting in wrongful death. - The specific inclusion of a wrongful death claim within the definition of a malpractice claim makes the limitation period of 41-5-13 NMSA 1978 applicable to a claim of malpractice resulting in wrongful death. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982); Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984).

And such different period not equal protection violation. - There is no equal protection violation because a wrongful death claim based on malpractice has a limitation period different from a wrongful death claim which does not involve malpractice. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982).

Tolling provisions in Medical Malpractice Act inapplicable. - The tolling provisions applicable to minors under the age of nine years contained in 41-5-13 NMSA 1978 (the Medical Malpractice Act) apply only to minors who suffer an alleged act of malpractice and not to minors who are beneficiaries under the Wrongful Death Act. Moncor Trust Co. ex rel. Flynn v. Feil, 105 N.M. 444, 733 P.2d 1327 (Ct. App. 1987).

Choice of law. - Where torts are committed beyond the territorial jurisdiction of the sovereignty in which the action is brought, the lex fori governs, no matter whether the right of action depends upon the common law or a local statute, unless the statute

creating or conferring the right limits the duration of such right to a prescribed time. Munos v. Southern Pac. Co., 51 F. 188 (5th Cir. 1891).

Effect on amount of damages. - The 1961 amendment made no change in the damages the personal representative might recover, since it did no more than change the time when the limitation period begins to run against the personal representative's cause of action. 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).

This section and 37-1-11 NMSA 1978 contrasted. - Section 37-1-11 NMSA 1978 would allow the bringing of suit within one year from the date of death of an incompetent, provided the injury sued upon did not result in death, but if suit is brought under the Wrongful Death Act, the action must be commenced within three years of the accrual of the cause of the action. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961)(decided prior to 1961 amendment).

This section and 37-1-8 NMSA 1978 contrasted. - Husband's personal cause of action, arising out of injury and death of his wife, for medical expenses and loss of consortium was not subject to the limitation prescribed in this section but was subject to three-year limitation prescribed in 37-1-8 NMSA 1978, relating to action for injury to the person. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Inapplicability of statute permitting continuation. - Provision of 37-1-14 NMSA 1978 permitting continuation after failure of first action is inapplicable to this section. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Effect of estoppel. - Estoppel cannot successfully be asserted to lengthen the period for recovery under this section, since this cause of action is created by statute. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Where appeal does not lie. - In wrongful death action appeal does not lie from an order of the court which does not dispose of the merits of the case, but merely overrules a motion to strike out part of defendant's answer setting up certain defenses, such as statute of limitations, fellow servant rule and joint venture. Burns v. Fleming, 48 N.M. 40, 145 P.2d 861 (1944).

Law reviews. - For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M.L. Rev. 271 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22A Am. Jur. 2d Death § 56 et seq.

Time of bringing action, provision of death statute as to, as condition of right of action or mere statute of limitations, 67 A.L.R. 1070.

Complaint or declaration which fails to allege that action for wrongful death was brought within statutory period, or affirmatively shows that it was not, as subject to demurrer, 107 A.L.R. 1048.

Exceptions attaching to limitation prescribed by death statutes or survival statues allowing recovery of damages for death, 132 A.L.R. 292.

Amendment of complaint or declaration by setting up death statute after expiration of period to which action is limited by the death statute or by the statute of limitations, 134 A.L.R. 779.

Limitation applicable to action for personal injury as affecting action for death resulting from injury, 167 A.L.R. 894.

Application and limits of rule that death of person liable does not interrupt running of statute of limitations, 174 A.L.R. 1423.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Validity of release of prospective right to wrongful death action, 92 A.L.R.3d 1232.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death, 54 A.L.R.4th 362.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice, 70 A.L.R.4th 535.

Fraudulent concealment of cause of action for wrongful death as affecting period of limitations, 88 A.L.R.4th 851.

25 C.J.S. Death § 53; 54 C.J.S. Limitation of Actions § 73.

41-2-3. [Personal representative to bring action; damages; distribution of proceeds of judgment.]

Every such action as mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties

entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child, but shall be distributed as follows:

First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if such deceased be a minor, childless and unmarried, then to the father and mother, who shall have an equal interest in the judgment, or if either of them be dead, then to the survivor; if there be no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

History: Laws 1882, ch. 61, § 3; C.L. 1884, § 2310; Laws 1891, ch. 49, § 2; C.L. 1897, § 3215; Code 1915, § 1823; C.S. 1929, § 36-104; Laws 1939, ch. 105, § 1; 1941 Comp., § 24-103; 1953 Comp., § 22-20-3.

Purpose of act. - The legislative purpose of this act (41-2-1 to 41-2-4 NMSA 1978) was not merely to provide compensation, but also to make negligence causing death costly to the wrongdoer. 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).

The authority to recover damages for wrongful death granted by statutes has for its purpose more than compensation. It is designed as well to promote the safety of life and limb by making it costly for the wrongdoer. Tauch v. Ferguson-Steere Motor Co., 62 N.M. 429, 312 P.2d 83 (1957).

Effect of limitation provisions. - This act creates a cause of action which did not exist at common law and the limitation provisions thereof are not only a limitation on the remedy, but also on the right to institute such an action. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Effect on common-law remedies. - The Wrongful Death Act does not apply to common-law remedies that heretofore existed and were not repealed by the act, therefore, the statute of limitations applicable to the wrongful death action is not applicable to the husband's common-law right of action for loss of consortium. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

No intent to change common-law rule on master's liability. - It was not the intention of the legislature to change the common-law rule exempting a master from liability to his servant for the negligence of a fellow servant. Lutz v. Atlantic & Pac. R.R., 6 N.M. 496, 30 P. 912, 16 L.R.A. 819 (1892).

Effect on death by common carriers. - This section refers to death caused by the wrongful act of persons and corporations other than common carriers, as embraced in 41-2-4 NMSA 1978. Romero v. Atchison, T & S.F. Ry., 11 N.M. 679, 72 P. 37 (1903); Mallory v. Pioneer S.W. Stages, Inc., 54 F.2d 559 (10th Cir. 1931).

Generally, as to recovery. - This section permits recovery by other than a statutory beneficiary, and recovery may be had even though there is no pecuniary injury to a statutory beneficiary. Damages are recoverable by proof of the worth of the life of the decedent, even though there is no kin to receive the award. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Section permits recovery by other than statutory beneficiary. Recovery of substantial damages may be had even though there is no pecuniary injury to a statutory beneficiary; recovery is authorized for pain and suffering and for medical and related care between injury and death the same as could be recovered by an injured party who did not die. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Section repealed to extent it prevents hospitals from asserting lien against wrongful death proceeds. - The Wrongful Death Act was enacted in 1882; the Hospital Lien Act (Chapter 48, Article 8 NMSA 1978) was enacted in 1961. The relevant provisions of the two acts have not been amended. Therefore, in view of the inconsistency between this section and 48-8-1, Subsection A NMSA 1978, the relevant provision of this section of the Wrongful Death Act is implicitly repealed to the extent it would prevent a hospital from asserting a lien against the proceeds of a wrongful death action. Moreover, the Hospital Lien Act specifically allows satisfaction of the decedent's hospital debt out of proceeds of an action brought by the decedent's personal representative, and this specific provision qualifies the general prohibition in the Wrongful Death Act against using proceeds from a wrongful death action to satisfy the debts of the deceased. Hall v. Regents of Univ. of N.M., 106 N.M. 167, 740 P.2d 1151 (1987).

Applicable section for loss of consortium. - Section 37-1-8 NMSA 1978 is the applicable section for an action brought by husband for loss of consortium, and this cause of action should be filed within three years from the date of the injury. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Representative to serve as trustee. - The personal representative who makes a recovery serves as a trustee, a "statutory trustee," for discoverable and identifiable beneficiaries in the line of named kinship or descent. He is also a trustee for the state and for estate creditors where none of the named kin are left, or the line of descent runs out. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

The personal representative serves as a statutory trustee for discoverable and identifiable beneficiaries in the line of named kinship or descent. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963).

Sharing damages with personal representative barred. - While the wrongful death action is brought by the personal representative, the personal representative does not share in any damages recovered. Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

Who may sue. - An action may be brought only by the personal representative or representatives of the deceased. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961); Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984).

This section does not give an alleged natural father the unconditional right to intervene in an action for the wrongful death of his daughter. Dominguez v. Rogers, 100 N.M. 605, 673 P.2d 1338 (Ct. App. 1983).

Use of "personal representative" not same as in Probate Code. - "Personal representative" for the purpose of a wrongful death action is not synonymous with the parameters of the Probate Code, 45-1-101 NMSA 1978 et seq. Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984).

Administrator and personal representative distinguished. - While the administrator may be the personal representative, there may be a personal representative who is not the administrator. 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).

Complaint amendable to include proper plaintiff. - The personal representative of the deceased should have been given a reasonable opportunity to amend, to include himself as the plaintiff, a wrongful death complaint in which the deceased had been named as the plaintiff, since all of earlier pleadings named the personal representative as the plaintiff. Jones v. 3M Co., 107 F.R.D. 202 (D.N.M. 1984).

Amendment of action not brought in name of personal representative. - An action for malpractice and wrongful death brought under the Tort Claims Act by the natural parents of a deceased girl within the limitation period was not barred because the parents failed to secure court appointment as personal representatives within the two-year limitation period of 41-4-15 NMSA 1978, due to the operation of Rules 15(c) (relation back of amendments) and 17(a) (real party in interest), N.M.R.C.P., (now see Paragraph C of Rule 1-015, and Paragraph A of Rule 1-017). Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Mexican administrator may be personal representative - Plaintiff administrator, a Mexican national and an alien in the United States, had the right to serve as administrator of his son's estate in the prosecution of wrongful death action, since the term "personal representative" in this section is used simply to designate the person

who may prosecute the action. Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Administrator may file suit for damages for wrongful death under this section. Romero v. Atchison, T. & S.F. Ry., 11 N.M. 679, 72 P. 37 (1903).

Relationship of suit to estate. - Wrongful death suit under this act has no relation to the estate, it being incidental that a "personal representative" is named to bring suit and it is not because this would fall within his duties as such, but because someone must be named and our legislature has fixed upon him as the one to sue. Henkel v. Hood, 49 N.M. 45, 156 P.2d 790 (1945).

Proceeds not part of estate. - The amount recovered under the wrongful death statute never becomes a part of the community or of the decedent's estate. Trefzer v. Stiles, 56 N.M. 296, 243 P.2d 605 (1952).

The recovery under this act is not a part of decedent's estate. 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).

Nor community property. - The right of action given the husband or wife to have an action brought for the wrongful death of a child is not a community right, and the proceeds from any recovery are not community property. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963).

Instructions as to damages. - Damages under the Wrongful Death Act are not merely compensatory of pecuniary loss to the survivors, and there is no error in the lower court's instructions on the measure of damages putting an emphasis upon the pecuniary value of the life taken to the survivors and in permitting the jury to consider the possible contributions to survivors and the expenditures which must be incurred during a lifetime, as well as the probable income of the deceased. Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962).

Proof of pecuniary loss not required. - Even in absence of proof of pecuniary loss, damages may be awarded. Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962).

Recoverable damages implied. - Proof of wrongful death of necessity implies recoverable damages so that, even in the absence of pecuniary injury, question of damages in wrongful death action was properly submitted to jury. Baca v. Baca, 81 N.M. 734, 472 P.2d 997 (Ct. App. 1970).

Ownership of right of recovery. - Recovery under this statute belongs to the relative for whose benefit the suit is brought, and the right of recovery extends to those distributees named in the statute, or to those entitled under the laws of descent and distribution, in the same manner and to the same extent as is given to the wife and children of the decedent. Varney v. Taylor, 79 N.M. 652, 448 P.2d 164 (1968).

Includes worth of life. - Damages for wrongful death are recoverable by proof of the worth of the life of the decedent and the measure of those damages is the worth of life of decedent to the estate. Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

Which is jury question. - Determination of present worth of life of deceased is for the jury, based upon proof as to age, earning capacity, health, habits and probable duration of life. Duncan v. Madrid, 44 N.M. 249, 101 P.2d 382 (1940); Cerrillos Coal R.R. v. Deserant, 9 N.M. 49, 49 P. 807 (1897); Hogsett v. Hanna, 41 N.M. 22, 63 P.2d 540 (1936); Mares v. New Mexico Pub. Serv. Co., 42 N.M. 473, 82 P.2d 257 (1938).

And valued as present worth. - Worth of life of deceased to her estate is not all that she would earn in her lifetime, but the present worth, taking into consideration the earning power. Mares v. New Mexico Pub. Serv. Co., 42 N.M. 473, 82 P.2d 257 (1938).

Earning power to be considered. - An award based entirely upon aggregate future benefits would amount to more than compensation unless the earning power of money was taken into account. Varney v. Taylor, 77 N.M. 28, 419 P.2d 234 (1966).

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).

Use of net income. - Net income is the more realistic basis for arriving at the equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of deceased in a wrongful death action. Varney v. Taylor, 77 N.M. 28, 419 P.2d 234 (1966).

Deduction of personal living expenses. - Decedent's anticipated personal living expenses ought to be deducted from the amount otherwise determined as reasonable compensation for the deprivation of expected pecuniary benefits that would have resulted from the decedent's continued life. The term "personal living expenses" has never been exactly defined, and because of the nature of the problem, no mathematical formula can ever be applied. Each case must depend upon its own facts and circumstances, but personal expenses would not ordinarily include recreational expenses. Varney v. Taylor, 79 N.M. 652, 448 P.2d 164 (1968).

Pain and medical expenses recoverable. - Recovery for decedent's pain and suffering and medical and related care from injury until death may be had by the personal representative, even though there is no statutory beneficiary. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Recovery of damages prior to death. - This section and 41-2-1 NMSA 1978 warrant the allowance, to the personal representative, of the decedent's damages prior to death, provided they are not the same as those for which the husband, individually, has a right

of recovery. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961); Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Estimating earnings between injury and death. - The net estimated earnings of decedent during the period from the date of death to the date of the judgment should be increased by the same discount rate applied to decrease the net income after judgment. Varney v. Taylor, 79 N.M. 652, 448 P.2d 164 (1968).

Funeral and burial expenses. - The funeral and burial expenses incurred by decedent's personal representatives are pecuniary injuries which are recoverable. 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).

Effect of taxes and retirement. - Federal and state income taxes and social security taxes are often substantial deductions from gross earnings and certainly are not a part of the decedent's income which his family could expect as direct pecuniary benefits nor should the other sources of employment which have compulsory retirement as after which, in the usual instance, the expected income from other than invested capital may reasonably be expected to be materially reduced. Varney v. Taylor, 77 N.M. 28, 419 P.2d 234 (1966).

Consideration of mitigating or aggravating circumstances. - 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).

Where punitive damages not available. - Punitive damages are not available from the estate of the wrongdoer, since the reason for their imposition can no longer be effective. Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962).

Pecuniary injury not necessary for recovery. - Widow's pecuniary injury inured to the benefit of the nondependent children and the fact that the children did not suffer pecuniary injury does not bar them from a distributive share of the proceeds. Brock v. Harkins, 80 N.M. 596, 458 P.2d 848 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969).

Where several beneficiaries. - If pecuniary injury is a requisite for recovery of damages for wrongful death, it is sufficient if one member of the same class of statutory beneficiaries suffers pecuniary injury. In such a case, the damages inure to every member of the same class. Brock v. Harkins, 80 N.M. 596, 458 P.2d 848 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969).

Admission of expenses held nonprejudicial. - Admission of evidence concerning ambulance, medical and burial expenses held nonprejudicial where no award in favor of

either party plaintiff was made on account of them. Hodgkins v. Christopher, 58 N.M. 637, 274 P.2d 153 (1954).

Admission of testimony of injuries resulting in death. - In spite of timely admission that death resulted from injuries received by accident in question, it was not an abuse of judicial discretion to permit the administrator of the estate of the decedent to introduce medical testimony as to injuries which resulted in the death. Hodgkins v. Christopher, 58 N.M. 637, 274 P.2d 153 (1954).

Distribution between parent and adult children. - A child shares equally with a widow in the wrongful death proceeds. The fact that two children are adults and not dependent on decedent does not bar them from a distributive share of the proceeds from the settlement of the wrongful death claim. Brock v. Harkins, 80 N.M. 596, 458 P.2d 848 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969).

Evidence identifying beneficiaries not error. - It is not error to admit evidence identifying the decedent's wife and children as beneficiaries under the New Mexico Wrongful Death Act. Harris v. Illinois-California Express, Inc., 687 F.2d 1361 (10th Cir. 1982).

"Child" not qualified term. - This section does not qualify the word "child" by the words "minor" or "dependent." Brock v. Harkins, 80 N.M. 596, 458 P.2d 848 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969).

Recovery in negligence case. - Where child's parents were killed simultaneously when automobile in which mother was passenger and which was driven by the father collided against defendant's truck, plaintiff in action brought against the truck owner and truck driver for death of the mother for benefit of the minor son, was entitled to recover if negligence of defendant truck driver was proximate cause of accident and death or if negligence of the father and the truck driver combined to cause the accident, but not if negligence of the father as driver of the automobile was sole cause of accident and death. Trefzer v. Stiles, 56 N.M. 296, 243 P.2d 605 (1952).

Effect of contributory negligence. - Where the personal representative brings the action for the benefit of the statutory beneficiaries, not of the estate, and the statutory beneficiaries are entitled to the recovery, not as distributees of the estate, the contributory negligence of one of several beneficiaries defeats the right of recovery to the extent of his share in the judgment. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963).

Where contributory negligence not imputed. - In an action for wrongful death of child for benefit of father and mother, contributory negligence of the child's mother, if any, would not be imputed as a matter of law to the father and prevent recovery by him. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963).

The contributory negligence of one spouse, if any, is not to be imputed to the other spouse. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963).

Wrongful death action is transitory and may be filed in any county in the state where both of the parties are nonresidents. State ex rel. Appelby v. District Court, 46 N.M. 376, 129 P.2d 338 (1942).

When assertion of estoppel barred. - Upon the expiration of the three-year limitation period provided in 41-2-2 NMSA 1978, the right to maintain the suit for the alleged wrongful death of decedent terminated, or was thereafter barred. Estoppel cannot be successfully asserted to lengthen the existence of such a statutorily created right of recovery. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Choice of law. - Wrongful death actions in New Mexico are governed by doctrine of lex loci delicti, which states that the law of the place of wrong determines whether a person has sustained a legal injury. First Nat'l Bank v. Benson, 89 N.M. 481, 553 P.2d 1288 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Presumption of due care. - Where only eyewitness testimony of the collision was supplied by a passing truck driver who saw car in which decedent was passenger strike rear end of defendants' truck-trailer, decedent would be presumed in action for her wrongful death to have used due care for her own safety. Trefzer v. Stiles, 56 N.M. 296, 243 P.2d 605 (1952), criticized Hartford Fire Ins. Co. v. Horne, 65 N.M. 440, 338 P.2d 1067 (1959).

Effect on truck operated as common carrier. - Action against an owner-driver operating truck as common carrier may be brought by the personal representative inasmuch as 41-2-4 NMSA 1978 prescribing who may sue and recover in suits for death caused by railroad, stage coach or public conveyance does not have application. White v. Montoya, 46 N.M. 241, 126 P.2d 471 (1942).

Effect on Indians. - The wrongful death statute applies to Indians on reservations, and the probate court may appoint an administrator for a deceased Indian to enforce his right of action under this statute. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Law reviews. - For note, "Torts - Wrongful Death - A Viable Fetus Is a 'Person' Under the New Mexico Wrongful Death Statute: Salazar v. St. Vincent Hospital," see 12 N.M.L. Rev. 843 (1982).

For annual survey 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. - 22A Am. Jur. 2d Death §§ 89 to 92, 141 to 148, 215 to 385, 398, 399.

Apportionment among beneficiaries of amount awarded by jury or received in settlement on account of wrongful death, as affected by death of distributee after judgment, 14 A.L.R. 538, 112 A.L.R. 30, 171 A.L.R. 204.

Disqualification of beneficiary of preferred class, effect of, upon right to sue in behalf of beneficiary of deferred class, 59 A.L.R. 747.

Judgment in favor of defendant in action by personal representative for damages to estate by injury resulting in death as bar to action in behalf of statutory beneficiaries, 64 A.L.R. 446.

Right of foreign domiciliary, or of ancillary, personal representative to maintain an action for death, under statute of forum which provides that action shall be brought by personal representative, 65 A.L.R. 563, 52 A.L.R. 2d 1048.

Delay in procuring appointment of personal representative of deceased or of person causing his death in event of latter's death, as extending period for bringing an action for death, 70 A.L.R. 472.

Wife of defendant, right to maintain death action where recovery will be for sole benefit of, 96 A.L.R. 479.

Beneficiary's right to bring action under death statute where executor or administrator, who by statute is the proper party to bring it, fails to do so, 101 A.L.R. 840.

Construction and application of provisions of death statute that makes the question whether action shall be brought by personal representative or by beneficiary dependent upon existence or nonexistence of cause of action in estate, 105 A.L.R. 834.

Right of action for death where decedent left no next of kin or person within class of beneficiaries named in the statute creating the right of action, 117 A.L.R. 953.

Relationship of parent and child between tortfeasor and person by whom or for whose benefit death action is brought as affecting right to maintain action under death statute, 119 A.L.R. 1394.

Kind of verdict or judgment where administrator or executor, whose decedent was negligently killed, brings an action which combines a cause of action for benefit of estate and another for statutory beneficiaries, 124 A.L.R. 621.

Validity of release of prospective right to wrongful death action, 92 A.L.R.3d 1232.

Liability for civilian skydiver's or parachutist's injury or death, 95 A.L.R.3d 1280.

Effect of death of beneficiary upon right of action under death statute, 13 A.L.R.4th 1060.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative, 21 A.L.R.4th 275.

Assignability of proceeds of claim for personal injury or death, 33 A.L.R.4th 82.

Action for loss of consortium based on nonmarital cohabitation, 40 A.L.R.4th 553.

Excessiveness or adequacy of damages resulting in death of homemaker, 47 A.L.R.4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 A.L.R.4th 134.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor, 49 A.L.R.4th 1076.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations, 50 A.L.R.4th 787.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering. 55 A.L.R.4th 186.

Recovery of damages for loss of consortium resulting from death of child-modern status, 77 A.L.R.4th 411.

25 C.J.S. Death §§ 32 to 37(2), 57 to 58(2), 95 to 129.

41-2-4. Death caused by railroad, stage coach or public conveyance; action for damages; defense.

Whenever any person shall die from any injury resulting from, or occasioned by[,] the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance, at the time any injury is received resulting from or occasioned by any defect, insufficiency, negligence, unskillfulness or criminal intent above declared, shall be liable in damages compensatory and exemplary, for such sum as a jury may deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving

party or parties entitled to the judgment or any interest therein, recovered in such action and also having regard to the mitigating or aggravating circumstances attending such defect or insufficiency, which may be sued and recovered; first by the husband or wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six months after such death then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother; or fourth, if the deceased has reached the age of majority and is unmarried, by a dependent father or mother or dependent brother or sister, who may join in the suit; and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In the event there are no such persons entitled to sue or in the event suit is not brought by any such persons within nine months after such death, suit may be brought by the personal representative or representatives of such deceased person.

History: Laws 1882, ch. 61, § 1; C.L. 1884, § 2308; C.L. 1897, § 3213; Code 1915, § 1820; C.S. 1929, § 36-101; Laws 1931, ch. 19, § 1; 1941 Comp., § 24-104; Laws 1947, ch. 125, § 1; 1953 Comp., § 22-20-4; Laws 1955, ch. 270, § 1; 1973, ch. 138, § 13.

Cross-references. - As to limitation of actions, see 41-2-2 NMSA 1978.

For railroad's liability for injuries to or death of employees, see N.M. Const., art. XX, § 16.

Repeal and revival of section. - In view of the fact that this section was repealed by Laws 1887, ch. 2, § 7, which in turn was repealed by Laws 1889, ch. 75, § 4, the rule of common law would be applied to revive this act, and make it again effective. Gallegos v. Atchison, T. & S.F. Ry., 28 N.M. 472, 214 P. 579 (1923).

Section is not unconstitutional for want of a taker under it. Tauch v. Ferguson-Steere Motor Co., 62 N.M. 429, 312 P.2d 83 (1957).

Or for denying recovery against employee. - It is not unconstitutionally discriminatory to deny a right of action for wrongful death against a negligent employee of a public conveyance, while granting the right against other negligent employees, under 41-2-1 NMSA 1978. Schloss v. Matteucci, 260 F.2d 16 (10th Cir. 1958).

Legislative intent as to master-servant rule. - By enactment of statute authorizing recovery of damages for negligent killing of persons by railroad company, its officers, agents or employees, the legislature did not intend to change the common-law rule exempting a master from liability to his servant for negligence of fellow servant. Lutz v. Atlantic & Pac. R.R., 6 N.M. 496, 30 P. 912, 16 L.R.A. 819 (1892).

Applicability to airplane pilot. - In the case of an airplane the terminology is "pilot," which means the same thing as "driver" for all practical as well as legislative purposes. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

Meaning of "locomotive," "car" and "stage coach". - The words "locomotive," "car" and "stage coach" refer to and include quasi-public corporations and agencies engaged in serving the public in the transportation of passengers and goods. Cain v. Bowlby, 114 F.2d 519 (10th Cir.), cert. denied, 311 U.S. 710, 61 S. Ct. 319, 85 L. Ed. 462 (1940).

Nature of wrongful death provisions. - New Mexico Wrongful Death Act (41-2-1 to 41-2-4 NMSA 1978) creates a cause of action which did not exist at common law and the limitation provisions thereof are not only a limitation on the remedy, but also on the right to institute such an action. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Intent of section. - The section is intended to protect life and to impose a new and extraordinary civil liability on those causing death by subjecting them to private actions for pecuniary damages, resulting to family of deceased. Nichols v. Atchison, T. & S.F. Ry., 286 F. 1 (9th Cir. 1923), aff'd, 264 U.S. 348, 44 S. Ct. 353, 68 L. Ed. 720 (1924).

More than compensation contemplated. - The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer. Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

Section to be strictly construed. - The Wrongful Death Act is in derogation of the common law and must be strictly construed. Cain v. Bowlby, 114 F.2d 519 (10th Cir.), cert. denied, 311 U.S. 710, 61 S. Ct. 319, 85 L. Ed. 462 (1940).

But only where meaning doubtful. - Though the New Mexico Wrongful Death Act, being in derogation of common law is to be construed strictly, the rule is applicable only in cases of doubtful meaning. Myers v. Pacific Greyhound Lines, 134 F.2d 457 (10th Cir. 1943).

Exclusivity of action. - Right of action for wrongful death caused by common carrier is exclusive of right of action for wrongful death caused by person or corporation other than common carriers. Mallory v. Pioneer S.W. Stages, Inc., 54 F.2d 559 (10th Cir. 1931).

Where suit against airplane pilot. - Administrator of the estate of one of deceased passengers of crashed airplane could not obtain a personal judgment against the pilot under 41-2-1 NMSA 1978 based on his alleged negligence as this section is the exclusive statutory remedy available to plaintiff. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

Remedy is exclusive and an exception to the death statute. Tilly v. Flippin, 237 F.2d 364 (10th Cir. 1956); In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

Recovery against employer or owner only. - This section limits those from whom recovery may be had to the employer of the person whose negligence, unskillfulness or criminal intent in running, conducting, managing or driving the public conveyance caused or occasioned death to the "owner" of the public conveyance, which does not include an airplane manufacturer. Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

Which includes employer common carrier. - An action under this section is limited to recovery only from the employer common carrier. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

But not employee-driver. - Recovery may not be had under this section against the "employee-driver" of a "public conveyance." Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

Statute excludes any liability of negligent employee for wrongful death. Campbell v. Matteucci, 261 F.2d 225 (10th Cir. 1958), cert. denied, 359 U.S. 966, 79 S. Ct. 877, 3 L. Ed. 2d 834 (1959); Schloss v. Matteucci, 260 F.2d 16 (10th Cir. 1958).

Effect of ejusdem generis. - This section controls actions for wrongful death caused by negligence of a truck while engaged as a common carrier, and the doctrine of ejusdem generis does not restrict its applicability to passenger carrying conveyances, for it is not confined to means of transportation which were known at time of its original enactment in 1882. Sanchez v. Contract Trucking Co., 45 N.M. 506, 117 P.2d 815 (1941).

Section applies to truck common carrier for hire. - In respect to the recovery of damages for wrongful death which by terms of the statute applies to death resulting from operation of a locomotive, car, stage coach or other public conveyance, considering statute as being prospective in operation, it applies to death occasioned by the wrongful act of the operator of a truck engaged as a common carrier for hire. Cain v. Bowlby, 114 F.2d 519 (10th Cir.), cert. denied, 311 U.S. 710, 61 S. Ct. 319, 85 L. Ed. 462 (1940).

Where owner driving truck as common carrier. - Where injury is caused by the owner operating truck as a common carrier rather than by an employee or agent of the common carrier this section has no application. White v. Montoya, 46 N.M. 241, 126 P.2d 471 (1942).

Or where unauthorized operator driving. - The owner of a truck operated as a common carrier for hire will be liable for wrongful act causing death, even though the truck was at the time being driven by an unauthorized person, while the regular operator slept. Cain v. Bowlby, 114 F.2d 519 (10th Cir.), cert. denied, 311 U.S. 710, 61 S. Ct. 319, 85 L. Ed. 462 (1940).

Common carriers by air are included along with other common carriers within the term "other public conveyance" contained in this section. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

Airline company may be common carrier. - An airline company engaged regularly in the transportation of persons and property for hire between points within the state and from a point within this state and return thereto is a common carrier. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

Liability of pilot barred. - Since an action is limited to recovery only from the employer common carrier, no recovery under this section may be had against the pilot. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

In an action arising out of the crash of a common carrier airplane against the estate of the pilot to recover damages for wrongful deaths, the court dismissed the action. Campbell v. Matteucci, 261 F.2d 225 (10th Cir. 1958), cert. denied, 359 U.S. 966, 79 S. Ct. 877, 3 L. Ed. 2d 834 (1959).

Contract and common carriers contrasted. - One who gathers garbage for disposal is a contract carrier and not a common carrier since the latter transports goods or property consigned for delivery. Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948).

Contributory negligence may be urged as a defense under the wrongful death statute as may any common-law defenses where the lawmakers omit any reference as to defenses which might be interposed. Le Doux v. Martinez, 57 N.M. 86, 254 P.2d 685 (1953).

Effect of pleadings on jury instructions. - Where the pleadings as framed limited the issue of contributory negligence to the parents and the child, an instruction that negligent acts of an uncle with whom child two years and eight months old was crossing the street were imputable to child's parents, had no basis and was erroneous. Le Doux v. Martinez, 57 N.M. 86, 254 P.2d 685 (1953).

Jury instruction erroneously refused. - In action for wrongful death of child of two years and eight months, an instruction that "children of tender years are entitled to care proportionate to their inability to foresee and avoid perils which they may encounter" and that "the duty and standard of care required to avoid doing them injury increases with their inability to protect themselves" was erroneously refused. Le Doux v. Martinez, 57 N.M. 86, 254 P.2d 685 (1953).

Limitation on who may be sued. - Where a statute gives the cause of action and designates the persons who may be sued, they alone are authorized to be sued. Langham v. Beech Aircraft Corp., 88 N.M. 516, 543 P.2d 484 (1975).

Suit in name of administrator prohibited. - A right of action for damages under this section does not exist in the name of the administrator of the estate of the deceased. Romero v. Atchison, T. & S.F. Ry., 11 N.M. 679, 72 P. 37 (1903).

Effect on children of suit by widow. - This section does not confer a collective right of action in favor of the widow and minor children of deceased, and where the widow sues within six months, the minor children have no right of action. Frampton v. Santa Fe N.W. Ry., 34 N.M. 660, 287 P. 694 (1930).

Effect of provisions authorizing suit by certain kinfolks. - Fact that wrongful death caused by common carrier was not, for want of proper kinship, maintainable under statute authorizing suit by certain kinfolks, did not make it maintainable under statute authorizing suit by same kinsmen for wrongful death caused by persons or corporations other than common carriers. Mallory v. Pioneer S.W. Stages, Inc., 54 F.2d 559 (10th Cir. 1931).

Recovery where no dependents. - Where decedent suffered wrongful death, was over 21 years of age, unmarried and left no dependent wife, children, parents or other dependent person, personal representative could recover statutory amount due to negligence of common carrier. Tauch v. Ferguson-Steere Motor Co., 62 N.M. 429, 312 P.2d 83 (1957).

Effect of double dependency on right to recover. - Fact husband of sister of the deceased was legally obligated to support her, and that she was dependent upon him for support, does not defeat her right to recover in wrongful death of brother if she was also dependent on him, and the question of dependency was for the jury. Myers v. Pacific Greyhound Lines, 134 F.2d 457 (10th Cir. 1943).

Since this section fails to define dependence, it would appear that substantial dependence of a sister and substantial contributions to her support are enough to entitle her to obtain a recovery. Myers v. Pacific Greyhound Lines, 134 F.2d 457 (10th Cir. 1943).

Survival of action. - Cause of action, for death, asserted against a defendant as personal representative of alleged wrongdoer, a common carrier, did not survive the latter's death irrespective of the statute creating right of action against the carrier, by reason of the survival statute, 37-2-1 NMSA 1978. Ickes v. Brimhall, 42 N.M. 412, 79 P.2d 942 (1938).

Effect of death on appeal. - Death of widow, pending appeal from adverse judgment, does not abate her suit to recover against common carrier for the death of her husband, but such cause may be revived in the name of her personal representative. Frampton v. Santa Fe N.W. Ry., 34 N.M. 660, 287 P. 694 (1930).

Presumption of care. - There is a presumption, in the absence of evidence to the contrary, that a person killed in crossing a railroad track, stopped, looked and listened. de Padilla v. Atchison, T. & S.F. Ry., 16 N.M. 576, 120 P. 724 (1911).

Use of estoppel. - Upon the expiration of the three-year limitation period provided in 41-2-2 NMSA 1978, the right to maintain the suit for the alleged wrongful death of decedent terminated, or was thereafter barred. Estoppel cannot be successfully asserted to lengthen the existence of such a statutorily created right of recovery. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

Law reviews. - For article, "The Economic Side of Wrongful Death Actions in New Mexico," see 2 N.M.L. Rev. 127 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22A Am. Jur. 2d Death §§ 11, 158, 182; 32 Am. Jur. 2d Federal Employer's Liability and Compensation Acts §§ 22, 58-84, 104, 105.

Liability of common carrier by motor bus or taxicab for personal injury to or death of passenger where condition of highway was the cause or a contributing factor, 126 A.L.R. 1084.

Liability of motor bus carrier for death of or injury to discharged passenger struck by vehicle not within its control, 145 A.L.R. 1206.

Liability for civilian skydiver's or parachutist's injury or death, 95 A.L.R.3d 1280.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 A.L.R.3d 627.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 A.L.R.3d 751.

Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle, 1 A.L.R.4th 1249.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor, 49 A.L.R.4th 1076.

Recovery of prejudgment interest in actions under the Federal Employers' Liability Act or Jones Act, 80 A.L.R. Fed. 185.

25 C.J.S. Death §§ 17, 38(4).

ARTICLE 3
CONTRIBUTION AMONG TORTFEASORS

41-3-1. Joint tortfeasors defined.

For the purposes of this act [41-3-1 to 41-3-8 NMSA 1978] the term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

History: 1941 Comp., § 21-118, enacted by Laws 1947, ch. 121, § 1; 1953 Comp., § 24-1-11.

Cross-references. - For liability of employer under Workmen's Compensation Act, see 52-1-8 NMSA 1978.

Applicability of act. - This act is applicable only in instances where joint tortfeasors share a common liability. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Legislative intent. - It is unreasonable to assume that the New Mexico legislature intended to grant the right of contribution to wrongdoers in pari delicto and take away from persons guilty only of imputed or constructive wrong the right to indemnity from the primary wrongdoer. Thomas v. Malco Refineries, Inc., 214 F.2d 884 (10th Cir. 1954).

Purpose of act. - This act provides for a proportionate allocation of the burden among tort feasors who are liable. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

Effect on common-law right to indemnity. - The right to indemnity at common law in New Mexico was not abrogated by the enactment of this act. Thomas v. Malco Refineries, Inc., 214 F.2d 884 (10th Cir. 1954).

Effect of Workmen's Compensation Act. - The Workmen's Compensation Act (52-1-1 NMSA 1978 et seq.) abrogates or modifies the Tortfeasor's Act (41-3-1 to 41-3-8 NMSA 1978) to the extent that it has application to the liability of an employer to an employee. If the basis for employer's liability is the injuries to its employees, it is limited by the Workmen's Compensation Act, and there can be no contribution. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Workmen's Compensation Act not invalid class legislation. - Insofar as negligent employers are relieved from the burden of contribution, the Workmen's Compensation Act (52-1-1 NMSA 1978 et seq.) does not constitute invalid class legislation. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Scope of employer's liability limitation under Workmen's Compensation Act. - The limitation of employer's liability for injuries sustained by an employee covered by the Workmen's Compensation Act (52-1-1 NMSA 1978 et seq.) covers all instances where that injury is sought to be made the basis for further and additional liability by the employee or others in his behalf, and indirect liability for such injury is also foreclosed

both by the terms of the act and because the employer's liability for such injury is not in tort. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Defendants under different theories of liability not joint tortfeasors. - 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).

Because the respondeat superior form of vicarious liability is imposed upon one party through a legal fiction, the parties are not joint tortfeasors. Kinetics, Inc. v. El Paso Prods. Co., 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982).

In a comparative negligence case, a concurrent tortfeasor is not liable for the entire damage caused by his concurrent tortfeasors. Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982).

Effect of setting aside part of verdict. - While it was the rule of the common law that a verdict set aside as to one joint tortfeasor was set aside as to all, the modern rule is that the court may grant a new trial as to one of several defendants and affirm as to the others. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960).

Effect on release and discharge. - This act changed the common-law rule that a release of one joint tortfeasor releases all, and satisfaction of judgment under this act does not operate to discharge all other tortfeasors. Herrera v. Uhl, 80 N.M. 140, 452 P.2d 474 (1969).

Effect of granting judgment notwithstanding verdict solely to codefendant. - Where a codefendant was granted a judgment notwithstanding the special verdict of the jury, the defendant in an automobile damage suit was an aggrieved party within the meaning of the rule providing for appeals from entry of final judgment in civil actions in view of the right of contribution among joint tortfeasors under this act. Marr v. Nagel, 58 N.M. 479, 272 P.2d 681 (1954).

Bank not indispensable party in suit against collection agency. - Debtor on automobile installment sales contract whose car was wrongfully repossessed is entitled to sue the collection agency separate and apart from the bank which authorized the repossession; and the failure of jurisdiction over the bank as joint defendant does not compel the sustaining of the collection agency's motion to dismiss complaint for lack of an indispensable party since the collection agency's right to contribution is preserved even in the absence of the bank as codefendant. Sanford v. Stoll, 86 N.M. 6, 518 P.2d 1210 (Ct. App. 1974).

Liability of joint tortfeasor to bailee where bailor-agent negligent. - Where a pickup truck struck the rear end of a tractor-trailer unit on a highway at night, the driver of the pickup truck was liable to the trailer owner for damages to the trailer where drivers of

both vehicles were joint tortfeasors under this section due to their combined negligence, and driver of pickup truck did not carry the burden of showing that relationship between owner and driver of trailer was more than that of bailor-agent of bailee. The driver of the pickup truck should compensate the trailer owner for the damage to his trailer, subject to the right of contribution provided for in 41-3-2 NMSA 1978. Bailey v. Jeffries-Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966).

No interspousal tort immunity. - There is no immunity from tort liability between spouses by reason of that relationship. Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975).

Law reviews. - For note, "Comparative v. Contributory Negligence: The Effect of Plaintiff's Fault," see 6 N.M.L. Rev. 171 (1975).

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

For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

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

For comment, "Survey of New Mexico Law: Torts," see 15 N.M.L. Rev. 363 (1985).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 74 Am. Jur. 2d Torts § 61.

Legal malpractice: defendant's right to contribution or indemnity from original tortfeasor, 20 A.L.R.4th 338.

42 C.J.S. Indemnity § 36 et seq.; 86 C.J.S. Torts § 37.

41-3-2. Right of contribution; accrual; pro rata share.

A. The right of contribution exists among joint tortfeasors.

B. A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

C. A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

D. A pro rata share shall be the portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of each joint tortfeasor's percentage of fault to the total percentage of fault attributed to all joint tortfeasors.

History: 1941 Comp., § 21-119, enacted by Laws 1947, ch. 121, § 2; 1953 Comp., § 24-1-12; 1987, ch. 141, § 3.

Cross-references. - For right of indemnity not impaired, see 41-3-6 NMSA 1978.

Purpose of statute. - The purpose of this act (41-3-1 to 41-3-8 NMSA 1978) is to provide for a proportionate allocation of the burden among tortfeasors who are liable. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969); Alder v. Garcia, 324 F.2d 483 (10th Cir. 1963).

Purpose of section. - The purpose of this section is to prevent the injured person from relieving one joint tortfeasor of the obligation of contribution except where he has also released the other tortfeasors from the pro rata share of the common liability. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Doctrine of contribution is deeply rooted in principles of equity, fair play and justice. Aalco Mfg. Co. v. City of Espanola, 95 N.M. 66, 618 P.2d 1230 (1980); Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Limited applicability of article. - The Uniform Contribution Among Tortfeasors Act, 41-3-1 to 41-3-8 NMSA 1978, no longer has force in this state with respect to contribution among concurrent tortfeasors. Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).

Contribution not available to servant against innocent master under vicarious liability. - If the master may obtain indemnity from a servant, for whose tort the master has responded in damages, it is totally illogical to think the servant may claim a right to contribution or indemnity from the innocent master once the servant has paid his liability to the injured plaintiff. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

The doctrine of vicarious liability was fashioned to provide a remedy to the innocent plaintiff, not to furnish a windfall to a solvent wrongdoer. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Generally, as to liability of joint tortfeasor. - Where pickup truck struck rear end of tractor-trailer unit on highway at night, pickup truck driver was liable to the owner of the trailer for damages to the trailer where drivers of both vehicles were joint tortfeasors

under 41-3-1 NMSA 1978 due to their combined negligence and driver of pickup truck did not carry the burden of showing that relationship between owner and driver of the tractor-trailer unit was more than that of bailor-agent of bailee. The driver of the pickup truck should compensate the trailer owner for the damage to his trailer, subject to the right of contribution under this section. Bailey v. Jeffries-Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966).

Recovery barred when tortfeasors in pari delicto. - One tortfeasor may not be indemnified by another when they are in pari delicto. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

Indemnity is allowed against the primary wrongdoer and not against a tortfeasor in pari delicto. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Assignment of future recovery void. - A person who was injured while moving hay elevator brought an action against the owner of the elevator for personal injuries. Owner's insurer settled the suit by paying plaintiff $40,000 for release of owner and assignment to insurer of one-half of any recovery or settlement, not to exceed $80,000, which plaintiff might later obtain in action against the manufacturer of the elevator. Plaintiff's action against manufacturer was settled by the manufacturer for $40,000. The insurer of the owner of the hay elevator could not enforce assignment against injured person and manufacturer as it was contrary to public policy as expressed in Subsection C and in 41-3-5 NMSA 1978. Alder v. Garcia, 324 F.2d 483 (10th Cir. 1963).

No interspousal tort immunity. - There is no immunity from tort liability between spouses by reason of that relationship. Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975).

Effect of family relationship on contribution. - The right of contribution is denied if the plaintiff, because of a marital, filial or other family relationship between the injured person and the person against whom contribution is sought, did not have an enforceable right against the latter. Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967).

Effect of settlement with one tortfeasor. - In personal injury action arising from gas explosion, gas company's settlement with injured party and resulting release did not operate to release landowner since landowner was not notified of settlement and release did not purport to release any other claims of injured party; therefore, gas company was not entitled to contribution by landowner. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

Release must be by name. - A joint tortfeasor must be released by name in order for the settling joint tortfeasor to recover contribution, and this notwithstanding language in the settlement or order of approval purporting to satisfy "all claims" arising out of the incident. United States v. Reilly, 385 F.2d 225 (10th Cir. 1967).

And be legally extinguished. - Where joint tortfeasor's potential liability to injured plaintiff is not legally extinguished by settlement proceedings, settling joint tortfeasor cannot claim contribution. United States v. Reilly, 385 F.2d 225 (10th Cir. 1967).

No right of contribution where verdict rendered on single defendant's liability. - No right of offset or contribution can arise with respect to a verdict rendered on the basis of one defendant's liability only. Kirby v. New Mexico State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App. 1982).

Common-law right to indemnity not abrogated. - The right to indemnity at common law in New Mexico was not abrogated by the enactment of the Uniform Contribution Among Tortfeasors Act (41-3-1 to 41-3-8 NMSA 1978). Thomas v. Malco Refineries, Inc., 214 F.2d 884 (10th Cir. 1954).

Nor impaired. - Section 41-3-6 NMSA 1978 does not impair any right of indemnity under existing law. Morris v. Uhl & Lopez Eng'rs, Inc., 442 F.2d 1247 (10th Cir. 1971).

Right of contribution among joint § 1983 defendants is federal common-law issue. - Where the plaintiff's cause of action is solely for violation of his civil rights under 42 U.S.C. § 1983, the question of whether a right of contribution exists among joint § 1983 defendants is one of federal common law, not one governed by reference to the law of the forum state. Valdez v. City of Farmington, 580 F. Supp. 19 (D.N.M. 1984).

Rights of indemnity and contribution distinguished. - Although state recognizes common-law right of indemnity in favor of a tortfeasor who has been guilty of only passive or secondary negligence against another who has been guilty of active or primary negligence, such right of indemnity is to be distinguished from right to contribution under this act. Morris v. Uhl & Lopez Eng'rs, Inc., 442 F. 2d 1247 (10th Cir. 1971).

The difference between indemnity and contribution is that with indemnity the right enforces a duty on the primary wrongdoer to respond for all damages; while with contribution, an obligation is imposed by law upon one joint tortfeasor to contribute his share to the discharge of the common liability. Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Law reviews. - For article, "Judicial Adoption of Comparative Fault in New Mexico: The Time Is at Hand," see 10 N.M.L. Rev. 3 (1979-80).

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

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

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Contribution §§ 31 to 46; 74 Am. Jur. 2d Torts §§ 78, 85.

Statute providing for contribution between joint tortfeasors as applicable where liability of respective tortfeasors rests upon different legal foundations, 156 A.L.R. 931.

Right of indemnitor of one joint tortfeasor to contribution by other joint tortfeasor or indemnity of the latter, 171 A.L.R. 271.

Contribution between joint tortfeasors as affected by settlement with one or both by person injured or damaged, 8 A.L.R.2d 196.

Liability insurance carried by a charity as subject to appropriation in satisfaction of judgment in tort, 25 A.L.R.2d 89.

Legal malpractice: defendant's right to contribution or indemnity from original tortfeasors, 20 A.L.R.4th 338.

Tort immunity of nongovernmental charities - modern status, 25 A.L.R.4th 517.

Right of tortfeasor to contribution from joint tortfeasor who is spouse or otherwise in close familial relationship to injured party, 25 A.L.R.4th 1120.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 A.L.R.4th 231.

18 C.J.S. Contribution §§ 12 to 15.

41-3-3. Judgment against one tortfeasor.

The recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasors.

History: 1941 Comp., § 21-120, enacted by Laws 1947, ch. 121, § 3; 1953 Comp., § 24-1-13.

Settlement for full damages not bar to suit of other joint tortfeasor. - Where an injured person settles with one tortfeasor for an amount equal to or in excess of the amount of damages, the injured person may pursue recovery from each severally liable tortfeasor without reduction. Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).

Effect of appeal on subsequent action. - Where a judgment was rendered against a different defendant which was not satisfied or settled, and was pending on appeal, it could not be urged as satisfaction of any claims of plaintiff against another defendant, nor bar further action by plaintiff against another defendant. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976).

Effect of dismissal of contribution suit. - Where gas company, being sued for injuries sustained in explosion by plaintiffs working on junction box beneath a street intersection, filed third-party complaint against city, alleging that the city knew of the dangerous condition but failed to notify the gas company, and seeking contribution under this act, error in dismissing the third-party complaint would not affect plaintiffs' verdicts against the gas company. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337, 84 A.L.R.2d 1269 (1960).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judgments § 566; 74 Am. Jur. 2d Torts § 69.

Payment of, or proceeding to collect, judgment against one tortfeasor as release of others, 27 A.L.R. 805, 65 A.L.R. 1087, 166 A.L.R. 1099, 40 A.L.R.3d 1181.

50 C.J.S. Judgments § 761.

41-3-4. Release; effect on injured person's claim.

A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

History: 1941 Comp., § 21-121, enacted by Laws 1947, ch. 121, § 4; 1953 Comp., § 24-1-14.

Interpretation of "claim" and "damages recoverable". - The legislature appears to have interpreted the terms "claim" and "damages recoverable" synonymously. In this section the release, under certain circumstances, has the effect of reducing the "claim" of the injured person against other tortfeasors, while in 41-3-5 NMSA 1978 the same right is spoken of as "damages recoverable." Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Effect of release. - The effect of the release of one joint tortfeasor upon the injured person's claim against remaining tortfeasors is to reduce it in an amount at least as great as the consideration paid for the release, and to a larger amount if the release so provides. This provision prevents a double recovery by the injured person. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Release effective whether or not person adjudged tortfeasor. - Whether or not one who settles and receives a release is judicially determined to be a tortfeasor or clearly admits being one, absent any other countervailing consideration, the release reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in such amount or proportion as the release provides for reduction, if the total claim is greater than the consideration paid. Kirby v. New Mexico State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App. 1982).

Effect of release under 41-3-5 NMSA 1978. - Where release is taken pursuant to 41-3-5 NMSA 1978, the release of one joint tortfeasor does not release all joint tortfeasors. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Effect of recovery alone on discharge of others. - The fact of the recovery of a judgment by the injured persons against one tortfeasor alone does not operate as a discharge of other joint tortfeasors. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969); Herrera v. Uhl, 80 N.M. 140, 452 P.2d 474 (1969).

When joint tortfeasor also released. - A release executed by the plaintiff to a motorist whose vehicle was involved in an accident with one operated by a city police officer in which plaintiff was a prisoner discharged the city from any liability where it provided for the extinguishment of any liability sought to be asserted by the plaintiff. Johnson v. City of Las Cruces, 86 N.M. 196, 521 P.2d 1037 (Ct. App. 1974).

Effect of release acknowledging full satisfaction of judgment. - Payment by a tortfeasor of $200,000 in return for an instrument which acknowledged "full satisfaction of the judgment" against him was a full satisfaction of the compensatory damages for the injury, thereby precluding an action by plaintiff against his principal for compensatory damages for the same injury, since where the consideration paid by one tortfeasor for a release represents full compensation for the injury, the other tortfeasor is discharged. Sierra Blanca Sales Co. v. Newco Indus., Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd sub nom. Fortuna Corp. v. Sierra Blanca Sales Co., 89 N.M. 187, 548 P.2d 865 (1976).

Where payment in full not required. - Although a judgment may only be satisfied by payment in full, payment in full is not required where there is a lawful agreement discharging the judgment, the essence of which is consideration, and where plaintiff accepted a lesser amount than that to which it was entitled by the judgment in order to obtain immediate cash, being unable to secure funds in order to levy on defendant's stock on which he had a lien, the court of appeals held that there was a lawful agreement discharging the judgment, plaintiff was compensated for the injury in full and the trial court was correct in granting summary judgment to his principal on the issue of compensatory damages. Sierra Blanca Sales Co. v. Newco Indus., Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd sub nom. Fortuna Corp. v. Sierra Blanca Sales Co., 89 N.M. 187, 548 P.2d 865 (1976).

Release must be read as a whole and the intent of the parties gathered from the entire instrument and not from separate portions. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Release is ambiguous if it is fairly susceptible to more than one meaning. Collins v. United States, 708 F.2d 499 (10th Cir. 1983).

Effect of release as to punitive damages. - Since punitive damages are not awarded as compensation to the party wronged, but rather as punishment of the offender, and as a warning to others, plaintiff ought not be limited to one amount of punitive recovery, and therefore the release of one tortfeasor as to the punitive aspect of the damages would logically have no effect on plaintiff's rights against another tortfeasor for such damages. Sierra Blanca Sales Co. v. Newco Indus., Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd sub nom. Fortuna Corp. v. Sierra Blanca Sales Co., 89 N.M. 187, 548 P.2d 865 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 54 Am. Jur. 2d Monopolies § 313; 66 Am. Jur. 2d Release §§ 2, 27 to 43, 55.

Payment of, or proceeding to collect, judgment against one tortfeasor as release of others, 27 A.L.R. 805, 65 A.L.R. 1087, 166 A.L.R. 1099, 40 A.L.R.3d 1181.

Release of one tortfeasor as affecting liability of others, 50 A.L.R. 1057, 66 A.L.R. 206, 104 A.L.R. 846, 124 A.L.R. 1298, 148 A.L.R. 1270.

Rule that release of one tortfeasor releases others, as applicable to cause of action which is punitive rather than compensatory in its nature, 85 A.L.R. 1164.

Amount paid by one alleged joint tortfeasor in consideration of covenant not to sue (or a release not effective as a full release of the other joint tortfeasor), as pro tanto satisfaction of damages recoverable against other joint tortfeasor, 104 A.L.R. 931.

Rule that release of one joint tortfeasor releases other as applicable in case of anticipatory release prior to accident or injury, 112 A.L.R. 78.

Release of one of two or more persons whose independent tortious acts combine to produce an injury as releasing other or others, 134 A.L.R. 1225.

Provision in judgment in action against one or more joint tortfeasors to effect that it shall be without prejudice to plaintiff's claim against another joint tortfeasor, or otherwise reserving rights against him, as affecting question of release of latter, 135 A.L.R. 1498.

Agreement with one tortfeasor that any judgment that may be recovered will not be enforced against him, as affecting liability of cotortfeasor, 160 A.L.R. 870.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 A.L.R.2d 1122.

Insured's release of tortfeasor before settlement by insurer as releasing insurer from liability, 38 A.L.R.2d 1095.

Judgment against or settlement with negligent employee as releasing United States, or vice versa, 42 A.L.R.2d 960.

Conflict of laws as to release of one tortfeasor upon liability of another tortfeasor, 69 A.L.R.2d 1034.

Civil damage act, settlement with or release of person directly liable for injury or death as releasing liability under, 78 A.L.R.2d 998.

Modern trends with respect to release of one joint tortfeasor as discharging liability of others, 73 A.L.R.2d 403.

Release of, or covenant not to sue, master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R.2d 533.

Manner of crediting one tortfeasor with amount paid by another for release or covenant not to sue, 94 A.L.R.2d 352.

Voluntary payment into court of judgment against one joint tortfeasor as release of others, 40 A.L.R.3d 1181.

Validity and effect of agreement with one cotortfeasor setting aside his maximum liability and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor, 65 A.L.R.3d 602.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative, 21 A.L.R.4th 275.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 24 A.L.R.4th 547.

76 C.J.S. Release §§ 47, 50.

41-3-5. Release; effect on right of contribution.

A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued,

and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.

History: 1941 Comp., § 21-122, enacted by Laws 1947, ch. 121, § 5; 1953 Comp., § 24-1-15.

Interpretation of "claim" and "damages recoverable". - The legislature appears to have interpreted the terms "claim" and "damages recoverable" synonymously. In 41-3-4 NMSA 1978 the release, under certain circumstances, has the effect of reducing the "claim" of the injured person against other tortfeasors, while in this section the same right is spoken of as "damages recoverable." Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Purpose of act. - One of the purposes of this act (41-3-1 to 41-3-8 NMSA 1978) is to provide for a proportionate allocation of the burden among tortfeasors who are liable. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

Limited applicability of article. - The Uniform Contribution Among Tortfeasors Act, 41-3-1 to 41-3-8 NMSA 1978, no longer has force in this state with respect to contribution among concurrent tortfeasors. Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).

Effect of limiting release to pro rata share. - Where release provided for reduction of plaintiff's claims for damage to extent of pro rata share of liability of released tortfeasors, it sufficiently complied with this section which establishes conditions under which an injured person's release relieves the joint tortfeasor from liability for contribution. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Where settling tortfeasor denied contribution. - Where the language of the release made it clear that the settlement between one tortfeasor and the plaintiffs was for that tortfeasor's benefit alone, and that tortfeasor settled its liability to the plaintiffs, separate and distinct from any liability of second tortfeasor to the plaintiffs, and without attempting to gain any benefit for second tortfeasor, the first tortfeasor was not entitled to contribution from the second. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

Rights of nonsettling joint tortfeasor. - The right of a nonsettling joint tortfeasor to collect contribution from the one released is protected unless the release provides for a reduction to the extent mentioned in 41-3-4 NMSA 1978 of the damages recoverable from the remaining tortfeasors. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

All joint tortfeasors not released. - Where release was taken under this section the release of one joint tortfeasor did not release all joint tortfeasors. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Settlement for full damages not bar to suit of other joint tortfeasor. - Where an injured person settles with one tortfeasor for an amount equal to or in excess of the amount of damages, the injured person may pursue recovery from each severally liable tortfeasor without reduction. Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).

Assignment of future recovery void. - A person injured while moving hay elevator sued owner of elevator for personal injuries. Owner's insurer settled suit by paying plaintiff $40,000 for release of owner and assignment to insurer of one-half of any recovery or settlement, not to exceed $80,000, which plaintiff might later obtain in action against the manufacturer of the elevator. Plaintiff's action against manufacturer was settled by the manufacturer for $40,000. The insurer of the owner of the hay elevator could not enforce assignment against injured person and manufacturer as it was contrary to public policy as expressed in 41-3-2, Subsection C NMSA 1978 and this section. Alder v. Garcia, 324 F.2d 483 (10th Cir. 1963).

Joint tortfeasor must be released by name in order for the settling joint tortfeasor to recover contribution, and this notwithstanding language in the settlement or order of approval purporting to satisfy "all claims" arising out of the incident. United States v. Reilly, 385 F.2d 225 (10th Cir. 1967).

Release must be read as a whole and the intent of the parties gathered from the entire instrument, not from separate portions. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Release §§ 37, 38, 40 to 43.

Tortfeasor's general release of cotortfeasor as affecting former's right of contribution against cotortfeasor, 34 A.L.R.3d 1374.

18 C.J.S. Contribution § 30.

41-3-6. Indemnity.

This act [41-3-1 to 41-3-8 NMSA 1978] does not impair any right of indemnity under existing law.

History: 1941 Comp., § 21-123, enacted by Laws 1947, ch. 121, § 6; 1953 Comp., § 24-1-16.

Cross-references. - For indemnity agreements, when void, see 56-7-1, 56-7-2 NMSA 1978.

Common-law right to indemnity not abrogated. - The right to indemnity at common law in New Mexico was not abrogated by the enactment of this act. Thomas v. Malco Refineries, Inc., 214 F.2d 884 (10th Cir. 1954).

Indemnity between primary and secondary wrongdoers. - New Mexico recognizes a common-law right of indemnity in favor of a tortfeasor who has been guilty of only passive or secondary negligence against another who has been guilty of active or primary negligence. Morris v. Uhl & Lopez Eng'rs, Inc., 442 F.2d 1247 (10th Cir. 1971).

Right of secondary wrongdoer to indemnity. - A secondary or passive wrongdoer who has paid damages to an injured party has a common-law right of indemnity against the primary or active wrongdoer. United States v. Reilly, 385 F.2d 225 (10th Cir. 1967).

Indemnity when tortfeasors in pari delicto. - One tortfeasor may not recover indemnity from another when they are in pari delicto. Morris v. Uhl & Lopez Eng'rs, Inc., 442 F.2d 1247 (10th Cir. 1971); Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Where not in pari delicto. - Where joint tortfeasors are not in pari delicto, or in equal fault, the secondary or passive wrongdoer may put the ultimate loss upon the one principally responsible for the injury done. United States v. Reilly, 385 F.2d 225 (10th Cir. 1967).

Indemnity and contribution contrasted. - The difference between indemnity and contribution in cases between persons liable for an injury to another is that, with indemnity, the right to recover springs from a contract, express or implied, and enforces a duty on the primary wrongdoer to respond for all damages; with contribution, an obligation is imposed by law upon one joint tortfeasor to contribute his share to the discharge of the common liability. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969); Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Indemnity springs from a contract, express or implied, and enforces a duty on the primary or principal wrongdoer to respond for all the damages. Contribution does not arise out of contract, but is an obligation imposed by law, and rests on the principle that, when the parties stand in aequali jure, the law requires equality, which is equity, and that all should contribute equally to the discharge of the common liability. Thomas v. Malco Refineries, Inc., 214 F.2d 884 (10th Cir. 1954).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Contribution §§ 35, 36, 81, 95, 115, 119.

Right of indemnitor of one joint tortfeasor to contribution by or indemnity against other joint tortfeasor or indemnitor of latter, 75 A.L.R. 1486, 171 A.L.R. 271.

Contribution or indemnity between joint tortfeasors on basis of relative fault, 53 A.L.R.3d 184.

When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

Products liability: seller's right to indemnity from manufacturer, 79 A.L.R.4th 278.

41-3-7. Uniformity of interpretation.

This act [41-3-1 to 41-3-8 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

History: 1941 Comp., § 21-124, enacted by Laws 1947, ch. 121, § 8; 1953 Comp., § 24-1-17.

41-3-8. Short title.

This act [41-3-1 to 41-3-8 NMSA 1978] may be cited as the Uniform Contribution Among Tortfeasors Act.

History: 1941 Comp., §21-125, enacted by Laws 1947, ch. 121, § 9; 1953 Comp., § 24-1-18.

ARTICLE 3A
SEVERAL LIABILITY

41-3A-1. Several liability.

A. In any cause of action to which the doctrine of comparative fault applies, the doctrine imposing joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished except as otherwise provided hereafter. The liability of any such defendants shall be several.

B. In causes of action to which several liability applies, any defendant who establishes that the fault of another is a proximate cause of a plaintiff's injury shall be liable only for that portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of such defendant's fault to the total fault attributed to all persons, including plaintiffs, defendants and persons not party to the action.

C. The doctrine imposing joint and several liability shall apply:

(1) to any person or persons who acted with the intention of inflicting injury or damage;

(2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;

(3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or

(4) to situations not covered by any of the foregoing and having a sound basis in public policy.

D. Where a plaintiff sustains damage as the result of fault of more than one person which can be causally apportioned on the basis that distinct harms were caused to the plaintiff, the fault of each of the persons proximately causing one harm shall not be compared to the fault of persons proximately causing other distinct harms. Each person is severally liable only for the distinct harm which that person proximately caused.

E. No defendant who is severally liable shall be entitled to contribution from any other person, nor shall such defendant be entitled to reduce the dollar damages determined by the factfinder to be owed by the defendant to the plaintiff in accordance with Subsection B of this section by any amount that the plaintiff has recovered from any other person whose fault may have also proximately caused injury to the plaintiff.

F. Nothing in this section shall be construed to affect or impair any right of indemnity or contribution arising out of any contract of agreement or any right of indemnity otherwise provided by law.

G. Nothing in this section creates or recognizes, either explicitly or impliedly, any new or different cause of action not otherwise recognized by law. Nothing in this section alters the doctrine of proximate cause.

History: Laws 1987, ch. 141, § 1.

Applicability clauses. - Laws 1987, ch. 141, § 5 makes this section applicable to all civil actions initially filed on and after July 1, 1987.

Retailer and manufacturer liability. - Extending strict liability to nonnegligent retailers provides two sources from which the injured consumer can obtain relief: the retailer and the manufacturer, and the former may seek indemnification from the latter for any loss he may suffer. Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (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).

For annual survey of New Mexico law of products liability, 19 N.M.L. Rev. 743 (1990).

For note, "Contract law: New Mexico interprets the insurance clause in the oil and gas anti-indemnity statute: *Amoco Production Co. v. Action Well Service, Inc.,*" 20 N.M.L. Rev. 179 (1990).

For annual survey of New Mexico Law of Torts, see 20 N.M.L. Rev. 407 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 74 Am. Jur. 2d Torts §§ 61 to 64.

86 C.J.S. Torts §§ 34 to 39.

41-3A-2. Definition.

As used in this act, "person" means any individual or entity of any kind whatsoever.

History: Laws 1987, ch. 141, § 2.

Applicability clauses. - Laws 1987, ch. 141, § 5 makes this section applicable to all civil actions initially filed on and after July 1, 1987.

Meaning of "this act". - The term "this act" as used in this section means Laws 1987, ch. 141, which appears as 41-3-2, 41-3A-1, 41-3A-2 and 52-1-10.1 NMSA 1978.

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).

ARTICLE 4
TORT CLAIMS

41-4-1. Short title.

Sections 41-4-1 through 41-4-27 NMSA 1978 may be cited as the "Tort Claims Act".

History: 1953 Comp., § 5-14-1, enacted by Laws 1976, ch. 58, § 1; 1977, ch. 386, § 1; 1981, ch. 118, § 1.

Constitutionality. - The legislature acted constitutionally in enacting the Tort Claims Act following judicial abolition of sovereign immunity. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Act does not violate equal protection clauses of the United States and New Mexico constitutions. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Policy of act. - The declared policy of this act indicates that the legislature authorized the filing of claims against governmental entities except in situations where the state may not have been able to act for some specific reason, so long as the act complained of falls within the list set out in this act. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Common-law sovereign immunity abolished. - Common-law sovereign immunity may no longer be interposed as a defense by the state or any of its political subdivisions in tort actions. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).

Recognition of sovereign immunity as common-law doctrine. - Section 5-13-2, 1953 Comp. (repealed), showed that the legislature itself recognized that sovereign immunity is a common-law doctrine and was not statutorily created either by specific statutes or by the statute adopting the common law in New Mexico. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).

Reasons justifying legislature's determination to partially retain governmental immunity are: (1) there is a need to protect the public treasuries; (2) partial immunity enables the government and its various subdivisions to function unhampered by the threat of time and energy consuming legal actions which would inhibit the administration of traditional state activities; and (3) in order to effectively carry out its services, many of which are financially unprofitable and which would not be provided at a reasonable cost by private enterprise, the government needs the protection provided by some immunity. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Act is remedial act which applies only prospectively, in the absence of expressed legislative intent to make it retroactive. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Act is extension of previous similar statutes. - This act is an extension of previous statutes that recognized a limited waiver of sovereign immunity. Accordingly, a claimant's remedy under former 5-6-20 NMSA 1953 to redress her 1974 injury due to the alleged negligence of a state agency did not abate upon the repeal of that statute in 1975, nor upon the enactment of the Tort Claims Act in 1976. Her claim was, thus, not barred under common-law sovereign immunity, but rather retained its vitality pursuant to former 5-6-20 NMSA 1953. Romero v. New Mexico Health & Env't Dep't, 107 N.M. 516, 760 P.2d 1282 (1988).

Action not barred by concurrent § 1983 action. - The New Mexico Tort Claims Act does not prohibit a plaintiff from bringing an action for damages under that act against a governmental entity or public employee where the plaintiff also pursues, by reason of the same occurrence or chain of events, an action against the same entity or employee pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Act's modification of common law requires strict construction of act. - Since this act is in derogation of petitioner's common-law rights to sue governmental employees for negligence, the act is to be strictly construed insofar as it modifies the common law. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

This article is in derogation of one's common-law right to sue and is to be strictly construed. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

The Tort Claims Act must be strictly construed. Fought v. State, 107 N.M. 715, 764 P.2d 142 (Ct. App. 1988).

Where there is no liability insurance, defense of sovereign immunity is valid as to a tort committed prior to July 1, 1976. New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

Law reviews. - For note, "Doctrine of Sovereign Immunity - Statute - Municipal Tort Liability," see 2 Nat. Resources J. 170 (1962).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

For note, "Comparative v. Contributory Negligence: The Effect of Plaintiff's Fault," see 6 N.M.L. Rev. 171 (1975).

For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

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

For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

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

For note, "Torts - Government Immunity Under the New Mexico Tort Claims Act," see 11 N.M.L. Rev. 475 (1981).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For comment, "Survey of New Mexico Law: Torts," see 15 N.M.L. Rev. 363 (1985).

For note, "Tort Claims Act - The Death of the Public Duty - Special Duty Rule: Schear v. Board of County Commissioners," see 16 N.M.L. Rev. 423 (1986).

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

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 case note, "CIVIL PROCEDURE-New Mexico Adopts the Modern View of Collateral Estoppel: Silva v. State," see 18 N.M.L. Rev. 597 (1988).

For annual survey of New Mexico Law of Torts, see 20 N.M.L. Rev. 407 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability, §§ 61, 62, 67 to 69, 184 to 190.

Denial of recovery for damage to property by negligence of governmental agents, on basis of immunity of state from suit without its consent, 2 A.L.R.2d 694.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state, 81 A.L.R.3d 1239.

Liability for child's personal injuries or death resulting from tort committed against child's mother before child was conceived, 91 A.L.R.3d 316.

Liability for overflow of water confined or diverted for public waterpower purposes, 91 A.L.R.3d 1065.

Liability of one negligently causing fire for injuries sustained by person other than firefighter in attempt to control fire or to save life or property, 91 A.L.R.3d 1202.

Governmental liability from operation of zoo, 92 A.L.R.3d 832.

Products liability: air guns and BB guns, 94 A.L.R.3d 291.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R.3d 778.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 773.

Governmental tort liability for injuries caused by negligently released individual, 6 A.L.R.4th 1155.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury - modern status, 7 A.L.R.4th 1063.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances, 38 A.L.R.4th 1194.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Recoverability from tort-feasor of cost of diagnostic examinations absent proof of actual bodily injury, 46 A.L.R.4th 1151.

Right of insured, precluded from recovering against owner or operator of uninsured motor vehicle because of governmental immunity, to recover uninsured motorist benefits, 55 A.L.R.4th 806.

Social worker malpractice, 58 A.L.R.4th 977.

Tort liability of college or university for injury suffered by student as a result of own or fellow student's intoxication, 62 A.L.R.4th 81.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 A.L.R.4th 204.

Tort liability of college, university, fraternity, or sorority for injury or death of member or prospective member by hazing or initiation activity, 68 A.L.R.4th 228.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured, 68 A.L.R.4th 266.

Applicability of 28 §§ 2680(a) and 2680(h) to Federal Tort Claims Act liability arising out of government informant's conduct, 85 A.L.R. Fed. 848.

Calculations of attorneys' fees under Federal Tort Claims Act - 28 USCS § 2678, 86 A.L.R. Fed. 866.

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of assault and battery (28 UCSC § 2680(h)), 88 A.L.R. Fed. 7

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of interference with contract rights (28 USCS § 2680(h)), 92 A.L.R. Fed. 186.

Application of collateral source rule in actions under Federal Tort Claims Act (28 USCS § 2674), 104 A.L.R. Fed. 492.

41-4-2. Legislative declaration.

A. The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] and in accordance with the principles established in that act.

B. The Tort Claims Act shall be read as abolishing all judicially-created categories such as "governmental" or "proprietary" functions and "discretionary" or "ministerial" acts previously used to determine immunity or liability. Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. The Tort Claims Act in no way imposes a strict liability for injuries upon governmental entities or public employees. Determination of the standard of care required in any particular instance should be made with the knowledge that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities.

History: 1953 Comp., § 5-14-2, enacted by Laws 1976, ch. 58, § 2.

Identification of entity against whom liability asserted. - Plaintiffs may not, by relying on the doctrine of respondeat superior, avoid the need to identify the particular entity against whom liability is asserted. Silva v. State, 106 N.M. 472, 745 P.2d 1160 (Ct. App. 1986).

To hold municipality liable for the conduct of third persons would be contrary to sound public policy and create policing requirements difficult of fulfillment. Trujillo v. City of Albuquerque, 93 N.M. 569, 603 P.2d 303 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

The Tort Claims Act grants immunity for strict liability in tort. McCurry v. City of Farmington, 97 N.M. 728, 643 P.2d 292 (Ct. App. 1982).

No distinction shall be drawn with regard to "public" or "special" duty of governmental employees whose immunity to suit for acts of negligence has been excepted under this article. Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

The distinction between public and private duty is invalid, and Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984)applied retrospectively; Wittkowski v. State, Cors. Dep't, 103 N.M. 526, 710 P.2d 93 (Ct. App. 1985), overruled on other grounds Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

Immunity for wrongful decision to perform autopsy. - In an action for damages on the basis of an alleged wrongful decision to perform an autopsy, even if 24-12-4 NMSA 1978, which provides for consent for post-mortem examinations, created a private cause of action, it did not override the state medical investigator's grant of immunity under the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

Ordinary care for preservation of life and health of arrestee. - When a governmental entity through its agents, by virtue of its law enforcement powers, has arrested and imprisoned a human being, it is bound to exercise ordinary and reasonable care, under the circumstances, for the preservation of his life and health. Doe v. City of Albuquerque, 96 N.M. 433, 631 P.2d 728 (Ct. App. 1981).

Jury instruction on "financial limitations". - Without evidence on the issue of "financial limitations," a party is not entitled to a jury instruction as to a governmental entity's standard of care as circumscribed by the "financial limitations" within which it must exercise authorized power. Doe v. City of Albuquerque, 96 N.M. 433, 631 P.2d 728 (Ct. App. 1981).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 11, 75 to 81, 110; 63A Am. Jur. 2d Public Officers and Employees § 358 et seq.

Effect of statute permitting state to be sued upon the question of its liability for negligence or torts, 13 A.L.R. 1276, 169 A.L.R. 105.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary functions, 101 A.L.R. 1166, 16 A.L.R.2d 1079.

Tort liability of public schools and institutions of higher learning, 160 A.L.R. 7, 86 A.L.R.2d 489.

Tort liability of private schools and institutions of higher learning, 160 A.L.R. 250.

67 C.J.S. Officers and Public Employees §§ 206 to 209, 251.

41-4-3. Definitions. (Effective until July 1, 1992.)

As used in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978]:

A. "board" means the risk management advisory board;

B. "governmental entity" means the state or any local public body as defined in Subsections C and G of this section;

C. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Sections 3-28-1 through 3-28-19 NMSA 1978;

D. "law enforcement officer" means any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor;

E. "public employee" means any officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (6) and (8) of this subsection, and including:

(1) elected or appointed officials;

(2) law enforcement officers;

(3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation;

(4) licensed foster parents providing care for children in the custody of the human services department, corrections department or health and environment department [department of health], but not including foster parents certified by a licensed child placement agency;

(5) members of state or local selection panels established pursuant to the Adult Community Corrections Act or the Juvenile Community Corrections Act [Chapter 33, Article 9 NMSA 1978];

(6) licensed medical, psychological or dental arts practitioners providing services to the corrections department pursuant to contract;

(7) members of the board of directors of the New Mexico comprehensive health insurance pool; and

(8) individuals who are members of medical review boards, committees or panels established by the board of the educational retirement association or the board of the public employees retirement association;

F. "scope of duties" means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance; and

G. "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

History: 1953 Comp., § 5-14-3, enacted by Laws 1976, ch. 58, § 3; 1977, ch. 386, § 2; 1983, ch. 123, § 2; 1983, ch. 242, § 1; 1985, ch. 76, § 1; 1988, ch. 31, § 1; 1991, ch. 29, § 1.

Delayed repeals. - Laws 1991, ch. 205, § 4 repeals 41-4-3 NMSA 1978, as amended by Laws 1991, ch. 29, § 1 effective July 1, 1992.

Cross-references. - As to the risk management advisory board, see 15-7-4 NMSA 1978.

Bracketed material. - The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and creates a new 9-7-4 NMSA 1978, relating to the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

The 1988 amendment, effective February 29, 1988, added the exclusion in the definition of "public employee" near the beginning of Subsection E; deleted "Except as provided by this paragraph, the term does not include an independent contractor" from the end of Subsection E(6); added Subsection E(7); and made minor stylistic changes.

The 1991 amendment, effective June 14, 1991, in Subsection E inserted "Adult" preceding "Community" and added "or the Juvenile Community Corrections Act" in Paragraph (5), added present Subsection (7), and made related stylistic changes; and made a stylistic change in Subsection F.

"Law enforcement officer". - The Eddy county sheriff, his deputies and the jailers at the Bernalillo county jail are "law enforcement officers" within the meaning of Subsection D. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Neither district attorney nor assistant district attorney is a "law enforcement officer," as defined in Subsection D; rather, both are "public employees"under Subsection E. Candelaria v. Robinson, 93 N.M. 786, 606 P.2d 196 (Ct. App. 1980).

The secretary of corrections and the penitentiary warden were not proper defendants in a wrongful death suit arising out of the escape of state prisoners, who killed a store owner during a robbery, since they are not "law enforcement officers". Wittkowski v. State, Cors. Dep't, 103 N.M. 526, 710 P.2d 93 (Ct. App. 1985), overruled on other grounds Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

To determine whether positions are of a law enforcement nature, the court will look at the character of the principal duties involved, those duties to which employees devote the majority of their time. Anchondo v. Corrections Dep't, 100 N.M. 108, 666 P.2d 1255 (1983).

The secretary of corrections is not a law enforcement officer within the meaning of 41-4-12 NMSA 1978 as defined in Subsection D of this section. Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

Assistant district attorney's letter to sheriff within scope of duty. - An assistant district attorney's letter to the sheriff, containing quotation from an allegedly defamatory investigation report by the assistant district attorney, was authorized and within the scope of assistant district attorney's duty, and he was immune from liability for the alleged defamation in the letter. Candelaria v. Robinson, 93 N.M. 786, 606 P.2d 196 (Ct. App. 1980).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Corrections department is a "governmental" entity under the Tort Claims Act, not an "employee" of a governmental entity. Therefore, it does not fall within 41-4-6 and 41-4-10 NMSA 1978 (negligence of "public employees"). Silva v. State, 106 N.M. 472, 745 P.2d 1160 (Ct. App. 1986).

City is "governmental entity". - Under the Tort Claims Act, a city is a "governmental entity" because of its legal status as a "local public body" and as a "political subdivision of the state." Cole v. City of Las Cruces, 99 N.M. 302, 657 P.2d 629 (1983).

Guardian ad litem was not a "public employee" within the meaning of the Tort Claims Act. Collins ex. rel. Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991).

That town or municipality is "local public body" is not open to question. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

A private corporation is generally not the type of "instrumentality" contemplated within the context of the Tort Claims Act, although there may be situations where a private corporation may be so organized and controlled, and its affairs so conducted, as to make it merely an instrumentality or adjunct of a municipality under the terms of the act. Cole v. City of Las Cruces, 99 N.M. 302, 657 P.2d 629 (1983).

State police and highway departments are "state agencies". - The state police department and the state highway department fit the statutory description of "state" or

"state agency." Ferguson v. New Mexico State Hwy. Comm'n, 98 N.M. 718, 652 P.2d 740 (Ct. App. 1981), rev'd on other grounds, 98 N.M. 680, 652 P.2d 230 (1982).

Irrigation district is "local public body" for purposes of this section. Tompkins v. Carlsbad Irrigation Dist., 96 N.M. 368, 630 P.2d 767 (Ct. App. 1981).

"Public employees". - Employees at a community mental health facility regulated by the health and environment department (now the department of health) were not "public employees" within the meaning of the Tort Claims Act, where the regulatory scheme did not give the department the right to control the details of the work of the facility. Armijo v. Department of Health & Env't, 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For annual survey 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, County, School, and State Tort Liability §§ 31, 67, 191 to 196.

41-4-3. Definitions. (Effective July 1, 1992.)

As used in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978]:

A. "board" means the risk management advisory board;

B. "governmental entity" means the state or any local public body as defined in Subsections C and H of this section;

C. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Sections 3-28-1 through 3-28-19 NMSA 1978;

D. "law enforcement officer" means any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor;

E. "maintenance" does not include:

(1) conduct involved in the issuance of a permit, driver's license or other official authorization to use the roads or highways of the state in a particular manner; or

(2) an activity or event relating to a public building or public housing project which was not forseeable;

F. "public employee" means any officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (6) and (7) of this subsection, and including:

(1) elected or appointed officials;

(2) law enforcement officers;

(3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation;

(4) licensed foster parents providing care for children in the custody of the human services department, corrections department or health and environment department [department of health], but not including foster parents certified by a licensed child placement agency;

(5) members of state or local selection panels established pursuant to the Adult Community Corrections Act [Chapter 33, Article 9 NMSA 1978];

(6) licensed medical, psychological or dental arts practitioners providing services to the corrections department pursuant to contract;

(7) members of the board of directors of the New Mexico comprehensive health insurance pool; and

(8) individuals who are members of medical review boards, committees or panels established by the board of the educational retirement association or the board of the public employees retirement association;

G. "scope of duties" means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance; and

H. "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

History: 1953 Comp., § 5-14-3, enacted by Laws 1976, ch. 58, § 3; 1977, ch. 386, § 2; 1983, ch. 123, § 2; 1983, ch. 242, § 1; 1985, ch. 76, § 1; 1988, ch. 31, § 1; 1991, ch. 29, § 1; 1991, ch. 205, § 1.

Delayed repeals. - Laws 1991, ch. 205, § 4, effective July 1, 1992, repeals "that version of 41-4-3 NMSA 1978 (being Laws 1976, Chapter 58, Section 3, as amended and as further amended by [Laws 1991, ch. 29] ...)". It is unclear whether the effect is to repeal

one or both of these versions. The section is set out as if Laws 1991, ch. 205, § 4 brings the repeal of both versions, effective July 1, 1992.

Bracketed material. - The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and creates a new 9-7-4 NMSA 1978, relating to the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

The 1991 amendment, effective July 1, 1992, added Subsection E; redesignated former Subsections E to G as Subsections F to H; in Subsection F, added Paragraph (7), redesignated former Paragraph (7) as Paragraph (8) and made a related and minor stylistic changes; and made a minor stylistic change in Subsection G.

41-4-4. Granting immunity from tort liability; authorizing exceptions.

A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978.

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including costs and attorneys' fees, for any public employee when liability is sought for:

(1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

(2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

C. A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his duty.

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

(1) any tort which was committed by the public employee while acting within the scope of his duty; or

(2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico which occurred while the public employee was acting within the scope of his duty.

E. A governmental entity shall have the right to recover from a public employee the amount expended by the public entity to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.

F. Nothing in Subsections B, C and D of this section shall be construed as a waiver of the immunity from liability granted by Subsection A of this section or as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution.

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated, if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

History: 1953 Comp., § 5-14-4, enacted by Laws 1976, ch. 58, § 4; 1977, ch. 386, § 3; 1978, ch. 166, § 1; 1981, ch. 267, § 1; 1982, ch. 8, § 1; 1989, ch. 369, § 1.

The 1989 amendment, effective June 16, 1989, inserted "including costs and attorneys' fees" in the introductory paragraph of Subsection B.

Act's modification of common law requires strict construction of act. - Since the Tort Claims Act is in derogation of petitioner's common-law rights to sue governmental employees for negligence, the act is to be strictly construed insofar as it modifies the common law. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Right to sue and recover under act is limited to the rights, procedures, limitations and conditions prescribed in this act. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Agency to be named in complaint. - Under the Tort Claims Act, the particular agency that caused the harm is the party that must be named in the complaint and against whom a judgment may be entered. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

Tort is separate and distinct from constitutional deprivation. - The New Mexico legislature recognizes that a tort is separate and distinct from a constitutional deprivation. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Tort Claims Act grants immunity for strict liability in tort. McCurry v. City of Farmington, 97 N.M. 728, 643 P.2d 292 (Ct. App. 1982).

No distinction shall be drawn with regard to "public" or "special" duty of governmental employees whose immunity to suit for acts of negligence has been excepted under this article. Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

Denial of immunity claim not immediately appealable. - Since Subsection A of this section provides a defense to liability, and not absolute immunity from suit, a denial of a claim of immunity under that section does not meet the requirements for immediate appellate review under the collateral order exception to the traditional requirement of finality. Allen v. Board of Educ., 106 N.M. 673, 748 P.2d 516 (Ct. App. 1987).

Liability of governmental entity for torts of employees. - A governmental entity is not immune from liability for any tort of its employee acting within the scope of duties for which immunity is waived. Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

It is only when a public entity is itself acting through its employee with the right to control the manner in which the details of work are to be done, that the Tort Claims Act comes into play. Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

The supervision required for naming a public entity includes more than "direct supervision"; it includes the right of control regardless of whether exercised. Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

Legislature acted within its powers in limiting liability of public employees in the same manner as it limited the liability of the entity for whom they work. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Waiver of immunity. - Section 41-4-21 NMSA 1978 was designed to preserve employment relations between the state, or a subdivision thereof, and its employees: It may not be read to expand Subsection A of this section and to provide a waiver of immunity to allow an educational malpractice action against a public school board. Rubio ex rel. Rubio v. Carlsbad Mun. School Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

The Tort Claims Act does not waive immunity from liability for invasions of privacy. 1987 Op. Att'y Gen. No. 87-63.

Act provides immunity to public employee acting within scope of duty. - If either district attorney or assistant district attorney was acting within the scope of his duty as a

public employee at the time of an alleged defamation, he is immune from liability under the Tort Claims Act regardless of any other immunity afforded to a district attorney or assistant district attorney. Candelaria v. Robinson, 93 N.M. 786, 606 P.2d 196 (Ct. App. 1980).

Limited liability of law enforcement officers. - The clear meaning of this section is that law enforcement officers are not personally liable for malicious or fraudulent torts when committed while acting within the scope of their duties, except as provided in 41-4-12 NMSA 1978. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Scope of course of employment. - One is not in the course of employment unless the conduct in controversy is of the same general nature as that authorized or incidental thereto. Stull v. City of Tucumcari, 88 N.M. 320, 540 P.2d 250 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Liability for actions outside of scope. - An officer of the state, who acts outside the scope of his authority and in so doing commits a willful and malicious tort, may be held liable for his actions. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967).

Liability where ordinance void. - An officer who makes an arrest for the violation of an ordinance committed in his presence, which by law he is required to make, should not be subjected to liability if thereafter it should be judicially determined that the ordinance was void and in fact no offense had been committed. Miller v. Stinnett, 257 F.2d 910 (10th Cir. 1958).

Negligent release of criminal suspect. - Plaintiff's complaint, claiming personal injuries and damages resulting from her rape by a criminal suspect following his allegedly negligent release from a detention center, stated a cause of action against the city which operated the center and against the center director. Abalos v. Bernalillo County Dist. Att'y Office, 105 N.M. 554, 734 P.2d 794 (Ct. App. 1987).

Liability for placement of signals and signs. - Where the plaintiff's allegations, in large part, concern the placement of signals and signs, the state of New Mexico does not enjoy immunity for such decisions, and whether signs or signals were necessary is a question for the jury. Blackburn v. State, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982).

Negligence of city in maintenance of gas service actionable. - If a city negligently maintains a gas service provided by it beyond the statutorily prescribed five-mile limit, that negligence is actionable and there exists no sovereign immunity to shield it from liability under the Tort Claims Act. Cole v. City of Las Cruces, 99 N.M. 302, 657 P.2d 629 (1983).

No liability for assault of one citizen by another. - A city is not liable for failure to provide adequate policing to protect one citizen from being assaulted by another citizen. A municipality will not be held liable for failure to carry out either a statutory function or a

governmental function. Trujillo v. City of Albuquerque, 93 N.M. 569, 603 P.2d 303 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

When such liability would exist. - Liability for failure to protect one citizen from being assaulted by another citizen would exist only if there had been a specific promise of protection by the police to the victim or if the police officer had affirmatively caused the damage of which the plaintiff was complaining. Trujillo v. City of Albuquerque, 93 N.M. 569, 603 P.2d 303 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

Immunity of state medical examiner. - An allegation of negligent decision-making by the state medical investigator does not fall within an exception to the legislative grant of sovereign immunity contained in the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

In an action for damages on the basis of an alleged wrongful decision to perform an autopsy, even if 24-12-4 NMSA 1978, which provides for consent for postmortem examinations, created a private cause of action, it did not override the state medical investigator's grant of immunity under the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

In an action for damages on the basis of a wrongful decision to perform an autopsy on decedent, causing emotional distress to family members because the body was not handled according to traditional Navajo religious beliefs, a count alleging interference with plaintiffs' free exercise of religion was dismissed since the state had given no consent to be sued and there was no express waiver for the state medical examiner under the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

Waiver of public employees' immunity not allowed. - Section does not allow an attorney of public employees who enjoy sovereign immunity to waive such immunity at trial. Garcia v. Board of Educ., 777 F.2d 1403 (10th Cir. 1985), cert. denied, 479 U.S. 814, 107 S. Ct. 66, 93 L. Ed. 2d 24 (1986).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

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

For note, "Torts - Government Immunity Under the New Mexico Tort Claims Act," see 11 N.M.L. Rev. 475 (1981).

For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

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

For annual survey of New Mexico insurance law, 19 N.M.L. Rev. 717 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 4, 130, 184 to 205; 63 Am. Jur. 2d Public Officers and Employees §§ 362, 363, 373.

Validity of contract exempting municipality from liability for negligence, 41 A.L.R. 1358.

Municipal immunity from liability for torts, 120 A.L.R. 1376, 60 A.L.R.2d 1198.

Constitutionality of statute which relieves municipality from liability for torts, 124 A.L.R. 350.

Validity and construction of legislation conferring personal immunity on public officers or employees for acts in course of duty, 163 A.L.R. 1435.

Right of contractor with federal, state or local public body to latter's immunity from tort liability, 9 A.L.R.3d 382.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning, 33 A.L.R.3d 703.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R.3d 778.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody, 12 A.L.R.4th 722.

State's liability to one injured by improperly licensed driver, 41 A.L.R.4th 111.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit, 43 A.L.R.4th 19.

Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Official immunity of state national guard members, 52 A.L.R.4th 1095.

Liability of school authorities for hiring or retaining incompetent or otherwise unsuitable teacher, 60 A.L.R.4th 260.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody, 60 A.L.R.4th 942.

Liability of operator of ambulance service for personal injuries to person being transported, 68 A.L.R.4th 14.

Municipal liability for negligent fire inspection and subsequent enforcement, 69 A.L.R.4th 739.

Immunity of public officials from personal liability in civil rights actions brought by public employees under 42 USCS § 1983, 63 A.L.R. Fed. 744.

Failure of state or local government to protect child abuse victim as violation of federal constitutional right, 79 A.L.R. Fed. 514.

81A C.J.S. States § 196 to 202.

41-4-5. Liability; operation or maintenance of motor vehicles, aircraft and watercraft.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft.

History: 1953 Comp., § 5-14-5, enacted by Laws 1976, ch. 58, § 5; 1977, ch. 386, § 4.

"Maintenance of motor vehicles" construed. - The "maintenance of motor vehicles" connotes the act of keeping them safe for public use. Certainly, burning of automobiles is inconsistent with this concept. McCurry v. City of Farmington, 97 N.M. 728, 643 P.2d 292 (Ct. App. 1982).

Operation of school bus. - Neither the adoption and enforcement of regulations to govern the design and operation of school buses, nor the design, planning and enforcement of safety rules for school bus transportation, fall within the meaning of "operation" of a motor vehicle, for purposes of this section. Chee Owens v. Leavitts Freight Serv., Inc., 106 N.M. 512, 745 P.2d 1165 (Ct. App. 1987).

The fact that a school district may be immune from liability for alleged improper design, planning and enforcement of school bus transportation procedures does not mean it is

immune if one of its drivers negligently operates a bus. Chee Owens v. Leavitts Freight Serv., Inc., 106 N.M. 512, 745 P.2d 1165 (Ct. App. 1987).

A bus driver, who pulled off the pavement of a highway, across which a child, while attempting to board the bus, ran before being struck by a truck, may have been negligent. Causal connection between the accident and the defendant's action was not resolved and summary judgment in favor of the defendant was improper. Chee Owens v. Leavitts Freight Serv., Inc., 106 N.M. 512, 745 P.2d 1165 (Ct. App. 1987).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 236, 577.

Responsibility of public officer for negligence of subordinate in operation of vehicle, 3 A.L.R. 149.

Criminal or penal responsibility of public officer or employee for violating speed regulation, 9 A.L.R. 367.

Personal liability of public official for personal injury on highway, 40 A.L.R. 39, 57 A.L.R. 1037.

"Motor vehicle" or the like within statute waiving governmental immunity as to operation of such vehicle, 77 A.L.R.2d 945.

Nonuse of automobile seatbelts as evidence of comparative negligence, 95 A.L.R.3d 239.

Liability for civilian skydiver's or parachutist's injury or death, 95 A.L.R.3d 1280.

Municipal or state liability for injuries resulting from police roadblocks or commandeering of private vehicles, 19 A.L.R.4th 937.

Admiralty jurisdiction: maritime nature of tort-modern cases, 80 A.L.R. Fed. 105.

60 C.J.S. Motor Vehicles § 14; 60A C.J.S. Motor Vehicles § 428.

41-4-6. Liability; buildings, public parks, machinery, equipment and furnishings.

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

History: 1953 Comp., § 5-14-6, enacted by Laws 1976, ch. 58, § 6; 1977, ch. 386, § 5.

Purpose of section. - This section contemplates waiver of immunity where, due to the alleged negligence of public employees, an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government. Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App. 1988).

Claim alleging unconstitutional activities. - In a suit under this article, the individual defendants (state officials) were not stripped of immunity by their alleged unauthorized, unconstitutional activities. Any claim that an individual was not acting within the scope of his duties is not a claim under this article. Gallegos v. State, 107 N.M. 349, 758 P.2d 299 (Ct. App. 1987).

Operation or maintenance of buildings. - The department of corrections was not a proper defendant in a wrongful death suit arising out of the escape of state prisoners, who killed a store owner during a robbery, since the injury alleged did not occur due to a physical defect in a building, as contemplated by this section. Wittkowski v. State, Cors. Dep't, 103 N.M. 526, 710 P.2d 93 (Ct. App. 1985), overruled on other grounds Wittkowski v. State, Cors. Dep't, 103 N.M. 526, 710 P.2d 93 (Ct. App. 1985).

The "maintenance of any building" includes keeping the grounds of a public housing project safe from unreasonable risk of harm to its residents and invitees. Castillo v. County of Santa Fe, 107 N.M. 204, 755 P.2d 48 (1988).

Waiver of immunity under this section applies to maintenance of school grounds as well as to the school building itself. Schleft v. Board of Educ., 109 N.M. 271, 784 P.2d 1014 (Ct. App. 1989).

While this section may appropriately be termed a "premises liability" statute, the liability envisioned by the statute is not limited to claims caused by injuries occurring on or off a certain "premises," as the words "machinery" and "equipment" reveal. Moreover, liability is predicated not only on "maintenance" of a piece of publicly owned property, such as a building, park, or item of machinery or equipment, but it also arises from the "operation" of any such property. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

Unsafe, dangerous or defective property conditions. - The waiver of immunity under this section may arise from an unsafe, dangerous, or defective condition on property

owned and operated by the government. Castillo v. County of Santa Fe, 107 N.M. 204, 755 P.2d 48 (1988).

This section probably waives immunity where, due to public employee negligence, an injury arises from an unsafe, dangerous or defective condition of governmental property. 1990 Op. Att'y Gen. No. 90-13.

Negligent design claims. - This section does not waive immunity for a plaintiff's claims of negligent design. Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App. 1988).

Operation of canals and ditches by irrigation district immune. - This section does not waive immunity for the operation of canals and ditches by an irrigation district. Tompkins v. Carlsbad Irrigation Dist., 96 N.M. 368, 630 P.2d 767 (Ct. App. 1981).

State fairground constituted a "building or public park" the negligent operation or maintenance of which, if it led to an unsafe or dangerous condition on the property, would give rise to liability under this section. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

State fair was not immune from liability under the Tort Claims Act for injuries sustained by a passenger in an automobile involved in an accident arising from a large number of cars exiting the fairgrounds onto a city street following a rock concert held on state fairground premises leased by concert promoter. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

Negligent maintenance of equipment may include failure to act. Rickerson v. State, 94 N.M. 473, 612 P.2d 703 (Ct. App. 1980).

Placement of signals and signs. - Where the plaintiff's allegations, in large part, concern the placement of signals and signs, the state of New Mexico does not enjoy immunity for such decisions, and whether signs or signals were necessary is a question for the jury. Blackburn v. State, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982).

Fire trucks and all pertinent equipment could be included in the phrase "machinery, equipment and furnishings." McCurry v. City of Farmington, 97 N.M. 728, 643 P.2d 292 (Ct. App. 1982).

Inspection of foods and food processing. - The waiver of immunity for the negligence of public employees in the operation or maintenance of any building does not include the inspections of foods and food manufacturing or processing operations. Martinex v. Kaune Corp., 106 N.M. 489, 745 P.2d 714 (Ct. App. 1987).

Prisoner's suit for injuries caused by other inmates. - In a suit brought by a former penitentiary inmate for damages resulting from injuries sustained when he was assaulted by other inmates, the state was not liable under the doctrine of respondeat superior. If immunity had been waived, the particular agency that caused the harm (i.e.,

the corrections department) could have been held liable for the negligent act or omission of its public employees, but not the state. Gallegos v. State, 107 N.M. 349, 758 P.2d 299 (Ct. App. 1987).

This section did not provide a waiver of immunity for a claim by a former inmate, that he was injured by a mop wringer wielded by another inmate. No claim was made that any physical defect existed with the mop wringer or that a defect caused the plaintiff's injuries. Gallegos v. State, 107 N.M. 349, 758 P.2d 299 (Ct. App. 1987).

Student's negligent supervision suit disallowed. - This section does not provide a remedy for an injured student to sue a school board on the theory of negligent supervision. Pemberton v. Cordova, 105 N.M. 476, 734 P.2d 254 (Ct. App. 1987).

Summary judgment in favor of state police was affirmed in the case of an automobile passenger's action for injuries sustained in a traffic accident following a rock concert, in the absence of any allegations giving rise to a duty on the part of the state police to exercise ordinary care for the passenger's safety. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

Loose dogs as unsafe condition. - Under the right circumstances, dogs roaming loose upon the common grounds of a government-operated residential complex could represent an unsafe condition. Castillo v. County of Santa Fe, 107 N.M. 204, 755 P.2d 48 (1988).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For annual survey 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, County, School, and State Tort Liability §§ 125, 126, 274 et seq.; 59 Am. Jur. 2d Parks, Squares, and Playgrounds §§ 43 to 56.

Governmental liability from operation of zoo, 92 A.L.R.3d 832.

Liability of university, college, or other school for failure to protect student from crime, 1 A.L.R.4th 1099.

Liability to one struck by golf ball, 53 A.L.R.4th 282.

State's liability for personal injuries from criminal attack in state park, 59 A.L.R.4th 1236.

Liability to one struck by golf club, 63 A.L.R.4th 221.

Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.

67 C.J.S. Officers and Public Employees § 208.

41-4-7. Liability; airports.

A. The immunity granted pursuant to Subsection A of Section 4 [41-4-4 NMSA 1978] of the Tort Claims Act does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of airports.

B. The liability imposed pursuant to Subsection A of this section shall not include liability for damages due to the existence of any condition arising out of compliance with any federal or state law or regulation governing the use and operation of airports.

History: 1953 Comp., § 5-14-7, enacted by Laws 1976, ch. 58, § 7.

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability for civilian skydiver's or parachutist's injury or death, 95 A.L.R.3d 1280.

41-4-8. Liability; public utilities.

A. The immunity granted pursuant to Subsection A of Section 4 [41-4-4 NMSA 1978] of the Tort Claims Act does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of the following public utilities and services: gas; electricity; water; solid or liquid waste collection or disposal; heating; and ground transportation.

B. The liability imposed pursuant to Subsection A of this section shall not include liability for damages resulting from bodily injury, wrongful death or property damage:

(1) caused by a failure to provide an adequate supply of gas, water, electricity or services as described in Subsection A of this section; or

(2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

History: 1953 Comp., § 5-14-8, enacted by Laws 1976, ch. 58, § 8.

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

"Operation" of public utilities and services. - The inspection by a city of a private sewer clean-out at the time of its initial construction is not part of the "operation" of a liquid waste collection or disposal utility for the purposes of Subsection A and is not activity for which sovereign immunity is waived. Adams v. Japanese Car Care, 106 N.M. 376, 743 P.2d 635 (Ct. App. 1987).

Fire department is not a public utility, and the legislature intended the application of this section only to public utilities. McCurry v. City of Farmington, 97 N.M. 728, 643 P.2d 292 (Ct. App. 1982).

No exemption from liability for negligent maintenance of service facility. - If the city negligently maintains an adequate service facility provided by it, that negligence has no statutory exemption from liability. Holiday Mgt. Co. v. City of Santa Fe, 94 N.M. 368, 610 P.2d 1197 (1980).

Nor where bicycle wheel slipped through drain grate on bicycle path. - City is not immune from suit brought for personal injuries sustained where front wheel of bicycle slipped through drain grate located in road designated as bicycle path. City of Albuquerque v. Redding, 93 N.M. 757, 605 P.2d 1156 (1980).

Negligent maintenance of gas service. - If a city negligently maintains a gas service provided by it beyond the statutorily prescribed five-mile limit, that negligence is actionable and there exists no sovereign immunity to shield it from liability under the Tort Claims Act. Cole v. City of Las Cruces, 99 N.M. 302, 657 P.2d 629 (1983).

Law reviews. - For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

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. - Liability of gas or electric light or power company for injury to fireman, policeman or other public employee seeking to prevent damage to person or property of others, 61 A.L.R. 1028.

Liability for overflow of water confined or diverted for public water purposes, 91 A.L.R.3d 1065.

Liability for injury or death resulting when object is manually brought into contact with, or close proximity to, electric line, 33 A.L.R.4th 809.

41-4-9. Liability; medical facilities.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities.

History: 1953 Comp., § 5-14-9, enacted by Laws 1976, ch. 58, § 9; 1977, ch. 386, § 6.

Activities of animal control center not within scope of section. - Activities of an animal control center do not fall within this exception to the governmental immunity granted to a city. Redding v. City of Truth or Consequences, 102 N.M. 226, 693 P.2d 594 (Ct. App. 1984).

Operation of facility by department of health. - Health and environment department's (now department of health's) regulation of a community mental health facility did not constitute operation of the facility within the meaning of this section, where the department did not step into the clinical decision-making process of the facility. Armijo v. Department of Health & Env't, 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

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 private, noncharitable hospital or sanitarium for improper care or treatment of patients, 22 A.L.R. 341, 39 A.L.R. 1431, 124 A.L.R. 186.

Liability of hospital maintained at expense of state or a political subdivision for torts of its officers or employees, 25 A.L.R.2d 203.

Hospital's liability for patient's injury or death as result of fall from bed, 9 A.L.R.4th 149.

Liability for wrongful autopsy, 18 A.L.R.4th 858.

Hospital's liability for mentally deranged patient's self-inflicted injuries, 36 A.L.R.4th 117.

Hospital's liability for patient's injury or death resulting from escape or attempted escape, 37 A.L.R.4th 200.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A.L.R.4th 235.

Medical malpractice: hospital's liability for injury allegedly caused by failure to have properly qualified staff, 62 A.L.R.4th 692.

Liability for injury or death allegedly caused by activities of hospital "rescue team", 64 A.L.R.4th 1200.

Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

14 C.J.S. Charities § 66; 20 C.J.S. Counties § 184.

41-4-10. Liability; health care providers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees licensed by the state or permitted by law to provide health care services while acting within the scope of their duties of providing health care services.

History: 1953 Comp., § 5-14-10, enacted by Laws 1976, ch. 58, § 10; 1977, ch. 386, § 7; 1978, ch. 166, § 2.

"Public employees". - Employees at a community mental health facility regulated by the health and environment department (now department of health) were not "public employees" within the meaning of the Tort Claims Act, where the regulatory scheme did not give the department the right to control the details of the work of the facility. Armijo v. Department of Health & Env't, 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Hospitals §§ 15, 38.

Liability of private, noncharitable hospital or sanitarium for improper care or treatment of patients, 22 A.L.R. 341, 39 A.L.R. 1431, 124 A.L.R. 186.

Liability of hospitals maintained at expense of state or a political subdivision for torts of its officers or employees, 25 A.L.R.2d 203.

Governmental tort liability for injuries caused by negligently released individual, 6 A.L.R.4th 1155.

Liability for wrongful autopsy, 18 A.L.R.4th 858.

Physician's liability to third person for prescribing drug to known drug addict, 42 A.L.R.4th 586.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A.L.R.4th 235.

Liability for injury or death allegedly caused by activities of hospital "rescue team", 64 A.L.R.4th 1200.

Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

14 C.J.S. Charities § 66; 20 C.J.S. Counties § 184.

41-4-11. Liability; highways and streets.

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

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

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

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

(3) a deviation from standard geometric design practices for any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area allowed on a case-by-case basis for appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical reasons, provided the deviation:

(a) is required by extraordinary circumstances;

(b) has been approved by the governing authority; and

(c) is reasonable and necessary as determined by the application of sound engineering principles taking into consideration the appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical circumstances.

History: 1953 Comp., § 5-14-11, enacted by Laws 1976, ch. 58, § 11; 1977, ch. 386, § 8; 1991, ch. 205, § 2.

The 1991 amendment, effective July 1, 1991, in Subsection A, substituted "41-4-4 NMSA 1978" for "14-4 NMSA 1953" and substituted "duties during the construction, and in subsequent maintenance of any bridge" for "duties in the maintenance of or for the existence of any bridge"; and, in Subsection B, added Paragraph (3) and made a related stylistic change.

Purpose of waiver of sovereign immunity in maintenance of highways is to protect the public. Fireman's Fund Ins. Co. v. Tucker, 95 N.M. 56, 618 P.2d 894 (Ct. App. 1980).

"Maintenance" as used in this section means upkeep and repair. 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); Smith v. Village of Corrales, 103 N.M. 734, 713 P.2d 4 (Ct. App. 1985).

Department of Transportation's (DOT) issuance of oversize-vehicle permits may have a bearing upon the proper "maintenance" of a highway for the purposes of Subsection A; and, therefore, any alleged negligent conduct of DOT in authorizing oversize loads traveling over New Mexico highways deprives DOT of the defense of immunity by reason of this section. Miller v. New Mexico Dep't of Transp., 106 N.M. 253, 741 P.2d 1374 (1987).

Absence of guardrail is defect in design, not maintenance. Moore v. State, 95 N.M. 300, 621 P.2d 517 (Ct. App. 1980).

Negligent maintenance of barrier not "plan" nor "design". - Negligent maintenance of a barrier, consisting of posts and a cable, across a service road is neither a "plan" nor "design" within the meaning of Subsection B. O'Brien v. Middle Rio Grande Conservancy Dist., 94 N.M. 562, 613 P.2d 432 (Ct. App. 1980).

Placement of signals and signs. - Where the plaintiff's allegations, in large part, concern the placement of signals and signs, the state of New Mexico does not enjoy immunity for such decisions, and whether signs or signals were necessary is a question for the jury. Blackburn v. State, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982).

The absence of traffic controls is a condition of a highway and is, therefore, the subject of maintenance, and the state is not immune from liability. Grano v. Roadrunner Trucking, Inc., 99 N.M. 227, 656 P.2d 890 (Ct. App. 1982).

Liability of flood control authority for road obstruction. - Placing a steel cable across a service road to prevent public travel on the road is more than the governmental activity of regulating the use of the road through traffic control devices, it is the placing of an obstruction in the service road, a proprietary activity for which Albuquerque metropolitan arroyo flood control authority is liable. A municipality is liable for the negligent failure to keep its streets in a reasonably safe condition. Gallagher v. Albuquerque Metro. Arroyo Flood Control Auth., 90 N.M. 309, 563 P.2d 103 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Waiver of immunity extends to private service roads. - Waiver of immunity for negligence in the maintenance of a roadway is not limited to a public roadway, but includes a private service road. O'Brien v. Middle Rio Grande Conservancy Dist., 94 N.M. 562, 613 P.2d 432 (Ct. App. 1980).

And it includes negligence in maintenance of highway fences. Fireman's Fund Ins. Co. v. Tucker, 95 N.M. 56, 618 P.2d 894 (Ct. App. 1980).

And maintenance of culvert. - This section waives immunity for the negligent maintenance of a culvert by an irrigation district. Tompkins v. Carlsbad Irrigation Dist., 96 N.M. 368, 630 P.2d 767 (Ct. App. 1981).

Notice of bridge fire not imputed. - Although deputy sheriff had received actual notice of the bridge fire prior to plaintiff's accident, he had no official responsibility to receive or relay notice of the fire to the officials charged with the duty of maintenance of county highways or roads. Thus, actual notice to the deputy sheriff could not have been actual notice to the board of county commissioners of Valencia county. Sanchez v. Board of County Comm'rs, 81 N.M. 644, 471 P.2d 678 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

State fair was not immune from liability under the Tort Claims Act for injuries sustained by a passenger in an automobile involved in an accident arising from a large number of cars exiting the fairgrounds onto a city street following a rock concert held on state fairground premises leased by concert promoter. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

Expert testimony regarding dangerous road condition. - Trial court did not abuse its discretion in allowing expert testimony concerning allegedly dangerous road conditions in the case of a single car collision. In such a case, a twofold inquiry is called for: (1) what was the plan or design of the roadway; and (2) did the evidence concern itself solely with that plan or design. Romero v. State, 112 N.M. 332, 815 P.2d 628 (1991).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

For annual survey 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. - 39 Am. Jur. 2d Highways, Streets, and Bridges §§ 104 to 106, 111, 112, 119, 341 to 350, 552; 40 Am. Jur. 2d Highways, Streets and Bridges § 615; 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 232, 326 to 331.

Liability of municipality for injury to traveler in alley, 44 A.L.R. 814, 48 A.L.R. 434.

Snow removal operations as within doctrine of governmental immunity from tort liability, 92 A.L.R.2d 796.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R.3d 778.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from ice or snow on surface of highway or street, 97 A.L.R.3d 11.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from failure to repair pothole in surface of highway or street, 98 A.L.R.3d 101.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from defect or obstruction on roadside parkway or parking strip, 98 A.L.R.3d 439.

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.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge, 2 A.L.R.4th 635.

Liability, in motor vehicle-related cases, of governmental entity for injury, death or property damage resulting from defect or obstruction in shoulder of street or highway, 19 A.L.R.4th 532.

Governmental liability for failure to post highway deer crossing warning signs, 54 A.L.R.4th 1217.

Governmental tort liability as to highway median barriers, 58 A.L.R.4th 559.

Governmental tort liability for injury to roller skater allegedly caused by sidewalk or street defects, 58 A.L.R.4th 1197.

Legal aspects of speed bumps, 60 A.L.R.4th 1249.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 A.L.R.4th 204.

41-4-12. Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

History: 1953 Comp., § 5-14-12, enacted by Laws 1976, ch. 58, § 12; 1977, ch. 386, § 9.

Act's modification of common law requires act's strict construction. - Since the Tort Claims Act is in derogation of a plaintiff's common-law rights to sue governmental employees for negligence, the act is to be strictly construed insofar as it modifies the common law. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

So right to sue and recover under this act is limited to the rights, procedures, limitations and conditions prescribed in the act. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

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. Cross v. City of Clovis, 107 N.M. 251, 755 P.2d 589 (1988).

Although a law enforcement officer or agency may be held liable under this section for negligently causing infliction of one of the predicate torts, simple negligence in the performance of a law enforcement officer's duty does not amount to commission of one of the torts listed in the section. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

Summary judgment in favor of state police was affirmed in the case of an automobile passenger's action for injuries sustained in a traffic accident following a rock concert, in the absence of any allegations giving rise to a duty on the part of the state police to exercise ordinary care for the passenger's safety. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

Liability will not attach until all elements of negligence have been proved, including duty, breach of duty and proximate cause. Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

"Caused by" similar to "proximate cause". - The words "caused by," as used in this section, do not differ significantly from the usual meaning of proximate cause found in ordinary negligence cases. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

County sheriff, deputies and jailers deemed "law enforcement officers." - Eddy county sheriff, his deputies and jailers employed by the city of Albuquerque who performed services in or held in custody plaintiffs incarcerated in the Bernalillo and Eddy county jails are "law enforcement officers," bringing them within the purview of this section. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Concurrent torts of other governmental entities. - This section does not provide a waiver of immunity for concurrent torts of all governmental entities when a police officer causes an occurrence for which immunity of a law enforcement agency is waived. California First Bank v. State, 111 N.M. 64, 801 P.2d 646 (1990).

Wrongful execution of writ. - The facial validity of a writ of restitution protects the executing officers from liability. Runge v. Fox, 110 N.M. 447, 796 P.2d 1143 (Ct. App. 1990).

Liability for inadequate response to reported criminal act. - A governmental entity and its law enforcement officers may be held liable for negligently failing, after receiving notice, to take adequate action to protect a citizen from imminent danger and injury and for failing to adopt proper procedures for responding to, and investigating, reported criminal acts. Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

Liability for violent assault. - Where deputy town marshal, acting upon order of mayor, committed violent assault upon plaintiff using more force than circumstances warranted, the town was not liable in damages since mayor exceeded his authority and ceased to act in behalf of the town. Salazar v. Town of Bernalillo, 62 N.M. 199, 307 P.2d 186 (1956).

Negligent training and supervision by superiors. - When personal injury results from a violation by subordinate officers of rights secured by the constitution or laws of the United States or New Mexico or from commission of certain torts specified in this section, then the Tort Claims Act waives immunity for negligent supervision or training by superior law enforcement officers that proximately causes the violation. However, that immunity is not waived for negligent training and supervision standing alone; such negligence must cause a tort specified in this section or violation of rights. McDermitt v. Corrections Corp. of Am., N.M. , 814 P.2d 115 (Ct. App. 1991).

The Tort Claims Act does not provide immunity to law enforcement officers whose negligent supervision and training of their subordinates proximately causes the commission by those subordinates of the torts of assault, battery, false arrest, and malicious prosecution. Ortiz v. New Mexico State Police, 112 N.M. 249, 814 P.2d 117 (Ct. App. 1991).

Sheriff, who was a defendant in a case involving a fatal shooting by a deputy, was not immune from liability for negligently failing to train or supervise his employees. Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991).

Emotional distress. - The Tort Claims Act does not waive the immunity of law enforcement officers for intentional infliction of emotional distress standing alone as a common-law tort. Damages for emotional distress, however, may be recoverable as damages for "personal injury" resulting from one of the enumerated acts. Romero v. Otero, 678 F. Supp. 1535 (D.N.M. 1987).

Negligent release of criminal suspect. - Plaintiff's complaint, claiming personal injuries and damages resulting from her rape by a criminal suspect following his allegedly negligent release from a detention center, stated a cause of action against the city which operated the center and against the center director. Abalos v. Bernalillo County Dist. Att'y Office, 105 N.M. 554, 734 P.2d 794 (Ct. App. 1987).

Negligent failure to apprehend drunk driver. - Allegations in a complaint that sheriff deputies failed to apprehend a drunk driver or investigate a tavern disturbance and that this failure proximately caused personal injury to the plaintiff's family, sufficed to state a cause of action for negligent violation of a right secured under New Mexico law for which this section waives sovereign immunity. California First Bank v. State, 111 N.M. 64, 801 P.2d 646 (1990).

Effect of exceeding official duties. - When an officer exceeds his official duties and makes an arrest without authority of the municipality or in execution of orders thereof, he ceases to act in behalf of the city and assumes the entire responsibility himself. Stull v. City of Tucumcari, 88 N.M. 320, 540 P.2d 250 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

No distinction shall be drawn with regard to "public" or "special" duty of governmental employees whose immunity to suit for acts of negligence has been excepted under this article. Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

Tort recognized as separate and distinct from constitutional deprivation. - The New Mexico legislature recognizes that a tort is separate and distinct from a constitutional deprivation. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Similarity to § 1983 action. - Under New Mexico law, the most closely analogous state cause of action for a federal civil rights cause of action under 42 U.S.C. § 1983 is provided for in this section. The statute of limitations applicable to such a cause of action is set forth in 41-4-15 NMSA 1978. DeVargas v. State ex rel. New Mexico Dep't of Cors., 97 N.M. 563, 642 P.2d 166 (1982).

Institution of suit invokes applicability of established law of negligence and damages. - In the event a suit is instituted as permitted and limited by this section, the

established law of negligence and damages shall apply to the claims as well as to all defenses which may be available to the defendants in those suits. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Secretary of corrections is not a law enforcement officer within the meaning of this section as defined in 41-4-3D NMSA 1978. Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

Negligence of city police officers in maintaining a police roadblock was a question for the jury, and the jury reasonably could have found that the officers' failure to keep a proper lookout and failure to warn proximately caused the death of one in the zone of the danger in question. Cross v. City of Clovis, 107 N.M. 251, 755 P.2d 589 (1988).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For note, "Federal Civil Rights Act - The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: DeVargas v. State ex rel. New Mexico Department of Corrections," see 13 N.M.L. Rev. 555 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 177 to 182, 428 to 481.

Liability of governmental unit or its officers for injury to innocent pedestrian or occupant of parked vehicle, or for damage to such vehicle, as result of police chase, 100 A.L.R.3d 815.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damage to such vehicle, as result of police chase, 4 A.L.R.4th 865.

Governmental tort liability for injuries caused by negligently released individual, 6 A.L.R.4th 1155.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody, 12 A.L.R.4th 722.

Liability of governmental unit for intentional assault by employee other than police officer, 17 A.L.R.4th 881.

Liability of governmental unit for injuries caused by driver of third vehicle to person whose vehicle had been stopped by police car, 17 A.L.R.4th 897.

Municipal or state liability for injuries resulting from police roadblocks or commandeering of private vehicles, 19 A.L.R.4th 937.

Liability for failure of police response to emergency call, 39 A.L.R.4th 691.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 A.L.R.4th 705.

Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Failure to restrain drunk driver as ground of liability of state or local government unit or officer, 48 A.L.R.4th 320.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Construction and application of Federal Tort Claims Act provision (28 U.S.C.S. § 2608(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 43 A.L.R. Fed. 571.

Failure of state or local government to protect child abuse victim as violation of federal constitutional right, 79 A.L.R. Fed. 514.

Applicability of libel and slander exception to waiver of sovereign immunity under Federal Tort Claims Act (28 USCS § 2680(h)), 79 A.L.R. Fed. 826.

41-4-13. Exclusions from waiver of immunity; community ditches or acequias; Sanitary Projects Act associations.

All community ditches or acequias and all associations created pursuant to the Sanitary Projects Act [3-29-1 to 3-29-19 NMSA 1978] are hereby excluded from the waiver of immunity of liability under Sections 41-4-6 through 41-4-12 NMSA 1978.

History: 1953 Comp., § 5-14-12.1, enacted by Laws 1977, ch. 386, § 10.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 338 to 427.

41-4-14. Defenses.

A governmental entity and its public employees may assert any defense available under the law of New Mexico.

History: 1953 Comp., § 5-14-13, enacted by Laws 1976, ch. 58, § 13.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 151 to 157, 668.

41-4-15. Statute of limitations.

A. Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

B. The provisions of Subsection A of this section shall not apply to any occurrence giving rise to a claim which occurred before July 1, 1976.

History: 1953 Comp., § 5-14-14, enacted by Laws 1976, ch. 58, § 14; 1977, ch. 386, § 11.

Constitutionality. - The failure of this section to provide a tolling provision for persons under a legal disability with claims against governmental entities does not violate the right of a mentally handicapped plaintiff to equal protection of the laws. Jaramillo v. State, 111 N.M. 722, 809 P.2d 636 (Ct. App. 1991).

The two-year time period of limitations under this section is a reasonable period of time and does not violate a plaintiff's rights to due process. Jaramillo v. State, 111 N.M. 722, 809 P.2d 636 (Ct. App. 1991).

Section inapplicable to federal civil rights action. - An action under 42 U.S.C. § 1983 for excessive use of force during an arrest is not governed by the limitations on actions contained in this section but by the general statutory limitations on actions for personal injury, 37-1-8 NMSA 1978, or for miscellaneous claims, 37-1-4 NMSA 1978. Gunther v. Miller, 498 F. Supp. 882 (D.N.M. 1980).

Under New Mexico law, the most closely analogous state cause of action for a federal civil rights cause of action under 42 U.S.C. § 1983 is provided for under 41-4-12 NMSA 1978. The statute of limitations applicable to such a cause of action is set forth in this section. DeVargas v. State ex rel. New Mexico Dep't of Cors., 97 N.M. 563, 642 P.2d 166 (1982).

Since claims under 42 U.S.C. § 1983 are in essence actions to recover for injury to personal rights, 37-1-8 NMSA 1978, not this section, provides the appropriate limitations

period. Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, 471 U.S. 261, 101 S. Ct. 1938, 85 L. Ed. 254 (1985).

For New Mexico, the United States Supreme Court has identified 37-1-8 NMSA 1978, governing the right to recover for injury to personal rights, as the relevant limitations statute in civil rights cases under 42 U.S.C. § 1983 as a matter of federal law. The court specifically rejected this section's statute of limitations applicable for wrongs committed by public officals. Walker v. Maruffi, 105 N.M. 763, 737 P.2d 544 (Ct. App. 1987).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - This section, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

The limitation period commences when an injury manifests itself and is ascertainable, rather than when the wrongful or negligent act occurs. Long v. Weaver, 105 N.M. 188, 730 P.2d 491 (Ct. App. 1986).

An incident does not give rise to a claim until the resulting injury manifests itself in a physically objective manner and is ascertainable. Until these factors are established, the question of fraudulent concealment need not be addressed. Long v. Weaver, 105 N.M. 188, 730 P.2d 491 (Ct. App. 1986).

Where plaintiff fell in a ditch and broke her ankle on December 6, 1987, and it was certain at that time that she had suffered an injury as a consequence of the alleged wrongful act of another for which the law afforded a remedy, the statute of limitations attached. The fact that the full extent of the injury was not known did not affect the running of the statute of limitations. Bolden v. Village of Corrales, 111 N.M. 721, 809 P.2d 635 (Ct. App. 1990).

It is not required that all the damages resulting from the negligent act be known before the statute of limitations begins to run. Once plaintiff suffers loss or injury, the statute begins to run. Bolden v. Village of Corrales, 111 N.M. 721, 809 P.2d 635 (Ct. App. 1990).

Once loss occurs, limitation period begins. - Until an occurrence resulting in loss takes place, the statute of limitations cannot begin to run. Aragon & McCoy v. Albuquerque Nat'l Bank, 99 N.M. 420, 659 P.2d 306 (1983).

Time for giving notice in medical malpractice action is calculated from the time the injury manifests itself in a physically objective manner and is ascertainable. Tafoya v. Doe, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983).

If governmental entity creates condition that causes injury, notice is still required of a claim for damages: Section 41-4-16 NMSA 1978, the notice provision, operates in conjunction with this section on the issue of a timely claim. Tafoya v. Doe, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983).

No relation back. - Where an amended complaint seeks damages against the state, the department of corrections and its employees under the Tort Claims Act, and where the original complaint is a nullity, there is no relation back. DeVargas v. State ex rel. New Mexico Dep't of Cors., 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981).

Relation back of amendments. - An action for malpractice and wrongful death brought under the Tort Claims Act by the natural parents of a deceased girl within the limitation period was not barred because the parents failed to secure court appointment as personal representatives within the two-year limitation period of this section, due to the operation of Rules 15(c) (relation back of amendments) and 17(a) (real party in interest), N.M.R.C.P., (now see Paragraph C of Rule 1-015 and Paragraph A of Rule 1-017). Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Minority exception under Subsection A applies only to living minors. Regents of Univ. of N.M. v. Armijo, 103 N.M. 174, 704 P.2d 428 (1985).

General savings provision inapplicable. - The general savings provision of 37-1-14 NMSA 1978, which protects from limitations a new suit filed within six months after dismissal of a prior suit, does not apply to action under this article. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

No equitable tolling while federal jurisdiction asserted. - Principles of equitable tolling did not apply to an action under this article during the time the claim was being asserted on the basis of pendent jurisdiction in a federal court. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

Law reviews. - For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

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

For note, "Federal Civil Rights Act - The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: DeVargas v. State ex rel. New Mexico Department of Corrections," see 13 N.M.L. Rev. 555 (1983).

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

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - What statute of limitations governs actions based on strict liability in tort, 91 A.L.R.3d 455.

Liability of hotel or motel operator for injury or death resulting to guest from defects in furniture in room or suite, 91 A.L.R.3d 483.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844.

41-4-16. Notice of claims.

A. Every person who claims damages from the state or any local public body under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality, the superintendent of the school district for claims against the school district, the county clerk of a county for claims against the county, or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

C. When a claim for which immunity has been waived under the Tort Claims Act is one for wrongful death, the required notice may be presented by, or on behalf of, the personal representative of the deceased person or any person claiming benefits of the proceeds of a wrongful death action, or the consular officer of a foreign country of which the deceased was a citizen, within six months after the date of the occurrence of the injury which resulted in the death; but if the person for whose death the claim is made has presented a notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

History: 1953 Comp., § 5-14-14.1, enacted by Laws 1977, ch. 386, § 12.

Due process. - The notice requirement is not unreasonably short, thus not constituting a denial of due process. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

The period of giving notice does not deny an incapacitated victim due process of law. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Section inapplicable to claims against public employees. - The language of the written notice section does not include, and therefore does not apply to, claims against public employees. Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 (Ct. App. 1980).

The written notice requirement of Subsection A does not apply to public employees, such as a mayor or a police chief. Frappier v. Mergler, 107 N.M. 61, 752 P.2d 253 (Ct. App. 1988).

Purpose of the notice requirement is four-fold: (1) to enable the person or entity to whom notice must be given, or its insurance company, to investigate the matter while the facts are accessible; (2) to question witnesses; (3) to protect against simulated or aggravated claims; and (4) to consider whether to pay the claim or to refuse it. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Contents of notice. - Subsection B does not require that the notice of a claim under this article indicate that a lawsuit will in fact be filed against the state, but, rather, it contemplates that the state must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it. Smith v. State ex rel. New Mexico Dep't of Parks & Recreation, 106 N.M. 368, 743 P.2d 124 (Ct. App. 1987).

To whom notice necessary. - In an action against the state park and recreation department, for its alleged negligence resulting in a boating accident and ensuing deaths, notice given to both the superintendent of the state park where the drownings occurred and to the boating supervisor at the park, satisfied the notice requirements specified in this section. Notice did not have to be given to the head of the department or its risk management division. Smith v. State ex rel. New Mexico Dep't of Parks & Recreation, 106 N.M. 368, 743 P.2d 124 (Ct. App. 1987).

The "actual notice" required by Subsection B is not simply actual notice of the occurrence of an accident or injury but rather, actual notice that there exists a "likelihood" that litigation may ensue. Frappier v. Mergler, 107 N.M. 61, 752 P.2d 253 (Ct. App. 1988).

Lack of notice relieving state from liability. - State was not responsible, under the Tort Claims Act, for paying a federal court judgment against a penitentiary guard when neither the state nor any of its agencies had notice of either the claim or of the federal court suit. Otero v. State, 105 N.M. 731, 737 P.2d 90 (Ct. App. 1987).

Notice begins to run when injury manifests itself. - Where the language of this section's notice provisions and the statute of limitations, 41-4-15 NMSA 1978, is similar, the rule that the statute of limitations period begins to run from the time an injury manifests itself in a physically objective manner and is ascertainable is an applicable precedent to the question of when, under the Tort Claims Act, notice begins to run. Emery v. University of N.M. Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981).

Notice defense may not be stricken as insufficient. - The notice defense accorded by this section is a defense under which a defendant may be entitled to relief against a plaintiff's claim and, thus, is not to be stricken as insufficient as a matter of law. Emery v. University of N.M. Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981).

Notice requirements of Subsections A and B may not be applied to bar infant's claim. One unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law and the U.S. Const., amend. XIV, or similar provisions in the state constitution. Tafoya v. Doe, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Notice to adjustor satisfies section. - Notice to an adjustor acting for his principal, and known to the claimant to be the adjustor for the principal, is sufficient notice to satisfy the statute requiring notice to the principal. Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 (Ct. App. 1980).

Report serves as notice if governmental entity made aware of claim. - Under some circumstances, a police or other report could serve as actual notice under Subsection B, but only where the report contains information which puts the governmental entity allegedly at fault on notice that there is a claim against it. City of Las Cruces v. Garcia, 102 N.M. 25, 690 P.2d 1019 (1984).

Notice provisions operate as statutes of limitations since they are conditions precedent to filing a suit. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

If governmental entity creates condition that causes injury, notice is still required of a claim for damages: this section operates in conjunction with 41-4-15 NMSA 1978, the statute of limitations section, on the issue of a timely claim. Tafoya v. Doe, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983).

Burden of proof that notice requirements not met. - It is the defendants' burden to sustain their defense that the notice requirements had not been met. Ferguson v. New Mexico State Hwy. Comm'n, 98 N.M. 718, 652 P.2d 740 (Ct. App. 1981), rev'd on other grounds, 98 N.M. 680, 652 P.2d 230 (1982).

Police accident report not "actual notice". - An accident report prepared by the New Mexico state police does not constitute "actual notice," within the meaning of Subsection B, to the state and to all state agencies. New Mexico State Hwy. Comm'n v. Ferguson, 98 N.M. 680, 652 P.2d 230 (1982).

Weight given statements made in workmen's compensation suits. - Since cases arising under the Tort Claims Act almost always present issues of first impression, statements made in workmen's compensation suits regarding the reason for notice should be accorded great weight. Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 (Ct. App. 1980).

Law reviews. - For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

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

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. - 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 680, 719, 737, 760, 773, 776, 782.

Attorney's mistake or neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit, 55 A.L.R.3d 930.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury - modern status, 7 A.L.R.4th 1063.

Local government tort liability: minority status as affecting notice of claim requirement, 58 A.L.R.4th 402.

Insufficiency of notice of claim against municipality as regards statement of place where accident occurred, 69 A.L.R.4th 484.

63 C.J.S. Municipal Corporations §§ 922 to 930; 81A C.J.S. States § 310.

41-4-16.1. Civil action; damages incurred while imprisoned; notice to victim.

Upon the filing of a civil action by an individual or his personal representative against the state for damages incurred while imprisoned in a state corrections facility, the district court clerk shall issue notice of the filing of that action to the corrections and criminal rehabilitation department [corrections department] which shall forward a copy of the notice to the victim of the crime for which that individual was imprisoned. If the civil action is filed in a federal forum, the individual or personal representative shall issue the required notice to the department.

History: Laws 1981, ch. 117, § 1.

Corrections and criminal rehabilitation department. - The corrections and criminal rehabilitation department, referred to in the first sentence, was renamed as the corrections department by Laws 1981, ch. 73, § 3. See 9-3-3 NMSA 1978.

Law reviews. - For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

41-4-17. Exclusiveness of remedy.

A. The Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim. No rights of a governmental entity to contribution, indemnity or subrogation shall be impaired by this section, except a governmental entity or any insurer of a governmental entity shall have no right to contribution, indemnity or subrogation against a public employee unless the public employee has been found to have acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death, property damage or violation of rights, privileges or immunities secured by the constitution and laws of the United States or laws of New Mexico resulting in the settlement or final judgment. Nothing in this section shall be construed to prohibit any proceedings for mandamus, prohibition, habeas corpus, certiorari, injunction or quo warranto.

B. The settlement or judgment in an action under the Tort Claims Act shall constitute a complete bar to any action by the claimant, by reason of the same occurrence against a governmental entity or the public employee whose negligence gave rise to the claim.

C. No action brought pursuant to the provisions of the Tort Claims Act shall name as a party any insurance company insuring any risk for which immunity has been waived by that act.

History: 1953 Comp., § 5-14-15, enacted by Laws 1976, ch. 58, § 15; 1977, ch. 386, § 13; 1982, ch. 8, § 2.

Application of 1977 amendment. - Where an act giving rise to a claim under the Tort Claims Act occurred prior to the effective date of the 1977 amendment which added "settlement" to Subsection B, but the injury and settlement occurred after the effective date, the settlement is governed by the amended subsection. Sugarman v. City of Las Cruces, 95 N.M. 706, 625 P.2d 1223 (Ct. App. 1980).

When settlement does not bar suit. - A suit authorized by the Tort Claims Act and brought against the potentially liable governmental entity is not barred by a settlement with one who has no statutory liability to the claimant, nor by a settlement reached with anyone outside the framework of a Tort Claims Act suit. Sugarman v. City of Las Cruces, 95 N.M. 706, 625 P.2d 1223 (Ct. App. 1980).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Simultaneous pursual of § 1983 action not barred. - The New Mexico Tort Claims Act does not prohibit a plaintiff from bringing an action for damages under that act against a governmental entity or public employee where the plaintiff also pursues, by reason of the same occurrence or chain of events, an action against the same entity or employee pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Although double recovery prohibited. - In those cases where tort damages will constitute a portion of the damages for a deprivation of a constitutional right, general principles against double recovery will prevail. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

City entitled to "exclusive remedy" provisions. - The operation of a natural gas system, even though beyond the statutory limitations imposed by 3-25-3A(2) NMSA 1978, does not deprive a city of the exclusive right, remedy and obligation provision of the Tort Claims Act. Cole v. City of Las Cruces, 99 N.M. 302, 657 P.2d 629 (1983).

Joinder of insurance company as party defendant. - Prior to the enactment of Subsection C, there was nothing in the Tort Claims Act which indicated the legislature's intention to disallow a plaintiff bringing an action under the act from joining an insurance company as a party defendant. By drawing a logical inference from the legislature's subsequent enactment of Subsection C, it appears that the legislature realized that without this subsection a plaintiff could join the insurance company and therefore this

prompted the 1977 amendment which specifically negated the idea of joinder. England v. New Mexico State Hwy. Comm'n, 91 N.M. 406, 575 P.2d 96 (1978).

In any action which falls within the purview of the Tort Claims Act where the injury occurred between July 1, 1976, and February of 1977, when the 1977 amendments became immediately effective, joinder of an insurance company as a party defendant is allowed. England v. New Mexico State Hwy. Comm'n, 91 N.M. 406, 575 P.2d 96 (1978). (This section was amended by Laws 1977, which contained an emergency clause, Laws 1977, ch. 386, § 23, and was approved April 8, 1977.)

Wrongful decision to perform autopsy. - In an action for damages on the basis of an alleged wrongful decision to perform an autopsy, even if 24-12-4 NMSA 1978, which provides for consent for post-mortem examinations, created a private cause of action, it did not override the state medical investigator's grant of immunity under the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

Law reviews. - For annual survey of New Mexico law relating to torts, see 12 N.M.L. Rev. 481 (1982).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

41-4-18. Jurisdiction; appeals; venue.

A. Exclusive original jurisdiction for any claim under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be in the district courts of New Mexico. Appeals may be taken as provided by law.

B. Venue for any claim against the state or its public employees, pursuant to the Tort Claims Act, shall be in the district court for the county in which a plaintiff resides, or in which the cause of action arose, or in Santa Fe county. Venue for all other claims pursuant to the Tort Claims Act, shall be in the county in which the principal offices of the governing body of the local public body are located.

History: 1953 Comp., § 5-14-16, enacted by Laws 1976, ch. 58, § 16.

Section is unconstitutional to extent that it acts to limit pendent jurisdiction of a federal district court over tort claims against counties, municipalities, and their officers. Wojciechowski v. Harriman, 607 F. Supp. 631 (D.N.M. 1985).

Constitutional deprivation may be remedied in a jurisdiction other than New Mexico. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Federal jurisdiction barred. - Inmate could not pursue his claim against the New Mexico Department of Corrections and its employees acting within the scope of their employment in the federal district court, but rather was relegated to the state district

court to seek relief consistent with the limited waiver of immunity under this section. Bishop v. Doe 1, 902 F.2d 809 (10th Cir. 1990).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Venue in actions against state educational institutions. - The venue provision of this section does not delimit choice of forum for tort actions brought against state educational institutions, which actions are governed by the venue provision set forth in 38-3-1G NMSA 1978. Clothier v. Lopez, 103 N.M. 593, 711 P.2d 870 (1985).

Federal jurisdiction barred. - A student at the New Mexico school of mines (now New Mexico institute of mining and technology), was barred from bringing an action in the United States district court for the district of New Mexico, seeking damages from personal injuries alleged to have resulted from the negligence of the school's board of regents in the operation of the school, because the action was, in effect, against the state of New Mexico, and the U.S. Const., amend. XI, barred federal jurisdiction. Korgich v. Regents of N.M. School of Mines, 582 F.2d 549 (10th Cir. 1978).

Law reviews. - For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 649 to 654.

41-4-19. Maximum liability. (Effective until July 1, 1992.)

A. In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], the liability shall not exceed:

(1) the sum of one hundred thousand dollars ($100,000) for damage to or destruction of property arising out of a single occurrence;

(2) the sum of three hundred thousand dollars ($300,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage as permitted under the Tort Claims Act; or

(3) the sum of five hundred thousand dollars ($500,000) for all claims arising out of a single occurrence.

B. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

History: 1953 Comp., § 5-14-17, enacted by Laws 1976, ch. 58, § 17; 1977, ch. 386, § 14.

Level of scrutiny of cap on damages. - A tort victim's interest in full recovery of damages calls for a form of scrutiny somewhere between minimum rationality and strict scrutiny. Therefore, intermediate scrutiny should be applied to determine the constitutionality of the cap on damages in Subsection A(2) of this section. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

Recovery of costs. - The legislature, in 39-3-30 NMSA 1978, gives express authority, without exception, to the recovery of costs against any losing party, including the state. Kirby v. New Mexico State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App. 1982).

Postjudgment interest. - Plaintiff in wrongful death action was not entitled to postjudgment interest on a prior judgment obtained against the New Mexico State Highway Department. Fought v. State, 107 N.M. 715, 764 P.2d 142 (Ct. App. 1988).

"Single occurrence" construed. - In a negligence action against a city for injuries sustained in a collision with a city-owned crane, there was but a single occurrence when successive negligent acts or omissions of the governmental entity combined concurrently to create a singular risk of collision and to proximately cause injury triggered by a discrete event. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

In a wrongful death and personal injury action brought against the state highway department and others for deaths and injuries from a runaway truck, all injuries proximately caused by a governmental agency's successive negligent acts or omissions that combined concurrently to create a singular, separate, and unitary risk of harm fell within the meaning of a "single occurrence" when triggered by the discrete event of one runaway truck. Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

Jury consideration of aggravating circumstances not punitive damages. - 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 Subsection B. Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 680 to 696.

Recovery of exemplary or punitive damages from municipal corporations, 1 A.L.R.4th 448.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit, 43 A.L.R.4th 19.

41-4-19. Maximum liability. (Effective July 1, 1992.)

A. In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], the liability shall not exceed:

(1) the sum of one hundred thousand dollars ($100,000) for damage to or destruction of property arising out of a single occurrence; and

(2) the sum of three hundred thousand dollars ($300,000) for all past and future medical and medically-related expenses arising out of a single occurrence; and

(3) the sum of four hundred thousand dollars ($400,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage and medical and medically-related expenses as permitted under the Tort Claims Act; or

(4) the sum of seven hundred fifty thousand dollars ($750,000) for all claims other than medical or medically-related expenses arising out of a single occurrence.

B. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

History: 1953 Comp., § 5-14-3, enacted by Laws 1976, ch. 58, § 3; 1977, ch. 386, § 2; 1983, ch. 123, § 2; 1983, ch. 242, § 1; 1985, ch. 76, § 1; 1988, ch. 31, § 1; 1991, ch. 205, § 3.

The 1991 amendment, effective July 1, 1992, in Subsection A, added Paragraph (2), redesignated former Paragraphs (2) and (3) as Paragraphs (3) and (4), substituted "four hundred thousand dollars ($400,000) for "three hundred thousand dollars ($300,000)" and inserted "and medical and medically-related expenses" in Paragraph (3), and substituted "seven hundred fifty thousand dollars ($750,000)" for "five hundred thousand dollars ($500,000)" and inserted "other than medical or medically-related expenses" in Paragraph (4).

41-4-20. Coverage of risks; insurance.

A. It shall be the duty of governmental entities to cover every risk for which immunity has been waived under the provisions of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or any liability imposed under Section 41-4-4 NMSA 1978 as follows:

(1) local public bodies shall cover every such risk or liability as follows:

(a) for a risk for which immunity has been waived pursuant to Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978, the local public body shall cover the risk, and for any commercially uninsurable risk for which public liability fund coverage is made available, the local public body may insure the risk in accordance with the provisions of Section 41-4-25 NMSA 1978;

(b) for excess liability for damages arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, the local public body shall provide coverage in accordance with the provisions of Subsection B of Section 41-4-27 [41-4-28] NMSA 1978, if coverage is available; and

(c) for a risk or liability not covered pursuant to Subparagraphs (a) and (b) of this paragraph, the local public body shall purchase insurance, establish reserves or provide a combination of insurance and reserves or provide insurance in any other manner authorized by law; and

(2) for state agencies, the risk management division shall insure or otherwise cover every such risk or liability in accordance with the provisions of Section 41-4-23 NMSA 1978. Coverage shall include but is not limited to coverage for all such liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America.

B. The department of finance and administration shall not approve the budget of any governmental entity that has not budgeted an adequate amount of money to insure or otherwise cover pursuant to this section or Section 3-62-2 NMSA 1978 every risk of the governmental entity for which immunity has been waived under the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978. The public school finance division of the department of finance and administration shall not approve the budget of any school district which has failed to budget sufficient revenues to insure or otherwise cover pursuant to this section every risk for which immunity has been waived pursuant to the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978.

C. No liability insurance may be purchased by any governmental entity other than as authorized by the Tort Claims Act.

History: Laws 1976, ch. 58, § 18; 1953 Comp., § 5-14-18; Laws 1977, ch. 247, § 52; 1977, ch. 386, § 15; 1978, ch. 166, § 3; 1979, ch. 287, § 4; 1979, ch. 392, § 2; 1981, ch. 268, § 1.

Compiler's note. - The reference in Subsection A(1)(b) to Subsection B of Section 41-4-27 NMSA 1978 should be to Subsection B of Section 41-4-28 NMSA 1978.

Existence of insurance waiver waive of immunity from suit. - Without specific authorization by the legislature, the existence of insurance covering a governmental agency does not constitute a waiver of immunity from suit. Chavez v. Mountainair School Bd., 80 N.M. 450, 457 P.2d 382 (Ct. App. 1969).

Where insufficiency of insurance not raised. - No question of immunity from suit existed where no claim was made that the insurance was insufficient to cover the amount of the verdict. 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).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability, 68 A.L.R.2d 1437.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844.

41-4-21. Application of act.

The provisions of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall not affect the provisions of any personnel act, any rules or regulations issued thereunder or any other provision of law governing the employer-employee relationship.

History: 1953 Comp., § 5-14-19, enacted by Laws 1976, ch. 58, § 19; 1977, ch. 386, § 16.

Purpose of section. - This section was designed to preserve employment relations between the state, or a subdivision thereof, and its employees: It may not be read to expand Subsection A of 41-4-4 NMSA 1978 and to provide a waiver of immunity to

allow an educational malpractice action against a public school board. Rubio ex rel. Rubio v. Carlsbad Mun. School Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

Asserting immunity for first time in supreme court permissible. - The right to assert sovereign immunity may be raised for the first time in the supreme court. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water, 91 A.L.R.3d 186.

Products liability: air guns and BB guns, 94 A.L.R.3d 291.

41-4-22. Insurance fund.

There is created the "insurance fund" to purchase insurance for the state and its public employees. Any money in the fund not needed to meet expected expenditures for the ensuing month shall be invested by the director of the risk management division with the prior approval of the state board of finance.

History: 1953 Comp., § 5-14-20, enacted by Laws 1976, ch. 58, § 20; 1977, ch. 247, § 53.

41-4-23. Public liability fund created; purposes.

A. There is created a "public liability fund". The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the general services department with the prior approval of the state board of finance.

B. Money deposited in the public liability fund may be expended by the risk management division:

(1) to purchase tort liability insurance for state agencies and their employees and for any local public body participating in the public liability fund and its employees;

(2) to contract with one or more consulting or claims adjusting firms pursuant to the provisions of Section 41-4-24 NMSA 1978;

(3) to defend, save harmless and indemnify any state agency or employee of a state agency or a local public body or an employee of such local public body for any claim or liability covered by a valid and current certificate of coverage to the limits of such certificate of coverage;

(4) to pay claims and judgments covered by a certificate of coverage;

(5) to contract with one or more attorneys or law firms on a per-hour basis, or with the attorney general, to defend tort liability claims against governmental entities and public employees acting within the scope of their duties;

(6) to pay any costs and expenses incurred in carrying out the provisions of this section;

(7) to create a retention fund for any risk covered by a certificate of coverage;

(8) to cover personal injury liability risks of governmental entities, including the risks set forth in Paragraph (2) of Subsection B and Paragraph (2) of Subsection D of Section 41-4-4 NMSA 1978, to the extent and to the limits of any certificate of coverage;

(9) to insure or provide certificates of coverage to school bus contractors and their employees, notwithstanding Subsection E of Section 41-4-3 NMSA 1978, for any comparable risk for which immunity has been waived for public employees pursuant to Section 41-4-5 NMSA 1978, if the coverage is commercially unavailable; except that coverage for exposure created by Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978 shall be provided to its member public school districts and participating other educational entities of the public school insurance authority, by the authority and except that coverage shall be provided to a contractor and his employees only through the public school group insurance authority or its successor unless the district to which the contractor provides services has been granted a waiver by the authority or the authority is not offering the coverage for the fiscal year for which the division offers its coverage. A local school district to which the division may provide coverage may provide for marketing and servicing to be done by licensed insurance agents who shall receive reasonable compensation for their services; and

(10) to insure or provide certificates of coverage for any ancillary coverage typically found in commercially available liability policies provided to governmental entities, if the coverage is commercially unavailable.

C. No settlement of any claim covered by the public liability fund in excess of five thousand dollars ($5,000) shall be made unless the settlement has first been approved in writing by the director of the risk management division. This subsection shall not be construed to limit the authority of an insurance carrier, covering any liability under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], to compromise, adjust and settle claims against governmental entities or their public employees.

D. Claims against the fund shall be made in accordance with rules or regulations of the director of the risk management division. If the director of the risk management division has reason to believe that the fund would be exhausted by payment of all claims allowed during a particular state fiscal year, pursuant to regulations of the risk management division, the amounts paid to each claimant and other parties obtaining judgments shall be prorated, with each party receiving an amount equal to the

percentage his own payment bears to the total of claims or judgments outstanding and payable from the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following fiscal years.

History: 1953 Comp., § 5-14-20.1, enacted by Laws 1977, ch. 386, § 17; 1978, ch. 166, § 4; 1982, ch. 8, § 3; 1983, ch. 301, § 75; 1986, ch. 102, § 8; 1989, ch. 373, § 6.

Cross-references. - As to state board of finance, see 6-1-1 NMSA 1978.

As to general services department, see 9-17-3 NMSA 1978.

As to risk management division, see 15-7-2 NMSA 1978.

As to powers of the risk management division in regard to the Tort Claims Act, see 15-7-3 NMSA 1978.

The 1989 amendment, effective June 16, 1989, inserted near the middle of the first sentence of Subsection B(9) "coverage for exposure created by Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978 shall be provided to its member public school districts and participating other educational entities of the public school insurance authority, by the authority and except that".

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability, 68 A.L.R.2d 1437.

41-4-24. Consulting and claims adjusting contracts.

A. Notwithstanding any other provision of law, the risk management division shall:

(1) contract, as may be necessary, with a recognized insurance consulting firm to assist in the implementation of the public liability fund; and

(2) contract with a recognized insurance claims adjusting firm for the handling of all claims made against the public liability fund.

B. No contract shall be entered into pursuant to this section, unless proposals have been sought from two or more qualified firms. Contracts shall be awarded on the basis of cost, financial resources of the firm, service facilities in New Mexico, service reputation and experience.

History: 1953 Comp., § 5-14-20.2, enacted by Laws 1977, ch. 386, § 18.

41-4-25. Public liability fund; municipal public liability fund; local public body participation; educational entity participation.

A. Except as provided in Subsections B and C of this section, local public bodies shall obtain coverage for all risks for which immunity has been waived under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] pursuant to Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978 through the public liability fund by paying into the fund an assessment, to be determined by the director of the risk management division, which shall be based on the risks to be insured. In addition, any local public body upon application to the risk management division may obtain coverage for any risk for which immunity has been waived under the Tort Claims Act through the public liability fund if the director of the risk management division determines that:

(1) the risk is, in fact, commercially uninsurable or insurable only at a cost or subject to conditions which the director deems unreasonable. To make this determination, the director may require the local public body to submit such information as he deems appropriate and may also seek information from any other source; and

(2) the local public body has paid all insurance premiums and public liability fund assessments in a timely manner or has had good cause for failing to do so. The local public body shall pay for coverage of uninsurable risks by paying into the fund an assessment, to be determined by the director, which shall be based on risks to be insured. However, payment of all or part of any such assessment may be deferred or postponed without penalty until future years if the local public body certifies to the director's satisfaction that it has insufficient funds available to pay all or a part of any assessment. A municipality or county shall be deemed to have insufficient funds only if it is, in the current fiscal year, levying the full property tax millage allotted it under law and, in addition, has levied during the current fiscal year a five-mill levy above the constitutional twenty-mill limit to pay tort judgments. Any deferred or postponed assessment is payable in any succeeding fiscal year, subject to the same limitations on duty to pay, until paid in full.

B. A municipality which has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may, by ordinance of the governing body, elect to create a "municipal public liability fund" to insure or otherwise cover any risk for which immunity has been waived under the Tort Claims Act. A municipal public liability fund created pursuant to this subsection shall provide that:

(1) the fund and any income from the fund shall be held in trust, deposited in a segregated account and invested in accordance with law;

(2) any money deposited in the fund may only be expended to purchase liability insurance; to contract with one or more consulting or claims adjusting firms; to defend, save harmless and indemnify any employee of the municipality for any liability covered by the municipal public liability fund; to contract with one or more attorneys or law firms on a per-hour basis to defend tort liability claims against the municipality and its officers and employees acting within the scope of their duties; and to create a retention fund adequate to cover all uninsured risks of the municipality;

(3) if the municipal public liability fund will be exhausted by the payment of all judgments and claims allowed during a particular fiscal year, amounts paid to each claimant or person obtaining a judgment shall be prorated, with each person receiving an amount equal to the percentage his own payment bears to the total of claims and judgments outstanding and payable from the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following fiscal year;

(4) no tort, civil rights or workers' compensation judgment shall be paid by a tax levy upon real or personal property unless the judgment exceeds one hundred thousand dollars ($100,000). The tax levy shall be made only on that portion of the judgment which is in excess of one hundred thousand dollars ($100,000). Judgments arising out of a single occurrence shall be paid by tax levies for the portions of the judgments in excess of one hundred thousand dollars ($100,000);

(5) the governing body shall review all judgments set forth in Paragraph (4) of this subsection prior to transmitting them to the county assessor for inclusion in the property tax assessment. The review by the governing body shall include a finding by the governing body that the judgment properly arose under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or under the Tort Claims Act. After so finding, the governing body shall by resolution direct the county assessor to provide an assessment as required; and

(6) the ordinance shall not become effective until the department of finance and administration and the general services department have reviewed and approved the ordinance as complying with all of the provisions of this subsection.

C. A local public body, other than one that has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico, may elect to obtain coverage from the public liability fund in accordance with Subsection A of this section or may:

(1) purchase commercial insurance coverage for the risks for which immunity is waived under the Tort Claims Act; or

(2) obtain coverage for the risks for which immunity is waived under the Tort Claims Act in accordance with the provisions of Chapter 3, Article 62 NMSA 1978.

D. The risk management division may assess any local public body with a risk covered by the public liability fund:

(1) a penalty in a percentage or minimum amount to be fixed by the director of the risk management division, with the advice of the board, for the failure to make timely payment of any assessment of the division; or

(2) a surcharge not exceeding seventy-five percent of the rate established by the division for coverage under the public liability fund, if:

(a) the local public body fails to meet any of the underwriting standards or claims procedures prescribed by regulations of the division; or

(b) the local public body fails to carry out any safety program prescribed by regulations of the division.

E. Any school district as defined in Section 22-1-2 NMSA 1978 or educational institution established pursuant to Chapter 21, Article 13, 16 or 17 NMSA 1978 may, upon application to and acceptance by the risk management division, purchase, if the coverage is commercially unavailable, any coverage offered by the division, through the public liability fund, including school bus coverage for school bus contractors, notwithstanding the limitation in Subsection E of Section 41-4-3 NMSA 1978; except that coverage other than for risks for which immunity has been waived pursuant to Sections 41-4-9, 41-4-10, 41-4-12 and 41-4-28 NMSA 1978 shall be provided to a school district only through the public school group insurance authority or its successor, unless the district has been granted a waiver by the authority or the authority is not offering the coverage for the fiscal year for which the division offers its coverage. A local school district to which the division may provide coverage may provide for marketing and servicing to be done by licensed insurance agents who shall receive reasonable compensation for their services.

F. If any local public body fails to insure or otherwise cover any risk, the immunity for which has been waived under the provisions of the Tort Claims Act, any resident of the local public body shall have standing to bring suit to compel compliance with the provisions of the Tort Claims Act. Nothing in this section shall be construed to allow any recovery against any governmental entity for any damages resulting from the failure of the governmental entity to insure or otherwise cover any risk.

G. Nothing in this section shall be construed as requiring the risk management division to provide coverage to any local public body, except coverage for those risks for which immunity has been waived under Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978, or as requiring the division to provide coverage on terms deemed to be unreasonable by the director of the division.

History: 1953 Comp., § 5-14-20.3, enacted by Laws 1977, ch. 386, § 19; 1978, ch. 166, § 5; 1979, ch. 10, § 1; 1979, ch. 392, § 3; 1983, ch. 301, § 76; 1986, ch. 27, § 1; 1986, ch. 102, § 9; 1988, ch. 57, § 1; 1989, ch. 372, § 1.

Cross-references. - As to county assessor, see 4-39-1 NMSA 1978.

As to department of finance and administration, see 9-6-3 NMSA 1978.

As to general services department, see 9-17-3 NMSA 1978.

As to risk management division, see 15-7-2 NMSA 1978.

The 1988 amendment, effective May 18, 1988, deleted "having a population over one hundred thousand" following "municipality" in the first sentence of Subsection B and substituted "Workers' Compensation Act" for "Workmen's Compensation Act" in the first sentence of Subsection B(5).

The 1989 amendment, effective June 16, 1989, in Subsection A substituted "Subsections B and C" for "Subsection B" near the beginning of the first sentence in the introductory paragraph; made a minor stylistic change in Subsection B(4); added present Subsection C; redesignated former Subsections C through F as present Subsections D through G; and substituted "board" for "risk management advisory board" in Subsection D(1).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Law reviews. - For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

41-4-26. Home rule municipality tort claims ordinances; severability; applicability.

A. Any provision of an ordinance adopted by a home rule municipality providing for the insurance or self-insurance of tort liability risks of the home rule municipality is declared to be severable if any part or application of such ordinance is held invalid.

B. Any home rule municipality which has adopted an ordinance providing for the insurance or self-insurance of any or all of the tort liability risks of the municipality, shall not be eligible to participate in the public liability fund created pursuant to Section 41-4-23 NMSA 1978.

C. A home rule municipality which has adopted an ordinance insuring or self-insuring its tort liability risks prior to July 1, 1978 or which has adopted an ordinance after July 1, 1978 insuring or self-insuring its tort liability risks pursuant to Subsection B of Section 41-4-25 NMSA 1978 may elect to be covered by the public liability fund created pursuant to Section 41-4-23 NMSA 1978 for the subsequent calendar years by:

(1) giving notice of the repeal of its ordinance to the risk management division prior to December 1 of any calendar year; and

(2) paying such assessments as may be determined by the risk management division. Occurrences giving rise to claims arising during any period of time [in] which a home rule municipality had a valid or invalid ordinance insuring or self-insuring its risks shall

be governed by the ordinance in effect at the time the claims arose and not by the public liability fund created pursuant to Section 41-4-23 NMSA 1978.

History: 1978 Comp., § 41-4-26, enacted by Laws 1978, ch. 166, § 18; 1986, ch. 27, § 2.

Cross-references. - As to home rule municipality, see N.M. Const., art. X, § 6.

As to risk management division, see 15-7-2 NMSA 1978.

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Governmental liability from operation of zoo, 92 A.L.R.3d 832.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R.3d 778.

41-4-27. Home rule municipality; joint powers agreements; coverage.

A. Any county covered through the public liability fund pursuant to Subsection A of Section 41-4-25 NMSA 1978 may enter into a joint powers agreement with a home rule municipality which has elected to be covered pursuant to Subsection B of Section 41-4-25 NMSA 1978, providing for exercise of certain of the county's powers or duties under the agreement. Any such joint powers agreement may provide for public liability fund coverage of a stated percentage of risks arising from exercise of the county's powers or duties.

B. Public liability fund coverage which may be provided under any such joint powers agreement shall be:

(1) limited to public liability fund coverage available to the county pursuant to Subsection A of Section 41-4-25 NMSA 1978; and

(2) subject to the prior approval of the risk management advisory board.

C. All coverage pursuant to this section shall terminate upon the date the joint powers agreement terminates.

D. For covering a risk pursuant to this section, the risk management division shall assess the county the full amount to be assessed for covering the entire risk under current regular risk management division assessment rates and schedules, plus any applicable penalties and surcharges, without adjustment based upon the percentage of risk for which the county is liable.

History: 1978 Comp., § 41-4-27, enacted by Laws 1981, ch. 118, § 2.

Two-year statute of limitations applicable to negligence suit involving public utility's employee. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

41-4-28. Coverage for liability subject to foreign jurisdiction's law.

A. Coverage which may be provided for liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States, is not limited as provided in Section 41-4-19 NMSA 1978.

B. The risk management division shall purchase liability insurance coverage for all local public bodies otherwise participating in the public liability fund for liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States. The risk management division shall purchase such liability insurance only if the director of the risk management division determines that the coverage offered is satisfactory and available at reasonable cost. If satisfactory coverage is unavailable at reasonable cost, the risk management division may offer a certificate through the public liability fund in limits not to exceed one million dollars ($1,000,000) per occurrence. Any liability insurance shall provide coverage only for amounts in excess of the limits set forth in Section 41-4-19 NMSA 1978.

Local public bodies shall obtain excess coverage for such foreign jurisdiction liability by paying into the public liability fund an assessment, determined by the director of the risk management division, based on the cost of the insurance and the risks to be insured. If such insurance is unavailable on a satisfactory basis or at reasonable cost and the risk management division does not provide a certificate or insurance with satisfactory limits, local public bodies shall cover such liability in accordance with Subparagraph (c) of Paragraph (1) of Subsection A of Section 41-4-20 NMSA 1978.

C. Nothing in this section shall be construed as a waiver of any sovereign or governmental immunity.

History: 1978 Comp., § 41-4-27, enacted by Laws 1981, ch. 268, § 2; 1986, ch. 102, § 10.

Cross-references. - As to risk management division, see 15-7-2 NMSA 1978.

41-4-29. Governmental entities; health care students liability coverage; authority to purchase.

A. Governmental entities may purchase public liability fund coverage, if offered, for health care liability of health care students currently enrolled in health care instructional programs provided by or through the governmental entity.

B. The risk management division of the general services department may provide public liability fund coverage for health care liability of health care students currently enrolled in health care instructional programs provided by or through a governmental entity. Such coverage shall be limited to health care liability risks arising out of assigned health care instructional activities.

C. This section shall not be construed as waiving or otherwise affecting any governmetal [governmental] entity's sovereign immunity or any other limitations or protections under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or any other law. This section shall not be construed as creating any right of action against any governmental entity or any of its officers, employees or servants for any activities insured pursuant to this section.

History: Laws 1981, ch. 269, § 1; 1983, ch. 301, § 77.

ARTICLE 5
MEDICAL MALPRACTICE ACT

41-5-1. Short title.

This act [41-5-1 to 41-5-28 NMSA 1978] may be cited as the "Medical Malpractice Act".

History: 1953 Comp., § 58-33-1, enacted by Laws 1976, ch. 2, § 1.

Scope of act. - The Medical Malpractice Act covers all causes of action arising in New Mexico that are based on acts of malpractice. Wilschinsky v. Medina, 108 N.M. 511, 775 P.2d 713 (1989).

Claim held within scope of act. - Third party's malpractice claim, resulting from injuries to him caused by a patient's impaired ability to drive after a doctor administered powerful drugs to the patient in the doctor's office, fell within the purpose of the Medical Malpractice Act. Wilschinsky v. Medina, 108 N.M. 511, 775 P.2d 713 (1989).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For comment, "Survey of New Mexico Law: Torts," see 15 N.M.L. Rev. 363 (1985).

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

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

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 annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 200 to 301.

Malpractice in connection with electroshock treatment, 94 A.L.R.3d 317.

Measure and elements of damages in action against physician for breach of contract to achieve particular result or cure, 99 A.L.R.3d 303.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 773.

Propriety of hospital's conditioning physician's staff privileges on his carrying professional liability or malpractice insurance, 7 A.L.R.4th 1238.

Medical malpractice, administering or prescribing birth control pills or devices, 9 A.L.R.4th 372.

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.

Duty of medical practioner to warn patient of subsequently discovered danger from treatment previously given, 12 A.L.R.4th 41.

Hospital's liability for negligence in failing to review or supervise treatment given by doctor, or to require consultation, 12 A.L.R.4th 57.

Physician's liability for causing patient to become addicted to drugs, 16 A.L.R.4th 999.

Liability of doctor, psychiatrist, or psychologist for failure to take steps to prevent patient's suicide, 17 A.L.R.4th 1128.

Liability for wrongful autopsy, 18 A.L.R.4th 858.

Medical malpractice: instrument breaking in course of surgery or treatment, 20 A.L.R.4th 1179.

Malpractice liability based on prior treatment of mental disorder alleged to relate to patient's conviction of crime, 28 A.L.R.4th 712.

Medical malpractice: Liability for failure of physician to inform patient of alternative modes of diagnosis or treatment, 38 A.L.R.4th 900.

Recovery by patient on whom surgery or other treatment was performed by one other than physician who patient believed would perform it, 39 A.L.R.4th 1034.

Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment, 42 A.L.R.4th 543.

Physician's liability to third person for prescribing drug to known drug addict, 42 A.L.R.4th 586.

Liability of physician, for injury to or death of third party, due to failure to disclose driving-related impediment, 43 A.L.R.4th 153.

Physician's or other healer's conduct in connection with defense of or resistance to malpractice action as ground for revocation of license or other disciplinary action, 44 A.L.R.4th 248.

Liability of hospital or clinic for sexual relationships with patients by staff physicians, psychologists, and other healers, 45 A.L.R.4th 289.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 A.L.R.4th 668.

Medical malpractice: res ipsa loquitur in negligent anesthesia cases, 49 A.L.R.4th 63.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A.L.R.4th 235.

Medical malpractice: "loss of chance" causality, 54 A.L.R.4th 10.

Recoverability of compensatory damages for mental anguish or emotional distress for breach of service contract, 54 A.L.R.4th 901.

Tortious maintenance or removal of life supports, 58 A.L.R.4th 222.

Criminal liability under statutes penalizing abuse or neglect of the institutionalized infirm, 60 A.L.R.4th 1153.

Medical malpractice: hospital's liability for injury allegedly caused by failure to have properly qualified staff, 62 A.L.R.4th 692.

Medical practitioner's liability for treatment given child without parent's consent, 67 A.L.R.4th 511.

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

Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 A.L.R.4th 906.

Propriety and prejudicial effect of trial counsel's reference or suggestion in medical malpractice case that defendant is insured, 71 A.L.R.4th 1025.

Tort liability of medical society or professional association for failure to discipline or investigate negligent or otherwise incompetent medical practitioner, 72 A.L.R.4th 1148.

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.

Recoverability of compensatory damages for mental anguish or emotional distress for tortiously causing another's birth, 74 A.L.R.4th 798.

Liability for medical malpractice in connection with performance of circumcision, 75 A.L.R.4th 710.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during caesarean delivery, 76 A.L.R.4th 1112.

Liability for dental malpractice in provision or fitting of dentures, 77 A.L.R.4th 222.

Liability of chiropractors and other drugless practitioners for medical malpractice, 77 A.L.R.4th 273.

Liability of orthodontist for malpractice, 81 A.L.R.4th 632.

Medical malpractice: drug manufacturer's package insert recommendations as evidence of standard of care, 82 A.L.R.4th 166.

Malpractice involving hysterectomies and oophorectomies, 86 A.L.R.4th 18.

Gynecological malpractice not involving hysterectomies or oophorectomies, 86 A.L.R.4th 125.

What nonpatient claims against doctors, hospitals, or similar health care providers are not subject to statutes specifically governing actions and damages for medical malpractice, 88 A.L.R.4th 358.

Recoverability of cost of raising normal, healthy child born as result of physician's negligence or breach of contract or warranty, 89 A.L.R.4th 632.

Malpractice: Physician's duty, under informed consent doctrine, to obtain patient's consent to treatment in pregnancy or childbirth cases, 89 A.L.R.4th 799.

What patient claims against doctor, hospital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice, 89 A.L.R.4th 887.

Application of "firemen's rule" to bar recovery by emergency medical personnel injured in responding to, or at scene of, emergency, 89 A.L.R.4th 1079.

When does medical practitioner's treatment of patient constitute "willful and malicious injury," so as to make practitioner's debt arising from such treatment nondischargeable under § 523(a)(6) of Bankruptcy Act (11 USCS § 523(a)(6)), 77 A.L.R. Fed. 918.

41-5-2. Purpose of act.

The purpose of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978] is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.

History: 1953 Comp., § 58-33-2, enacted by Laws 1976, ch. 2, § 2.

Medical Malpractice Act held constitutional. Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493 (Ct. App. 1984).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 372 to 377.

Coverage and exclusions of liability or indemnity policy on physicians, surgeons, and other healers, 33 A.L.R.4th 14.

41-5-3. Definitions.

As used in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978]:

A. "health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant;

B. "insurer" means an insurance company engaged in writing health care provider malpractice liability insurance in this state;

C. "malpractice claim" includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death; "malpractice claim" does not include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance;

D. "medical care and related benefits" means all reasonable medical, surgical, physical rehabilitation and custodial services and includes drugs, prosthetic devices and other similar materials reasonably necessary in the provision of such services;

E. "patient" means a natural person who received or should have received health care from a licensed health care provider, under a contract, express or implied; and

F. "superintendent" means the superintendent of insurance of this state.

History: 1953 Comp., § 58-33-3, enacted by Laws 1976, ch. 2, § 3; 1977, ch. 284, § 1.

No distinction between qualified and nonqualified health care providers, for limitations' purposes. - The statutory limitation period cannot be considered to come within the meaning of "benefit" as used in 41-5-5B NMSA 1978. The result is that 41-5-13 NMSA 1978 applies to all malpractice claims, as defined in Subsection C of this section. There is no distinction, for limitation of action purposes, between qualified and nonqualified health care providers. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982).

Negligent misrepresentation and intentional infliction of emotional distress not "malpractice claim(s)". - Claims for negligent misrepresentation and intentional infliction of emotional distress do not first have to be presented to the medical review

commission because they do not come within the definition of a malpractice claim. Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 Am. Jur. 2d Venue § 16.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 A.L.R.3d 639.

Liability of operating surgeon for negligence of nurse assisting him, 12 A.L.R.3d 1017.

Liability for injuries or death as a result of physical therapy, 53 A.L.R.3d 1250.

Chiropractor's liability for failure to refer patient to medical practitioner, 58 A.L.R.3d 590.

Liability of anesthetist for injuries from spinal anesthetics, 90 A.L.R.3d 775.

What constitutes physician-patient relationship for malpractice purposes, 17 A.L.R.4th 132.

Liability for injury or death allegedly caused by activities of hospital "rescue team", 64 A.L.R.4th 1200.

Recovery in death action for failure to diagnose incurable disease which caused death, 64 A.L.R.4th 1232.

70 C.J.S. Physicians and Surgeons § 62.

41-5-4. Ad damnum clause.

A patient or his representative having a malpractice claim for bodily injury or death may file a complaint in any court of law having requisite jurisdiction and demand right of trial by jury. No dollar amount or figure shall be included in the demand in any complaint asserting a malpractice claim and filed after the effective date of this section, but the request shall be for such damages as are reasonable. This section shall not prevent a patient or his representative from alleging a requisite jurisdictional amount in a malpractice claim filed in a court requiring such an allegation.

History: 1953 Comp., § 58-33-4, enacted by Laws 1976, ch. 2, § 4; 1977, ch. 284, § 2.

Cross-references. - As to jurisdictional amount in magistrate court, see 35-3-3 NMSA 1978.

For commencement of action in district court, see Rule 1-003.

For commencement of action by complaint in magistrate court, see Rule 2-201.

This section refers to jurisdiction, not venue, and 38-3-1 NMSA 1978 governs venue in an action brought under the Medical Malpractice Act. Bullock v. Lehman, 99 N.M. 515, 660 P.2d 605 (Ct. App. 1983).

"Representative" same as under wrongful death statute. - The "representative" who may bring suit for a death under this section means the same thing as the personal representative under the wrongful death statute. Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), overruled on other grounds Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Qualification of personal representative. - Where an original pleading alleged a valid cause of action, relation back of the appointment of the plaintiff as personal representative to the initial filing of the action did not compromise this section nor the statute of limitations. Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-5. Qualifications. (Effective until July 1, 1992.)

A. To be qualified under the provisions of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978], a health care provider shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance in the amount of at least one hundred fifty thousand dollars ($150,000) per occurrence or, for an individual health care provider, excluding hospitals, by having continuously on deposit the sum of four hundred fifty thousand dollars ($450,000) in cash with the superintendent or such other like deposit as the superintendent may allow by rule or regulation; provided that in the absence of an additional deposit as required by this subsection, the deposit shall provide coverage for not more than three separate occurrences; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 41-5-25 NMSA 1978.

B. For hospitals electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on a risk assessment of each hospital, each hospital's base coverage or deposit and additional charges for the patient's compensation fund. The superintendent shall contract for an actuarial study, as provided in Section 41-5-25 NMSA 1978.

C. Health care providers not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of malpractice claims against them.

History: 1953 Comp., § 58-33-5, enacted by Laws 1976, ch. 2, § 5; 1991, ch. 264, § 1.

The 1991 amendment, effective July 1, 1991, in Paragraph (1) in Subsection A, substituted "one hundred fifty thousand dollars ($150,000)" for "one hundred thousand dollars ($100,000)" and substituted the language beginning "for an individual health care provider," for "by having continuously on deposit the sum of one hundred thousand dollars ($100,000) in cash with the superintendent or such other like deposit as the superintendent may allow by rule or regulation" at the end of the paragraph; substituted "41-5-25 NMSA 1978" for 25 of the Medical Malpractice Act" at the end of Paragraph (2) in Subsection A; added present Subsection B; redesignated former Subsection B as present Subsection C; and substituted "under this section" for "hereunder" in Subsection C.

Temporary provisions. - Laws 1991, ch. 264, § 12, effective July 1, 1991, provides that a health care provider who qualified under the provisions of the Medical Malpractice Act prior to July 1, 1991, shall remain subject to those terms and provisions of the act which existed on that date of qualification and that, upon the date of renewal of the health care provider's policy of malpractice liability insurance or continuation of coverage for those health care providers who have a cash deposit with the superintendent of insurance, those provisions of the act effective on those dates shall apply and the provisions of Subsection B of Section 41-5-6.1 NMSA 1978 shall apply for the purposes of base premium calculations.

Statutory limitation period cannot be considered to come within the meaning of "benefit" as used in Subsection B of this section. The result is that 41-5-13 NMSA 1978 applies to all malpractice claims, as defined in 41-5-3C NMSA 1978. There is no distinction, for limitation of action purposes, between qualified and nonqualified health care providers. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982).

Superintendent to maintain list of qualified providers. - This section creates in the superintendent of insurance some requirement to maintain a list of those whose qualified status affects suits against them. Otero v. Zouhar, 102 N.M. 482, 697 P.2d 482 (1985), overruled on other grounds, Grantland v. Lea Regional Hosp., Inc., 110 N.M. 378, 796 P.2d 599 (1990).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For comment on access to the courts and the Medical Malpractice Act: Jiron v. Mahlab, see 14 N.M.L. Rev. 503 (1984).

41-5-5. Qualifications. (Effective July 1, 1992.)

A. To be qualified under the provisions of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978], a health care provider shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance in the amount of at least two hundred thousand dollars ($200,000) per occurrence or for an individual health care provider, excluding hospitals, by having continuously on deposit the sum of six hundred thousand dollars ($600,000) in cash with the superintendent or such other like deposit as the superintendent may allow by rule or regulation; provided that in the absence of an additional deposit as required by this subsection, the deposit shall provide coverage for not more than three separate occurrences; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 41-5-25 NMSA 1978.

B. For hospitals electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on a risk assessment of each hospital, each hospital's base coverage or deposit and additional charges for the patient's compensation fund. The superintendent shall arrange for an actuarial study, as provided in Section 41-5-25 NMSA 1978.

C. Health care providers not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of malpractice claims against them.

History: 1978 Comp., § 41-5-5, enacted by Laws 1991, ch. 264, § 2.

Repeals and reenactments. - Laws 1991, ch. 264, § 2 repeals 41-5-5 NMSA 1978, as amended by Laws 1991, ch. 264, § 1, and enacts the above section, effective July 1, 1992.

41-5-6. Limitation of recovery. (Effective until July 1, 1992.)

A. Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed five hundred thousand dollars ($500,000) per occurrence. In jury cases, the jury shall not be given any instructions dealing with this limitation.

B. If a jury returns a malpractice award in excess of five hundred thousand dollars ($500,000), the jury shall be given a special interrogatory asking the value of the accrued medical care and related benefits included in the jury's award. This special interrogatory shall not inquire into the value of future medical care and related benefits. If the value of the accrued medical care and related benefits equals or exceeds the

amount by which the jury award exceeds five hundred thousand dollars ($500,000), the court shall enter judgment in the amount of the jury award. If the value given by the jury in response to this special interrogatory is less than the amount by which the jury award exceeds five hundred thousand dollars ($500,000), then the trial court shall reduce the jury award by the difference between the two figures. If the malpractice claim is tried without a jury, the value of the accrued medical care and related benefits shall not be subject to the five hundred thousand dollars ($500,000) limitation.

C. Monetary damages shall not be awarded for future medical expenses in malpractice claims.

D. A health care provider's personal liability is limited to one hundred fifty thousand dollars ($150,000) for monetary damages and medical care and related benefits as provided in Section 41-5-7 NMSA 1978. Any amount due from a judgment or settlement in excess of one hundred fifty thousand dollars ($150,000) shall be paid from the patient's compensation fund, as provided in Section 41-5-25 NMSA 1978.

History: 1953 Comp., § 58-33-6, enacted by Laws 1976, ch. 2, § 6; 1991, ch. 264, § 3.

The 1991 amendment, effective July 1, 1991, substituted "shall not exceed" for "may not exceed" in Subsection A; and, in Subsection D, substituted "one hundred fifty thousand dollars ($150,000)" for "one hundred thousand dollars ($100,000)" in two places, "41-5-7 NMSA 1978" for "7" at the end of the first sentence and "41-5-25 NMSA 1978" for "25 of the Medical Malpractice Act" at the end of the second sentence.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 288, 289; 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 367 to 371.

Contributory negligence or assumption of risk, 50 A.L.R.2d 1043.

Aggravation of injuries as mitigating damages in action against physician or surgeon for malpractice, 50 A.L.R.2d 1055.

Liability of chiropodist, 80 A.L.R.2d 1278.

Allowance of punitive damages in medical malpractice action, 27 A.L.R.3d 1274.

Validity and construction of state statutory provisions relating to limitations on amount of recovery in medical malpractice claim and submission of such claim to pretrial panel, 80 A.L.R.3d 583.

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.

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions, 12 A.L.R.4th 23.

Validity of state statute providing for periodic payment of future damages in medical malpractice action, 41 A.L.R.4th 275.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 A.L.R.4th 13.

Recovery in death action for failure to diagnose incurable disease which caused death, 64 A.L.R.4th 1232.

Medical malpractice: measure and elements of damages in actions based on loss of chance, 81 A.L.R.4th 485.

What nonpatient claims against doctors, hospitals, or similar health care providers are not subject to statutes specifically governing actions and damages for medical malpractice, 88 A.L.R.4th 358.

70 C.J.S. Physicians and Surgeons §§ 124, 127.

41-5-6. Limitation of recovery. (Effective July 1, 1992.)

A. Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed five hundred thousand dollars ($500,000) per occurrence. In jury cases, the jury shall not be given any instructions dealing with this limitation.

B. If a jury returns a malpractice award in excess of five hundred thousand dollars ($500,000), the jury shall be given a special interrogatory asking the value of the accrued medical care and related benefits included in the jury's award. This special interrogatory shall not inquire into the value of future medical care and related benefits. If the value of the accrued medical care and related benefits equals or exceeds the amount by which the jury award exceeds five hundred thousand dollars ($500,000), the court shall enter judgment in the amount of the jury award. If the value given by the jury in response to this special interrogatory is less than the amount by which the jury award exceeds five hundred thousand dollars ($500,000), then the trial court shall reduce the jury award by the difference between the two figures. If the malpractice claim is tried without a jury, the value of the accrued medical care and related benefits shall not be subject to the five hundred thousand dollars ($500,000) limitation.

C. Monetary damages shall not be awarded for future medical expenses in malpractice claims.

D. A health care provider's personal liability is limited to two hundred thousand dollars ($200,000) for monetary damages and medical care and related benefits as provided in Section 41-5-7 NMSA 1978. Any amount due from a judgment or settlement in excess of two hundred thousand dollars ($200,000) shall be paid from the patient's compensation fund, as provided in Section 41-5-25 NMSA 1978.

History: 1978 Comp., § 41-5-6, enacted by Laws 1991, ch. 264, § 4.

Repeals and reenactments. - Laws 1991, ch. 264, § 4 repeals 41-5-6 NMSA 1978, as amended by Laws 1991, ch. 264, § 3, and enacts the above section, effective July 1, 1992.

41-5-6.1. Amount recoverable.

A. Notwithstanding any other provision of the Medical Malpractice Act, if on July 1, 1993, it is determined by an actuarial study as provided for in Section 41-5-25 NMSA 1978 that on an occurrence basis the total recommended surcharge to the patient's compensation fund, based on a five-hundred-thousand-dollar ($500,000) aggregate amount recoverable by all persons for, or arising from, any injury or death to a patient as a result of malpractice is:

(1) equal to or less than thirty-three percent, then the aggregate dollar amount recoverable by all persons for, or arising from, any injury or death to a patient as a result of malpractice occurring on or after July 1, 1993 shall be seven hundred fifty thousand dollars ($750,000);

(2) greater than thirty-three percent but equal to or less than sixty-six percent, the aggregate amount recoverable shall be increased on a pro-rata basis not to exceed seven hundred fifty thousand dollars ($750,000); and

(3) greater than sixty-six percent, there shall be no increase in the aggregate amount recoverable, which shall remain at five hundred thousand dollars ($500,000).

B. Except as provided in Subsection C of this section, for the period of July 1, 1991 through July 1, 1993, the superintendent shall not approve a base premium for health care providers, of less than that approved on January 1, 1991.

C. For the period of July 1, 1991 through July 1, 1993, the superintendent, based on sound actuarial principles, shall require an increase in base premiums sufficient to reflect the increased exposure of the health care provider's personal liability from one hundred thousand dollars ($100,000) to one hundred fifty thousand dollars ($150,000) effective July 1, 1991 and to two hundred thousand dollars ($200,000) effective July 1, 1992.

History: 1978 Comp., § 41-5-6.1, enacted by Laws 1991, ch. 264, § 5.

Effective dates. - Laws 1991, ch. 264, § 15 makes the act effective on July 1, 1991.

41-5-7. Future medical expenses. (Effective until July 1, 1992.)

A. In all malpractice claims where liability is established, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits. No inquiry shall be made concerning the value of such future medical care and related benefits, and evidence relating to the same shall not be admissible. In actions upon malpractice claims tried to the court, where liability is found, the court's findings shall include a recitation that the patient is or is not in need of future medical care and related benefits.

B. Except as provided in Section 41-5-10 NMSA 1978, once a judgment is entered in favor of a patient who is found to be in need of future medical care and related benefits or a settlement is reached between a patient and health care provider in which the provision of medical care and related benefits is agreed upon, and continuing as long as medical or surgical attention is reasonably necessary, the patient shall be furnished with all medical care and related benefits directly or indirectly made necessary by the health care provider's malpractice, subject to a semi-private room limitation in the event of hospitalization, unless the patient refuses to allow them to be so furnished.

C. Awards of such future medical care and related benefits shall not be subject to the five hundred thousand dollar ($500,000) limitation imposed in Section 41-5-6 NMSA 1978.

D. Payments for medical care and related benefits shall be made as expenses are incurred.

E. The health care provider shall be liable for all medical care and related benefit payments until the total payments made by or on behalf of it for monetary damages and medical care and related benefits combined equals one hundred fifty thousand dollars ($150,000), after which the payments shall be made by the patient's compensation fund.

F. This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.

G. The court in a supplemental proceeding shall estimate the value of the future medical care and related benefits reasonably due the patient on the basis of evidence presented to it. That figure shall not be included in any award or judgment but shall be included in the record as a separate court finding.

H. A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider. Punitive damages shall not be paid from the patient's compensation fund nor from the proceeds of the health care provider's insurance contract unless the contract expressly provides coverage. Nothing in Section 41-5-6

NMSA 1978 shall preclude the award of punitive damages to a patient. Nothing in this subsection shall be construed to authorize the imposition of liability for punitive damages on a derivative basis where that imposition would not be otherwise authorized by law.

History: 1953 Comp., § 58-33-7, enacted by Laws 1976, ch. 2, § 7; 1991, ch. 264, § 6.

The 1991 amendment, effective July 1, 1991, substituted "41-5-10 NMSA 1978" for "10" in Subsection B; inserted "future" near the beginning of Subsection C; substituted "41-5-6 NMSA 1978" for "6" at the end of Subsection C and in the second sentence in Subsection H; and substituted "one hundred fifty thousand dollars ($150,000)" for "one hundred thousand dollars ($100,000)" in Subsection E.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For annual survey of New Mexico insurance law, 19 N.M.L. Rev. 717 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of state statute providing for periodic payment of future damages in medical malpractice action, 41 A.L.R.4th 275.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 A.L.R.4th 13.

41-5-7. Future medical expenses. (Effective July 1, 1992.)

A. In all malpractice claims where liability is established, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits. No inquiry shall be made concerning the value of such future medical care and related benefits, and evidence relating to the same shall not be admissible. In actions upon malpractice claims tried to the court, where liability is found, the court's findings shall include a recitation that the patient is or is not in need of future medical care and related benefits.

B. Except as provided in Section 41-5-10 NMSA 1978, once a judgment is entered in favor of a patient who is found to be in need of future medical care and related benefits or a settlement is reached between a patient and health care provider in which the provision of medical care and related benefits is agreed upon, and continuing as long as medical or surgical attention is reasonably necessary, the patient shall be furnished with all medical care and related benefits directly or indirectly made necessary by the health care provider's malpractice, subject to a semi-private room limitation in the event of hospitalization, unless the patient refuses to allow them to be so furnished.

C. Awards of future medical care and related benefits shall not be subject to the five hundred thousand dollar ($500,000) limitation imposed in Section 41-5-6 NMSA 1978.

D. Payments for medical care and related benefits shall be made as expenses are incurred.

E. The health care provider shall be liable for all medical care and related benefit payments until the total payments made by or on behalf of it for monetary damages and medical care and related benefits combined equals two hundred thousand dollars ($200,000), after which the payments shall be made by the patient's compensation fund.

F. This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.

G. The court in a supplemental proceeding shall estimate the value of the future medical care and related benefits reasonably due the patient on the basis of evidence presented to it. That figure shall not be included in any award or judgment but shall be included in the record as a separate court finding.

H. A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider. Punitive damages shall not be paid from the patient's compensation fund nor from the proceeds of the health care provider's insurance contract unless the contract expressly provides coverage. Nothing in Section 41-5-6 NMSA 1978 shall preclude the award of punitive damages to a patient. Nothing in this subsection shall be construed to authorize the imposition of liability for punitive damages on a derivative basis where that imposition would not be otherwise authorized by law.

History: 1978 Comp., § 41-5-7, enacted by Laws 1991, ch. 264, § 7.

Repeals and reenactments. - Laws 1991, ch. 264, § 7 repeals former 41-5-7 NMSA 1978, as amended by Laws 1991, ch. 264, § 6, and enacts the above section, effective July 1, 1992.

41-5-8. Medical benefits prior to judgment.

A health care provider named as a defendant in a malpractice claim, or named as a respondent in a proceeding before the medical review commission created in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978], shall have the option of paying for the patient's medical care and related benefits at any time prior to the entry of a judgment. Except as provided in Section 11 [41-5-11 NMSA 1978] of the Medical Malpractice Act, evidence of a health care provider's payment for such benefits shall not be admissible in the trial of the malpractice claim brought against it.

History: 1953 Comp., § 58-33-8, enacted by Laws 1976, ch. 2, § 8.

41-5-9. District court; continuing jurisdiction.

A. The district court from which final judgment issues shall have continuing jurisdiction in cases where medical care and related benefits are awarded pursuant to Section 7 [41-5-7 NMSA 1978].

B. In all cases where the patient's continued need of such benefits, or the degree to which such benefits are needed is challenged at a point in time after a judgment is entered, the court, sitting without a jury, shall determine whether such need continues to exist and the extent of such need.

C. Whenever a patient petitions the district court for an increase in medical care and related benefits, the petition shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character and motions for preliminary injunctions filed pursuant to Rules 65, 66, NMR Civ. P. [Rules 1-065, 1-066].

D. The health care provider shall have the burden of proving that the patient's need for benefits has subsided or abated, or that medical care and related benefits are not reasonably necessary, which it shall establish by clear and convincing evidence. The patient shall have the burden of proving that his need for medical care and related benefits has increased, which he shall establish by a preponderance of the evidence.

History: 1953 Comp., § 58-33-9, enacted by Laws 1976, ch. 2, § 9.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-10. Patient; future examinations and hearings.

A. Any health care provider shall be entitled to have a physical examination of the patient by a physician of the health care provider's choice from time to time for the purpose of determining the patient's continued need of medical care and related benefits, subject to the following requirements:

(1) notice in writing shall be delivered to or served upon the patient specifying the time and place where it is intended to conduct the examination. Such notice must be given at least ten days prior to the time stated in the notice. Delivery by certified mail is permitted;

(2) such examination shall be by a physician qualified to practice medicine under the law of this state or of the state or county wherein the patient resides;

(3) the place at which such examination is to be conducted shall not involve an unreasonable amount of travel for the patient considering all the circumstances. It shall not be necessary for a patient who resides outside this state to come into this state for such an examination unless so ordered by the court;

(4) within thirty days after the examination, the patient shall be compensated by the party requesting the examination for all necessary and reasonable expenses incidental to submitting to the examination including the reasonable cost of travel, meals, lodging, loss of pay or other like direct expense;

(5) examinations may not be required more frequently than at six-month intervals; except that upon application to the court having jurisdiction of the claim and after reasonable cause shown therefor, examination within a shorter interval may be ordered. In considering such application, the court should exercise care to prevent harassment to the patient;

(6) the patient shall be entitled to have a physician or an attorney of his own choice or both present at such examination. The patient shall pay such physician or attorney himself; and

(7) the patient shall be promptly furnished with a copy of the report of the physical examination made by the physician making the examination on behalf of the health care provider.

B. If a patient fails or refuses to submit to examination in accordance with the notice and if the requirements of Subsection A of this section have been satisfied, the court may forfeit all medical care and related benefits which would accrue or become due to him except for such failure or refusal to submit to examination during the period that he willfully persists in such failure or refusal.

C. If any patient shall persist in any injurious practice which imperils, retards or impairs his recovery or increases his injury or refuses to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the court may in its discretion reduce or suspend his medical care and related benefits until the injurious practice is discontinued.

D. Any physician selected by the health care provider and paid by the health care provider who shall make or be present at an examination of the patient conducted in pursuance of this section may be required to testify as to the conduct thereof and the findings made. Communications made by the patient upon such examination to such physician or physicians shall not be considered privileged.

E. The health care provider or the custodian of the patient's compensation fund shall pay all reasonable legal fees, cost of medical examinations and the cost of the fees of medical expert witnesses in any proceeding in which the patient succeeds in raising his medical care and related benefits or in any unsuccessful proceeding brought by the health care provider or the patient's compensation fund custodian to reduce medical care and related benefits.

History: 1953 Comp., § 58-33-10, enacted by Laws 1976, ch. 2, § 10.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of state statute providing for periodic payment of future damages in medical malpractice action, 41 A.L.R.4th 275.

41-5-11. Set-off of advance payments.

A. Evidence of an advance payment is not admissible until there is a final judgment in favor of the patient, in which event the court shall reduce the judgment to the patient to the extent of the advance payment. In jury cases where there is a factual dispute concerning an alleged advance payment, all questions of fact relating to such an advance payment shall be resolved by the jury after it has reached its verdict. The advance payment shall inure to the exclusive benefit of the health care provider or a party making the payment in its behalf. In the event the advance payment exceeds the liability of the defendant or the insurer making it, the court shall order any adjustment necessary to equitably apportion the amount which each defendant is obligated to pay, exclusive of costs. In no case shall an advance payment in excess of an award be repayable by the person receiving it.

B. If a health care provider should elect to pay for medical care and related benefits at any time prior to the entry of a judgment, as provided in Section 8 [41-5-8 NMSA 1978] of the Medical Malpractice Act, and subsequently is found not to be liable, its legal and equitable right of recovery for all such payments shall not be foreclosed or prejudiced in any way.

History: 1953 Comp., § 58-33-11, enacted by Laws 1976, ch. 2, § 11.

41-5-12. Claims for compensation not assignable.

A patient's claim for compensation under the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978] is not assignable.

History: 1953 Comp., § 58-33-12, enacted by Laws 1976, ch. 2, § 12.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 170 to 174.

41-5-13. Limitations.

No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978] may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This subsection [section] applies to all persons regardless of minority or other legal disability.

History: 1953 Comp., § 58-33-13, enacted by Laws 1976, ch. 2, § 13.

Cross-references. - For tolling of limitations period while matter under consideration of panel, see 41-5-22 NMSA 1978.

Compiler's note. - The "effective date of the Medical Malpractice Act," referred to in the first sentence, is February 27, 1976. See Laws 1976, ch. 2, § 32.

Section applicable to both qualified and nonqualified health care providers. - The statutory limitation period cannot be considered to come within the meaning of "benefit" as used in 41-5-5B NMSA 1978. The result is that this section applies to all malpractice claims, as defined in 41-5-3C NMSA 1978. There is no distinction, for limitation of action purposes, between qualified and nonqualified health care providers. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982).

Section applicable to wrongful death action based on malpractice. - The specific inclusion of a wrongful death claim within the definition of a malpractice claim makes the limitation period of this section applicable to a claim of malpractice resulting in wrongful death. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982); Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), overruled on other grounds Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Section inapplicable to minor beneficiaries under Wrongful Death Act. - The tolling provisions applicable to minors under the age of nine years contained in this section apply only to minors who suffer an alleged act of malpractice and not to minors who are beneficiaries under the Wrongful Death Act. Moncor Trust Co. ex rel. Flynn v. Feil, 105 N.M. 444, 733 P.2d 1327 (Ct. App. 1987).

When cause of action commences. - A cause of action for personal injuries for malpractice accrues at the time of the wrongful act causing the injury, and the mere fact that plaintiff was not aware of the existence or extent of his injuries or his right of action for malpractice does not postpone the commencement of the statute of limitations. Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963).

The statute of limitations commences running from the date of injury or the date of the alleged malpractice. Crumpton v. Humana, Inc., 99 N.M. 562, 661 P.2d 54 (1983); Keithley v. St. Joseph's Hosp., 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984); Irvine v. St. Joseph's Hosp., 102 N.M. 572, 698 P.2d 442 (Ct. App. 1984).

To toll statute of limitations under doctrine of fraudulent concealment, a patient has the burden of showing (1) that the physician knew of the alleged wrongful act and concealed it from the patient or had material information pertinent to its discovery which he failed to disclose, and (2) that the patient did not know, or could not have known

through the exercise of reasonable diligence, of his cause of action within the statutory period. Kern ex rel. Kern v. St. Joseph Hosp., 102 N.M. 452, 697 P.2d 135 (1985).

Questions for fact finder in fraudulent concealment. - The question of a physician's knowledge of the error or concealment of pertinent facts that might have reasonably led to the discovery of the error and the related question of the patient's due diligence in discovering the cause of action are ordinarily for determination by the finder of fact. Kern ex rel. Kern v. St. Joseph Hosp., 102 N.M. 452, 697 P.2d 135 (1985).

Statute tolled by nondisclosure of pertinent, not reasonably discoverable, facts. - The statute of limitations may be tolled where a physician has knowledge of facts relating to medical malpractice and fails to disclose such facts to the patient under circumstances where the patient may not be reasonably expected to learn of the improper acts. Keithley v. St. Joseph's Hosp., 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984).

Proof required with allegation that statute tolled by fraud. - A plaintiff who alleges that the statute has been tolled by fraud, either active or passive, must establish that she did not have the means to discover the fraud. Keithley v. St. Joseph's Hosp., 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984).

Evidence insufficient to toll statute of limitations. - See Ealy v. Sheppeck, 100 N.M. 250, 669 P.2d 259 (Ct. App. 1983).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For comment on access to the courts and the Medical Malpractice Act: Jiron v. Mahlab, see 14 N.M.L. Rev. 503 (1984).

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

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Limitation of actions, 80 A.L.R.2d 320.

Applicability, to negligence action against hospital, of statute of limitations applicable to malpractice and related actions against physicians, surgeons, or the like, 89 A.L.R.2d 1180.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice, 8 A.L.R.3d 1336.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 A.L.R.3d 7.

Amendment purporting to change the nature of the action or theory of recovery made after statute of limitations has run, as relating back to filing of original complaint, 70 A.L.R.3d 82.

Statute of limitations relating to medical malpractice actions as applicable to actions against unlicensed practitioner, 70 A.L.R.3d 114.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 A.L.R.3d 218.

When statute of limitations begins to run in dental malpractice suits, 3 A.L.R.4th 318.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 A.L.R.4th 1214.

Statute of limitations applicable to third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats, 41 A.L.R.4th 1078.

Applicability of "foreign object" exception in medical malpractice statutes of limitations, 50 A.L.R.4th 250.

Medical malpractice statutes of limitation minority provisions, 62 A.L.R.4th 758.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice, 70 A.L.R.4th 535.

Medical malpractice: when limitations period begins to run on claim for optometrist's malpractice, 70 A.L.R.4th 600.

70 C.J.S. Physicians and Surgeons §§ 107, 108.

41-5-14. Medical review commission.

A. The New Mexico medical review commission is created. The function of the New Mexico medical review commission is to provide panels to review all malpractice claims against health care providers covered by the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978].

B. Those eligible to sit on a panel shall consist of health care providers licensed pursuant to New Mexico law and residing in New Mexico and the members of the state bar.

C. Cases which a panel will consider include all cases involving any alleged act of malpractice occurring in New Mexico by health care providers qualified under the Medical Malpractice Act.

D. An attorney shall submit a case for the consideration of a panel, prior to filing a complaint in any district court or other court sitting in New Mexico, by addressing an application, in writing, signed by the patient or his attorney, to the director of the medical review commission.

E. The director of the medical review commission will be an attorney appointed by and serving at the pleasure of the chief justice of the New Mexico supreme court.

F. The chief justice shall set the director's salary and report the same to the superintendent in his capacity as custodian of the patient's compensation fund.

History: 1953 Comp., § 58-33-14, enacted by Laws 1976, ch. 2, § 14.

Claim submitted as of date of mailing. - The date of mailing an application for a claim to the review commission constitutes submission of the claim for purposes of Subsection D of this section. Otero v. Zouhar, 102 N.M. 482, 697 P.2d 482 (1985), overruled on other grounds, Grantland v. Lea Regional Hosp., Inc., 110 N.M. 378, 796 P.2d 599 (1990).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For comment on access to the courts and the Medical Malpractice Act: Jiron v. Mahlab, see 14 N.M.L. Rev. 503 (1984).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

41-5-15. Commission decision required; application.

A. No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered.

B. This application shall contain the following:

(1) a brief statement of the facts of the case, naming the persons involved, the dates and the circumstances, so far as they are known, of the alleged act or acts of malpractice; and

(2) a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application, and, for the purposes of its consideration of the matter only, waiving any claim of privilege as to

the contents of those records. Nothing in that statement shall in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

History: 1953 Comp., § 58-33-15, enacted by Laws 1976, ch. 2, § 15.

Section does not deprive all plaintiffs of constitutional right of access to courts. Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983).

But unconstitutional to cause undue delay. - Where the requirement of first going before the medical review commission causes undue delay prejudicing a plaintiff by the loss of witnesses or parties, the plaintiff is unconstitutionally deprived of his right of access to the courts. Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983).

Subsection A procedural and not binding. - The statutory provision that claimants against health care providers first submit their claims to the commission before filing suit is a purely procedural requirement and cannot, therefore, be deemed binding; the procedural provisions of the Medical Malpractice Act, to the extent of denying plaintiff access to the courts, shall not control where the defendant has not been prejudiced. Otero v. Zouhar, 102 N.M. 482, 697 P.2d 482 (1985), overruled on other grounds, Grantland v. Lea Regional Hosp., Inc., 110 N.M. 378, 796 P.2d 599 (1990).

Not necessary to bring each allegation before commission. - Under this section, it is not necessary that each of plaintiff's counts, nor each of his allegations, be presented to the medical review commission, as the district court has subject matter jurisdiction over medical malpractice and battery claims not submitted to the commission where application satisfied requirements of this section. Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

Claims not necessary to bring before commission. - Claims for negligent misrepresentation and intentional infliction of emotional distress do not first have to be presented to the medical review commission because they do not come within the definition of a malpractice claim. Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

Excused failure to file claim with commission. - Misinformation supplied by the office of the state superintendent of insurance, regarding who were qualified health care providers, excused plaintiff's failure to file his claim with the commission before filing his complaint in district court. Otero v. Zouhar, 102 N.M. 482, 697 P.2d 482 (1985), overruled on other grounds, Grantland v. Lea Regional Hosp., Inc., 110 N.M. 378, 796 P.2d 599 (1990).

Statute of limitation tolled regardless of outcome. - This section, which tolls the statute of limitations period upon submission of a case to the commission, should be enforced according to its terms whether the commission's determination is that the health care provider is not qualified and the claim is consequently rejected, or that the

health care provider is qualified and the claim is resolved on its merits. Grantland v. Lea Regional Hosp., Inc., 110 N.M. 378, 796 P.2d 599 (1990).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For comment on access to the courts and the Medical Malpractice Act: Jiron v. Mahlab, see 14 N.M.L. Rev. 503 (1984).

41-5-16. Application procedure.

A. Upon receipt of an application for review, the commission's director or his delegate shall cause to be served a true copy of the application on the health care providers involved. Service shall be effected pursuant to New Mexico law. If the health care provider involved chooses to retain legal counsel, his attorney shall informally enter his appearance with the director.

B. The health care provider shall answer the application for review and in addition shall submit a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application, and, for the purposes of its consideration of the matter only, waiving any claim of privilege as to the contents of those records. Nothing in that statement shall in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

C. In instances where applications are received employing the theory of respondeat superior or some other derivative theory of recovery, the director shall forward such applications to the state professional societies, associations or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed, and the health care provider named a respondent as employer, master or principal.

History: 1953 Comp., § 58-33-16, enacted by Laws 1976, ch. 2, § 16.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 70 C.J.S. Physicians and Surgeons §§ 110 to 113.

41-5-17. Panel selection.

A. Applications for review shall be promptly transmitted by the director to the directors of the health care provider's state professional society or association and the state bar association, who shall each select three panelists within thirty days from the date of transmittal of the application.

B. If no state professional society or association exists, or if the health care provider does not belong to such a society or association, the director shall transmit the application to the health care provider's state licensing board, which shall in turn select

three persons from the health care provider's profession and, where applicable, to [two] persons specializing in the same field or discipline as the health care provider.

C. In cases where there are multiple defendants, the case against each health care provider may be reviewed by a separate panel, or a single combined panel may review the claim against all parties defendant, at the discretion of the director.

D. Three panel members from the health care provider's profession and three panel members from the state bar association shall sit in review in each case.

E. In those cases where the theory of respondeat superior or some other derivative theory of recovery is employed, two of the panel members shall be chosen from the individual health care provider's profession and one panel member shall be chosen from the profession of the health care provider named a respondent employer, master or principal.

F. The director of the commission or his delegate, who shall be an attorney, shall sit on each panel and serve as chairman.

G. Any member shall disqualify himself from consideration of any case in which, by virtue of his circumstances, he feels his presence on the panel would be inappropriate, considering the purpose of the panel. The director may excuse a proposed panelist from serving.

H. Whenever a party shall make and file an affidavit that a panel member selected pursuant to this section cannot, according to the belief of the party making the affidavit, sit in review of the application with impartiality, that panel member shall proceed no further. Another panel member shall be selected by the health care provider's professional association, state licensing board or the state bar association, as the case may be. A party may not disqualify more than three proposed panel members in this manner in any single malpractice claim.

History: 1953 Comp., § 58-33-17, enacted by Laws 1976, ch. 2, § 17.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 374 to 376.

41-5-18. Time and place of hearing.

A date, time and place for hearing shall be fixed by the director and prompt notice thereof shall be given to the parties involved, their attorneys and the members of the panel. In no instance shall the date set be more than sixty days after the transmittal by the director of the application for review, unless good cause exists for extending the

period. Hearings may be held anywhere in the state of New Mexico, and the director shall give due regard to the convenience of the parties in determining the place of hearing.

History: 1953 Comp., § 58-33-18, enacted by Laws 1976, ch. 2, § 18.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-19. Hearing procedures.

A. At the time set for hearing, the attorney submitting the case for review shall be present and shall make a brief introduction of his case, including a resume of the facts constituting alleged professional malpractice which he is prepared to prove. The health care provider against whom the claim is brought and its attorney may be present and may make an introductory statement of its case.

B. Both parties may call witnesses to testify before the panel, which witnesses shall be sworn. Medical texts, journals, studies and other documentary evidence relied upon by either party may be offered and admitted if relevant. Written statements of fact of treating health care providers may be reviewed. The monetary damages in any case shall not be a subject of inquiry or discussion.

C. The hearing will be informal and no official transcript shall be made. Nothing contained in this paragraph shall preclude the taking of the testimony by the parties at their own expense.

D. At the conclusion of the hearing, the panel may take the case under advisement or it may request that additional facts, records, witnesses or other information be obtained and presented to it at a supplemental hearing, which shall be set for a date and time certain, not longer than thirty days from the date of the original hearing unless the attorney bringing the matter for review shall in writing consent to a longer period.

E. Any supplemental hearing shall be held in the same manner as the original hearing, and the parties concerned and their attorneys may be present.

History: 1953 Comp., § 58-33-19, enacted by Laws 1976, ch. 2, § 19.

Hearings conducted in atmosphere free of judicial intimidations. - Hearings are to be conducted in an atmosphere free of the intimidations that may accompany a court setting, and the give-and-take of the panel's deliberations, after it has heard the presentation of the parties, is to be as open and uninhibited as are a jury's deliberations at the end of a court trial. Salazare v. St. Vincent Hosp., 96 N.M. 409, 631 P.2d 315 (Ct. App.), aff'd in part and rev'd on other grounds, 95 N.M. 147, 619 P.2d 823 (1980).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-20. Panel deliberations and decision.

A. The deliberations of the panel shall be and remain confidential. Upon consideration of all the relevant material, the panel shall decide only two questions:

(1) whether there is substantial evidence that the acts complained of occurred and that they constitute malpractice; and

(2) whether there is a reasonable medical probability that the patient was injured thereby.

B. All votes of the panel on the two questions for decision shall be by secret ballot. The decision shall be by a majority vote of those voting members of the panel who have sat on the entire case. The decision shall be communicated in writing to the parties and attorneys concerned and a copy thereof shall be retained in the permanent files of the commission.

C. The decision shall in every case be signed for the panel by the chairman, who shall vote only in the event the other members of the panel are evenly divided, and shall contain only the conclusions reached by a majority of its members and the number of members, if any, dissenting therefrom; provided, however, that if the vote is not unanimous, the majority may briefly explain the reasoning and basis for their conclusion, and the dissenters may likewise explain the reasons for disagreement.

D. The report of the medical review panel shall not be admissible as evidence in any action subsequently brought in a court of law. A copy of the report shall be sent to the health care provider's professional licensing board.

E. Panelists and witnesses shall have absolute immunity from civil liability for all communications, findings, opinions and conclusions made in the course and scope of duties prescribed by the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978].

F. The panel's decisions shall be without administrative or judicial authority and shall not be binding on any party. The panel shall make no effort to settle or compromise any claim nor express any opinion on the monetary value of any claim.

History: 1953 Comp., § 58-33-20, enacted by Laws 1976, ch. 2, § 20.

Panel's deliberations to be open and uninhibited. - Hearings are to be conducted in an atmosphere free of the intimidations that may accompany a court setting, and the give-and-take of the panel's deliberations, after it has heard the presentation of the parties, is to be as open and uninhibited as are a jury's deliberations at the end of a

court trial. Salazare v. St. Vincent Hosp., 96 N.M. 409, 631 P.2d 315 (Ct. App.), aff'd in part and rev'd on other grounds, 95 N.M. 147, 619 P.2d 823 (1980).

Extent of privilege from discovery. - The privilege exempting panelists of the medical review commission from discovery applies to the panel's deliberations and any report made by the panel, but not to testimony heard by the panel. St. Vincent Hosp. v. Salazare, 95 N.M. 147, 619 P.2d 823 (1980).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For comment on access to the courts and the Medical Malpractice Act: Jiron v. Mahlab, see 14 N.M.L. Rev. 503 (1984).

41-5-21. Director; rules of procedure.

The director is authorized to adopt and publish rules of procedure necessary to implement and carry out the duties of the medical review commission. No rule shall be adopted, however, which requires a party to make a monetary payment as a condition to bringing a malpractice claim before the medical review panel.

History: 1953 Comp., § 58-33-21, enacted by Laws 1976, ch. 2, § 21.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 374, 375.

41-5-22. Tolling of statute of limitation.

The running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the panel and shall not commence to run again until thirty days after the panel's final decision is entered in the permanent files of the commission and a copy is served upon the claimant and his attorney by certified mail.

History: 1953 Comp., § 58-33-22, enacted by Laws 1976, ch. 2, § 22.

Mailing decision to claimant's attorney suffices. - Mailing of the final decision of the medical review commission to a claimant in care of his attorney is sufficient service for the purpose of determining recommencement of the limitation period relating to medical malpractice actions. Saiz v. Barham, 100 N.M. 596, 673 P.2d 1329 (Ct. App. 1983).

Claim submitted as of date of mailing. - A claim is considered to have been submitted to the medical review commission as of the date that the application for the claim is mailed to the commission. Otero v. Zouhar, 102 N.M. 482, 697 P.2d 482 (1985), overruled on other grounds, Grantland v. Lea Regional Hosp., Inc., 110 N.M. 378, 796 P.2d 599 (1990).

Negligence prior to effective date of act. - This section does not apply to toll the running of the general limitation period for a personal injury claim (37-1-8 NMSA 1978), where the act of malpractice has occurred prior to the effective date of the Medical Malpractice Act, February 27, 1976. Loesch v. Henderson, 103 N.M. 554, 710 P.2d 748 (Ct. App. 1985).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For comment on access to the courts and the Medical Malpractice Act: Jiron v. Mahlab, see 14 N.M.L. Rev. 503 (1984).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - When statute of limitations begins to run in dental malpractice suits, 3 A.L.R.4th 318.

41-5-23. Provision of expert witness.

In any malpractice claim where the panel has determined that the acts complained of were or reasonably might constitute malpractice and that the patient was or may have been injured by the act, the panel, its members, the director and the professional association concerned will cooperate fully with the patient in retaining a physician qualified in the field of medicine involved, who will consult with, assist in trial preparation and testify on behalf of the patient, upon his payment of a reasonable fee to the same effect as if the physician had been engaged originally by the patient.

History: 1953 Comp., § 58-33-23, enacted by Laws 1976, ch. 2, § 23.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Expert and Opinion Evidence §§ 19, 20, 40.

Necessity of expert evidence to support an action for malpractice against a physician or surgeon, 81 A.L.R.2d 597.

Competency of general practitioner to testify as expert witness in action against specialist for medical malpractice, 31 A.L.R.3d 1163.

Competence of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality, 37 A.L.R.3d 420.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 A.L.R.3d 1084.

41-5-24. Maintenance of records.

The director shall maintain records of all proceedings before the medical review commission which shall include the nature of the acts or omissions complained of, a brief summary of the evidence presented, the decision of the panel and any majority or dissenting opinions filed. Such records shall not be made public and shall not be subject to subpoena but shall be used solely for the purpose of compiling statistical data and facilitating on-going studies of medical malpractice in New Mexico.

History: 1953 Comp., § 58-33-24, enacted by Laws 1976, ch. 2, § 24.

41-5-25. Patient's compensation fund. (Effective until July 1, 1992.)

A. There is created in the state treasury a "patient's compensation fund" to be collected and received by the superintendent for exclusive use for the purposes stated in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978]. The fund and any income from it shall be held in trust, deposited in a segregated account, invested and reinvested by the superintendent with the prior approval of the state board of finance and shall not become a part of or revert to the general fund of this state. The superintendent shall have the authority to use fund money to purchase insurance for the fund and its obligations. The superintendent, as custodian of the patient's compensation fund, shall be notified by the health care provider or his insurer within thirty days of service on the health care provider of a complaint asserting a malpractice claim brought in a court in this state against the health care provider.

B. To create the patient's compensation fund, an annual surcharge shall be levied on all health care providers qualifying under Paragraph (1) of Subsection A of Section 41-5-5 NMSA 1978 in New Mexico. The surcharge shall be determined by the superintendent based upon sound actuarial principles, using data obtained from New Mexico experience if available, and shall not exceed sixty-six percent of the cost to each health care provider for his malpractice insurance or, if not insured, sixty-six percent of the average premium for practitioners in its own field or discipline. The surcharge shall be collected on the same basis as premiums by each insurer from the health care provider.

C. The surcharge with accrued interest shall be due and payable within thirty days after the premiums for malpractice liability insurance have been received by the insurer from the health care provider in New Mexico.

D. If the annual premium surcharge is collected but not paid within the time limit specified in Subsection C of this section, the certificate of authority of the insurer may be suspended until the annual premium surcharge is paid.

E. All expenses of collecting, protecting and administering the patient's compensation fund or of purchasing insurance for the fund shall be paid from the fund.

F. Claims payable pursuant to Laws 1976, Chapter 2, Section 30 shall be paid in accordance with the payment schedule constructed by the court. If the patient's compensation fund would be exhausted by payment of all claims allowed during a particular calendar year, then the amounts paid to each patient and other parties obtaining judgments shall be prorated, with each such party receiving an amount equal to the percentage his own payment schedule bears to the total of payment schedules outstanding and payable by the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following calendar years. However, payments for medical care and related benefits shall be made before any payment made under Laws 1976, Chapter 2, Section 30.

G. Upon receipt of one of the proofs of authenticity listed in this subsection, reflecting a judgment for damages rendered pursuant to the Medical Malpractice Act, the superintendent shall issue or have issued warrants in accordance with the payment schedule constructed by the court and made a part of its final judgment. The only claim against the patient's compensation fund shall be a voucher or other appropriate request by the superintendent after he receives:

(1) a certified copy of a final judgment in excess of one hundred fifty thousand dollars ($150,000) against a health care provider;

(2) a certified copy of a court-approved settlement or certification of settlement made prior to initiating suit, signed by both parties, in excess of one hundred fifty thousand dollars ($150,000) against a health care provider; or

(3) a certified copy of a final judgment less than one hundred fifty thousand dollars ($150,000) and an affidavit of a health care provider or its insurer attesting that payments made pursuant to Subsection E of Section 41-5-7 NMSA 1978, combined with the monetary recovery, exceed one hundred fifty thousand dollars ($150,000).

H. The superintendent shall contract for an independent actuarial study of the patient's compensation fund to be performed not less than once every two years.

History: 1978 Comp., § 41-5-25, enacted by Laws 1990, ch. 111, § 2; 1991, ch. 264, § 8.

Repeals and reenactments. - Laws 1990, ch. 111, § 2 repeals former 41-5-25 NMSA 1978, as amended by Laws 1990, ch. 111, § 1, relating to patient's compensation fund, and enacts the above section, effective July 1, 1991.

The 1990 amendment, effective March 5, 1990, inserted "and any income from it shall be held in trust, deposited in a segregated account invested and reinvested by the superintendent with prior approval of the state board of finance and" in the second sentence of Subsection A; substituted "sixty-six percent" for "thirty-three percent" in two places in Subsection B; deleted the former second sentence of Subsection C which read "Before July 1, 1976, the superintendent shall send to each insurer a statement

explaining the provisions of this section together with any other information necessary for their compliance with this section"; deleted former Subsection F pertaining to reduction of the surcharge in order to maintain the fund at approximately $5,000,000"; and redesignated former Subsections G and H as present Subsections F and G.

The 1991 amendment, effective July 1, 1991, substituted "sixty-six percent" for "thirty-three percent" in two places in Subsection B; deleted the former second sentence in Subsection C, relating to a duty of the superintendent prior to July 1, 1976; deleted former Subsection F, which read "If the fund exceeds the sum of five million dollars ($5,000,000) at the end of any calendar year after the payment of all claims and expenses, the superintendent shall reduce the surcharge provided in this section in order to maintain the fund at an approximate level of five million dollars ($5,000,000)"; redesignated former Subsections G and H as present Subsections F and G; substituted "one hundred fifty thousand dollars ($150,000)" for "one hundred thousand dollars ($100,000)" in four places in Subsection G; added Subsection H; and made minor stylistic changes throughout the section.

Compiler's note. - Laws 1990, ch. 111, § 3 repeals Laws 1989, ch. 324, § 43 which enacted 41-5-25 NMSA 1978 to become effective on July 1, 1990.

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

41-5-25. Patient's compensation fund. (Effective July 1, 1992 until July 1, 1993.)

A. There is created in the state treasury a "patient's compensation fund" to be collected and received by the superintendent for exclusive use for the purposes stated in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978]. The fund and any income from it shall be held in trust, deposited in a segregated account, invested and reinvested by the superintendent with the prior approval of the state board of finance and shall not become a part of or revert to the general fund of this state. The superintendent shall have the authority to use fund money to purchase insurance for the fund and its obligations. The superintendent, as custodian of the patient's compensation fund, shall be notified by the health care provider or his insurer within thirty days of service on the health care provider of a complaint asserting a malpractice claim brought in a court in this state against the health care provider.

B. To create the patient's compensation fund, an annual surcharge shall be levied on all health care providers qualifying under Paragraph (1) of Subsection A of Section 41-5-5 NMSA 1978 in New Mexico. The surcharge shall be determined by the superintendent based upon sound actuarial principles, using data obtained from New Mexico experience if available, and shall not exceed sixty-six percent of the cost to each health care provider for his malpractice insurance or, if not insured, sixty-six percent of the average premium for practitioners in its own field or discipline. The surcharge shall be collected on the same basis as premiums by each insurer from the health care provider.

C. The surcharge with accrued interest shall be due and payable within thirty days after the premiums for malpractice liability insurance have been received by the insurer from the health care provider in New Mexico.

D. If the annual premium surcharge is collected but not paid within the time limit specified in Subsection C of this section, the certificate of authority of the insurer may be suspended until the annual premium surcharge is paid.

E. All expenses of collecting, protecting and administering the patient's compensation fund or of purchasing insurance for the fund shall be paid from the fund.

F. Claims payable pursuant to Laws 1976, Chapter 2, Section 30 shall be paid in accordance with the payment schedule constructed by the court. If the patient's compensation fund would be exhausted by payment of all claims allowed during a particular calendar year, then the amounts paid to each patient and other parties obtaining judgments shall be prorated, with each such party receiving an amount equal to the percentage his own payment schedule bears to the total of payment schedules outstanding and payable by the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following calendar years. However, payments for medical care and related benefits shall be made before any payment made under Laws 1976, Chapter 2, Section 30.

G. Upon receipt of one of the proofs of authenticity listed in this subsection, reflecting a judgment for damages rendered pursuant to the Medical Malpractice Act, the superintendent shall issue or have issued warrants in accordance with the payment schedule constructed by the court and made a part of its final judgment. The only claim against the patient's compensation fund shall be a voucher or other appropriate request by the superintendent after he receives:

(1) a certified copy of a final judgment in excess of two hundred thousand dollars ($200,000) against a health care provider;

(2) a certified copy of a court-approved settlement or certification of settlement made prior to initiating suit, signed by both parties, in excess of two hundred thousand dollars ($200,000) against a health care provider; or

(3) a certified copy of a final judgment less than two hundred thousand dollars ($200,000) and an affidavit of a health care provider or its insurer attesting that payments made pursuant to Subsection E of Section 41-5-7 NMSA 1978, combined with the monetary recovery, exceed two hundred thousand dollars ($200,000).

H. The superintendent shall contract for an independent actuarial study of the patient's compensation fund to be performed not less than once every two years.

History: 1978 Comp., § 41-5-25, enacted by Laws 1991, ch. 264, § 9.

Repeals and reenactments. - Laws 1991, ch. 264, § 9 repeals 41-5-25 NMSA 1978, as amended by Laws 1991, ch. 264, § 8, and enacts the above section, effective July 1, 1992.

41-5-25. Patient's compensation fund. (Effective July 1, 1993.)

A. There is created in the state treasury a "patient's compensation fund" to be collected and received by the superintendent for exclusive use for the purposes stated in the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978]. The fund and any income from it shall be held in trust, deposited in a segregated account, invested and reinvested by the superintendent with the prior approval of the state board of finance and shall not become a part of or revert to the general fund of this state. The superintendent shall have the authority to use fund money to purchase insurance for the fund and its obligations. The superintendent, as custodian of the patient's compensation fund, shall be notified by the health care provider or his insurer within thirty days of service on the health care provider of a complaint asserting a malpractice claim brought in a court in this state against the health care provider.

B. To create the patient's compensation fund, an annual surcharge shall be levied on all health care providers qualifying under Paragraph (1) of Subsection A of Section 41-5-5 NMSA 1978 in New Mexico. The surcharge shall be determined by the superintendent based upon sound actuarial principles, using data obtained from New Mexico experience if available. The surcharge shall be collected on the same basis as premiums by each insurer from the health care provider.

C. The surcharge with accrued interest shall be due and payable within thirty days after the premiums for malpractice liability insurance have been received by the insurer from the health care provider in New Mexico.

D. If the annual premium surcharge is collected but not paid within the time limit specified in Subsection C of this section, the certificate of authority of the insurer may be suspended until the annual premium surcharge is paid.

E. All expenses of collecting, protecting and administering the patient's compensation fund or of purchasing insurance for the fund shall be paid from the fund.

F. Claims payable pursuant to Laws 1976, Chapter 2, Section 30 shall be paid in accordance with the payment schedule constructed by the court. If the patient's compensation fund would be exhausted by payment of all claims allowed during a particular calendar year, then the amounts paid to each patient and other parties obtaining judgments shall be prorated, with each such party receiving an amount equal to the percentage his own payment schedule bears to the total of payment schedules outstanding and payable by the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following calendar years. However, payments for medical care and related benefits shall be made before any payment made under Laws 1976, Chapter 2, Section 30.

G. Upon receipt of one of the proofs of authenticity listed in this subsection, reflecting a judgment for damages rendered pursuant to the Medical Malpractice Act, the superintendent shall issue or have issued warrants in accordance with the payment schedule constructed by the court and made a part of its final judgment. The only claim against the patient's compensation fund shall be a voucher or other appropriate request by the superintendent after he receives:

(1) a certified copy of a final judgment in excess of two hundred thousand dollars ($200,000) against a health care provider;

(2) a certified copy of a court-approved settlement or certification of settlement made prior to initiating suit, signed by both parties, in excess of two hundred thousand dollars ($200,000) against a health care provider; or

(3) a certified copy of a final judgment less than two hundred thousand dollars ($200,000) and an affidavit of a health care provider or its insurer attesting that payments made pursuant to Subsection E of Section 41-5-7 NMSA 1978, combined with the monetary recovery, exceed two hundred thousand dollars ($200,000).

H. The superintendent shall contract for an independent actuarial study of the patient's compensation fund to be performed not less than once every two years.

History: 1978 Comp., § 41-5-25, enacted by Laws 1991, ch. 264, § 10.

Repeals and reenactments. - Laws 1991, ch. 264, § 10 repeals 41-5-25 NMSA 1978, as enacted by Laws 1991, ch. 264, § 9, and enacts the above section, effective July 1, 1993.

41-5-26. Malpractice coverage.

A. The filing of proof of financial responsibility with the superintendent, as provided in Section 41-5-5 NMSA 1978, shall constitute a conclusive and unqualified acceptance of the provisions of the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978].

B. Any provision in a policy attempting to limit or modify the liability of the insurer contrary to the provisions of the Medical Malpractice Act is void.

C. Every policy issued under the Medical Malpractice Act is deemed to include the following provisions:

(1) the insurer assumes all obligations to pay an award imposed against its insured under the provisions of the Medical Malpractice Act; and

(2) any termination of a policy by an insurer shall not be effective unless written notice of such termination has been mailed by certified mail to both the insured and the superintendent at least ninety days prior to the date the cancellation is to become

effective, except that an insurer may terminate a policy if a billed premium payment is thirty days past due upon ten days' prior written notice mailed by certified mail to the insured of the failure of the insured to pay premiums, and an insured may terminate his policy by written request to the insurer but the effective date of termination shall be not sooner than ten days after the receipt by the insurer of the written request to terminate. In all cases when a policy is terminated for failure of the insured to pay premiums or at the request of the insured, the insurer shall notify the superintendent in writing immediately of the effective date of termination of the policy. The insurer shall remain liable for all causes of action accruing prior to the effective date of the termination, unless otherwise barred by the provisions of the Medical Malpractice Act.

History: 1953 Comp., § 58-33-26, enacted by Laws 1976, ch. 2, § 26; 1977, ch. 284, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 62.

Wrongful cancellation of medical malpractice insurance, 99 A.L.R.3d 469.

Propriety of hospital's conditioning physician's staff privileges on his carrying professional liability or malpractice insurance, 7 A.L.R.4th 1238.

Coverage and exclusions of liability or indemnity policy on physicians, surgeons, and other healers, 33 A.L.R.4th 14.

Health provider's agreement as to patient's copayment liability after award by professional service insurer as unfair trade practice under state law, 49 A.L.R.4th 1240.

Liability insurance: what is "claim" under deductibility-per-claim clause, 60 A.L.R.4th 983.

41-5-27. Report by district court clerks.

Within thirty days of entry of judgment, the clerk of the district court from which judgment issues shall forward the name of every health care provider against whom a judgment is rendered under the Medical Malpractice Act [41-5-1 to 41-5-28 NMSA 1978] to the appropriate board of professional registration and examination for review of the fitness of the health care provider to practice his profession. In cases where judgments are entered against hospitals or other institutional health care providers, on the basis of respondeat superior or some other derivative theory of recovery, the clerk of the district court shall forward the name of the individual health care provider whose negligence caused the injury to that health care provider's board of professional registration and examination for such review. Review of the health care provider's fitness to practice shall be conducted in accordance with law.

History: 1953 Comp., § 58-33-27, enacted by Laws 1976, ch. 2, § 27.

41-5-28. Payment of medical review commission expenses.

Unless otherwise provided by law, expenses incurred in carrying out the powers, duties and functions of the New Mexico medical review commission, including the salary of the director, shall be paid by the patient's compensation fund. The superintendent, in his capacity as custodian of the fund, shall disburse fund money to the director upon receipt of vouchers itemizing expenses incurred by the New Mexico medical review commission. The director shall supply the chief justice of the New Mexico supreme court with duplicates of all vouchers submitted to the superintendent. Expenses paid by the fund shall not exceed two hundred fifty thousand dollars ($250,000) in any single calendar year provided, however, that expenses incurred in defending the commission shall not be subject to that maximum amount.

History: 1953 Comp., § 58-33-28, enacted by Laws 1976, ch. 2, § 29; 1991, ch. 264, § 11.

The 1991 amendment, effective July 1, 1991, substituted "two hundred fifty thousand dollars ($250,000)" for "one hundred fifty thousand dollars ($150,000)" in the final sentence; added the proviso at the end of the final sentence; and made minor stylistic changes throughout the section.

Applicability. - Laws 1976, ch. 2, § 28, provides that the act does not apply to malpractice occurring prior to its effective date [February 27, 1976].

Laws 1991, ch. 264, § 14 makes the provisions of the act applicable only to ocurrences arising on and after July 1, 1991.

Severability clauses. - Laws 1976, ch. 2, § 31, provides for the severability of the act if any part or application thereof is held invalid.

Laws 1991, ch. 264, § 13 provides for the severability of the Medical Malpractice Act if any part or application thereof is held invalid.

ARTICLE 6
PROFESSIONAL LIABILITY FUND ACT

41-6-1 to 41-6-14. Repealed.

ANNOTATIONS

Repeals. - Laws 1976, ch. 5, § 15 repeals the provisions of the Professional Liability Fund Act (41-6-1 to 41-6-14 NMSA 1978), as enacted by Laws 1976, ch. 5, §§ 1 to 14, effective July 1, 1981. For provisions of former sections, see the 1978 Original Pamphlet.

ARTICLE 7
LIBEL AND SLANDER

41-7-1. [Limitation of tort actions based on single publication or utterance; damages recoverable.]

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

History: 1953 Comp., § 40-27-30, enacted by Laws 1955, ch. 50, § 1; 1978 Comp., § 30-34-1, recompiled as 1978 Comp., § 41-7-1.

Compiler's note. - Sections 41-7-1 to 41-7-6 NMSA 1978, formerly 30-34-1 to 30-34-6 NMSA 1978, have been recompiled to be included with other tort, rather than criminal, provisions.

Law reviews. - For comment on Blount v. T.D. Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966), see 8 Nat. Resources J. 348 (1968).

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

For comment, "Survey of New Mexico Law: Torts," see 15 N.M.L. Rev. 363 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Libel and Slander § 153.

Conflict of laws with respect to the "single publication" rule as to defamation, invasion of privacy or similar tort, 58 A.L.R.2d 650.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages, 91 A.L.R.3d 1015.

Libel by newspaper headlines, 95 A.L.R.3d 660.

Liability for defamation for criticizing restaurant's food, 96 A.L.R.3d 609.

Defamation: publication of "letter to editor" in newspaper as actionable, 99 A.L.R.3d 573.

Labor union's liability to member for defamation, 100 A.L.R.3d 546.

What constitutes special damages in action for slander of title, 4 A.L.R.4th 532.

Allowance of punitive damages in action for slander of title or disparagement of property, 7 A.L.R.4th 1219.

State constitutional protection of allegedly defamatory statements regarding private individual, 33 A.L.R.4th 212.

Libel and slander: privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings, 33 A.L.R.4th 632.

Criticism or disparagement of character, competence, or conduct of candidate for office as defamation, 37 A.L.R.4th 1088.

Criticism or disparagement of physician's or dentist's character, competence, or conduct as defamation, 38 A.L.R.4th 836.

Defamation of psychiatrist, psychologist, or counselor, 38 A.L.R.4th 874.

Defamation: application of *New York Times* and related standards to nonmedia defendants, 38 A.L.R.4th 1114.

What constitutes "single publication" within meaning of single publication rule affecting action for libel and slander, violation of privacy, or similar torts, 41 A.L.R.4th 541.

Defamation: nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings, 41 A.L.R.4th 1116.

Defamation action as surviving plaintiff's death, under statute not specifically covering action, 42 A.L.R.4th 272.

Actionable nature of advertising impugning quality or worth of merchandise or products, 42 A.L.R.4th 318.

Criticism or disparagement of attorney's character, competence, or conduct as defamation, 46 A.L.R.4th 326.

Libel or slander: defamation by gestures or acts, 46 A.L.R.4th 403.

Defamation: publication by intracorporate communication of employee's evaluation, 47 A.L.R.4th 674.

Defamation: privilege attaching to news report of criminal activities based on information supplied by public safety officers - modern status, 47 A.L.R.4th 718.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 A.L.R.4th 668.

Excessiveness or inadequacy of compensatory damages for defamation, 49 A.L.R.4th 1158.

Liability of better business bureau or similar organization in tort, 50 A.L.R.4th 745.

Defamation: who is "libel-proof", 50 A.L.R.4th 1257.

Name appropriation by employer or former employer, 52 A.L.R.4th 156.

Libel and slander: defamation by cartoon, 52 A.L.R.4th 424.

Libel and slander: defamation by photograph, 52 A.L.R.4th 488.

Defamation of class or group as actionable by individual member, 52 A.L.R.4th 618.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 A.L.R.4th 853.

Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

Libel and slander: defamation by question, 53 A.L.R.4th 450.

False light invasion of privacy - neutral or laudatory depiction of subject, 54 A.L.R.4th 502.

Libel and slander: sufficiency of identification of allegedly defamed party, 54 A.L.R.4th 746.

Defamation of professional athlete or sports figure, 54 A.L.R.4th 869.

False light invasion of privacy - Cognizability and elements, 57 A.L.R.4th 22.

False light invasion of privacy - Defenses and remedies, 57 A.L.R.4th 244.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation - post-*New York Times* cases, 57 A.L.R.4th 404.

Libel or slander: defamation by statement made in jest, 57 A.L.R.4th 520.

False light invasion of privacy - accusation or innuendo as to criminal acts, 58 A.L.R.4th 902.

False light invasion of privacy - disparaging but noncriminal depiction, 60 A.L.R.4th 51.

Imputation of allegedly objectionable political or social beliefs or principles as defamation, 62 A.L.R.4th 314.

Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action, 62 A.L.R.4th 616.

Defamation: designation as scab, 65 A.L.R.4th 1000.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 A.L.R.4th 1006.

Free exercise of religion clause of First Amendment as defense to tort liability, 93 A.L.R. Fed. 754.

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.

41-7-2. [Judgment as res judicata.]

A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in Section 1 [41-7-1 NMSA 1978] shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

History: 1953 Comp., § 40-27-31, enacted by Laws 1955, ch. 50, § 2; 1978 Comp., § 30-34-2, recompiled as 1978 Comp., § 41-7-2.

41-7-3. [Uniformity of interpretation.]

This act [41-7-1 to 41-7-5 NMSA 1978] shall be so interpreted as to effectuate its purpose to make uniform the law of those states or jurisdictions which enact it.

History: 1953 Comp., § 40-27-32, enacted by Laws 1955, ch. 50, § 3; 1978 Comp., § 30-34-3, recompiled as 1978 Comp., § 41-7-3.

41-7-4. [Short title.]

This act [41-7-1 to 41-7-5 NMSA 1978] may be cited as the Uniform Single Publication Act.

History: 1953 Comp., § 40-27-33, enacted by Laws 1955, ch. 50, § 4; 1978 Comp., § 30-34-4, recompiled as 1978 Comp., § 41-7-4.

41-7-5. [Retroactive effect.]

This act [41-7-1 to 41-7-5 NMSA 1978] shall not be retroactive as to causes of action existing on its effective date.

History: 1953 Comp., § 40-27-34, enacted by Laws 1955, ch. 50, § 5; 1978 Comp., § 30-34-5, recompiled as 1978 Comp., § 41-7-5.

41-7-6. [Defamation by radio and television; liability of owner, licensee or operator; compliance with federal law.]

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast. Provided, however, the exercise of due care shall be construed to include a bona fide compliance with any federal law, or the regulation of any federal regulatory agency, including those laws and regulations fixing the rates that may be charged for use of such facilities for visual or sound broadcasts.

History: 1953 Comp., § 40-27-35, enacted by Laws 1955, ch. 32, § 1; 1978 Comp., § 30-34-6, recompiled as 1978 Comp., § 41-7-6.

Qualified privilege retained. - This section does not purport to divest broadcast media owners of their qualified privilege in libel actions nor to change the rule that proof of malice is required before those having a qualified privilege may be held responsible for defamation. Anderson v. Dun & Bradstreet, Inc., 543 F.2d 732 (10th Cir. 1976).

More than negligence required for liability. - The assertion that this section recognizes the negligence doctrine in regard to radio and television broadcasts is untenable; the section may not be cited for the proposition that New Mexico requires only a showing of negligence in a defamation action against owners and employees of broadcast media facilities for their defamatory statements. Anderson v. Dun & Bradstreet, Inc., 543 F.2d 732 (10th Cir. 1976).

Due care standard. - This section deals with the liability of the owner of a broadcast media facility for defamatory broadcasts made by unauthorized persons, absolving him from liability if he has used due care in preventing broadcasts by such persons. Anderson v. Dun & Bradstreet, Inc., 543 F.2d 732 (10th Cir. 1976).

Law reviews. - For comment on Reed v. Melnick, 81 N.M. 14, 462 P.2d 148 (Ct. App. 1969), see 1 N.M. L. Rev. 615 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Libel and Slander §§ 343, 344.

Defamation by radio or television, 50 A.L.R.3d 1311.

Invasion of privacy by radio or television, 56 A.L.R.3d 386.

Waiver or loss of right of privacy, 57 A.L.R.3d 16.

What constitutes special damages in action for slander of title, 4 A.L.R.4th 532.

Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual, 37 A.L.R.4th 987.

Criticism or disparagement of character, competence, or conduct of candidate for office as defamation, 37 A.L.R.4th 1088.

What constitutes "single publication" within meaning of single publication rule affecting action for libel and slander, violation of privacy, or similar torts, 41 A.L.R.4th 541.

Criticism or disparagement of attorney's character, competence, or conduct as defamation, 46 A.L.R.4th 326.

Libel or slander: defamation by gestures or acts, 46 A.L.R.4th 403.

Defamation: privilege attaching to news report of criminal activities based on information supplied by public safety officers - modern status, 47 A.L.R.4th 718.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

ARTICLE 8
ARSON REPORTING IMMUNITY

41-8-1. Short title.

This act [41-8-1 to 41-8-6 NMSA 1978] may be cited as the "Arson Reporting Immunity Act".

History: Laws 1979, ch. 117, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. - What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

41-8-2. Definitions.

As used in the Arson Reporting Immunity Act [41-8-1 to 41-8-6 NMSA 1978]:

A. "authorized agencies" means the:

(1) state fire marshal or his designate when authorized or charged with the investigation of the fire or explosion at the place where the fire or explosion actually took place;

(2) district attorney responsible for prosecution in the county where the fire occurred;

(3) attorney general when involved in the investigation or responsible for the prosecution of an alleged arson or prosecution of an arson;

(4) county and municipal fire departments authorized or charged with the investigation of fires at the place where the fire actually occurred;

(5) governor's organized crime prevention commission;

(6) county sheriffs' departments and municipal police departments authorized or charged with the investigation of fires at the place where the fire actually occurred; and

(7) New Mexico state police;

B. "authorized agencies" for the purposes of Subsection A of Section 41-8-3 NMSA 1978 also means:

(1) the federal bureau of investigation;

(2) the United States attorney's office when authorized or charged with investigation or prosecution of the fire in question; and

(3) the United States treasury department bureau of alcohol, tobacco and firearms;

C. "relevant" means information having any tendency to make the existence of any fact that is of consequence to the investigation or determination of the issue more probable than it would be without the evidence;

D. "deemed important" means material deemed important if, within the sole discretion of the authorized agency, such material is requested by that authorized agency;

E. "action" as used in this statute, includes nonaction or the failure to take action;

F. "immune" means that neither a civil action nor a criminal prosecution may arise from any action taken pursuant to Section 41-8-3 or 41-8-4 NMSA 1978 where actual malice

on the part of the insurance company or authorized agency against the insured is not present; and

G. "insurance company" includes the New Mexico FAIR plan [59A-29-2 to 59A-29-9 NMSA 1978].

History: Laws 1979, ch. 117, § 2; 1987, ch. 276, § 1.

41-8-3. Disclosure and information.

A. Any authorized agency may, in writing, require the insurance company at interest to release to the requesting agency any or all relevant information or evidence deemed important to the authorized agency which the company may have in its possession, relating to the fire loss in question. Relevant information includes but is not limited to:

(1) pertinent insurance policy information relevant to a fire loss under investigation and any application for such policy;

(2) policy premium payment records which are available;

(3) history of previous claims made by the insured; or

(4) material relating to the investigation of the loss, including statements of any person, proof of loss and any other evidence relevant to the investigation.

B. When an insurance company has reason to believe that a fire loss in which it has an interest may be of other than accidental cause, the company shall, in writing, notify an authorized agency and provide it with any or all material developed from the company's inquiry into the fire loss. When an insurance company provides any one of the authorized agencies with notice of a fire loss, it shall be sufficient notice for the purpose of the Arson Reporting Immunity Act [41-8-1 to 41-8-6 NMSA 1978]. Nothing in this subsection shall abrogate or impair the rights or powers created under Subsection A of this section.

C. The authorized agency provided with information pursuant to Subsection A or B of this section and in furtherance of its own purposes, may release or provide such information to any of the other authorized agencies.

D. Any insurance company providing information to an authorized agency or agencies pursuant to Subsection A or B of this section shall have the right to request relevant information and receive, within a reasonable time, the information requested.

E. Any insurance company or person acting on its behalf or authorized agency who releases information, whether oral or written, pursuant to Subsection A, B or C of this section shall be immune from any liability arising out of a civil action or penalty resulting from a criminal prosecution.

History: Laws 1979, ch. 117, § 3.

41-8-4. Evidence.

Any authorized agency or insurance company described in Section 2 or 3 [41-8-2 or 41-8-3 NMSA 1978] of the Arson Reporting Immunity Act who receives any information furnished pursuant to that act, shall hold the information in confidence except as provided for in Subsection C of Section 3 [41-8-3 NMSA 1978] of that act or until such time as its release is required pursuant to a criminal or civil proceeding.

History: Laws 1979, ch. 117, § 4.

41-8-5. Enforcement.

Any person who fails to hold in confidence information required to be held in confidence by Subsection A of Section 4 [41-8-4 NMSA 1978] of the Arson Reporting Immunity Act, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine not to exceed one thousand dollars ($1,000).

History: Laws 1979, ch. 117, § 5.

Compiler's note. - The reference to "Subsection A of Section 4 of the Arson Reporting Immunity Act" is apparently a reference to Section 4 [41-8-4 NMSA 1978] of the act, which has no subsections.

41-8-6. Jurisdiction not affected.

The provisions of the Arson Reporting Immunity Act [41-8-1 to 41-8-6 NMSA 1978] shall not be construed to extend or affect the jurisdiction of any authorized agency specified in that act.

History: Laws 1979, ch. 117, § 6.

ARTICLE 9
REVIEW ORGANIZATION IMMUNITY

41-9-1. Short title.

This act [41-9-1 to 41-9-7 NMSA 1978] may be cited as the "Review Organization Immunity Act".

History: Laws 1979, ch. 169, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Tort liability of medical society or professional association for failure to discipline or investigate negligent or otherwise incompetent medical practitioner, 72 A.L.R.4th 1148.

41-9-2. Definitions.

As used in the Review Organization Immunity Act [41-9-1 to 41-9-7 NMSA 1978]:

A. "person" means any individual, corporation, partnership, firm or other entity;

B. "health care provider" means any person licensed by the state or permitted by law to provide health care services;

C. "health care services" means services rendered by a health care provider of the type the health care provider is licensed or permitted to provide;

D. "staff" means the members of the governing board, officers and employees of a health care provider which is not an individual; and

E. "review organization" means an organization whose membership is limited to health care providers and staff (except where otherwise provided for by state or federal law) and which is established by a health care provider which is a hospital, by one or more state or local associations of health care providers, by a nonprofit health care plan, by a health maintenance organization or by a professional standards review organization established pursuant to 42 U.S.C., Section 1320c-1 et seq. to gather and review information relating to the care and treatment of patients for the purposes of:

(1) evaluating and improving the quality of health care services rendered in the area or by a health care provider;

(2) reducing morbidity or mortality;

(3) obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illnesses and injuries;

(4) developing and publishing guidelines showing the norms of health care services in the area or by health care providers;

(5) developing and publishing guidelines designed to keep within reasonable bounds the cost of health care services;

(6) reviewing the nature, quality or cost of health care services provided to enrollees of health maintenance organizations and nonprofit health care plans;

(7) acting as a professional standards review organization pursuant to 42 U.S.C., Section 1320c-1, et seq.; or

(8) determining whether a health care provider shall be granted authority to provide health care services using the health care provider's facilities or whether a health care provider's privileges should be limited, suspended or revoked.

History: Laws 1979, ch. 169, § 2.

41-9-3. Limitation on liability for persons providing information to review organization.

No person providing information to a review organization shall be subject to any action for damages or other relief by reason of having furnished such information, unless such information is false and the person providing such information knew or had reason to believe such information was false.

History: Laws 1979, ch. 169, § 3.

41-9-4. Limitation on liability for members of review organizations.

No person who is a member or employee of, who acts in an advisory capacity to or who furnishes counsel or services to a review organization shall be liable for damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by a review organization by reason of the performance by the person of any duty, function or activity of such review organization, unless the performance of such duty, function or activity was done with malice toward the person affected thereby. No person shall be liable for damages or other relief in any action by reason of the performance of the person of any duty, function or activity as a member of a review organization or by reason of any recommendation or action of the review organization when the person acts in the reasonable belief that the person's action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made.

History: Laws 1979, ch. 169, § 4.

41-9-5. Confidentiality of records of review organization.

All data and information acquired by a review organization in the exercise of its duties and functions shall be held in confidence and shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization or in a judicial appeal from the action of a review organization. No person described in Section 4 [41-9-4 NMSA 1978] of the Review Organization Immunity Act shall disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of a review organization or in a judicial appeal from the action of a review organization. Information, documents or records otherwise available from original sources shall not be immune from discovery or

use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of a review organization be prevented from testifying as to matters within his knowledge, but a witness cannot be asked about opinions formed by him as a result of the review organization's hearings.

History: Laws 1979, ch. 169, § 5.

Immunity from discovery. - Where a party seeks to immunize from discovery data or information acquired by a review organization in the exercise of its duties and functions, and opinions formed as a result of the review organization's hearings, the burden rests upon that party to prove that the data or information was generated exclusively for peer review and for no other purpose, and that opinions were formed exclusively as a result of peer review deliberations. If the evidence was neither generated nor formed exclusively for or as a result of peer review, it shall not be immune from discovery unless it is shown to be otherwise available by the exercise of reasonable diligence. Southwest Community Health Servs. v. Smith, 107 N.M. 196, 755 P.2d 40 (1988).

Production of confidential information. - Where information is ruled confidential and the party seeking access satisfies the trial court that the information is critical to the cause of action or defense, the trial court shall compel production of such evidence. Southwest Community Health Servs. v. Smith, 107 N.M. 196, 755 P.2d 40 (1988).

This section does not create an evidentiary privilege in civil litigation, and thus does not come into direct conflict with Rule 11-501. Southwest Community Health Servs. v. Smith, 107 N.M. 196, 755 P.2d 40 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes, 60 A.L.R.4th 1273.

41-9-6. Penalty for violation.

Any disclosure other than that authorized by the Review Organization Immunity Act [41-9-1 to 41-9-7 NMSA 1978] of data and information acquired by a review organization or of what transpired at a review organization meeting is guilty of a petty misdemeanor and shall be punished by imprisonment for not to exceed six months or by a fine of not more than one hundred dollars ($100), or both.

History: Laws 1979, ch. 169, § 6.

41-9-7. Protection of patient.

Nothing contained in the Review Organization Immunity Act [41-9-1 to 41-9-7 NMSA 1978] shall be construed to relieve any person of any liability which the person has

incurred or may incur to a patient as a result of furnishing health care services to such patient.

History: Laws 1979, ch. 169, § 7.

Severability clauses. - Laws 1979, ch. 169, § 8, provides for the severability of the act if any part or application thereof is held invalid.

ARTICLE 10
FOOD DONORS LIABILITY

41-10-1. Short title.

This act [41-10-1 to 41-10-3 NMSA 1978] may be cited as the "Food Donors Liability Act".

History: Laws 1981, ch. 100, § 1.

Cross-references. - For Food Products Delivery Guarantee Act, see ch. 57, art. 24 NMSA 1978.

41-10-2. Definitions.

As used in the Food Donors Liability Act [41-10-1 to 41-10-3 NMSA 1978]:

A. "canned food" means any food commercially processed and prepared for human consumption;

B. "gleaner" means any person who harvests for free distribution any part or all of an agricultural crop that has been donated by the owner;

C. "nonprofit organization" means any organization which was organized and is operated for charitable purposes and meets the requirements set forth in Section 170 of the Internal Revenue Code;

D. "perishable food" means any food that may spoil or otherwise become unfit for human consumption because of its nature, type or physical condition. "Perishable food" includes but is not limited to fresh or processed meats, poultry, seafood, dairy products, bakery products, eggs in the shell, fresh fruits or vegetables and foods that have been packaged, refrigerated or frozen; and

E. "person who donates food" means any individual, partnership, corporation, association, governmental entity or public or private organization of any character which gives food to others, including restaurants, grocery stores and retail and wholesale

businesses which give or otherwise provide food, directly or indirectly, to the needy or indigent.

History: Laws 1981, ch. 100, § 2; 1989, ch. 168, § 1.

The 1989 amendment, effective June 16, 1989, substituted "170" for "70" in Subsection C, and added Subsection E.

Compiler's note. - Section 170 of the Internal Revenue Code, referred to in Subsection C, appears as 26 U.S.C. § 170.

41-10-3. Food donors liability protection; purpose; donors or distributors of canned or perishable food; limit on liability for injury.

A. Notwithstanding any other provision of law, any person who donates food in good faith, including the good-faith donor of any perishable or canned food, apparently fit for human consumption, to a bona fide charitable or nonprofit organization or municipality for free distribution or a gleaner of any perishable food, apparently fit for human consumption, shall not be subject to any criminal penalty or be liable for any civil damages arising from the condition of the food unless an injury arising from the food is caused by the gross negligence, recklessness or intentional conduct of the person who donates the food.

B. Notwithstanding any other provision of law, a bona fide charitable or nonprofit organization or municipality which in good faith receives food, apparently fit for human consumption, and distributes it at no charge shall not be subject to any criminal penalty or be liable for any civil damages resulting from the condition of the food unless an injury arising from the food is caused by the gross negligence, recklessness or intentional conduct of the organization.

C. This section does not restrict the authority of an appropriate governmental agency to regulate or ban the use of any food for human consumption.

History: Laws 1981, ch. 100, § 3; 1987, ch. 137, § 1; 1989, ch. 168, § 2.

The 1989 amendment, effective June 16, 1989, inserted "Food donors liability protection; purpose" in the catchline; and in Subsection A inserted "any person who donates food in good faith, including" near the beginning of the subsection and substituted "person who donates the food" for "donor or gleaner" at the end of the subsection.

ARTICLE 11
ALCOHOLIC LICENSEES LIABILITY

41-11-1. Tort liability for alcoholic liquor sales or service.

A. No civil liability shall be predicated upon the breach of Section 60-7A-16 NMSA 1978 by a licensee, except in the case of the licensee who:

(1) sold or served alcohol to a person who was intoxicated;

(2) it was reasonably apparent to the licensee that the person buying or apparently receiving service of alcoholic beverages was intoxicated; and

(3) the licensee knew from the circumstances that the person buying or receiving service of alcoholic beverages was intoxicated.

B. No person who was sold or served alcoholic beverages while intoxicated shall be entitled to collect any damages or obtain any other relief against the licensee who sold or served the alcoholic beverages unless the licensee is determined to have acted with gross negligence and reckless disregard for the safety of the person who purchased or was served the alcoholic beverages.

C. No licensee is chargeable with knowledge of previous acts by which a person becomes intoxicated at other locations unknown to the licensee.

D. As used in this section:

(1) "licensee" means a person licensed under the provisions of the Liquor Control Act and the agents or servants of the licensee; and

(2) "intoxicated" means the impairment of a person's mental and physical faculties as a result of alcoholic beverage use so as to substantially diminish that person's ability to think and act in a manner in which an ordinary [ordinarily] prudent person, in full possession of his faculties, would think and act under like circumstances.

E. No person who has gratuitously provided alcoholic beverages to a guest in a social setting may be held liable in damages to any person for bodily injury, death or property damage arising from the intoxication of the social guest unless the alcoholic beverages were provided recklessly in disregard of the rights of others, including the social guest.

F. A licensee may be civilly liable for the negligent violation of Sections 60-7B-1 and 60-7B-1.1 NMSA 1978. The fact-finder shall consider all the circumstances of the sale in determining whether there is negligence such as the representation used to obtain the alcoholic beverage. It shall not be negligence per se to violate Sections 60-7B-1 and 60-7B-1.1 NMSA 1978.

G. A licensee shall not be held civilly liable pursuant to the provisions of Subsection F of this section except when:

(1) it is demonstrated by the preponderance of the evidence that the licensee knew, or that a reasonable person in the same circumstances would have known, that the person who received the alcoholic beverages was a minor; and

(2) licensee's violation of Section 60-7B-1 or 60-7B-1.1 NMSA 1978 was a proximate cause of the plaintiff's injury, death or property damage.

H. No person may seek relief in a civil claim against a licensee or a social host for injury or death or damage to property which was proximately caused by the sale, service or provision of alcoholic beverages except as provided in this section.

I. Liability arising under this section shall not exceed fifty thousand dollars ($50,000) for bodily injury to or death of one person in each transaction or occurrence or, subject to that limitation for one person, one hundred thousand dollars ($100,000) for bodily injury to or death of two or more persons in each transaction or occurrence, and twenty thousand dollars ($20,000) for property damage in each transaction or occurrence.

History: Laws 1983, ch. 328, § 1; 1985, ch. 191, § 1; 1986, ch. 100, § 1.

Liquor Control Act. - See 60-3A-1 NMSA 1978.

Constitutionality. - The damage limitation in subsection I has no substantial relationship to a legitimate or important governmental purpose and is constitutionally invalid as violative of the equal protection clause of the New Mexico Constitution. Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 763 P.2d 1153 (1988).

Subsection A not applied retroactively. - In a case against an absent owner-lessor of a liquor license, arising out of the lessee's service of alcohol to an intoxicated patron who injured third parties (the plaintiffs), Subsection A, enacted in 1983, under which the absent owner-lessor is liable for the acts of a lessee not in the employ of the licensee, was not applicable. At the time of the injury in 1982 the cause of action created by 60-3A-2 NMSA 1978 inured to the plaintiffs as a vested right, and the the court could not apply Subsection A retroactively against the plaintiffs and divest them of that right. Ashbaugh v. Williams, 106 N.M. 598, 747 P.2d 244 (1987).

Effect of Subsection B. - Subsection B, effective June 14, 1985, creates a cause of action for a patron based upon the tavernkeeper's gross negligence or reckless disregard for the safety of the patron in the sale or service of alcohol. Trujillo v. Trujillo, 104 N.M. 379, 721 P.2d 1310 (Ct. App.), cert. denied, 104 N.M. 289, 720 P.2d 708 (1986).

Subsection B does not limit the common-law liability recognized in Baxter v. Noce, 107 N.M. 48, 752 P.2d 240 (1988). Murphy v. Tomada Enters., Inc., N.M. , 819 P.2d 1358 (Ct. App. 1991).

Subsection B was intended to expand upon common-law liability, not restrict it. Murphy v. Tomada Enters., Inc., N.M. , 819 P.2d 1358 (Ct. App. 1991).

Subsection B relates only to injury to a patron to the extent that it is proximately caused by the patron's own intoxication, not by the intoxication of another patron. Murphy v. Tomada Enters., Inc., N.M. , 819 P.2d 1358 (Ct. App. 1991).

Breach of 60-7B-1.1 NMSA 1978 states claim for relief. - An allegation of a breach of 60-7B-1.1 NMSA 1978 which caused injury to plaintiffs states a claim for relief and that claim is not barred by the prospectivity rule stated in Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982). Walker v. Key, 101 N.M. 631, 686 P.2d 973 (Ct. App. 1984).

Recovery by intoxicated passenger. - An intoxicated passenger of a vehicle has a cause of action against a tavern that served alcohol, in violation of this section, to both the passenger and the driver of a vehicle that subsequently was involved in an accident. The plaintiff's negligent conduct in voluntarily drinking does not bar his recovery completely, but serves only to reduce the amount of his recovery under the principles of comparative negligence. Baxter v. Noce, 107 N.M. 48, 752 P.2d 240 (1988)(decided under facts existing prior to 1985 amendment).

Basis for liability. - A finding that a tavernkeeper acted with gross negligence and reckless disregard for the safety of a customer, who was killed while riding as a passenger in another customer's vehicle, was not necessary to establish liability. Liability of the tavernkeeper could be predicated on his serving liquor to the customer who drove the vehicle. Murphy v. Tomada Enters., Inc., N.M. , 819 P.2d 1358 (Ct. App. 1991).

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).

For annual survey of New Mexico Law of Torts, see 20 N.M.L. Rev. 407 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 45 Am. Jur. 2d Intoxicating Liquors §§ 561 to 614.

Products liability: alcoholic beverages, 42 A.L.R.4th 253.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 A.L.R.4th 16.

Tort liability of college or university for injury suffered by student as a result of own or fellow student's intoxication, 62 A.L.R.4th 81.

Validity, construction, and effect of statute limiting amount recoverable in dram shop action, 78 A.L.R.4th 542.

48 C.J.S. Intoxicating Liquors §§ 429, 430.

ARTICLE 12
ATHLETIC ORGANIZATION VOLUNTEERS

41-12-1. Athletic organization volunteer civil liability; conviction of violation of law required.

Any person or entity who acts without compensation and renders volunteer services as a manager, coach, athletic instructor, umpire, referee or other league official in a formally organized nonprofit sports association for persons under the age of eighteen, to the extent not otherwise covered by insurance, is not liable to any person for any civil damages as a result of any negligent acts or omissions in rendering those services or in conducting or sponsoring that sports program unless:

A. the conduct of that person or entity falls substantially below the standards generally accepted and practiced in the sport in like circumstances by similar persons or similar nonprofit associations rendering those services or conducting that program;

B. it was reasonably foreseeable that the person's or entity's conduct would create a substantial risk of injury or death to the person or property of another; and

C. the harm complained of was not a part of the ordinary give and take common to the particular sport.

History: Laws 1989, ch. 345, § 1.

Emergency clauses. - Laws 1989, ch. 345, § 3 makes the act effective immediately. Approved April 7, 1989.

Law reviews. - For annual survey of New Mexico Law of Torts, see 20 N.M.L. Rev. 407 (1990).

41-12-2. Interpretation.

Nothing contained in this act [41-12-1, 41-12-2 NMSA 1978] shall be construed so as to affect or limit the liability of any person or entity identified in Section 1 [41-12-1 NMSA 1978] of this act which:

A. relates to the transportation of participants in a sports program to or from a game, event or practice; or

B. is not a part of a formally organized nonprofit sports program.

History: Laws 1989, ch. 345, § 2.

Emergency clauses. - Laws 1989, ch. 345, § 3 makes the act effective immediately. Approved April 7, 1989.