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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and it is not part of the law.

Adverse or potentially adverse parties. — On its face, the Release Act pertains only to adverse or potentially adverse parties and prevents those parties from obtaining statements from injured patients for the purpose of settlement or release. Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215, cert. quashed, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 263.

An OSHA compliance officer conducting a routine interview in the normal course of business is not an adverse party within the meaning of the Release Act, despite the plaintiffs' contention that OSHA was potentially an "adverse party" in the sense that the OSHA report blamed the injured plaintiffs and/or their co-employees for the accident causing the injuries. Apodaca v. AAA Gas Co., 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215, cert. quashed, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 263.

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), cert. denied, 102 N.M. 225, 693 P.2d 591 (1985).

For attorney to bind client to settlement agreement, the attorney 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 person prior to its approval by the court or its dismissal under Rule 41(a)(1) or (2), N.M.R. Civ. P., (now Rule 1-041 NMRA). 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).

Notary publics. — 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).

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. Thus, although plaintiff's injury was more serious than originally believed, the release could not be set aside. 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).

Conflicts of law. — Where plaintiff, who was a resident of Minnesota, signed a release of a workers' compensation claim in Minnesota and the workers' compensation claim arose out of an injury that occurred while plaintiff was a resident of and working in New Mexico and that was initially treated in New Mexico, the policy underlying Section 41-1-1 NMSA 1978 and the protections guaranteed by the statute required the application of New Mexico law. Ratzlaff v. Seven Bar Flying Services, Inc., 98 N.M. 159, 646 P.2d 586 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

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 the extent or nature of injuries, 71 A.L.R.2d 82, 13 A.L.R.4th 686.

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 et seq.; 25 C.J.S. Damages § 81; 37 C.J.S. Fraud §§ 41, 93; 76 C.J.S. Release § 1 et seq.

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.

ANNOTATIONS

Severability. — Laws 1971, ch. 70, § 3 provided for the severability of the act if any part or application thereof was held invalid.

For attorney to bind client to settlement agreement, the attorney 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

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 Workers' Compensation Law, *see* 52-1-8 NMSA 1978.

I. GENERAL CONSIDERATION.

Applicability of Missouri prior construction. — Because statute (41-2-1 to 41-2-4 NMSA 1978) was 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 to these statutes. White v. Montoya, 46 N.M. 241, 126 P.2d 471 (1942).

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).

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 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).

This section is a survival statute under which the cause of action arises at time of death. State ex rel. De Moss v. Dist. 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) (decided under prior law).

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).

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

Effect of limitation. — The 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).

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).

II. STANDING TO SUE.

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 the regular administrator refuses to sue. Henkel v. Hood, 49 N.M. 45, 156 P.2d 790 (1945).

Identification of child as a beneficiary. — New Mexico law permits the admission of evidence identifying the decedent’s children in a wrongful death action and the trial court did err by admitting evidence that the decedent had a child by a prior marriage. Harris v. Illinois-California Express, 687 F.2d 1361 (10th Cir. 1982).

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).

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).

Appointment of co-personal representative not required. — Where an adversity of interest between the illegitimate child of the decedent and the personal representative of the decedent exists, appointing a co-personal representative is not required where appointment would not remedy the adversity. Spoon v. Mata, 2014-NMCA-115.

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).

Personal representative stands in the place of statutory beneficiaries. — Where personal representative's role in wrongful death action is to stand in the place of the statutory beneficiaries, to centralize claims, and to prevent multiple and possibly contradictory lawsuits, statutory beneficiaries should not be allowed to intrude on the role of a properly appointed personal representative. Spoon v. Mata, 2014-NMCA-115.

Disqualification of personal representative not required. — Where personal representative maintained that the illegitimate child of the decedent in a wrongful death action was entitled to the statutory share of wrongful death proceeds and that the personal representative intended to fulfill her duty towards the child, there was not sufficient adversity of interest requiring the personal representative's disqualification or appointment of co-personal representative. Spoon v. Mata, 2014-NMCA-115.

The fact that the personal representative is also pursuing individual claims in a wrongful death lawsuit is not a sufficient basis by itself to presume that the interests of the personal representative and the statutory beneficiaries are so adverse as to preclude the individual from representing the statutory beneficiaries' interest in the action. Spoon v. Mata, 2014-NMCA-115.

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 those duties, but because someone must be named and our legislature has fixed the personal representative of that individual. 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 character as estate administrator, the 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).

III. CLAIMS COVERED.

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).

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. — 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).

Torts against Indians. — The cause of action which an Indian acquires when a tort is committed against that Indian is property which the Indian 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 that Indian is killed as a result of a 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 had 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 kindred. Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970).

Spousal consortium claim recognized. — New Mexico recognizes a claim for loss of spousal consortium. This cause of action imposes no new conduct obligation on potential defendants. Romero v. Byers, 117 N.M. 422, 872 P.2d 840 (1994).

Murder conviction required for forfeiture. — Section 30-2-9 NMSA 1978 requires a conviction of murder, and did not apply to require forfeiture of husband's rights as a beneficiary under the Wrongful Death Act when the husband was convicted of vehicular homicide in the death of his wife. Aranda v. Camacho, 1997-NMCA-010, 122 N.M. 763, 931 P.2d 757.

A nonviable fetus, a fetus incapable of sustaining life outside the mother's womb, is not a "person" under the Wrongful Death Act. Miller v. Kirk, 120 N.M. 654, 905 P.2d 194 (1995).

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.), cert. quashed, 94 N.M. 806, 617 P.2d 1321 (1980).

Exceptions to section. — While this section, if standing alone, would apply to all deaths resulting from the 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).

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

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).

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).

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 child, who had the capacity to comprehend and avoid the danger 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).

Effect on action for loss of consortium. — The Wrongful Death Act does not apply to common-law remedies that existed prior to this act and which were not repealed; 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).

IV. DEFENSES.

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).

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).

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. Dist. 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) (decided under prior law).

Last clear chance doctrine held improper. — In a head-on collision between decedent's automobile and a commercial truck-trailer on a two-lane highway with both drivers having 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 the proper lane or had turned right instead of left was of no legal significance. The concept of a last clear chance is negated 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).

Defense of suicide. — Where decedent, who was a pedestrian, was struck by defendant’s vehicle and killed; prior to the accident, decedent told some friends that decedent was going to kill decedent; in a subsequent telephone conversation, decedent told a friend that decedent was "walking between cars"; and in a wrongful death action, defendant took the position that decedent had committed suicide, the district court did not abuse its discretion in allowing the use of the term "suicide" at trial. Zia Trust, Inc. v. Aragon, 2011-NMCA-076, 150 N.M. 763, 258 P.3d 1146, cert. denied, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Inapplicability of limitations of actions. — 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).

V. EVIDENCE.

Presumption of due care. — In a wrongful 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 a malpractice case against a surgeon, the supreme court will make absolute its alternative writ of prohibition where the 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. Dist. Court, 55 N.M. 135, 227 P.2d 937 (1951).

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.), cert. denied, 106 N.M. 174, 740 P.2d 1158 (1987).

Where second vehicle involved. — Where there is absolutely no evidence in the record to show that decedent was alive when decedent's body was run over by the second vehicle, and no evidence to show this act by the second driver in any way contributed to the death, the burden was on plaintiff to not only show that the second driver was negligent, but that the second driver's 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).

In the absence of any evidence to show that death resulted from the body being run over by the second vehicle, the first driver's failure to remove the body from the highway cannot possibly be said to have proximately caused this 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).

VI. DAMAGES.

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).

Determining damages. — 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).

When husband performed household services, other income-producing activity could not be undertaken. Further, specific costs would be incurred if someone else were retained to perform them. The value of those services is an evidentiary item admissible in establishing the present worth of husband's life. Corlett v. Smith, 107 N.M. 707, 763 P.2d 1172 (Ct. App.), cert. denied, 107 N.M. 610, 762 P.2d 897 (1988).

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

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).

Per accident coverage limitation. — The several statutory beneficiaries in a wrongful death action are entitled to recover, pursuant to underinsured motorist insurance policies, the per-person rather than the per-accident limits of coverage for underinsured motorist benefits. Lewis v. Dairyland Ins. Co., 113 N.M. 686, 831 P.2d 985 (1992).

VII. ATTORNEY DUTIES TO BENEFICIARIES.

Attorney owes duty to statutory beneficiaries. — An attorney handling a wrongful death case owes to the statutory beneficiaries of that action a duty of reasonable care to

protect their interests in receiving any proceeds obtained. Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995).

Attorney's duty to resolve conflicts according to professional standards. — Where the attorney represented the client as the personal representative of the wrongful death estates of the client's child and grandchild who had been killed in a collision between the client's car and a truck; the client claimed that the non-client, who was a statutory beneficiary and the parent of the client's child, had abandoned the child and was not entitled to any of the wrongful death proceeds; the attorney knew that the client had been drinking alcohol before the collision and that the collision occurred when the client stopped the client's car in a traffic lane of an interstate highway at night with the car lights off; the attorney negotiated a settlement agreement with the non-client that substantially reduced the non-client's entitlement to the wrongful death proceeds; the attorney told the non-client that the attorney did not represent the non-client, the attorney represented only the client, and the attorney was not providing services to the non-client; there was a dispute as to whether the attorney informed the non-client that the client challenged the non-client's right to receive any of the wrongful death proceeds; the attorney did not tell the non-client the size of the anticipated settlement, that the attorney represented the client against the non-client, or that the non-client was entitled to fifty percent of the wrongful death proceeds; and the non-client sued the attorney for malpractice, fraud, collusion and misrepresentation, summary judgment for the attorney was not appropriate because there were genuine issues of material fact regarding whether the attorney had a conflict of interest in representing the personal representative who was potentially liable for the decedents' deaths and whether the attorney handled the conflict of interest between the client and non-client with due care and skill without harming the statutory beneficiary and because the non-client's independent tort claims were not barred by the adversarial exception. Spencer v. Barber, 2013-NMSC-010, 299 P.3d 388, rev'g 2011-NMCA-090, 150 N.M. 519, 263 P.3d 296.

Adversarial exception to attorney's duty to statutory beneficiaries. — The adversarial exception to an attorney's implied duty to pursue a wrongful death case for the benefit of a non-client statutory beneficiary applies when there is a conflict of interest or a breach of confidence between the client and the non-client statutory beneficiary. Even if an attorney identifies an actual or potential conflict, the attorney continues to owe a duty to the non-client statutory beneficiary unless the non-client statutory beneficiary knows or should know that the non-client statutory beneficiary cannot rely on the attorney to act for the non-client statutory beneficiary's benefit. If an attorney identifies a conflict between the attorney's client and a non-client statutory beneficiary, the attorney should give notice to the non-client statutory beneficiary that the non-client statutory beneficiary cannot rely on the attorney to act for the non-client statutory beneficiary's benefit and then the adversarial exception negates the duty owed by the non-client statutory beneficiary. Spencer v. Barber, 2011-NMCA-090, 150 N.M. 519, 263 P.3d 296, cert. granted, 2011-NMCERT-009, 269 P.3d 904.

Adversarial exception applies to contract and tort-based malpractice claims. — The adversarial exception to the implied duty owed by an attorney to non-client statutory beneficiaries applies to both contract-based and tort-based claims of malpractice against the attorney. Spencer v. Barber, 2011-NMCA-090, 150 N.M. 519, 263 P.3d 296, cert. granted, 2011-NMCERT-009, 269 P.3d 904.

Adversarial exception to attorney's duty to statutory beneficiaries. — Where the attorney filed a wrongful death action for the estate of the client's child and grandchild; the client took the position that the non-client, who was the surviving parent of the grandchild, had abandoned the grandchild and was not entitled to recover from the wrongful death estates; before the attorney accepted any offer of settlement from the tortfeasors, the attorney met with the non-client to settle any claims of the non-client to the wrongful death estates; the attorney told the non-client and the non-client understood that the attorney did not represent the non-client, the attorney represented only the client, and the attorney was not providing services to the non-client; and the non-client negotiated with the attorney to obtain a better settlement than the attorney offered, any implied duties that the attorney owed to the non-client ended when the adversarial relationship developed between the client and the non-client regarding the non-client's right to recover from the wrongful death estates. Spencer v. Barber, 2011-NMCA-090, 150 N.M. 519, 263 P.3d 296, cert. granted, 2011-NMCERT-009, 269 P.3d 904.

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).

For note, "New Mexico Adopts Hedonic Damage in the Context of Wrongful Death Actions: *Sears v. Nissan (Romero v. Byers),*" see 25 N.M.L. Rev. 385 (1995).

For note, “Trends in New Mexico Law 1994–95: Tort Law (legal malpractice) — Attorneys Owe a Duty to Statutory Beneficiaries Regardless of Privity,” see 26 N.M.L. Rev. 643 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Death §§ 1 et seq., 158 et seq., 215 et seq.

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 personal tort against minor child, 19 A.L.R.2d 423, 41 A.L.R.3d 904, 6 A.L.R.4th 1066.

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 bond for negligence causing death, 60 A.L.R.2d 873.

Action for death of adoptive parent, by or for benefit of adopted or equitably 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 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.

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.

Primary liability of private chain franchisor for injury or death caused by franchise premises or equipment, 59 A.L.R.4th 1142.

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 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.

Liability for injury or death allegedly caused by foreign substance in beverage, 90 A.L.R.4th 12.

Liability for injury or death allegedly caused by foreign object in food or food product, 1 A.L.R.5th 1.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 A.L.R.5th 189.

Franchisor's tort liability for injuries allegedly caused by assault or other criminal activity on or near franchise premises, 2 A.L.R.5th 369.

Liability of travel publication, travel agent, or similar party for personal injury or death of traveler, 2 A.L.R.5th 396.

Refusal of medical treatment on religious grounds as affecting right to recover for personal injury or death, 3 A.L.R.5th 721.

Right of workers' compensation insurer or employer paying to a workers' compensation fund, on the compensable death of an employee with no dependents, to indemnity or

subrogation from proceeds of wrongful death action brought against third-party tortfeasor, 7 A.L.R.5th 969.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 A.L.R.5th 195.

Landlord's liability for injury or death of tenant's child from lead paint poisoning, 19 A.L.R.5th 405.

Wrongful death damages for loss of expectancy of inheritance from decedent, 42 A.L.R.5th 465.

Landlord's liability for failure to protect tenant from criminal acts of third person, 43 A.L.R.5th 207.

Liability of electric company to one other than employee for injury or death arising from commencement or resumption of service, 46 A.L.R.5th 423.

Failure to use or misuse of automobile child safety seat or restraint system as affecting recovery for personal injury or death, 46 A.L.R.5th 557.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 54 A.L.R.5th 513.

Liability of hotel, motel, resort, or private membership club or association operating swimming pool, for injury or death of guest or member, 55 A.L.R.5th 463.

Venue of wrongful death action, 58 A.L.R.5th 535.

Hospital liability as to diagnosis and care of patients in emergency room, 58 A.L.R.5th 613.

Validity of state statutory cap on punitive damages, 103 A.L.R.5th 379.

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 (45 USCS § 51 et seq.) or Jones Act (46 USCS Appx § 688), 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 et seq., 95 et seq.

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.

ANNOTATIONS

Compiler's notes. — 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. — If 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).

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. Dist. Court, 55 N.M. 135, 227 P.2d 937 (1951).

The second sentence of this section provides for a specific date on which a cause of action accrues. Clark v. Lovelace Health Sys., Inc., 2004-NMCA-119, 136 N.M. 411, 99 P.3d 232.

Effect of statute of limitations. — Not only the remedy but 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. Dist. Court, 55 N.M. 135, 227 P.2d 937 (1951).

Effective date of statute. — 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. quashed, 98 N.M. 336, 648 P.2d 794 (1982), and cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982), overruled on other grounds by Roberts v. SW Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992); Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), overruled by Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Different periods are 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. quashed, 98 N.M. 336, 648 P.2d 794 (1982), and cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982), overruled on other grounds by Roberts v. SW Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992).

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.), cert. denied, 105 N.M. 421, 733 P.2d 869 (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. 1892).

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).

Discovery. — The legislature has not felt it necessary to amend the language of the Wrongful Death Statute to allow for application of a discovery rule. Clark v. Lovelace Health Systems, Inc., 2004-NMCA-119, 136 N.M. 411, 99 P.3d 232.

This section and Section 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 Section 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).

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 a 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.

Every action mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name of the personal representative of the deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they deem fair and just, taking into consideration the pecuniary injury resulting from the death to the surviving party entitled to the judgment, or any interest in the judgment, recovered in such action and also having regard to the mitigating or aggravating circumstances attending the 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 the decedent has left a spouse, child, father, mother, brother, sister or child or children of the deceased child, as defined in the New Mexico Probate Code [Chapter 45 NMSA 1978], but shall be distributed as follows:

A. if there is a surviving spouse and no child, then to the spouse;

B. if there is a surviving spouse and a child or grandchild, then one-half to the surviving spouse and the remaining one-half to the children and grandchildren, the grandchildren taking by right of representation;

C. if there is no husband or wife, but a child or grandchild, then to such child and grandchild by right of representation;

D. if the deceased is 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 is dead, then to the survivor;

E. if there is no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister if there are any; and

F. if there is no kindred as named in Subsections A through E of this section, then the proceeds of the 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; Laws 2001, ch. 130, § 1.

ANNOTATIONS

Cross references. — For definitions under the Uniform Probate Code, *see* 45-1-201 NMSA 1978.

The 2001 amendment, effective June 15, 2001, added the section heading; updated the internal reference at the beginning of the subsection; added Subsection designations A to F; substituted "spouse" for "husband or wife" throughout the section; inserted "as defined in the New Mexico Probate Code" following "deceased child," in the preliminary language; rewrote Subsection B, which read "if there be a surviving husband or wife and child or children or grandchildren, then equally to each"; and made stylistic changes throughout the section.

I. GENERAL CONSIDERATION.

September 11th Victim Compensation Fund of 2001. — The economic loss award for the decedent from the September 11th Victim Compensation Fund of 2001 should be distributed in the same manner as proceeds from an award in a wrongful death action. Marchand v. Marchand, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309, aff'd in part, rev'd on other grounds Marchand v. Marchand, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281, cert. denied, 129 S. Ct. 2386, 173 L. Ed 2d 1294 (2009).

The amount of collateral benefits assigned to each beneficiary of a September 11th Victim Compensation Fund of 2001 award should be applied against each beneficiary's share of the award for economic loss, thereby offsetting each beneficiary's share in proportion to the collateral benefits each beneficiary has received. Marchand v. Marchand, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281, rev'g, in part, 2007-NMCA-138, 142 N.M.795, 171 P.3d 309, cert. denied, 129 S. Ct. 2386, 173 L. Ed. 2d 1294 (2009).

Where the total award from the September 11th Victim Compensation Fund of 2001 for economic loss was $1,397,970; the spouse of the victim received $1,012,321 in collateral benefits, and the victim was survived by one child, the spouse's one-half share of the award for economic loss should be reduced by the amount of the collateral benefits that the spouse received, which eliminated any award for economic loss to the spouse. Marchand v. Marchand, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281, rev'g, in part, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309, cert. denied, 129 S. Ct. 2386, 173 L. Ed. 2d 1294 (2009).

Decedent's arbitration agreement is binding on estate and heirs. — Because a wrongful death action is derivative of the decedent's right to sue, a valid arbitration agreement signed by the decedent binds the decedent's estate and statutory heirs in a subsequent wrongful death action. Peck v. Laurel Healthcare Providers, L.L.C., 2014-NMCA-001, cert. denied, 2013-NMCERT-012.

Where the decedent's attorney-in-fact signed an admission agreement on behalf of the decedent when the decedent was admitted to defendant's nursing home; the agreement contained an arbitration agreement that bound the decedent and the decedent's representatives, successors, family, heirs and personal representatives to arbitrate disputes related to the agreement and the provision of services under the agreement; the decedent died five months after being admitted to the nursing home; plaintiff, who was the personal representative of the decedent's wrongful death estate, filed a wrongful death action against defendant alleging that the decedent died as a result of defendant's poor care of the decedent; and defendant sought to compel arbitration of the decedent's claims, plaintiff was bound by the agreement to arbitrate the decedent's claims because the decedent was bound by the agreement to arbitrate the decedent's claims against defendant. Peck v. Laurel Healthcare Providers, L.L.C., 2014-NMCA-001, cert. denied, 2013-NMCERT-012.

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 statute 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).

Choice of law to be that of state where tort occurred. — Where the tort and death occurred in a state which was not the domicile of the decedent or of any of the potential beneficiaries of the wrongful death claim, in the absence of compelling reasons to apply the law of another state, the law governing the apportionment of proceeds was that of the state where the tort and death occurred. In re. Estate of Gilmore, 1997-NMCA-103, 124 N.M. 119, 946 P.2d 1130.

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 existed prior to the act and which were not repealed; 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. — The legislature did not intend to change the common-law rule exempting a master from liability to a 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).

Recovery. — This section permits recovery by someone 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 someone 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 Section 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).

Nonviable fetus not a "person." — A fetus that was nonviable, incapable of sustaining life outside the mother's womb, at the time of injury in a motor vehicle accident was not a "person" under Wrongful Death Act. Miller v. Kirk, 120 N.M. 654, 905 P.2d 194 (1995).

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).

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 that beneficiary's share in the judgment. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963).

Contributory negligence not imputed. — In an action for wrongful death of child for benefit of the parents, 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).

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. Dist. 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 the 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. — Because the only eyewitness testimony of the collision was supplied by a passing truck driver who saw the car in which decedent was a passenger strike the rear end of defendants' truck-trailer, decedent would be presumed to have used due care for individual 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 apply. 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 an Indian's right of action under this statute. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

II. PERSONAL REPRESENTATIVE.

Representative 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. The personal representative 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).

Wrongful death action brought by a personal representative against a governmental entity is a single claim. — A personal representative, whether consisting of one or more individuals, is the "person" for purposes of Paragraph 3 of Subsection A of Section 41-4-19 NMSA 1978 of the Tort Claims Act because under the Wrongful Death Act, Section 41-2-1 NMSA 1978 et seq., the personal representative of the deceased person replaces the deceased person and has the sole right to pursue the action on behalf of the statutory beneficiaries. A wrongful death action brought by a personal representative on behalf of multiple statutory beneficiaries is a single claim under Paragraph 3 of Subsection A of Section 41-4-19 NMSA 1978, rather than multiple claims under Paragraph 4 of Subsection A of Section 41-4-19 NMSA 1978. Estate of Lajeuenesse v. UNM Bd. of Regents, 2013-NMCA-004, 292 P.3d 485, cert. quashed, 2013-NMCERT-001.

Where the personal representative of the decedent sued defendants for the wrongful death of the decedent based on the negligent medical care provided by defendants; no claims were made by any person other than the personal representative; and the jury awarded plaintiff damages of $750,000, the district court properly applied the monetary

limitation of Paragraph 3 of Subsection A of Section 41-4-19 NMSA 1978, rather than multiple claims limitation under Paragraph 4 of Subsection A of Section 41-4-19 NMSA 1978, to reduce the verdict to $400,000 because the wrongful death action was a single claim, not multiple claims. Estate of Lajeuenesse v. UNM Bd. of Regents, 2013-NMCA-004, 292 P.3d 485, cert. quashed, 2013-NMCERT-001.

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), cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985).

III. BENEFICIARIES.

Proof of natural-parent status is not necessarily sufficient for recovery under the wrongful death statute; a personal representative in a wrongful death action may present evidence of abandonment and non-support, and even seek to terminate parental rights, particularly in light of the fact that the only remaining one is a right to recover money. Perry v. Williams, 2003-NMCA-084, 133 N.M. 844, 70 P.3d 1283, cert. denied, 134 N.M. 123, 73 P.3d 826 (2003).

The legislature intended to incorporate the common law principal that the rights of parents and children are interlocked, and that a parent may lose his or her right to benefit from a child if that parent abandons the child, into the Wrongful Death Act when it was passed. Perry v. Williams, 2003-NMCA-084, 133 N.M. 844, 70 P.3d 1283, cert. denied, 134 N.M. 123, 73 P.3d 826 (2003).

Attorney's duty to statutory beneficiaries. — The Rules of Professional Conduct are relevant in determining the scope of the duty owed by an attorney to the personal representative of a wrongful death estate and how a breach of that duty may have harmed the statutory beneficiaries. Statutory beneficiaries are intended beneficiaries of the agreement between the attorney and the personal representative and the statutory beneficiaries may sue the attorney when the attorney's breach of the duty to the personal representative to exercise reasonable skill and care during the attorney's representation harms the statutory beneficiaries. Spencer v. Barber, 2013-NMSC-010, 299 P.3d 388, rev'g 2011-NMCA-090, 150 N.M. 519, 263 P.3d 296.

Attorneys' duty of disclosure to statutory beneficiaries. — When the interests of the personal representative and a statutory beneficiary are adverse, the attorney for the personal representative may negotiate a settlement between the personal representative and the statutory beneficiary after the attorney discloses to the statutory beneficiary that (1) the beneficiary is a beneficiary in a wrongful death lawsuit and the

identities of the parties to the lawsuit, (2) the amount of any settlement or verdict reached, or any settlement offers under consideration, (3) the percentage of the settlement or verdict to which the beneficiary is entitled under the statute, (4) the basic position of the adverse party, and (5) the fact that the attorney represents the adverse party against the beneficiary and is not looking out for the beneficiary's interests. Spencer v. Barber, 2013-NMSC-010, 299 P.3d 388, rev'g 2011-NMCA-090, 150 N.M. 519, 263 P.3d 296.

Attorney's duty to resolve conflicts according to professional standards. — Where the attorney represented the client as the personal representative of the wrongful death estates of the client's child and grandchild who had been killed in a collision between the client's car and a truck; the client claimed that the non-client, who was a statutory beneficiary and the parent of the client's child, had abandoned the child and was not entitled to any of the wrongful death proceeds; the attorney knew that the client had been drinking alcohol before the collision and that the collision occurred when the client stopped the client's car in a traffic lane of an interstate highway at night with the car lights off; the attorney negotiated a settlement agreement with the non-client that substantially reduced the non-client's entitlement to the wrongful death proceeds; the attorney told the non-client that the attorney did not represent the non-client, the attorney represented only the client, and the attorney was not providing services to the non-client; there was a dispute as to whether the attorney informed the non-client that the client challenged the non-client's right to receive any of the wrongful death proceeds; the attorney did not tell the non-client the size of the anticipated settlement, that the attorney represented the client against the non-client, or that the non-client was entitled to fifty percent of the wrongful death proceeds; and the non-client sued the attorney for malpractice, fraud, collusion and misrepresentation, summary judgment for the attorney was not appropriate because there were genuine issues of material fact regarding whether the attorney had a conflict of interest in representing the personal representative who was potentially liable for the decedents' deaths and whether the attorney handled the conflict of interest between the client and non-client with due care and skill without harming the statutory beneficiary and because the non-client's independent tort claims were not barred by the adversarial exception. Spencer v. Barber, 2013-NMSC-010, 299 P.3d 388, rev'g 2011-NMCA-090, 150 N.M. 519, 263 P.3d 296.

Attorney owes duty to statutory beneficiaries. — An attorney handling a wrongful death case owes to the statutory beneficiaries of that action a duty of reasonable care to protect their interests in receiving any proceeds obtained. Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995).

Who may sue. — 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.), cert. denied, sub. nom. Sosa v. Dominguez, 100 N.M. 689, 675 P.2d 421 (1983).

The act furnishes the basis for recovery, by the statutory beneficiaries, of the decedent's damages; but it provides no basis for recovery by the decedent's parents, or anyone else, of their own damages flowing from the loss of the decedent's life. Solon ex rel. Ponce v. WEK Drilling Co., Inc., 113 N.M. 566, 829 P.2d 645 (1992).

Per accident coverage limitation. — The several statutory beneficiaries in a wrongful death action are entitled to recover. Pursuant to underinsured motorist insurance policies, the per-person rather than the per-accident limits of coverage for underinsured motorist benefits applies. Lewis v. Dairyland Ins. Co., 113 N.M. 686, 831 P.2d 985 (1992).

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, Section 45-1-101 NMSA 1978 et seq. Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985).

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 in a wrongful death complaint in which the deceased had been named as the plaintiff, since all of the 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 child 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 Section 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, NMRA and Paragraph A of Rule 1-017) NMRA. 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 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).

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).

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).

Adoption prerequisite for wrongful death recovery by child. — Child who had not been legally adopted by decedent, and could not establish a basis for equitable adoption, could not recover in a wrongful death action based on the accident that killed decedent. Otero v. City of Albuquerque, 1998-NMCA-137, 125 N.M. 770, 965 P.2d 354.

Death of survivor of child. — In an action for a child's wrongful death in which the child, along with her mother, was severely burned by the explosion of a natural gas pipeline and died within hours of the explosion, the right of the mother, who survived the child's death but died thereafter from her own injuries, to share in the proceeds of the action became absolutely vested upon the child's death; upon the mother's death, her interest in the proceeds passed to her estate. In re Estate of Sumler, 2003-NMCA-030, 133 N.M. 319, 62 P.3d 776.

Construction of "survivor" that delays ascertainment of the identities of beneficiaries until a judgment is recovered is incompatible with this section. In re Estate of Sumler, 2003-NMCA-030, 133 N.M. 319, 62 P.3d 776.

IV. DAMAGES.

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).

Proceeds not 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).

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).

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).

Loss of guidance and counseling by a minor child is a pecuniary injury. Romero v. Byers, 117 N.M. 422, 872 P.2d 840 (1994).

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).

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. Co. v. Deserant, 9 N.M. 49, 49 P. 807 (1897); Hogsett v. Hanna, 41 N.M. 22, 63 P.2d 540 (1936); Mares v. N. M. Pub. Serv. Co., 42 N.M. 473, 82 P.2d 257 (1938).

Life valued as present worth. — Worth of life of deceased to estate is not all that the individual would earn in a lifetime, but the present worth, taking into consideration the earning power. Mares v. N. M. 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.), cert. denied, 107 N.M. 610, 762 P.2d 867 (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 should 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 the 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 Section 41-4-19B (now 41-4-19D) NMSA 1978. Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

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).

Expert testimony allowed on non-pecuniary value. — Because the value of life itself is compensable under the Wrongful Death Act the jury must determine fair and just compensation for the reasonable expected nonpecuniary rewards the deceased would have reaped from life as demonstrated by his or her health and habits. Admissibility of evidence directed at establishing this value is governed by the rules of evidence of the applicable trial court. However, plaintiffs may introduce expert testimony by an economist for establishing the value of life itself. Romero v. Byers, 117 N.M. 422, 872 P.2d 840 (1994).

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 there was no award in favor of either party plaintiff based on these expenses. Hodgkins v. Christopher, 58 N.M. 637, 274 P.2d 153 (1954).

Testimony about 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).

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 note, "New Mexico Adopts Hedonic Damage in the Context of Wrongful Death Actions: *Sears v. Nissan (Romero v. Byers),*" see 25 N.M.L. Rev. 385 (1995).

For note, "Trends in New Mexico Law: 1994-95: Tort Law (Legal Malpractice) — Attorneys May Owe a Duty to Statutory Beneficiaries Regardless of Privity: Leyba v. Whitley", see 26 N.M. L. Rev. 643 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Death §§ 89 et seq., 141 et seq., 215 et seq. 398 et seq.

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 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.

Who, other than parent, may recover for loss of consortium on death of minor child, 84 A.L.R.5th 687.

Validity of state statutory cap on punitive damages, 103 A.L.R.5th 379.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For 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).

Constitutionality of 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 Section 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 death 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 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 (Sections 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).

Strict construction. — 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).

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).

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 Section 41-2-1 NMSA 1978 based on the pilot's 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 wrongful 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).

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).

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).

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).

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 the 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).

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).

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 the two year old child 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 Nw. 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. — Although the husband of the sister of the deceased was legally obligated to support her, and she was dependent

upon him for support, that 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. Pac. Greyhound Lines, 134 F.2d 457 (10th Cir. 1943).

Since this section fails to define dependence, it would appear that substantial dependence of a sibling and substantial contributions to support are enough to entitle the sibling to obtain a recovery. Myers v. Pac. 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 a 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 Nw. 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).

Estoppel. — Upon the expiration of the three-year limitation period provided in 41-2-2 NMSA 1978, the right to maintain 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; 32B Am. Jur. 2d Federal Employer's Liability and Compensation Acts §§ 22, 52 et seq., 99 et seq.

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 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.

Liability of motorbus carrier or driver for death of, or injury to, discharged passenger struck by other vehicle, 16 A.L.R.5th 1.

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 through 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.

ANNOTATIONS

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

Proportional indemnification. — Proportional indemnification need not apply when a factfinder makes a determination that a concurrent tortfeasor is proportionally liable to an injured party. By adopting pure comparative negligence and several liability, the supreme court has already created a system in which each concurrent tortfeasor is liable only for the percentage of damages that is attributable to his or her fault. Similarly, proportional indemnification does not apply when the statute provides for proration of damages among joint tortfeasors. Under the statute, if one tortfeasor has been held liable for more than that his or her share of the fault, that tortfeasor may seek contribution from others who were at fault. Amrep Sw., Inc. v. Shollenbarger Wood Treating, Inc., 119 N.M. 542, 893 P.2d 438 (1995).

The Uniform Contribution Among Tortfeasors Act does not apply to defendants sued under vicarious liability theories, because vicarious liability is a legal fiction imputing wrongdoing of an agent to a principal who are not joint tortfeasors. Valdez v. R-Way, LLC, 2010-NMCA-068, 148 N.M. 477, 237 P.3d 1289, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Employer liability under the doctrine of respondeat superior. — Where an employer's liability arises only by virtue of the doctrine of respondeat superior, and not through any independent negligence of the employer, the employer and the employee are not true joint tortfeasors. Valdez v. R-Way, LLC, 2010-NMCA-068, 148 N.M. 477, 237 P.3d 1289, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Where plaintiff's vehicle was rear-ended by a vehicle driven by defendant's employee; plaintiff sued defendant's employee for negligence and claimed that defendant was vicariously liable based on respondeat superior; plaintiff and defendant's employee settled; plaintiff fully released defendant's employee for all claims arising from the accident; in the release, plaintiff specifically preserved plaintiff's claim against defendant, the release of defendant's employee released defendant despite the reservation of plaintiff's claim against defendant because defendant's liability was imputed solely based on the negligent conduct of defendant's employee, without fault of defendant, and the release of defendant's employee removed the basis on which defendant's fault was imputed. Valdez v. R-Way, LLC, 2010-NMCA-068, 148 N.M. 477, 237 P.3d 1289, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Applicability of act. — This act is applicable only in instances where joint tortfeasors share a common liability. Beal v. S. 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 tortfeasors who are liable. Rio Grande Gas Co. v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

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).

Workmen's Compensation Act. — The Workmen's Compensation Act (52-1-1 NMSA 1978 et seq.) (now Workers' Compensation Act) 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. S. Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

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

Workers' Compensation Act. — Contribution remedy outside the Workers' Compensation Act is not authorized by the Workers' Compensation Act. Tom Growney Equip. Co. v. Jouett, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

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 (Section 52-1-1 NMSA 1978 et seq.) (now Workers' Compensation Act) covers all instances where that injury is sought to be made the basis for further and additional liability by the employee or others in the worker's 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. S. 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 other concurrent tortfeasors. Bartlett v. N. M. Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (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. S. 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. The failure of jurisdiction over the bank as joint defendant does not compel the sustaining of the collection agency's motion to dismiss the 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 the 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 the trailer, subject to the right of contribution provided for in Section 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 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.

Modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory, 3 A.L.R.5th 1.

Comparative negligence: judgment allocating fault in action against less than all potential defendants as precluding subsequent action against parties not sued in original action, 4 A.L.R.5th 753.

Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release, 6 A.L.R.5th 883.

Joint and several liability of physicians whose independent negligence in treatment of patient causes indivisible injury, 9 A.L.R.5th 746.

Apportionment of liability between landowners and assailants for injuries to crime victims, 54 A.L.R.5th 379.

42 C.J.S. Indemnity § 59 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.

ANNOTATIONS

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 the

injured person has also released the other tortfeasors from their pro rata share of the common liability. Garrison v. Navajo Freight Lines, Inc., 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. Mem'l Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

Limited application. — 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.), cert. quashed, 100 N.M. 192, 668 P.2d 308 (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 liability to the injured plaintiff. Dessauer v. Mem'l 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. Mem'l Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

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 Section 41-3-1 NMSA 1978 due to their combined negligence and the 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 the 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. Mem'l 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 Section 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).

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).

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).

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).

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. N. M. State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App.), cert. denied, 98 N.M. 51, 644 P.2d 1040 (1982).

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 (Sections 41-3-1 to 41-3-8 NMSA 1978). Thomas v. Malco Refineries, Inc., 214 F.2d 884 (10th Cir. 1954).

Indemnity not 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 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 the 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 that tortfeasor's share to the discharge of the common liability. Dessauer v. Mem'l 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 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).

For comment, "Bartlett Revisted: New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability - Part One," see 33 N.M. L. Rev. 1 (2003).

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.

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.

Right to contribution or indemnity on behalf of owner, operator, maintainer, repairer, or installer of automatic passenger elevator in action by elevator user, 100 A.L.R.5th 409.

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.

ANNOTATIONS

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.), cert. quashed, 100 N.M. 192, 668 P.2d 308 (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).

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, an error in dismissing the third-party complaint would not affect plaintiffs' verdicts against the gas company. Beal v. S. 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. — 47 Am. Jur. 2d Judgments § 685; 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.

ANNOTATIONS

"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, Inc., 74 N.M. 238, 392 P.2d 580 (1964).

Release of joint tortfeasors. — A release of liability executed in favor of one defendant does not operate to extinguish liability of the joint tortfeasors unless the release so provides. Rather, the release only operates to reduce the amount of damages for which the remaining defendants are responsible. Martinez v. Albuquerque Collection Servs., Inc., 867 F. Supp. 1495 (D.N.M. 1994).

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, Inc., 74 N.M. 238, 392 P.2d 580 (1964).

Releases are contractual in nature; thus, the question of whether the general release clause contained in the plaintiff's release of the defendants discharging "every other person, firm, or corporation" is binding upon the plaintiff must be determined in accordance with contract principles. Absent an ambiguity or other reasons which might invalidate the contract, such as fraud, duress, or undue influence, the parties to a release are free to discharge not only the settling tortfeasor but all other unnamed tortfeasors as third party beneficiaries to the release. Perea v. Snyder, 117 N.M. 774, 877 P.2d 580 (Ct. App.), cert. denied, 118 N.M. 90, 879 P.2d 91 (1994).

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. N. M. State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App.), cert. denied, 98 N.M. 51, 644 P.2d 1040 (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, Inc., 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 because the release 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).

Plaintiff's burden of proof following execution of release when suing different defendants. — Following the plaintiff's execution of a release of judgment, the plaintiffs sought under a different theory of recovery and against different defendants the same damages as evidenced by the release. Since an award for punitive damages must be supported by an established cause of action, the plaintiffs may recover any unpaid compensatory and punitive damages if they can successfully establish a cause of action for either nominal or compensatory damages. Sanchez v. Clayton, 117 N.M. 761, 877 P.2d 567 (1994).

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 that tortfeasor was a full satisfaction of the compensatory damages for the injury, thereby precluding an action by plaintiff against the tortfeasor's principal for compensatory damages for the same injury, since 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).

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, Inc., 74 N.M. 238, 392 P.2d 580 (1964).

There is no right to reduction of jury award based on out-of-court settlements when the case is tried on a theory of comparative fault. Atler v. Murphy Enters., Inc., 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. quashed, 2005-NMCERT-008, 138 N.M. 330, 119 P.3d 126.

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).

Law reviews. — For note, "Tort Law - Original and Successive Tortfeasors and Release Documents in New Mexico Tort Law: Lujan v. Healthsouth Rehabilitation Corporation," see 27 N.M.L. Rev. 697 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54 Am. Jur. 2d Monopolies § 526; 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.

Release of one joint tortfeasor as discharging liability of others: modern trends, 73 A.L.R.2d 403, 6 A.L.R.5th 883.

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.

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.

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.

Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release, 6 A.L.R.5th 883.

Validity and effect of "Mary Carter" or similar agreement setting maximum liability of one cotortfeasor and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor, 22 A.L.R.5th 483.

76 C.J.S. Release § 1 et seq.

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.

ANNOTATIONS

"Claim" and "damages recoverable". — The legislature appears to have interpreted the terms "claim" and "damages recoverable" synonymously. In Section 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, Inc., 74 N.M. 238, 392 P.2d 580 (1964).

Purpose of act. — One of the purposes of this act (Sections 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, Sections 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.), cert. quashed, 100 N.M. 192, 668 P.2d 308 (1983).

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, Inc., 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 Section 41-3-4 NMSA 1978 of the damages recoverable from the remaining tortfeasors. Garrison v. Navajo Freight Lines, Inc., 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, Inc., 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.), cert. quashed, 100 N.M. 192, 668 P.2d 308 (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, Inc., 74 N.M. 238, 392 P.2d 580 (1964).

Law reviews. — For note, "Trends in New Mexico Law: 1995–96: Tort Law – Original and Successive Tortfeasors and Release Documents in New Mexico Tort Law: Lujan v. Health South Rehabilitation Corp.," see 27 N.M. L. Rev. 697 (1997).

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 through 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.

ANNOTATIONS

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

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).

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. Mem'l Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

If 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. 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 that tortfeasor's 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. Mem'l 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.

Product 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 through 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 through 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.

ANNOTATIONS

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

Section 41-3A-1 NMSA 1978 did not change the New Mexico common law regarding vicarious liability, because vicarious liability is a legal fiction imputing the wrongdoing of an agent to a principal who are not joint tortfeasors. Valdez v. R-Way, LLC, 2010-NMCA-068, 148 N.M. 477, 237 P.3d 1289, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Employer's liability under the doctrine of respondeat superior. — Where an employer's liability arises only by virtue of the doctrine of respondeat superior, and not through any independent negligence of the employer, the employer and the employee are not true joint tortfeasors. Valdez v. R-Way, LLC, 2010-NMCA-068, 148 N.M. 477, 237 P.3d 1289, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Where plaintiff's vehicle was rear-ended by a vehicle driven by defendant's employee; plaintiff sued defendant's employee for negligence and claimed that defendant was vicariously liable based on respondeat superior; plaintiff and defendant's employee settled; plaintiff fully released defendant's employee for all claims arising from the accident; in the release, plaintiff specifically preserved plaintiff's claim against defendant, the release of defendant's employee released defendant despite the reservation of plaintiff's claim against defendant because defendant's liability was imputed solely based on the negligent conduct of defendant's employee, without fault of defendant, and the release of defendant's employee removed the basis on which defendant's fault was imputed. Valdez v. R-Way, LLC, 2010-NMCA-068, 148 N.M. 477, 237 P.3d 1289, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Successive torfeasor exception. — Where tortfeasor and other defendants were involved in a chain reaction automobile accident, the fact that there were multiple and separate collisions is not enough by itself to establish successive tortfeasor liability and

the lapse of time between the various chain reaction impacts is not enough to deem the other defendants successive tortfeasors. Gulf Ins. Co. v. Cottone, 2006-NMCA-150, 140 N.M. 728, 148 P.3d 814.

The inherently dangerous activity exception does not apply in a chain reaction automobile accident where there is no connection between the activities of the tortfeasor who was a transporter of liquid carbon dioxide and the activities of other defendants who were travelers on the roadway. Gulf Ins. Co. v. Cottone, 2006-NMCA-150, 140 N.M. 728, 148 P.3d 814.

New Mexico has statutorily adopted majority view as articulated in Subsection C(1) of this section. Garcia v. Gordon, 2004-NMCA-114, 136 N.M. 394, 98 P.3d 1044.

Application of comparative-fault principles. — Where the jury only found that defendant's belief that plaintiff was resisting, evading, or obstructing an officer was "unreasonable" and it did not find that defendant acted with the intention of inflicting injury or damage, application of comparative-fault principles is not inconsistent with public policy. Garcia v. Gordon, 2004-NMCA-114, 136 N.M. 394, 98 P.3d 1044.

Test for successive or concurrent tortfeasors. — Several factors are relevant in determining whether tortfeasors are successive or concurrent. These factors include: 1) the identity of time and place between the acts of alleged negligence; 2) the nature of the cause of action brought against each defendant; 3) the similarity or differences in the evidence relevant to the causes of action; 4) the nature of the duties allegedly breached by each defendant; and 5) the nature of the harm or damages caused by each defendant. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

Elements of successive tortfeasor liability. — Under successive tortfeasor liability theory, a plaintiff must prove that a first injury is caused by an original tortfeasor and that that injury then casually led to a second distinct injury, or a distinct enhancement of the first injury, caused by a successive tortfeasor. Payne v. Hall, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599.

Successive tortfeasors. — Government-owned hospital that misdiagnosed the decedent's condition first and another hospital that misdiagnosed it days later were successive tortfeasors where the hospitals' alleged negligence occurred days apart from one another and in different locations, the decedent's hantavirus symptoms were more severe when he presented himself to the second hospital than they were when he went to the government-owned hospital, and the duty owed by the hospitals differed because of the advanced state of the decedent's condition. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

Successive tortfeasor liability jury instruction. — Jury instruction that "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury

caused by the subsequent medical treatment, if any" properly set forth successive tortfeasor liability. Payne v. Hall, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599.

Nonnegligent party cannot be held jointly liable or subject to right of contribution. Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 909 P.2d 1 (Ct. App. 1995).

No joint and several liability found. — Electric cooperative could not be held jointly and severally liable for a homeowner's share of fault arising from the death of plaintiff's decedent who was electrocuted while doing construction work on the homeowner's property. Abeita v. N. Rio Arriba Elec. Coop., 1997-NMCA-097, 124 N.M. 97, 946 P.2d 1108.

There is no right to reduction of jury award based on out-of-court settlements when the case is tried on a theory of comparative fault. Atler v. Murphy Enters., Inc., 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. quashed, 2005-NMCERT-008, 138 N.M. 330, 119 P.3d 126.

Consideration of co-tortfeasor settlement. — Because a joint tortfeasor who is severally liable is not entitled to contribution, the judgment against that joint tortfeasor will not be reduced by any amount the plaintiff has recovered from any other joint tortfeasor. Servants of Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560 (D.N.M. 1994).

In an action by a subcontractor's workers against the operators of a natural gas well for injuries from a well explosion, since the verdict was based upon principles of comparative fault, negligence, and several liability, the trial court's reduction of the verdict by the amount paid to the workers in settlement by other subcontractors was erroneous. Hinger v. Parker & Parsley Petro. Co., 120 N.M. 430, 902 P.2d 1033 (Ct. App.), cert. denied, 120 N.M. 213, 900 P.2d 962 (1995).

Liability of negligent co-tortfeasor. — Although this section does not address the liability of a negligent tortfeasor when a co-tortfeasor committed an intentional tort, liability of a negligent employer sued for the acts of an employee can still be found by extending the doctrine of respondeat superior to hold that an employer who is liable for negligently hiring an intentional tortfeasor should be vicariously liable for the fault attributed to the tortfeasor-employee even if the employee did not act in the scope of employment. Medina v. Graham's Cowboys, Inc., 113 N.M. 471, 827 P.2d 859 (Ct. App. 1992).

Percentage of fault. — The defendant's liability for the injuries sustained by the plaintiff must be reduced by the percentage of fault attributable to the other defendant. The district court must determine the defendants' percentages of fault and must then reduce the defendant's liability in accordance with the percentages of fault attributable to the other defendant and the plaintiff. Barth v. Coleman, 118 N.M. 1, 878 P.2d 319 (1994).

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 suffered. Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (Ct. App.), cert. denied sub nom., H & P Equip. Co., 106 N.M. 24, 738 P.2d 518 (1987).

Burden of proof in subsequent medical negligence. — In claims against a subsequent medical tortfeasor the standard adopted in Lujan v. Healthsouth Rehabiltation Corp., 120 N.M. 422, 902 P.2d 1025 (1995) applies: the plaintiff must prove 1) that the successive tortfeasor's negligence resulted in injuries separate from and in addition to the injuries caused from the initial tort, and 2) the degree of enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent physician's negligence. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

A physician accused of subsequent medical negligence may rebut the plaintiff's evidence of causation through evidence of the initial tortfeasor's responsibility for the entire harm. Lewis v. Samson, 2001-NMSC-035, 131 N.M. 317, 35 P.3d 972.

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

Inherently dangerous activities. — Felling large dead trees is an inherently dangerous activity, giving rise to joint and several liability under the "public policy" exception of Subsection C(4). Enriquez v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

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 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 note, "Tort Law - New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm From Dangerous Work, but Bestows Immunity on a Government Employer: Saiz v. Belen School District," see 23 N.M.L. Rev. 399 (1993).

For note, "Tort Law - Comparative Fault Eliminates the Need for Indemnification Between Concurrent Tortfeasors: Otero v. Jordan Restaurant Enterprises," see 27 N.M.L. Rev. 679 (1997).

For note, "Tort Law - Original and Successive Tortfeasors and Release Documents in New Mexico Tort Law: Lujan v. Healthsouth Rehabilitation Corporation," see 27 N.M.L. Rev. 697 (1997).

For article, "Bartlett Revisited: New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability – Part One," see 33 N.M.L. Rev. 1 (2003).

For article, "*Bartlett* Revisited: The Impact of Several Liability on Pretrial Procedure in New Mexico – Part Two", see 35 N.M.L. Rev. 37 (2005).

For article, "Can I Buy your Lawsuit? A Proposed Solution to the Unstated Problem in Gulf Insurance Co. v. Cottone," see 38 N.M. L. Rev. 511 (2008).

For note and comment, "Multiple Tortfeasors Defined by Injury: Successive Tortfeasor Liability After Payne v. Hall," see 37 N.M. L. Rev. 603 (2007).

For note, "Tort Law — The Doctrine of Independent Intervening Cause Does Not Apply in Cases of Multiple Acts of Negligence – Torres v. El Paso Electric Company," see 300 N.M. L. Rev. 325 (2000).

For note, "Trends in New Mexico Law: 1994–95: Tort Law – New Mexico Adopts Proportional Indemnity and Clouds the Distinction between Contract and Tort: Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.," see 26 N.M. L. Rev. 603 (1996).

For note, "Trends in New Mexico Law: 1993–94: Tort Law – New Mexico Examines the Doctrine of Comparative Fault in the Context of Promises Liability," see Reichert v. Atler, 25 N.M. L. Rev. 353 (1995).

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

Comparative negligence: judgment allocating fault in action against less than all potential defendants as precluding subsequent action against parties not sued in original action, 4 A.L.R.5th 753.

Joint and several liability of physicians whose independent negligence in treatment of patient causes indivisible injury, 9 A.L.R.5th 746.

86 C.J.S. Torts § 34 et seq.

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.

ANNOTATIONS

Compiler's notes. — The term "this act" means Laws 1987, ch. 141, which appears as 41-3-2, 41-3A-1, 41-3A-2 and 52-1-10.1 NMSA 1978.

Applicability. — Laws 1987, ch. 141, § 5 made this section applicable to all civil actions initially filed on and after July 1, 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).

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.

ANNOTATIONS

Cross references. — For immunity from liability for employers for statements in references of former employees, *see* 50-12-1 NMSA 1978.

Constitutionality. — The legislature acted constitutionally in enacting the Tort Claims Act following judicial abolition of sovereign immunity. Ferguson v. N. M. State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Act does not violate Equal Protection Clauses of the United States and New Mexico constitutions. Garcia v. Albuquerque Pub. Sch. Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

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. Cnty. of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

This act was enacted in response to the judicial abrogation of sovereign immunity in *Hicks v. State,* 88 N.M. 588, 592, 544 P.2d 1153 (1975), and the basic intent was to

reestablish government immunity, while creating specific exceptions for which the government could be sued for tort liability. Bd. of Cnty. Comm'rs v. Risk Mgmt. Div., 120 N.M. 178, 899 P.2d 1132 (1995).

Important policies underlying enactment of the Tort Claims Act were to protect the public treasury, to enable the government to function unhampered by the threat of legal actions that would inhibit the administration of traditional state activities, and to enable the government to effectively carry out its services. Maestas v. Zager, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, rev'd on other grounds, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

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) (decided under prior law).

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. Schs. Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

Act is remedial act which applies only prospectively, in the absence of expressed legislative intent to make it retroactive. Methola v. Cnty. 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, 1953 Comp., to redress a 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. The claim was, thus, not barred under common-law sovereign immunity, but rather retained its vitality pursuant to former 5-6-20, 1953 Comp. Romero v. N. M. 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 if 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. Cnty. of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Strict construction. — 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. Cnty. 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 sub nom. Haney v. Albuquerque Police Dep't., 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds by 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), overruled in part on other grounds by Folz v. State, 115 N.M. 639, 857 P.2d 39 (Ct. App.), cert. denied, 115 N.M. 602, 856 P.2d 250 (1993).

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).

Indemnification contract impermissible. — Provision in a contract between a city and a beverage company under which the city agreed to indemnify the company against certain liabilities is impermissible to the extent it required the city to assume liability outside the Tort Claims Act. 2000 Op. Att'y Gen. No. 00-04.

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 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 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 note, "The New Mexico Tort Claims Act: The King Can Do 'Little' Wrong," see 21 N.M.L. Rev. 441 (1991).

For note, "Contracts - The Supreme Court Speaks Where the Legislature Was Silent: *Torrance County Mental Health Program, Inc. v. New Mexico Health & Environment*," see 23 N.M.L. Rev. 291 (1993).

For note, "Tort Law - Either the Parents or the Child May Claim Compensation for the Child's Medical and Nonmedical Damages: *Lopez v. Southwest Community Health Services*," see 23 N.M.L. Rev. 373 (1993).

For note, "Tort Law - New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm From Dangerous Work, but Bestows Immunity on a Government Employer: *Saiz v. Belen School District*," see 23 N.M.L. Rev. 399 (1993).

For note, "Torts - Sovereign Immunity: *Caillouette v. Hercules*," see 23 N.M.L. Rev. 423 (1993).

For note, "In the aftermath of M.D.R., Holding the State to Its Promises: *M.D.R. v. State Human Services Dep't*," see 24 N.M.L. Rev. 557 (1994).

For article, "Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M.L. Rev. 173 (1995).

For note, "Foreseeability vs. Public Policy Considerations in Determining the Duty of Physicians to Non-Patients - *Lester v. Hall,*" see 30 N.M.L. Rev. 351 (2000).

For note, "New Mexico Limits Recovery of Negligent Infliction of Emotional Distress to Sudden, Traumatic Accidents - *Fernandez v. Walgreen Hastings Co.,*" see 30 N.M.L. Rev. 363 (2000).

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.

Damage to property caused by negligence of governmental agents, as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

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.

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

Liability in tort for interference with attorney-client relationship, 90 A.L.R.4th 621.

Liability of private operator of "halfway house" or group home housing convicted prisoners before final release for injury to third person caused by inmate, 9 A.L.R.5th 969.

Municipal liability for negligent performance of building inspector's duties, 24 A.L.R.5th 200.

Liability of school or school personnel for injury to student resulting from cheerleader activities, 25 A.L.R.5th 784.

Collateral source rule: admissibility of evidence of availability to plaintiff of free public special education on issue of amount of damages recoverable from defendant, 41 A.L.R.5th 771.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 A.L.R.5th 49.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student, 85 A.L.R.5th 301.

Liability of municipality or other governmental unit for failure to provide police protection from crime, 90 A.L.R.5th 273.

What constitutes "claim arising in a foreign country" under 28 U.S.C.A. § 2680(k), excluding such claims from Federal Tort Claims Act, 158 A.L.R. Fed. 137.

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.

Appealability, under collateral order doctrine, of order denying qualified immunity in 42 USCS § 1983 or Bivens action for damages where claim for equitable relief is also pending - post-Harlow cases, 105 A.L.R. Fed. 851.

When is federal agency employee independent contractor, creating exception to United States waiver of immunity under Federal Tort Claims Act (28 U.S.C.A. § 2671), 166 A.L.R. Fed. 187.

Claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception of federal Tort Claims Act (28 U.S.C.A. § 2680(a)), 167 A.L.R. Fed. 1

Liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal government and not in national parks as affected by "discretionary function or duty" exception to federal Tort Claims Act, 169 A.L.R. Fed. 421.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to federal Tort Claims Act (28 U.S.C.A. § 2680(a)), 170 A.L.R. Fed. 365.

Liability of United States for failure to warn local police or individuals of discharge, release, or escape of person who is deemed dangerous to public as affected by "discretionary act or duty" exception to federal Tort Claims Act, 171 A.L.R. Fed. 655.

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 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.

ANNOTATIONS

"In derogation of common law." – Insofar as it re-established sovereign immunity, the Tort Claims Act was in derogation of the common law, but in its exceptions, the Act restored the common law right to sue in those specific situations; because of the complex relationship between the Act and the common law, the more useful canon of construction is that requiring courts to give effect to the legislature's intent. Brenneman v. Bd. of Regents of UNM, 2004-NMCA-003, 135 N.M. 68, 84 P.3d 685, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Different treatment of government and private tortfeasors. — The legislature never intended government and private tortfeasors to receive identical treatment. The liabilities of the private tortfeasor in no way compare with the potential liabilities of the state highway and transportation department [department of transportation] for the multitude of daily injuries and deaths on the state's highways. Marrujo v. N.M. State Hwy. Transp. Dep't, 118 N.M. 753, 887 P.2d 747 (1994).

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 380 (1987).

To hold municipality liable for the conduct of third persons would be contrary to sound public policy and create policing requirements difficult to fulfill. Trujillo v. City of Albuquerque, 93 N.M. 564, 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).

Immunity waiver is not for indirect or incidental victims. — The legislature did not intend by this section to waive immunity for injuries to indirect or incidental victims of tortious acts committed by government employees. The plaintiff's, as children of the deceased killed by law enforcement officers, were unforeseeable; as injured parties;

therefore, the officers owed no duty to them. Lucero v. Salazar, 117 N.M. 803, 877 P.2d 1106 (Ct. App.), cert. denied, 117 N.M. 802, 877 P.2d 1105 (1994).

But extends to claims for loss of consortium. – Once a duty is established, loss of consortium damages flow from the principles of tort liability; as loss of consortium is a damage resulting from bodily injury and loss of consortium plaintiffs are foreseeable, loss of consortium is exactly the type of damage "based upon the traditional tort concepts of duty" that the legislature intended to include under the applicable waivers of sovereign immunity in the Tort Claims Act. Brenneman v. Bd. of Regents of UNM, 2004-NMCA-003, 135 N.M. 68, 84 P.3d 685, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

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. Bd. of Cnty. Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

The distinction between public and private duty is invalid, and applied retrospectively. Schear v. Bd. of Cnty. Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984); Wittkowski v. State, Corr. Dep't, 103 N.M. 526, 710 P.2d 93 (Ct. App.), cert. quashed, 103 N.M. 446, 708 P.2d 1047 (1985), overruled on other grounds by Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

Personal actions against public employees barred. — The language of Subsection F of 5-1-1 NMSA 1978 constitutes a bar to personal actions against public employees; it does not provide an independent statutory waiver of governmental immunity. Gallegos v. Trujillo, 114 N.M. 435, 839 P.2d 645 (Ct. App.), cert. denied, 114 N.M. 314, 838 P.2d 468 (1992).

Governmental entities can share maintenance responsibilities for road by agreement. Bierner v. City of Truth or Consequences, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

City duty to maintain road. — Whether a city had either a statutory or a common law duty to maintain a road is dispositive on the issue of immunity. Bierner v. City of Truth or Consequences, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Waiver of immunity inapplicable. — Where there is no question that the highway department had the sole responsibility to maintain the street in the vicinity where the accident occurred, the waiver of immunity in Subsection A of this section does not apply to the city because it had no duty upon which negligence could be premised. Bierner v. City of Truth or Consequences, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Navajo police officer not New Mexico "public employee". — Fact that Navajo Nation police officer was cross-deputized as a county sheriff did not make the officer a "public employee" of a New Mexico governmental body. Williams v. Bd. of Cnty. Comm'rs,

1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

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 Section 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), rev'd on other grounds sub nom., Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677 (1986).

School district immune from liability for breach of nondelegable duty. — Direct liability of the possessor of land under a nondelegable duty to ensure against an unreasonable risk of injury for a special danger is based not on what the possessor knew or should have known, but upon breach of duty imputed as a matter of law. This is strict liability for which the legislature granted immunity under the Tort Claims Act. Consequently, a school district was immune from its joint and several liablity for the acts of independent contractors in constructing a high voltage lighting system that caused the death of a student attending a school football game. Saiz v. Belen Sch. Dist., 113 N.M. 387, 827 P.2d 102 (1992).

Suit against state hospital in federal court not permitted. — Congress does not have the power to make statutes such as the Emergency Medical Treatment and Active Labor Act (EMTALA) applicable to state-run hospitals without the state's express consent. As indicated by this section, 41-4-4 NMSA 1978 and 41-4-18 NMSA 1978, New Mexico has not consented to be sued in federal court for violations of EMTALA, nor for any other tort. Ward v. Presbyterian Healthcare Servs., 72 F. Supp. 2d 1285 (D.N.M. 1999).

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 the arrestee's 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).

For note and comment, "The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effect on State Constitutional Tort

Jurisprudence," see Correctional Services Corp. v. Malesko, 33 N.M. L. Rev. 401 (2003).

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.

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

Tort liability of public schools and institutions of higher learning, 160 A.L.R. 7, A.L.R.2d 489, 33 A.L.R.3d 703, 34 A.L.R.3d 1166, 34 A.L.R.3d 1210, 35 A.L.R.3d 725, 35 A.L.R.3d 758, 36 A.L.R.3d 361, 37 A.L.R.3d 712, 37 A.L.R.3d 738, 38 A.L.R.3d 830, 23 A.L.R.5th 1.

Tort liability of public schools and institutions of higher learning for accidents occurring in physical education classes, 66 A.L.R.5th 1.

Tort liability of schools and institutions of higher learning for personal injury suffered during school field trip, 68 A.L.R.5th 519.

Tort liability of public schools and institutions of higher learning for accidents occurring during school athletic events, 68 A.L.R.5th 663.

Tort liability of public schools and institutions of higher learning for injury to student walking to or from school, 72 A.L.R.5th 469.

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

41-4-3. Definitions.

As used in the Tort Claims Act:

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 Chapter 3, Article 28 NMSA 1978;

D. "law enforcement officer" means a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by 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 that was not foreseeable;

F. "public employee" means an officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (7), (8), (10), (14) and (17) of this subsection, or of a corporation organized pursuant to the Educational Assistance Act [Chapter 21, Article 21A NMSA 1978], the Small Business Investment Act [Chapter 58, Article 29 NMSA 1978] or the Mortgage Finance Authority Act [Chapter 58, Article 18 NMSA 1978] or a licensed health care provider, who has no medical liability insurance, providing voluntary services as defined in Paragraph (16) 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 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) members of state or local selection panels established pursuant to the Juvenile Community Corrections Act [Chapter 33, Article 9A NMSA 1978];

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

(8) members of the board of directors of the New Mexico medical insurance pool;

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

(10) licensed medical, psychological or dental arts practitioners providing services to the children, youth and families department pursuant to contract;

(11) members of the board of directors of the New Mexico educational assistance foundation;

(12) members of the board of directors of the New Mexico student loan guarantee corporation;

(13) members of the New Mexico mortgage finance authority;

(14) volunteers, employees and board members of court-appointed special advocate programs;

(15) members of the board of directors of the small business investment corporation;

(16) health care providers licensed in New Mexico who render voluntary health care services without compensation in accordance with rules promulgated by the secretary of health. The rules shall include requirements for the types of locations at which the services are rendered, the allowed scope of practice and measures to ensure quality of care;

(17) an individual while participating in the state's adaptive driving program and only while using a special-use state vehicle for evaluation and training purposes in that program; and

(18) the staff and members of the board of directors of the New Mexico health insurance exchange established pursuant to the New Mexico Health Insurance Exchange Act [59A-23F-1 through 59A-23F-8 NMSA 1978];

G. "scope of duty" 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; 1993, ch. 195, § 1; 1993, ch. 203, § 1; 1994, ch. 123, § 1; 1995, ch. 173, § 2; 2003, ch. 399, § 3; 2007, ch. 104, § 1; 2009, ch. 8, § 2; 2009, ch. 129, § 2; 2009, ch. 249, § 2; 2013, ch. 54, § 11.

ANNOTATIONS

Compiler's notes. — The following sections make specific entities subject to the Tort Claims Act: 6-8-20 NMSA 1978 (venture capital investment advisory committee); 6-21-4 NMSA 1978 (New Mexico finance authority); 21-28-7 NMSA 1978 (research park corporations); 24-10B-4 NMSA 1978 (emergency medical volunteers); 24-10B-8 NMSA 1978 (licensed emergency medical personnel); 33-3-28 NMSA 1978 (jailers); 59A-54-4 NMSA 1978 (New Mexico comprehensive health insurance pool); 59A-56-4 NMSA 1978 (New Mexico health insurance alliance board); 76-21-22 NMSA 1978 (agricultural commodity commission); 77-2A-9 NMSA 1978 (New Mexico beef council).

Cross references. — For the risk management advisory board, *see* 15-7-4 NMSA 1978.

The 2013 amendment, effective March 28, 2013, defined "public employee" to include staff and members of the board of directors of the New Mexico health exchange; and added Paragraph (18) of Subsection F.

Severability. — Laws 2013, ch. 54, § 16 provided that if any part or application of Laws 2013, ch. 54, §§ 1 through 15 are held invalid, the remainder or its application to other situations or persons shall not be affected.

The 2009 amendment, effective June 19, 2009, in Subsection D, after "governmental entity", added "or a certified part-time salaried police officer employed by a governmental entity".

The 2007 amendment, effective July 1, 2007, provided tort immunity to a licensed health care provider who has no medical liability insurance and who provides voluntary services without compensation in accordance with rules of the secretary of health.

The 2003 amendment, effective April 8, 2003, inserted "the Small Business Investment Act" following "Educational Assistance Act" near the end of Subsection F; substituted "medical" for "comprehensive health" following "of the New Mexico" near the end of Paragraph F(8); and added Paragraph F(15).

The 1995 amendment, effective June 16, 1995, substituted "and (14)" for "(14) and (15)" in the introductory paragraph, deleted former Paragraph (15) of Subsection F relating to nonprofit corporations that provide developmental disabilities services pursuant to contract, and deleted "and, as provided in the Tort Claims Act, includes developmental disabilities service providers" following "institutions" at the end of Subsection H.

The 1994 amendment, effective March 8, 1994, substituted "foreseeable" for "forseeable" in Paragraph E(2), deleted "and" following "(8)," and added ", (14) and (15)" in Subsection F, substituted "educational retirement board" for "board of the educational retirement association" in Paragraph F(9), deleted "and" following the semicolon in Paragraph F(12), added Paragraphs (F)(14) and (F)(15), and added "and,

as provided in the Tort Claims Act, includes developmental disabilities service providers" in Subsection H.

The 1993 amendment, effective June 18, 1993, substituted "Chapter 3, Article 28" for "Sections 3-28-1 through 3-28-19" in Subsection C; and in Subsection F, substituted the language beginning "Paragraphs (7), (8) through (10)" and ending "or the Mortgage Finance Authority Act" for "Paragraphs (6) and (7) of this subsection" in the introductory language, substituted "department of health" for "health and environment department" in Paragraph (4), added present Paragraphs (6) and (10) through (13), making related grammatical changes, and renumbered former Paragraphs (6) through (8) accordingly.

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.

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.

I. GENERAL CONSIDERATION.

Scope of duties. — Where school administrators allegedly used procedures ostensibly based upon statute and regulations and used the mechanism of their employment to harass and attempt to force plaintiff out of her job, the school administrators were acting within the scope of their duties as school administrators and were immune from liability under the Tort Claims Act. Henning v. Rounds, 2007-NMCA-139, 142 N.M. 803, 171 P.3d 317.

Under the definition of "scope of duties" in Subsection G of this section, when reconciled with the indemnification provisions in Subsection E of Section 41-4-4 NMSA 1978 and Subsection A of Section 41-4-17 NMSA, an employee's acts are not excluded simply because they are criminal. Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 129 N.M. 778, 14 P.3d 43, cert. denied, 130 N.M. 17, 16 P.3d 442 (2000).

Failing to perform a regular duty, such as timely responding to requests for records, still falls with the scope of duties for purposes of the Tort Claims Act. Derringer v. State, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

Public employee may be within scope of authorized duty even if the employee's acts are fraudulent, intentionally malicious, or even criminal. Seeds v. Lucero, 2005-NMCA-067, 137 N.M. 589, 113 P.3d 859, cert. denied, sub nom. Seeds v. Vandervossen, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Co-conspirator's acts are imputed to employee. — As long as the act of conspiring is within the scope of a public employee's duties, any co-conspirator's acts that are imputed to the public employee will be, by definition, within the scope of the employee's duties. Seeds v. Lucero, 2005-NMCA-067, 137 N.M. 589, 113 P.3d 859, cert. denied sub nom. Seeds v. Vandervossen, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

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).

II. GOVERNMENTAL ENTITIES.

Corrections department is a "governmental" entity under the Tort Claims Act, not an "employee" of a governmental entity. Therefore, it does not fall within Sections 41-4-6 and 41-4-10 NMSA 1978 (negligence of "public employees"). Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

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).

Issue of whether 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).

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. N. M. 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).

Privately owned irrigation company is not "local public body" under the Tort Claims Act, even though it performs the same function as a public irrigation district, where the company has had the option of reorganizing as a body politic and gaining the benefits and obligations of such status but has chosen not to do so. Carmona v. Hagerman Irrigation Co., 1998-NMSC-007, 125 N.M. 59, 957 P.2d 44.

Water and Sanitation District Act districts are a quasi-municipal governmental entity and fall within the definition of "governmental entity" under the Tort Claims Act. El Dorado Utils., Inc. v. Eldorado Area Water and Sanitation Dist., 2005-NMCA-036, 137 N.M. 217, 109 P.3d 305.

Public defenders' immunity not violation of equal protection. — Public defenders, whether regular employees of the public defender's office or performing as contractors, are immune from malpractice claims, and statutes providing such immunity did not violate the equal protection rights of a former prisoner. Coyazo v. State, 120 N.M. 47, 897 P.2d 234 (Ct. App. 1995).

III. LAW ENFORCEMENT OFFICERS.

Office of state engineer employee. — Where the defendant, who was employed as a water resource specialist and supervisor of the Hondo Basin by the office of the state engineer, who had never actually arrested anyone, who had no law enforcement certification, who did not carry a gun, whose duties were mainly administrative, but included enforcement regarding water rights, and whose vehicle did not have police emergency light, caused the destruction of the plaintiff's dam that diverted water to which the plaintiff had some right pursuant to a compliance order that was based solely on the defendant's field investigation, the defendant did not engage in conduct sufficient to trigger the law enforcement officer waiver of immunity. Limacher v. Spivey, 2008-NMCA-163, 145 N.M. 344, 198 P.3d 370, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

Animal control officer. — For an animal control officer to come within the definition of "law enforcement officer" under this section, the officer's principal duties under law must be: (a) to hold in custody any person accused of a criminal offense, (b) to maintain public order or (c) to make arrests for crimes. It suffices if an animal control officer's principal duties are either (a), (b) or (c). Baptiste v. City of Las Cruces, 115 N.M. 178, 848 P.2d 1105 (Ct. App. 1993).

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

District attorneys are not law enforcement officers. — 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).

District attorneys and their staffs do not fall within the "law enforcement officer" exception from immunity under the Tort Claims Act. Coyazo v. State, 120 N.M. 47, 897 P.2d 234 (Ct. App. 1995).

Warden and head of department not law enforcement officers. — 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, Corr. Dep't, 103 N.M. 526, 710 P.2d 93 (Ct. App.), cert. quashed, 103 N.M. 446, 708 P.2d 1047

(1985), overruled on other grounds by Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

Secretary of corrections. — The secretary of corrections is not a law enforcement officer within the meaning of Section 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).

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. Corrs. Dep't, 100 N.M. 108, 666 P.2d 1255 (1983).

The statutory requirement that the defendants be law enforcement officers does not focus on the defendants' specific acts at the time of their alleged negligence; instead, it simply requires that the defendants' principal duties, those duties to which they devote a majority of their time, be of a law enforcement nature. The requirement in Section 41-4-12 NMSA 1978 that the officer must be acting within the scope of his duties simply means that the officer must be acting within the scope of employment in order to be sued in his or her capacity as a law enforcement officer. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

County detention center officers. — The director and the captain and assistant director of a county detention center are subject to suit as law enforcement officers under the Tort Claims Act. Davis v. Bd. of Cnty. Comm'rs, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172.

Director of DMV is not law enforcement officer. — The director of the motor vehicle division, whose duties involved principally administrative matters, and who did not serve as a full-time law enforcement officer whose principal duties involved holding in custody persons accused of criminal offenses, maintaining public order or making arrests for crimes, was not a "law enforcement officer" within the contemplation of 41-4-12 NMSA 1978. Dunn v. State ex rel. Taxation & Revenue Dep't, 116 N.M. 1, 859 P.2d 469 (Ct. App. 1993).

Motor vehicle division official who investigated plaintiff’s participation in forging automobile title was not acting as a full-time law enforcement officer, as contemplated by Subsection D of this section, and his immunity from suit was not waived. Boydston v. New Mexico Taxation & Revenue Dep’t., 125 F.3d 861 (10th Cir. 1997).

Parole officers not law enforcement officers. — Parole officers and their supervisors are not law enforcement officers under Subsection D of this section, and therefore the waiver of immunity in Section 41-4-12 NMSA 1978 does not apply to them. Vigil v. Martinez, 113 N.M. 714, 832 P.2d 405 (Ct. App. 1992).

Tribal police officer was not a "public employee". — Where an on-duty, full-time pueblo tribal law enforcement officer, acting in the officer’s capacity as a commissioned

deputy sheriff for the county stopped plaintiff's vehicle on a state-maintained road within the exterior boundaries of the pueblo and arrested plaintiff for reckless driving; the officer was dressed in a full tribal police uniform, displaying a tribal badge of office, and driving a tribal police vehicle; in addition to acting under tribal law, the officer was on duty as a duly commissioned deputy sheriff, which gave the officer authority to arrest, charge, and jail non-Indians for violations of New Mexico state laws; the officer took plaintiff to the tribal police department for processing and later transported plaintiff to the county jail; the officer was not a salaried officer employed by the county; the pueblo was a sovereign Indian tribe; plaintiff sued the officer for violation of plaintiff's constitutional rights, the officer was not a "law enforcement officer" or a "public employee" of a "governmental entity" as defined in Section 40-4-3 NMSA 1978 and the county did not have a duty under Section 40-4-4 NMSA 1978 to defend or indemnify the officer for tortious acts committed while exercising the officer's authority as a commissioned deputy sheriff. Loya v. Gutierrez, 2014-NMCA-028, cert. denied, 2014-NMCERT-002.

Navajo police officer not "public employee". — Fact that Navajo Nation police officer was cross-deputized as a county sheriff did not make the officer a "public employee" of a New Mexico governmental body. Williams v. Bd. of Cnty. Comm'rs, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

Prison guards are not law enforcement officers for purposes of Subsection D, because: (1) the principal duties of prison guards are to hold in custody persons who have already been convicted rather than merely accused of a criminal offense; (2) maintenance of public order relates to a public not a penitentiary setting; and (3) although prison guards may have the supplemental power to arrest pursuant to the guidelines of 33-1-10 NMSA 1978, their principal statutory duties are those set forth in 33-2-15 NMSA 1978. Callaway v. N. M. Dep't of Corrs., 117 N.M. 637, 875 P.2d 393 (Ct. App.), cert. denied, 118 N.M. 90, 879 P.2d 91 (1994).

A mayor is not a law enforcement officer for purposes of this act. Montes v. Gallegos, 812 F. Supp. 1165 (D.N.M. 1992).

Medical investigator. — The office of the medical investigator and a physician employed as a medical investigator by that office are not law enforcement officers. Dunn v. McFeeley, 1999-NMCA-084, 127 N.M. 513, 984 P.2d 760, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

Crime laboratory. — A crime laboratory technician and his employer, the state police crime laboratory, whose duties are to examine and evaluate physical evidence that may relate to a possible offense, are not law enforcement officers. Dunn v. McFeeley, 1999-NMCA-084, 127 N.M. 513, 984 P.2d 760, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

Municipal police officers are law enforcement officers. — The officers in this case are municipal police officers subject to Section 3-13-2 NMSA 1978, and their principal duties entail making arrests for crimes and maintaining public order; accordingly, they

are law enforcement officers for purposes of the Tort Claims Act. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

"Any person accused". — A person who has been convicted is no longer an "accused" for the purposes of Subsection D of this section. Vigil v. Martinez, 113 N.M. 714, 832 P.2d 405 (Ct. App. 1992).

"Maintenance of public order". — Maintenance of public order, within the meaning of Subsection D of this section, is not a principal duty of probation and parole officers or their supervisors. Vigil v. Martinez, 113 N.M. 714, 832 P.2d 405 (Ct. App. 1992).

Officers of county detention home. — Whether officers of a county detention home were acting within the scope of their duties in making an employment recommendation about a former employee was a question of fact. Davis v. Bd. of Cnty. Comm'rs, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172.

Scope of duties. — 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).

Deputy sheriff who was involved in accident while driving her assigned department vehicle home was acting within the scope of her duties, because she was required to be available for calls at all times. Medina v. Fuller, 1999-NMCA-011, 126 N.M. 460, 971 P.2d 851.

Liability for failure to detain intoxicated driver. — Law enforcement officers may be liable if they fail to detain an intoxicated driver who then acts with the requisite level of intent to commit a battery while driving intoxicated. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App.), cert. denied, 117 N.M. 328, 871 P.2d 984 (1994).

IV. PRIVATE PERSONS, CORPORATIONS AND ENTITIES.

Developmental disabilities center subject to Act for discharge error. — If the state provides developmental disability services by delegating those responsibilities to a private entity under former Sections 28-16-1 to 28-16-18 NMSA 1978, while retaining the right to determine discharge terms and the responsibility to protect patients' constitutional and statutory rights, a sufficient nexus between the private entity's decision and the state has been demonstrated so that the private entity's discharge decision will be considered state action, and the Tort Claims Act is applicable. LaBalbo v. Hymes, 115 N.M. 314, 850 P.2d 1017 (Ct. App.), cert. denied, 115 N.M. 359, 851 P.2d 481 (1993) (decided prior to 1995 amendment).

Act not applicable to foster homes. — The department of human services was not liable under the Tort Claims Act for negligently placing a child in a foster home, since

those duties fall outside of the Act. M.D.R. v. State ex rel. Human Servs. Dep't, 114 N.M. 187, 836 P.2d 106 (Ct. App. 1992).

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).

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).

Community mental health facility 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. Dep't of Health & Env't, 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989).

Physician. — Where the contract between a physician and a public hospital precluded the physician from practicing medicine except as an employee of the hospital, the hospital could fire the physician with or without cause, and dictated the terms of the physician's service; the hospital required the physician to maintain certain office hours and ask permission to change the office hours, to be an active member of the hospital staff, and to perform other duties and services requested from time to time by the hospital. The hospital compensated the physician with a salary, benefits, and insurance, paid taxes and professional dues, and provided leave time. The hospital billed patients directly for the physician's services; and the hospital provided all of the physician's supplies, equipment, and staff; the physician was a public employee. Blea v. Fields, 2005-NMSC-029, 138 N.M. 348, 120 P.3d 430.

Independent corrections contractor employees. — An employee of an independent corrections contractor is not a "public employee" immune from tort liability under this article. Giron v. Corrs. Corp. of Am., 14 F. Supp. 2d 1245 (D.N.M. 1998).

Volunteers. — It is an express declaration of legislative intent in including volunteers acting on behalf of a governmental entity within the purview of the Tort Claims Act. Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Tort Claims Act explicitly contemplates that volunteers acting on behalf of the government may become public employees, thereby entitled to the protections of the Tort Claims Act and subject to the reliability of the same. Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Sheriff's department chaplain. — Whether a defendant who volunteered as a chaplain for a county sheriff's department was a public employee or an independent

contractor was a question of fact, upon which the "right to control" test would bear. Celaya v. Hall, 2003-NMCA-086, 134 N.M. 19, 71 P.3d 1281, aff'd in part and rev'd in part, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Where, at the time of the incident, defendant had been an official sheriff's department volunteer chaplain for eight years, and as part of his official duties, defendant was summoned to crime and accident scenes by the department on an as-needed basis where he provided counseling and support services to civilians, acting primarily at the department's request, therefore, defendant was an employee of the department because, considered in context, the department exercised sufficient control over defendant's activities in a manner consistent with the status of employee. Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

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

For note, "An Employer's Duty to Third Parties When Giving Employment Recommendations - *Davis v. Board of County Commissioners of Dona Ana County,*" see 30 N.M.L. Rev. 307 (2000).

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.

41-4-4. 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 the New Mexico Religious Freedom Restoration Act [28-22-1 through 28-22-5 NMSA 1978] and 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, but the waiver of immunity provided in those sections does not waive immunity granted pursuant to the Governmental Immunity Act [41-13-1 through 41-13-3 NMSA 1978].

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including costs and attorney 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 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 that 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 that 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.

I. A jointly operated public school, community center or athletic facility that is used or maintained pursuant to a joint powers agreement shall be deemed to be used or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978.

J. For purposes of this section, a "jointly operated public school, community center or athletic facility" includes a school, school yard, school ground, school building, gymnasium, athletic field, building, community center or sports complex that is owned or

leased by a governmental entity and operated or used jointly or in conjunction with another governmental entity for operations, events or programs that include sports or athletic events or activities, child-care or youth programs, after-school or before-school activities or summer or vacation programs at the facility.

K. A fire station that is used for community activities pursuant to a joint powers agreement between the fire department or volunteer fire department and another governmental entity shall be deemed to be operated or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978. As used in this subsection, "community activities" means operations, events or programs that include sports or athletic events or activities, child care or youth programs, after-school or before-school activities, summer or vacation programs, health or education programs and activities or community events.

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; 1996, ch. 68, § 1; 1999, ch. 268, § 1; 2000 (2nd S.S.), ch. 17, § 6; 2001, ch. 211, § 1.

ANNOTATIONS

The 2001 amendment, effective June 15, 2001, added Subsection K.

The 2000 amendment, effective July 3, 2000, inserted "the New Mexico Religious Freedom Restoration Act and by" following "waived by" in Subsection A and deleted "but not limited to" following "including" in Subsection C.

The 1999 amendment, effective June 18, 1999, inserted the language beginning "but the waiver of immunity" in the last sentence of Subsection A.

The 1996 amendment, effective March 5, 1996, added Subsections I and J and made stylistic changes in Paragraphs D(1) and D(2).

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

I. GENERAL CONSIDERATION.

Joint operation of a facility. — Without proof of a joint powers agreement plaintiff cannot apply Section 41-4-4I NMSA 1978 and J. Gutierrez v. W. Las Vegas Sch. Dist., 2002-NMCA-068, 132 N.M. 372, 48 P.3d 761

Modification of common law requires strict construction. — 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. Cnty. 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. Cnty. 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), rev'd on other grounds sub nom., Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677 (1986).

Proper defendant. — The statutory structure of the Tort Claims Act indicates that either a governmental entity or an individual public employee can be the sole named defendant. The Tort Claims Act does not require a plaintiff to name a specific public employee as a defendant to recover damages and a plaintiff may state a claim by naming only a governmental entity. Lopez v. Las Cruces Police Dept., 2006-NMCA-074, 139 N.M. 730, 137 P.3d 670, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

Duty and immunity are distinct. — The concepts of duty and immunity are different under the Tort Claims Act. The Act is not a source of duties to be imposed on government entities. Duty or responsibility must be found outside the act either at common law or by statute. Rutherford v. Chaves Cnty., 2002-NMCA-059, 132 N.M. 289, 47 P.3d 448, aff'd 2003-NMSC-010, 133 N.M. 756, 69 P.3d 119.

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. Cnty. of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

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. Bd. of Educ., 106 N.M. 673, 748 P.2d 516 (Ct. App. 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. Schs. Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

Suit against state hospital in federal court not permitted. — Congress does not have the power to make statutes such as the Emergency Medical Treatment and Active Labor Act (EMTALA) applicable to state-run hospitals without the state's express consent. As indicated by this section, 41-4-2 NMSA 1978 and 41-4-18 NMSA 1978, New Mexico has not consented to be sued in federal court for violations of EMTALA, nor for any other tort. Ward v. Presbyterian Healthcare Servs., 72 F. Supp. 2d 1285 (D.N.M. 1999).

Suits in federal court. — Although the state has waived its immunity from suit in its own state courts for actions of law enforcement officers, it has not waived its Eleventh Amendment immunity from suit in federal courts. Flores v. Long, 926 F. Supp. 166 (D.N.M. 1995), appeal dismissed, 110 F.3d 730 (10th Cir. 1997).

Governmental entities liable for discriminatory practices. — The Tort Claims Act does not override or supersede the Human Rights Act (Section 28-1-1 NMSA 1978 et seq.), so as to shield a governmental entity from liability otherwise flowing from a discriminatory practice proscribed by the latter act. Section 28-1-13D NMSA 1978 constitutes a waiver of sovereign immunity for liability imposed on public entities by the human rights commission, or by a district court on appeal from a commission decision, for violations of the Human Rights Act. Luboyeski v. Hill, 117 N.M. 380, 872 P.2d 353 (1994).

Subpoena power. — The Tort Claims Act does not protect government actors from a court's subpoena power. Seeds v. Lucero, 2005-NMCA-067, 137 N.M. 589, 113 P.3d 859, cert. denied sub nom. Seeds v. Vandervossen, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Liability question of fact. — Question of whether boy scout troop using school district's swimming pool was a business invitee to whom school district owed duty of reasonable care to avoid risk of harm and question as to negligence of school district for failing to provide lifeguard and safety equipment were questions raising genuine issue of material fact precluding summary judgment in wrongful action. Seal v. Carlsbad Indep. Sch. Dist., 116 N.M. 101, 860 P.2d 743 (1993).

Duty to defend. — Where a police officer was sued individually in federal court for violation of plaintiff’s constitutional rights; the officer asked the municipality to provide a defense and gave a copy of the complaint to the municipal attorney; the municipality refused to provide a defense, the municipality had actual notice of the federal action and was asked to provide a defense within the time for filing an answer to the complaint; the municipality did not dispute that the officer acted within the scope of the officer’s employment; the officer defended the federal action pro se; and the officer and plaintiff settled the federal claims; and plaintiff did not give the municipality written notice of the incident within ninety days after the incident occurred, Section 41-4-16 NMSA 1978 does not require notice to be given by a claimant who sues, only a governmental employee, and the municipality was required to defend and indemnify the officer and pay the judgment against the officer. Niederstadt v. Town of Carrizozo, 2008-NMCA-053, 143 N.M. 786, 182 P.3d 769, cert. denied 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

II. IMMUNITY AND WAIVER.

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).

Subsection A provides government entities with immunity from liability for any tort, except as waived in other sections of the Tort Claims Act. Bierner v. City of Truth or Consequences, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Prima facie tort is not included in the specific provisions of the Tort Claims Act; government entities and public employees acting within the scope of duty therefore enjoy immunity to such claims. Derringer v. State, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

Tort Claims Act clearly contemplates including employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity. Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

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).

Constructive fraud not basis for waiver. — Constructive fraud is not one of the causes of action for which a city's sovereign immunity is waived under this section. Health Plus v. Harrell, 1998-NMCA-064, 125 N.M. 189, 958 P.2d 1239, cert. denied, 125 N.M. 145, 958 P.2d 103 (1998). Cordova v. N. M. Taxation & Revenue Dep't., 2005-NMCA-009, 136 N.M. 713, 104 P.3d 1104.

Economic compulsion and constructive fraud are not specifically waived by the statute. Valdez v. State, 2002-NMSC-028, 132 N.M. 667, 54 P.3d 71.

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. Sch. Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

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. Cnty. of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

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. Bd. 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).

III. SCOPE OF DUTY.

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. Bd. of Cnty. Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

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).

Scope of duties/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).

Scope of duties. — Under the definition of "scope of duties" in Subsection G of 41-4-3 NMSA 1978, when reconciled with the indemnification provisions in Subsection E of this section and Subsection A of 41-4-17 NMSA, an employee's acts are not excluded simply because they are criminal. Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, 129 N.M. 778, 14 P.3d 43, cert. denied, 130 N.M. 17, 16 P.3d 442 (2000).

Where plaintiff contended that intentional torts are outside the scope of duties of certain state officials, but she failed to specify any actions by the officials which they were not "requested, required, or authorized to perform," defendants were entitled to summary judgment against her on her claims of intentional infliction of emotional distress and defamation. Garcia-Montoya v. State Treasurer's Office, 2001-NMSC-003, 130 N.M. 25, 16 P.3d 1084.

Horseplay did not take place in the course and scope of employee's employment. Rivera v. N. M. Hwy. & Transp. Dep't, 115 N.M. 562, 855 P.2d 136 (Ct. App.), cert. denied, 115 N.M. 545, 854 P.2d 872 (1993).

Failing to perform a regular duty, such as timely responding to requests for records, still falls with the scope of duties for purposes of the Tort Claims Act. Derringer v. State, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

The defendant failed to show that he was acting in the scope of his duties as a matter of law where his evidence primarily consisted of habit evidence combined with lack of memory and he could not recall anything about his most recent official acts before the accident occurred. Celaya v. Hall, 2003-NMCA-086, 134 N.M. 19, 71 P.3d 1281, aff'd in part and rev'd in part, 135 N.M. 115, 85 P.3d 239.

Actions outside employment scope. — An officer of the state, who acts outside the scope of authority and in so doing commits a willful and malicious tort, may be held liable for those actions. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967), overruled on other grounds, N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

IV. SPECIFIC CASES.

Constitutional claims. — The Tort Claims Act does not waive immunity for separation of powers for unlawful taxation on unlawful special tax claims. Valdez v. State, 2002-NMSC-028, 132 N.M. 667, 54 P.3d 71.

Operation of a swimming pool is not an inherently dangerous activity giving rise to the strict liability from which a school district and its employees would have enjoyed sovereign immunity under this section for the drowning of a handicapped 18-year-old boy. Seal v. Carlsbad Indep. Sch. Dist., 116 N.M. 101, 860 P.2d 743 (1993).

Police owe no duty to unforeseeable plaintiffs. — As a matter of law, the plaintiffs, children of the deceased killed by law enforcement officers, were unforeseeable as injured parties and, therefore, the defendant officers owed no duty to them. Lucero v. Salazar, 117 N.M. 803, 877 P.2d 1106 (Ct. App.), cert. denied, 117 N.M. 802, 877 P.2d 1105 (1994).

No waiver of immunity for conducting physical agility test prior to employment. — There is no waiver of immunity which can impose liability on a school board or school officers when the plaintiff's decedent, while interviewing for the job of security officer and attempting to complete a physical agility test, suffered a heart attack and subsequently died. The conduction of the physical agility test was an administrative function and, additionally, simple negligence in the performance of a law enforcement officer's duty does not amount to commission of a tort. Tafoya v. Bobroff, 865 F. Supp. 742 (D.N.M. 1994), aff'd, 74 F.3d 1250 (10th Cir. 1996).

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 rape by a criminal suspect following suspect's 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 Cnty. Dist. Attorney's Office, 105 N.M. 554, 734 P.2d 794 (Ct. App.), cert. quashed, 106 N.M. 35, 738 P.2d 907 (1987).

Liability for placement of signals and signs. — Because 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. 564, 603 P.2d 303 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

Government liability for individual assault — 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. 564, 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), rev'd on other grounds sub nom., Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677 (1986).

In an action for damages on the basis of an alleged wrongful decision to perform an autopsy, even if Section 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), rev'd on other grounds sub nom., Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677 (1986).

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), rev'd on other grounds sub nom., Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677 (1986).

Immunity of state auditor. — Because state auditor was acting within his scope of duty in commissioning a special audit and publishing the report, no waiver of immunity exists under the Tort Claims Act for claims of defamation. Vigil v. State Auditor's Office, 2005-NMCA-096, 138 N.M. 63, 116 P.3d 854, cert. denied, 2005-NMCERT-007, 138 N.M. 146, 117 P.3d 952.

Immunity of building inspector. — City building inspector who inspected building held to have qualified immunity for equal protection claim, but issue raised as to whether inspector had qualified immunity for fourth amendment and first amendments claims. Mimics, Inc. v. Village of Angel Fire, 277 F. Supp. 2d 1131 (D.N.M. 2003), rev'd on other grounds, 394 F. 3d 836 (10th Cir. 2005).

Jeopardy tax assessment. — State officials are not entitled to absolute immunity for jeopardy tax assessments which are primarily investigatory and administrative in nature. Perez v. Ellington, 421 F.3d 1128 (10th Cir. 2005).

Intentional interference with contract. — Under the Tort Claims Act, a governmental entity may not be held liable for damages resulting from the tort of intentional interference with contract. El Dorado Utils., Inc. v. Eldorado Area Water and Sanitation Dist., 2005-NMCA-036, 137 N.M. 217, 109 P.3d 305.

V. DEFENSE AND INDEMNITY.

Tribal police officer was not a "public employee". — Where an on-duty, full-time pueblo tribal law enforcement officer, acting in the officer’s capacity as a commissioned deputy sheriff for the county stopped plaintiff’s vehicle on a state-maintained road within the exterior boundaries of the pueblo and arrested plaintiff for reckless driving; the officer was dressed in a full tribal police uniform, displaying a tribal badge of office, and driving a tribal police vehicle; in addition to acting under tribal law, the officer was on duty as a duly commissioned deputy sheriff, which gave the officer authority to arrest, charge, and jail non-Indians for violations of New Mexico state laws; the officer took plaintiff to the tribal police department for processing and later transported plaintiff to the county jail; the officer was not a salaried officer employed by the county; the pueblo was a sovereign Indian tribe; plaintiff sued the officer for violation of plaintiff’s constitutional rights, the officer was not a "law enforcement officer" or a "public employee" of a "governmental entity" as defined in Section 40-4-3 NMSA 1978 and the county did not have a duty under Section 40-4-4 NMSA 1978 to defend or indemnify the officer for tortious acts committed while exercising the officer's authority as a commissioned deputy sheriff. Loya v. Gutierrez, 2014-NMCA-028, cert. denied, 2014-NMCERT-002.

Attorney fees incurred by an employee in a mandamus action to compel the employee's governmental employer to appoint independent defense counsel to defend the employee are not recoverable by the employee under the Tort Claims Act. Paz v. Tijerina, 2007-NMCA-109, 142 N.M. 391, 165 P.3d 1167.

Defense for mandamus actions. — Subsection B, requiring that the government provide a defense for employees subject to a claim for liability, does not include providing a defense for mandamus actions. Bod. of Cnty. Comm'rs v. Risk MgMt. Div., 120 N.M. 178, 899 P.2d 1132 (1995).

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

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

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 note, "Constitutional Law: Qualified Immunity and 'Factual Correspondence' in New Mexico: The Tension Between Formalism and Legal Realism," see 32 N.M.L. Rev. 439 (2002).

For note, "The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effect on State Constitutional Tort Jurisprudence: Correctional Services Corp. v. Malesko," see 33 N.M.L. Rev. 401 (2003).

For article, "What Does the Natural Rights Clause Mean to New Mexico?", see 35 N.M. L. Rev. 375 (2009).

For article, "Reticent Revolution and Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M. L. Rev. 173 (1995).

For note, "Torts – Sovereign Immunity: Caillouette v. Hercules," see 23 N.M. L. Rev. 423 (1993).

For note, "Tort Law – New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm from Dangerous Work, but Bestows Immunity on a Government Employer," see 25 N.M. L. Rev. 173 (1995).

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.

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

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 apparently 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 police or other law enforcement officer from liability in defamation action, 100 A.L.R.5th 341.

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.

ANNOTATIONS

Immunity not waived. — Where the decedent was experiencing the effect of withdrawal from heroin when the metropolitan court ordered his release; the decedent was initially released to be transported by van as required by jail policy, but he exited the van; the decedent re-entered the metropolitan jail; the decedent was released to the jail parking lot without signing a waiver of van transportation contrary to jail policy; the decedent wandered off into the desert and died of hypothermia; and the medical director of the jail opined that at the time of his release, the decedent had no medical condition that required treatment, the city was not liable under the Tort Claims Act on plaintiff's claim that the van driver negligently operated the van. Lessen v. City of Albuquerque, 2008-NMCA-085, 144 N.M. 314, 187 P.3d 179, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

"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).

In a wrongful death suit, the actions of a state police emergency response officer, in supervising the removal of a privately owned trailer from a highway in a condition that eventually caused the death of plaintiff's decedent, were not within the meaning of "maintenance" or "operation" as those terms are used in this section and, accordingly, immunity was not waived. Caillouette v. Hercules, Inc., 113 N.M. 492, 827 P.2d 1306 (Ct. App), cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

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), cert. denied sub nom. Chee Owens v. Loshbough, 107 N.M. 106, 753 P.2d 352 (1988).

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), cert. denied sub nom. Chee Owens v. Loshbough, 107 N.M. 106, 753 P.2d 352 (1988).

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), cert. denied sub nom. Chee Owens v. Loshbough, 107 N.M. 106, 753 P.2d 352 (1988).

Operation of school bus. — Operation of a school bus under this section includes making decisions, while driving the bus, about whether to stop the vehicle on the pavement, with lights flashing, or off the road. Therefore, when a bus driver decided, while driving the bus each day, not to pick up a child on the child's side of a state road, but to pick the child up on the opposite side on the driver's return trip, that decision constituted operation of the bus; it occurred while the driver was in control of the bus, and it affected the manner in which the driver performed his driving duties. Gallegos v. Sch. Dist., 115 N.M. 779, 858 P.2d 867 (Ct. App.), cert. denied, 115 N.M. 795, 858 P.2d 1274 (1993).

Applicability to law enforcement officers. — This section, which waives immunity for negligent operation or maintenance of a motor vehicle, watercraft, or aircraft, applies to all public employees, including law enforcement officers. Section 41-4-12 NMSA 1978, which applies only to law enforcement officers, waives immunity only for the acts enumerated in that provision, such as assault and battery. Wilson v. Grant Cnty., 117 N.M. 105, 869 P.2d 293 (Ct. App. 1994).

Immunity not waived for third-party negligence. — This section does not provide for a waiver of immunity for acts of public employees that cause or allow third parties to negligently operate motor vehicle resulting in injuries. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App.), cert. denied, 117 N.M. 328, 871 P.2d 984 (1994).

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

For note, "Liability of Law Enforcement Officers While in the Line of Duty: *Wilson v. Grant County,*" see 25 N.M.L. Rev. 329 (1995).

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.

Tort liability of public schools and institutions of higher learning for accidents associated with transportation of students, 23 A.L.R.5th 1.

Comparative negligence of driver as defense to enhanced injury, crashworthiness, or second collision claim, 69 A.L.R.5th 625.

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.

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

B. 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.

C. All irrigation and conservancy districts and their public employees acting lawfully and within the scope of their duties that authorize any part of their property to be used as part of trails within a state park, the state trails system or a trail established and managed by a local public body are excluded from the waiver of immunity under Subsection A of this section for damages arising out of the operation or maintenance of such trails if the irrigation or conservancy district has entered into a written agreement with the state agency or local public body operating or maintaining the trail and that state agency or local public body has agreed to assume the operation and maintenance of that portion of the district's property used for the trail; the state agency or local public body operating or maintaining the trail shall be subject to liability as provided in the Tort Claims Act.

History: 1953 Comp., § 5-14-6, enacted by Laws 1976, ch. 58, § 6; 1977, ch. 386, § 5; 2007, ch. 207, § 1.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, added Subsection C.

I. GENERAL CONSIDERATION.

No risk to general public. — Defendants' mishandling of a firearm and handcuffs while apprehending plaintiff, did not put the general public at risk, and therefore, immunity was not waived under this section. Oliveros v. Mitchell, 449 F.3d 1091 (10th Cir. 2006).

Negligent performance of administrative function. — Defendant misclassified plaintiff for work in the prison kitchen contrary to his medically ordered restriction prohibiting heavy lifting. Section 41-4-6 NMSA 1978 does not waive immunity when public employees negligently perform such administrative functions. Lymon v. Aramark, 728 F.Supp.2d 1222 (D.N.M. 2010).

Administrative decision. — Denial of prisoner's use of the formal grievance process was a discrete administrative decision and does not waive immunity under Section 41-4-6 NMSA 1978. Lymon v. Aramark, 728 F.Supp.2d 1222 (D.N.M. 2010).

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.), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988).

Strict liability instruction prohibited. — UJI 13-506, pertaining to liability for dog bites, is a strict liability instruction, thus, it cannot be given to the jury in an action for relief under this section because it does not embody a negligence theory of recovery. Smith v. Vill. of Ruidoso, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

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 duties is not a claim under this article. Gallegos v. State, 107 N.M. 349, 758 P.2d 299 (Ct. App.), cert. quashed, 107 N.M. 314, 757 P.2d 370 (1987), overruled on other grounds by Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978 (Ct. App. 1997).

State prisoner protected. — A prisoner injured in a manner contemplated by the operation of this section is as much a member of the general public as anyone else. Garner v. Dep't of Corrs., 120 N.M. 547, 903 P.2d 858 (Ct. App. 1995).

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), overruled on other grounds by Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978 (Ct. App. 1997).

Negligent supervision of student lunch area. — Where plaintiff sued defendant for legal malpractice on the ground that defendant failed to file plaintiff's suit against a public high school and school district within the statute of limitations; defendant claimed that plaintiff would not have prevailed on the underlying claim because the claim would have been barred by sovereign immunity; plaintiff was badly beaten by a classmate in an area outside the school property on a street that the school had cordoned off so that students could patronize food vendors parked in the street; an assistant principal at the school stated that the area where the vendors parked was considered a hot zone for student violence; the area was not monitored by security cameras; and the security guards and teachers assigned to monitor the area were not present at the time plaintiff was attacked, plaintiff established the existence of a genuine issue of material fact regarding the presence of a dangerous condition at the high school and summary judgment for defendant on the malpractice claim was inappropriate. Encinias v. Whitener Law Firm, P.A., 2013-NMSC-045, rev'g 2013-NMCA-003, 294 P.3d 1245.

Where plaintiff was attacked during the lunch period at plaintiff's high school by fellow students, one of whom was a suspended student; the attack occurred on a street adjacent to the school that was roped off by the school for lunch vendors to provide food to the students; plaintiff presented evidence that a security guard or teacher usually patrolled the food vendor area, that no security guard or teacher was monitoring the area at the time of the attack, that school personnel knew that the vendor food area was a "hot zone" for potential trouble, and that the suspended student had entered the school campus for the purpose of attacking plaintiff; and plaintiff claimed that the school's negligent execution of its safety policies for patrolling the food vendor area during the lunch period and failure to keep a suspended student off campus resulted in plaintiff's injuries, the school did not waive immunity because plaintiff solely alleged negligent supervision and failed to provide sufficient evidence of a dangerous condition

requiring supervision. Encinias v. Whitener Law Firm, P.A., 2013-NMCA-003, 294 P.3d 1245, cert. granted, 2012-NMCERT-012, rev'd, 2013-NMSC-045.

Negligent supervision of children by town. — This section did not waive sovereign immunity for a town's failure to exercise ordinary care in the supervision of children who participated in its summer day camp program. Espinoza v. Town of Taos, 120 N.M. 680, 905 P.2d 718 (1995).

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. N. M. 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. Cnty. of Santa Fe, 107 N.M. 204, 755 P.2d 48 (1988).

Dog-bite victim may pursue negligence claim. — A negligence claim is appropriate where the municipality as dog owner lacks knowledge of the dog's vicious propensities and ineffectively controls the animal in a situation where it would reasonably be expected that injury could occur. Smith v. Vill. of Ruidoso, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

II. BUILDINGS.

Duty to inspect not tantamount to operation or maintenance. — For premises liability under Section 41-4-6 NMSA 1978, the governmental entity must be shown to have both a legal interest and control of the property. The element of a legal interest is consistent in case law. Responsibility for inspection may have given the county some measure of control over the property. But the courts have never equated control alone with the specific duty of "operation or maintenance." Cobos v. Dona Ana Cnty. Hous. Auth., 121 N.M. 20, 908 P.2d 250 (Ct. App. 1995).

Duty of care to baseball spectators. — An owner/occupant of a commercial baseball stadium owns a duty that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk. Edward C. v. City of Albuquerque, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086, rev'g Crespin v. Albuquerque Baseball Club, LLC, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827.

The court declined to adopt the "baseball rule", which provides that in the exercise of reasonable care, the proprietor of a ballpark need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is greatest, and

that such screening must be of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, because comparative negligence principles allow the fact finder to take into account the risks that spectators voluntarily accept when they attend baseball games as well as the ability of stadium owners to guard against unreasonable risks that are not essential to the game itself. Crespin v. Albuquerque Baseball Club, LLC, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827, rev'd, Edward C. v. City of Albuquerque, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086.

Immunity not waived. — Where the decedent was experiencing the effect of withdrawal from heroin when the metropolitan court ordered his release; the decedent was initially released to be transported by van as required by jail policy, but he exited the van; the decedent re-entered the metropolitan jail; the decedent was released to the jail parking lot without signing a waiver of van transportation contrary to jail policy; the decedent wandered off into the desert and died of hypothermia; and the medical director of the jail opined that at the time of his release, the decedent had no medical condition that required treatment, the city was not liable under the Tort Claims Act on plaintiff's claim that the city negligently operated and maintained the jail. Lessen v. City of Albuquerque, 2008-NMCA-085, 144 N.M. 314, 187 P.3d 179, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Residence of adopted child. – Where a state adoption agency had a duty to make home visits to ensure that the home was safe for the adopted child, but did not have a duty to operate and maintain the residential building where the child lived, the adoption agency was not subject to liability under the operation and maintenance of a building exception. Johnson ex rel. Estate of Cano v. Holmes, 377 F. Supp. 2d 1069 (D.N.M. 2004), affirmed 455 F. 3d 1133 (10th Cir. 2006).

Control of a licensed foster placement building as operation. — The court declined to broaden the waiver in Section 41-4-6 NMSA 1978 to apply to the negligent failure of the children, youth and families department, after an evaluation by the department to disclose post-adoption knowledge of the violent tendencies of the adopted child or urging the adoptive parents to take their adopted child back into their home. Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269.

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, Corr. Dep't, 103 N.M. 526, 710 P.2d 93 (Ct. App.), cert. quashed, 103 N.M. 446, 708 P.2d 1047 (1985), overruled on other grounds, Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

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. Cnty. 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. Bd. of Educ., 109 N.M. 271, 784 P.2d 1014 (Ct. App.), cert. denied, 109 N.M. 232, 784 P.2d 419 (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. N. M. State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

This section applies to "any building," public or private, that public employees have a duty to operate and maintain with ordinary care. Cobos v. Dona Ana Cnty. Hous. Auth., 1998-NMSC-049, 126 N.M. 418, 970 P.2d 1143.

Where victim's injury was caused by county's failure to correct a dangerous condition created when waste transfer facility was constructed, facility came within the waiver of liability in this section negligent operation and maintenance of county facility. Romero v. Valencia Cnty., 2003-NMCA-019, 133 N.M. 214, 62 P.3d 305.

Where the child suffered from asthma; the child's parents informed the child's physical education teacher about the child's asthmatic condition; the physical education teacher agreed that the child could limit participation if the child felt that the physical exercise was triggering an attack; the child's parents noted the child's condition in the child's Individualizing Education Plan with the school; the child's parents gave consent so school personnel could immediately call medical personnel directly in the event of an attack; on the day of the child's death, a substitute physical education teacher required exercise that was more strenuous than normal; the child began having difficulty breathing and became red in the face; when the child asked the substitute teacher for permission to stop, the teacher refused; after the physical education class, the child collapsed; it took the school fifteen minutes to call 911; school personnel tried to give the child an inhaler treatment but did not administer CPR even though the child was not breathing well and was turning blue, the school district's failure to implement the child's Individualizing Education Plan and the specific assurances given to the child's parents about the care the school was to provide in light of the child's special needs created a dangerous condition in the operation of the school for all special-needs children at the school and the school district's failure to respond adequately to the emergency created a dangerous condition for every student at the school. Upton v. Clovis Mun. Sch. Dist., 2006-NMSC-040, 140 N.M. 205, 141 P.3d 1259, rev'g 2005-NMCA-085, 137 N.M. 779, 115 P.3d 795.

Operation of foster home. — Because plaintiff specifically alleges that the department knew or should have known before the child's placement for adoption in the adoptive parents' home that the child was capable of violent and uncontrolled behavior and that such behavior was likely to occur without therapeutic intervention, plaintiff must be permitted to proceed on the merits of his claim that department operated the foster

home within the meaning of the immunity waiver in this section. Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269.

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. Cnty. of Santa Fe, 107 N.M. 204, 755 P.2d 48 (1988).

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.), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988); Callaway v. N. M. Dep't of Corrs., 117 N.M. 637, 875 P.2d 393 (Ct. App.), cert. denied, 118 N.M. 90, 879 P.2d 91 (1994).

In an action against a county race track by a jockey who was injured when his horse veered, causing him to fall and strike a post and track rail, the trial court correctly ruled that failure to correct an alleged hazardous condition caused by an exposed gooseneck rail did not constitute a design defect, but rather the case involved whether the rail was safe and related to the operation and maintenance of the track. Yardman v. San Juan Downs, Inc., 120 N.M. 751, 906 P.2d 742 (Ct. App.), cert. denied, 120 N.M. 636, 904 P.2d 1061 (1995).

There is no exception to premises liability for defects originating in design. Williams v. Central Consol. Sch. Dist., 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978.

A school district could be held liable for negligence in failing to correct a dangerous condition in a building regardless of whether the condition originated in a defect in design. Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978.

Life guards. — Failure of a city to provide adequate life guard protection, which resulted in plaintiff's injury, came within the ambit of negligent "operation" of a municipal swimming pool, and, therefore, there was a waiver of sovereign immunity. Leithead v. City of Santa Fe, 1997-NMCA-041, 123 N.M. 353, 940 P.2d 459.

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. Martinez v. Kaune Corp., 106 N.M. 489, 745 P.2d 714 (Ct. App.), cert. denied, 106 N.M. 439, 744 P.2d 912 (1987), overruled on other grounds by Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978 (Ct. App. 1997).

Operation and maintenance of penitentiary. — The "operation" and "maintenance" of the penitentiary premises, as these terms are used in this section, does not include the security, custody, and classification of inmates. The purpose of this section is to ensure the general public's safety by requiring public employees to exercise reasonable care in maintaining and operating the physical premises owned and operated by the

government. The prison official in this case was not operating and maintaining the prison's physical premises when the official negligently classified the plaintiff as an inmate that could be released into the general prison population. Rather, the official was performing an administrative function associated with the operation of the corrections system. This section does not waive immunity when public employees negligently perform such administrative functions. Archibeque v. Moya, 116 N.M. 616, 866 P.2d 344 (1993).

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 the inmate 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.), cert. quashed, 107 N.M. 314, 757 P.2d 370 (1987), overruled on other grounds by Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978 (Ct. App. 1997).

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.), cert. quashed, 107 N.M. 314, 757 P.2d 370 (1987), overruled on other grounds by Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978 (Ct. App. 1997).

This section contemplates waiver of immunity if 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. The plaintiff states a claim sufficient to waive immunity under this section because the defendants (department of corrections and prison guards) knew or should have known that roaming gang members with a known propensity for violence had access to potential weapons in the recreation area, that such gang members created a dangerous condition on the premises of the penitentiary, and that the danger to other inmates was foreseeable. Callaway v. N. M. Dep't of Corr., 117 N.M. 637, 875 P.2d 393 (Ct. App.), cert. denied, 118 N.M. 90, 879 P.2d 91 (1994).

III. PUBLIC PARKS.

Condition creating risk to general public. — The policy of the state fair officials to require security officers to blindly follow instructions of parking attendants to eject persons from fairgrounds property created a potentially dangerous condition and, in a case when the negligence of parking attendants combined with that policy to cause injury to the plaintiff, immunity of the state fair was waived. Baca v. State, 1996-NMCA-021, 121 N.M. 395, 911 P.2d 1199.

Original purpose of recreational park not controlling. — Sovereign immunity was waived since the plaintiff was injured by diving off a raft in a lake at a park even though the original purpose of the lake may have been for storage and diversion of water. Under the lease between the stream commission (owner) and the recreation division (lessee), the park was to be used "for recreational purposes and for no other purpose," the park was not used for diversion or storage of water at the time of the accident, but the park was in fact used only for swimming, diving, boating, fishing, and other recreational activities. Bell v. N. M. Interstate Stream Comm'n, 117 N.M. 71, 868 P.2d 1296 (Ct. App. 1993), cert. denied, 117 N.M. 121, 869 P.2d 820 (1994).

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. N. M. 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. N. M. State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

IV. MACHINERY.

Operation of machinery and equipment. — This section by its terms operates as a waiver of immunity for claims arising from the operation of machinery and equipment. Garner v. Dep't of Corrs., 120 N.M. 547, 903 P.2d 858 (Ct. App. 1995).

This section applied to a prisoner's claim for injures sustained in the prison industries paint shop, allegedly due to failure to provide the prisoner with safety glasses or training in the use of an electric wire brush, because the claim did not relate to administrative functions of the corrections system, such as supervision and classification of prisoners, but related to the operation or maintenance of machinery or equipment. Garner v. Dep't of Corrs., 120 N.M. 547, 903 P.2d 858 (Ct. App. 1995).

"Maintenance" or "operation" of a vehicle. — In a wrongful death suit, the actions of a state police emergency response officer, in supervising the removal of a privately owned trailer from a highway in a condition that eventually caused the death of plaintiff's decedent, were not within the meaning of "maintenance" or "operation" as those terms are used in this section and, accordingly, immunity was not waived. Caillouette v. Hercules, Inc., 113 N.M. 492, 827 P.2d 1306 (Ct. App.), cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

V. EQUIPMENT AND FURNISHINGS.

Negligent maintenance of equipment may include failure to act. Rickerson v. State, 94 N.M. 473, 612 P.2d 703 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (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).

VI. IRRIGATION AND CONSERVANCY FACILITIES.

Operation of lake used for water diversion or storage. — A father could not maintain an action against state agencies for injuries caused to son while tubing on a man-made lake which was used for the diversion or storage of water. The statutory immunity found in the first sentence of this section must give way to the more specific statutory provisions in the second sentence which reestablishes immunity in "works used for diversion or storage of water". Allocca v. N. M. Dep't of Energy Minerals & Natural Res., 118 N.M. 668, 884 P.2d 824 (Ct. App.), cert. denied, 118 N.M. 731, 885 P.2d 1325 (1994).

Operation of lake used for both recreation and diversion and storage purposes. — Since water diversion and storage were among the current uses of a lake which was also used for recreational purposes, government entities and their employees responsible for the existence and maintenance of the park in which the lake was located were entitled to immunity. Bell v. N. M. Interstate Stream Comm'n, 1996-NMCA-010, 121 N.M. 328, 911 P.2d 222.

The Parks and Recreation Division was entitled to governmental immunity under this section; the Elephant Butte Reservoir is a "works used for diversion or storage of water" for the purposes of this section, although the state operates the area as a recreational park. Chaleunphonh v. Parks & Recreation Div., 1996-NMCA-066, 121 N.M. 801, 918 P.2d 717, cert. denied, 121 N.M. 783, 918 P.2d 369.

Liability arising from the maintenance of water diversion channels. — The natural interpretation of the second sentence of this section is that it preserves immunity with respect to damages arising out of the operation and maintenance of works used for diversion or storage of water in public parks and on the grounds of public buildings. The immunity preserved by this sentence does not, however, extend to liability arising from the maintenance of diversion channels on public property in general. Espander v. City of Albuquerque, 115 N.M. 241, 849 P.2d 384 (Ct. App. 1993), overruled on other grounds by Bybee v. City of Albuquerque, 120 N.M. 17, 896 P.2d 1164 (1995).

The city was immune from liability for injuries caused when the plaintiff stepped in a flood control diversion channel running through a city park. Bybee v. City of Albuquerque, 120 N.M. 17, 896 P.2d 1164 (Ct. App. 1995) (overruling City of

Albuquerque v. Redding, 93 N.M. 757, 605 P.2d 1156 (1980) and Espander v. City of Albuquerque, 115 N.M. 241, 849 P.2d 384 (Ct. App. 1993)).

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).

Plaintiffs' claim against a state irrigation district for injuries sustained by their son while playing near an irrigation ditch on state land was barred by the Tort Claims Act because an injury in an irrigation ditch falls within the exception to the state's waiver of immunity set forth in this section for injuries that arise out of "the operation or maintenance of works used for diversion or storage of water." Noriega v. Stahmann Farms, Inc., 113 N.M. 441, 827 P.2d 156 (Ct. App.), cert. denied, 113 N.M. 449, 827 P.2d 837 (1992).

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

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

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

ANNOTATIONS

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.

Air carrier's liability for injury from condition of airport premises, 14 A.L.R.5th 662.

Liability of owner of wires, poles, or structures struck by aircraft for resulting injury or damage, 49 A.L.R.5th 659.

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.

ANNOTATIONS

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 (now two) limitation of Section 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) (decided prior to 2011 amendment).

"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).

Runoff water. — Paragraph B(2) of this section did not preserve a city's immunity for liability arising from property damage and personal injury caused by flooding onto resident's property by water that came from a city arroyo. This paragraph does not include runoff water. Espander v. City of Albuquerque, 115 N.M. 241, 849 P.2d 384 (Ct. App. 1993), overruled on other grounds, Bybee v. City of Albuquerque, 120 N.M. 17, 896 P.2d 1164 (1995).

Storm runoff water was not "liquid waste" and, therefore, a flood control diversion channel carrying the runoff was not a public utility for which immunity is waived under this section. Bybee v. City of Albuquerque, 120 N.M. 17, 896 P.2d 1164 (Ct. App. 1995) (overruling City of Albuquerque v. Redding, 93 N.M. 757, 605 P.2d 1156 (1980) and Espander v. City of Albuquerque, 115 N.M. 241, 849 P.2d 384 (Ct. App. 1993)).

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 Mgmt. Co. v. City of Santa Fe, 94 N.M. 368, 610 P.2d 1197 (1980).

Liability for maintenance of 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), overruled on other grounds, Bybee v. City of Albuquerque, 120 N.M. 17, 896 P.2d 1164 (Ct. App. 1995).

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).

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.

ANNOTATIONS

Immunity not waived. — Where the decedent was experiencing the effect of withdrawal from heroin when the metropolitan court ordered his release; the decedent was initially released to be transported by van as required by jail policy, but he exited the van; the decedent re-entered the metropolitan jail; the decedent was released to the jail parking lot without signing a waiver of van transportation contrary to jail policy; the decedent wandered off into the desert and died of hypothermia; and the medical director of the jail opined that at the time of his release, the decedent had no medical condition that required treatment, the city was not liable under the Tort Claims Act on plaintiff's claim that the jail did not provide the decedent adequate medical care. Lessen v. City of Albuquerque, 2008-NMCA-085, 144 N.M. 314, 187 P.3d 179, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Specific waiver of immunity. — A specific waiver of immunity exists pursuant to this section and Section 41-4-10 NMSA 1978, making a hospital liable for any negligence by its employees who had a duty to employ reasonable care in providing health care services and operating the facility. Brenneman v. Bd. of Regents of U.N.M., 2004-NMCA-003, 135 N.M. 68, 84 P.3d 685, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Damages for loss of consortium recoverable. — The plain language of the Tort Claims Act, cases interpreting it, and its legislative history all indicate that loss of consortium damages should be recoverable under this section and Section 41-4-10 NMSA 1978; persons claiming loss of consortium are foreseeable plaintiffs under traditional tort concepts, and loss of consortium as a type of damage "resulting from bodily injury" fits with the its characterization as a derivative claim. Brenneman v. Bd. of Regents of U.N.M., 2004-NMCA-003, 135 N.M. 68, 84 P.3d 685, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

"Operation" should not be extended to include funding decisions by a county or the allocation or nonallocation of funds. Gallegos v. Trujillo, 114 N.M. 435, 839 P.2d 645 (Ct. App.), cert. denied, 114 N.M. 314, 838 P.2d 468 (1992).

"Like facilities". — A foster home is not "like" a hospital, infirmary, mental institution, clinic, dispensary, or medical care home. M.D.R. v. State ex rel. Human Servs. Dep't, 114 N.M. 187, 836 P.2d 106 (Ct. App. 1992).

The office of Medical Imvestigator at the University of New Mexico is not a "like facility." Ross v. Bd. Of Regents of the Univ. of N.M., 599 F. 3d 1114 (10th Cir. 2010).

Activities of animal control center excluded. — 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. Dep't 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. — 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.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital, 25 A.L.R.2d 203, 18 A.L.R.4th 858.

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.

Liability of hospital for injury to person invited or permitted to accompany patient during emergency room treatment, 90 A.L.R.4th 478.

Liability of hospital, physician, or other medical personnel for death or injury from use of drugs to stimulate labor, 1 A.L.R.5th 243.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper administration of, or failure to administer, anesthesia or tranquilizers, or similar drugs, during labor and delivery, 1 A.L.R.5th 269.

Hospital liability as to diagnosis and care of patients in emergency room, 58 A.L.R.5th 613.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 65 A.L.R.5th 357.

Action under 42 USCS § 1983 against mental institution or its staff for injuries to institutionalized person, 118 A.L.R. Fed. 519.

14 C.J.S. Charities § 58; 20 C.J.S. Counties § 166.

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.

ANNOTATIONS

"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 because the regulatory scheme did not give the department the right to control the details of the work of the facility. Armijo v. Dep't of Health & Env't, 108 N.M. 616, 775 P.2d 1333 (Ct. App. 1989).

Health care providers. — The legislature, in partially waiving the state's sovereign immunity, clearly intended to limit "health care providers" to those who cure or prevent impairments of the normal state of the body. M.D.R. v. State ex rel. Human Servs. Dep't, 114 N.M. 187, 836 P.2d 106 (Ct. App. 1992).

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. — 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.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital, 25 A.L.R.2d 203, 18 A.L.R.4th 858.

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.

Liability of hospital for injury to person invited or permitted to accompany patient during emergency room treatment, 90 A.L.R.4th 478.

Liability of hospital, physician, or other medical personnel for death or injury from use of drugs to stimulate labor, 1 A.L.R.5th 243.

Hospital liability as to diagnosis and care of patients in emergency room, 58 A.L.R.5th 613.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 65 A.L.R.5th 357.

14 C.J.S. Charities § 58; 20 C.J.S. Counties § 166.

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.

ANNOTATIONS

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.

Slip and fall instruction. — Where plaintiff tripped and fell over a city water meter in an alley, the court erred in refusing to give the basic slip and fall instruction, UJI 1318 NMRA, together with UJI 13-1317 NMRA, which states the general duty of a city to maintain its alleys in a safe condition, because the slip and fall instruction includes the elements that a city has a duty to maintain alleys in a safe condition whether or not a dangerous condition is obvious and whether or not the city has notice of any condition that it would have discovered upon reasonable inspection. Benavidez v. City of Gallup, 2007-NMSC-026, 141 N.M. 808, 161 P.3d 853.

Purpose of section. — This section must be construed to effectuate its remedial purpose of ensuring that highways are made safe and kept safe for the traveling public. Rutherford v. Chaves Cnty., 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

The legislature did not intend design immunity to continue in perpetuity. Martinez v. N.M. Dep't of Transp., 2013-NMSC-005, 296 P.3d 468, rev'g 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Remediation measures are maintenance. — Maintenance is not limited to upkeep and repair. The duty to maintain a roadway subsumes within it a duty to remediate a known, dangerous condition, regardless of whether the source of that danger can be traced back to a design feature. It requires a reasonable response to the known dangerous condition on a roadway. When the reasonableness of that response pertains to traffic controls, it is not measured just by size and weight, permanence or mobility, whether the defect is a structural element or is more transitory in nature. Martinez v. N.M. Dep't of Transp., 2013-NMSC-005, 296 P.3d 468, rev'g 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Where a state road was designed partially with and partially without center lane barriers to prevent cross-over collisions; while passing another car, the driver of a car in the eastbound lane lost control of the car, skidded, and collided head-on with the decedents' car in the west bound lane; barriers were not installed at the site of the cross-over collision; and plaintiffs offered evidence of other cross-median, fatal collisions that had occurred within the two mile stretch of road that included the site of the collision and citizen complaints regarding the lack of a center barrier, defendant's decision not to install post-construction barriers at the site of the collision, after being alerted of a potentially dangerous condition at the general location of the collision, was a matter of maintenance, not of design. Martinez v. N.M. Dep't of Transp., 2013-NMSC-005, 296 P.3d 468, rev'g 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Relevant evidence of dangerous condition. — Depending on the particular characteristics of the road, evidence of other collisions occurring in the general area of a particular collision or in other areas with similar characteristics, may be relevant to whether the department of transportation was on notice of a dangerous condition. Martinez v. N.M. Dep't of Transp., 2013-NMSC-005, 296 P.3d 468, rev'g 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Where a state road was designed partially with and partially without center lane barriers to prevent cross-over collisions; while passing another car, the driver of a car in the east bound lane lost control of the car, skidded, and collided head-on with the decedents' car in the west bound lane; barriers were not installed at the site of the cross-over collision; and plaintiffs offered evidence of other cross-median, fatal collisions that had occurred within the two mile stretch of road that include the site of the collision and citizen complaints regarding the lack of a center barrier to show that defendant negligently failed to remedy a dangerous condition when it chose not to install cross-over barriers after it had been put on notice of a dangerous condition, the district court erred in limiting the evidence to the site of the collision. Martinez v. N.M. Dep't of Transp., 2013-NMSC-005, 296 P.3d 468, rev'g 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

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. Vill. of Corrales, 103 N.M. 734, 713 P.2d 4 (Ct. App. 1985), cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).

The 1991 legislative amendment specifically repudiated the decision of the New Mexico Supreme Court in Miller v. State Department of Transportation, 106 N.M. 253, 741 P.2d 1374 (1987), which construed "maintenance" such that the issuance of oversize vehicle permits for transport of a mobile home over a winding road on a busy holiday weekend fit within the statutory waiver of immunity under the Tort Claims Act. Rutherford v. Chaves Cnty., 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

Subsection B grants immunity for road design issues. Bierner v. City of Truth or Consequences, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Presence of condition on one side of road which might spill over to other side of road did not create a duty on the part of a state entity to alter the road and areas off the road so that the road becomes a barrier to those conditions Bierner v. City of Truth or Consequences, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Absence of guardrail is defect in design, not maintenance. Moore v. State, 95 N.M. 300, 621 P.2d 517 (Ct. App. 1980), cert. denied sub nom. State v. City of Albuquerque, 95 N.M. 426, 622 P.2d 1046 (1981).

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).

State liable for negligent fence maintenance. — The state highway department has always had a common law duty to exercise ordinary care to protect the general public from foreseeable harm on the highways of the state. It is for the factfinder to decide whether this duty includes either the erection or maintenance of fences along an urban freeway for the protection of pedestrians; but if the department is found to have breached it's duty by negligently failing to erect or maintain fences along the highway, it may be held liable because such negligence falls within the waiver of sovereign immunity. Lerma ex rel. Lerma v. State Hwy. Dep't, 117 N.M. 782, 877 P.2d 1085 (1994).

Addition of wheelchair ramps not "maintenance". — The waiver of immunity for maintenance of streets and sidewalks does not create duty for city to add wheelchair ramps to sidewalks and intersections; instead, such addition is a reconstruction, immunity for which is expressly restored by Subsection B(2). Villanueva v. City of Tucumcari, 1998-NMCA-138, 125 N.M. 762, 965 P.2d 346.

Traffic controls constitute maintenance activities under the Tort Claims Act. Rutherford v. Chaves Cnty., 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

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), cert. denied, 99 N.M. 358, 658 P.2d 433 (1983).

Placement of signals and signs. — The erection of permanent concrete barriers as part of a road is a matter of road design, not maintenance, and is outside the Tort Claims Act’s waiver of immunity. Martinez v. N.M. Dep't of Transp., 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483, cert. granted, 2011-NMCERT-008, 268 P.3d 514.

Placement of concrete barriers was not maintenance. — Where the driver of a vehicle was using the center turn lane to pass a vehicle, lost control, and collided with decedents’ vehicle, killing the decedents; and the decedents’ estates claimed that the department of transportation negligently failed to maintain the highway because the department failed to perform its duty to erect concrete barriers separating the driving lanes, the lack of permanent barriers in the center turn lane was an attribute of the design of the highway and the department was immune from suit for the alleged failure

to install concrete barriers. Martinez v. N.M. Dep't of Transp., 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483, cert. granted, 2011-NMCERT-008, 268 P.3d 514.

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Identification and remediation of roadway hazards constitutes highway maintenance under this section. Rutherford v. Chaves Cnty., 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

Placement of school bus stop deemed "maintenance". — The placement of a school bus stop involves elements of traffic control, both pedestrian and vehicular, that are quite similar to the placement of traffic lights or other controls on a road. The placement of such controls, or the lack thereof, constitutes "maintenance" of a road under this section. Gallegos v. Sch. Dist., 115 N.M. 779, 858 P.2d 867 (Ct. App.), cert. denied, 115 N.M. 795, 858 P.2d 1274 (1993).

Bus stop designation not part of road design. — The state transportation division of the state board of education was not immune from liability under Subsection A in connection with an accident at a school bus stop, since there was sufficient evidence to support a finding that designation of the bus stop by the division was not a part of the design of the road. Gallegos v. State Bd. of Educ., 1997-NMCA-040, 123 N.M. 362, 940 P.2d 468, cert. denied, 123 N.M. 215, 937 P.2d 76.

Failure to enforce procedures not "maintenance". — The waiver of immunity contained in this section does not apply to tort claims against the director of the motor vehicles division for failure to implement or enforce procedures, as that is not covered by the definition of "maintenance." Dunn v. State ex rel. Taxation & Revenue Dep't, 116 N.M. 1, 859 P.2d 469 (Ct. App. 1993).

Gaps in fence along right-of-way. — The question of whether the department complied with its highway fence design necessarily involves questions of fact such as whether the department secured an agreement from the property owners to construct or maintain fences, or alternatively whether the department made a fact determination that

livestock could not enter the highway. If the fact finder determines that the department failed to comply with the design of the highway as governed by Sections 30-8-13 and 30-8-14 NMSA 1978, the lack of agreements or other protective measures would be considered maintenance, and the department would not be entitled to immunity under Section 41-4-11 NMSA 1978. Because these questions of fact remain to be resolved, summary judgment in favor of the department is precluded. Madrid v. N.M. State Hwy. Dep't, 117 N.M. 171, 870 P.2d 133 (Ct. App. 1994).

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).

Traffic control during flood. — In wrongful death action, where county failed to control traffic on a county road to keep it from entering a crossing when water was high, an objective consistent with the notion of regular highway maintenance, the county was not immune from suit where passengers were washed downstream and drowned during a flood. Rutherford v. Chaves Cnty., 2002-NMCA-059, 132 N.M. 289, 47 P.3d 448, aff'd, 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

No sovereign immunity for negligent highway maintenance. — Under this section, sovereign immunity does not apply to liability damages caused by negligent maintenance of highways; rather, the highway department has a common-law duty to exercise ordinary care to protect the public from foreseeable harm on the state's highways. Ryan v. N. M. State Hwy. & Transp. Dep't, 1998-NMCA-116, 125 N.M. 588, 964 P.2d 149, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

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).

Waiver of immunity 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).

Waiver of immunity for 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).

Waiver not applicable. — Plaintiffs' claim against a state irrigation district for injuries sustained by their son while playing on state property did not fall within the waiver of immunity set forth in this section for the negligent maintenance of a roadway where

plaintiffs' complaint did not even allege the existence of a road, much less that the road was owned by the irrigation district or that the road had any causal relationship with the accident. Noriega v. Stahmann Farms, Inc., 113 N.M. 441, 827 P.2d 156 (Ct. App.), cert. denied, 113 N.M. 449, 827 P.2d 837 (1992).

Notice of bridge fire not imputed. — Although deputy sheriff had received actual notice of the bridge fire prior to plaintiff's accident, the deputy 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. Bd. of Cnty. 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. N. M. 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).

Municipal school system not liable. — Because a municipal school system had no responsibility for maintaining the crosswalk and accompanying signs and signals in front of one of its schools, this section's street maintenance waiver of immunity was inapplicable to it. Johnson v. School Bd., 114 N.M. 750, 845 P.2d 844 (Ct. App. 1992).

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, 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 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.

Governmental liability for failure to post highway deer crossing warning signs, 59 A.L.R.4th 1217.

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.

Governmental tort liability for detour accidents, 1 A.L.R.5th 163.

Measure and elements of damages for injury to bridge, 31 A.L.R.5th 171.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 A.L.R.5th 49.

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.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Listed torts. — Defendants' immunity for mishandling a gun during an arrest was not waived pursuant to this section, because plaintiff did not allege one of the predicate torts enumerated in the section. Oliveros v. Mitchell, 449 F.3d 1091 (10th Cir. 2006).

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. Cnty. of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

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

Immunity from suit in federal courts. — Although the state has waived its immunity from suit in its own state courts for actions of law enforcement officers, it has not waived its eleventh amendment immunity from suit in federal courts. Flores v. Long, 926 F. Supp. 166 (D.N.M. 1995), appeal dismissed, 110 F.3d 730 (10th Cir. 1997).

Relationship requirement. — A minor daughter of the alleged victim satisfied the close relationship requirement but plaintiffs who asserted that they maintained an intimate relationship with a victim as the equivalent of their "step-dad" or "common law" husband in their "family unit" did not satisfy the close relationship requirement needed to state a claim for bystander recovery. Sollars v. City of Albuquerque, 794 F. Supp. 360 (D.N.M. 1992).

Claim for violating right to familial association. — The plaintiffs, parents of a decedent allegedly killed by the gross negligence and reckless conduct of the defendants, had a claim for violation of constitutional right to familial association. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App.), cert. denied, 117 N.M. 328, 871 P.2d 984 (1994).

Liability will not attach until all elements of negligence have been proved, including duty, breach of duty and proximate cause. Schear v. Bd. of Cnty. Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

"Deprivation of rights". — Plaintiff's reliance on wrongful death statute and state constitution to argue that violations of those provisions amount to a deprivation of rights secured by the constitution and laws of New Mexico within the meaning of this section was misplaced, because to base a waiver of immunity on those provisions would create exceptions that would eliminate the principle of sovereign immunity, a result not intended by the legislature. Caillouette v. Hercules, Inc., 113 N.M. 492, 827 P.2d 1306 (Ct. App), cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

"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. Cnty. 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).

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. Cnty. 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 Section 41-4-15 NMSA 1978. DeVargas v. State ex rel. N. M. Dep't of Corr., 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. Cnty. of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Vicarious liability of police department. — Absent a claim that the officers were acting outside the scope of their authority, the police department may be held vicariously liable for any alleged torts committed by the officer for which immunity has been waived. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

II. LAW ENFORCEMENT OFFICERS.

Probation and parole officers. — Where the probationer kidnapped the minor victim and repeatedly raped the victim leaving the victim with permanent physical and emotional harm; the probationer was a convicted sex offender with a sixteen-year history of violent crimes; the probationer was under the supervision of the defendant

probation and parole officers; the probationer violated the terms of probation numerous times by committing new crimes; in violation of the conditions of probation, the probationer was able to be near plaintiff's home where the probationer had access to the victim and the opportunity to kidnap and rape the victim; plaintiff sued the defendant probation and parole officers alleging that they failed to monitor and supervise the probationer, enforce the conditions of probation, report violations of probation conditions to the court, maintain personal contact with the probationer, and recommended probationer for early discharge; and making arrests for crime, holding persons accused of criminal offense in custody, and maintaining public order did not constitute duties to which probation and parole officers were required to devote a majority of their time, the district court did not err when it ruled that the defendant probation and parole officers were not law enforcement officers under 41-4-3(D) NMSA 1978 and that the waiver of immunity in 41-4-12 NMSA 1978 did not apply to them. Rayos v. State ex rel. Dep't of Corrections, 2014-NMCA-103, cert. granted, 2014-NMCERT-____.

Probation officers. — Probation officers are not "law enforcement officers" under Section 41-4-3D NMSA 1978 and therefore the waiver of immunity for violations of constitutional rights "caused by law enforcement officers acting within the scope of their duties" does not apply to them. Bliss v. Franco, 446 F.3d 1036 (10th Cir. 2006)

Investigator for district attorney. — Where the duties of the chief investigator for the district attorney were to assist attorneys to prepare their cases, assist different agencies with their investigations, help on search warrants, supervise the assignments of a deputy and other investigators and the chief investigator, and accept assignments from attorneys, the office manager, pre-prosecution division, and finance staff, but did not include holding persons in custody, maintaining public order, or making arrests, the chief investigator was not a law enforcement officer. Fernandez v. Mora - San Miguel Elec. Co-op., Inc., 462 F. 3d 1244 (10th Cir. 2006).

"Law enforcement officers". — The director and the captain and assistant director of a county detention center were subject to suit as law enforcement officers under the Tort Claims Act. Davis v. Bd. of Cnty. Comm'rs, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172.

Parole officers and their supervisors were not law enforcement officers under Section 41-4-3 D NMSA 1978 and therefore the waiver of immunity in this section did not apply to them. Vigil v. Martinez, 113 N.M. 714, 832 P.2d 405 (Ct. App. 1992).

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. Cnty. of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

The office of the medical investigator and a physician employed as a medical investigator by that office are not law enforcement officers. Dunn v. McFeeley, 1999-

NMCA-084, 127 N.M. 513, 984 P.2d 760, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

A crime laboratory technician and his employer, the state police crime laboratory, whose duties are to examine and evaluate physical evidence that may relate to a possible offense, are not law enforcement officers. Dunn v. McFeeley, 1999-NMCA-084, 127 N.M. 513, 984 P.2d 760, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

A mayor is not a law enforcement officer for purposes of this act. Montes v. Gallegos, 812 F. Supp. 1165 (D.N.M. 1992).

The director of the motor vehicle division, whose duties involved principally administrative matters, and who did not serve as a full-time law enforcement officer whose principal duties involved holding in custody persons accused of criminal offenses, maintaining public order or making arrests for crimes, was not a "law enforcement officer" within the contemplation of this section. Dunn v. State ex rel. Taxation & Revenue Dep't, 116 N.M. 1, 859 P.2d 469 (Ct. App. 1993).

District attorneys and their staffs do not fall within the "law enforcement officer" exception from immunity under the Tort Claims Act. Coyazo v. State, 120 N.M. 47, 897 P.2d 234 (Ct. App. 1995).

The statutory requirement that the defendants be law enforcement officers does not focus on the defendants' specific acts at the time of their alleged negligence; instead, it simply requires that the defendants' principal duties, those duties to which they devote a majority of their time, be of a law enforcement nature. The requirement in Section 41-4-12 NMSA 1978 that the officer must be acting within the scope of his duties simply means that the officer must be acting within the scope of employment in order to be sued in his or her capacity as a law enforcement officer. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

The officers in this case are municipal police officers subject to Section 3-13-2 NMSA 1978, and their principal duties entail making arrests for crimes and maintaining public order; accordingly, they are law enforcement officers for purposes of the Tort Claims Act. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

Adoption agency investigators. — Employees of a state adoption agency who investigated the death of an adopted child were not law enforcement officers because they did not perform the traditional duties of law enforcement officers of holding persons in custody, maintaining public order, and making arrests. Johnson ex rel. Estate of Cano v. Holmes, 377 F. Supp. 2d 1069 (D.N.M. 2004), affirmed 455 F.3d 1133 (10th Cir. 2006).

Animal control officer. — An animal control officer of a municipality is not a law enforcement officer, because the officer's duties did not include the maintenance of public order. Tate v. Fish, 347 F. Supp. 2d 1049 (D.N.M. 2004).

Effect of exceeding official duties. — When an officer exceeds official duties and makes an arrest without authority of the municipality or in execution of orders thereof, the officer ceases to act in behalf of the city and assumes the entire responsibility personally. 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. Bd. of Cnty. Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

Secretary of corrections is not a law enforcement officer within the meaning of this section as defined in Section 41-4-3D NMSA 1978. Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

III. SCOPE OF DUTIES.

Duty to enforce speed limits. — Where decedent was killed when decedent's vehicle was struck by a speeding van driver by a corrections officer; the sheriff's department received numerous complaints about the dangerous traffic condition on the road where the accident occurred involving its own officers, corrections officers and others; and despite that knowledge, the sheriff's department did not enforce the traffic laws as required by state or investigate the complaints, the wrongful death claim falls within the waiver of immunity for law enforcement officers. Wachocki v. Bernalillo Cnty. Sheriff's Department, 2010-NMCA-021, 147 N.M. 720, 228 P.3d 504, aff'd, 2011-NMSC-039, 150 N.M. 650, 265 P.3d 701.

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. N. M. 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. N. M. State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

As a matter of law, the plaintiffs, children of the deceased killed by law enforcement officers, were unforeseeable as injured parties and, therefore, the defendant officers owed no duty to them. Lucero v. Salazar, 117 N.M. 803, 877 P.2d 1106 (Ct. App.), cert. denied, 117 N.M. 802, 877 P.2d 1105 (1994).

An employee's action, although unauthorized, is considered to be in the scope of employment if the action (1) is the kind the employee is employed to perform; (2) occurs during a period reasonably connected to the authorized employment period; (3) occurs in an area reasonably close to the authorized area, and (4) is actuated, at least in part, by a purpose to serve the employer. Accordingly, since the police officer conducted an arrest too far removed from the place he was authorized to perform his duties, and the arrest occurred during a time that he was expressly told to take off, the officer did not act within scope of his duties. Narney v. Daniels, 115 N.M. 41, 846 P.2d 347 (Ct. App. 1992), cert. denied, 114 N.M. 720, 845 P.2d 814 (1993).

IV. WAIVER OF IMMUNITY.

Immunity not waived. — Where the decedent was experiencing the effect of withdrawal from heroin when the metropolitan court ordered his release; the decedent was initially released to be transported by van as required by jail policy, but he exited the van; the decedent re-entered the metropolitan jail; the decedent was released to the jail parking lot without signing a waiver of van transportation contrary to jail policy; the decedent wandered off into the desert and died of hypothermia; and the medical director of the jail opined that at the time of his release, the decedent had no medical condition that required treatment, the city was not liable under the Tort Claims Act on plaintiff’s claim that the jail officers who knew or should have known that the manner of the decedent’s release would endanger his life. Lessen v. City of Albuquerque, 2008-NMCA-085, 144 N.M. 314, 187 P.3d 179, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Immunity not waived for mere negligence. — There is no waiver of immunity under this section for mere negligence of law enforcement officers that does not result in one of the enumerated acts. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App.), cert. denied, 117 N.M. 328, 871 P.2d 984 (1994).

Immunity not waived for deprivation of "happiness". — Vague references to "safety" or "happiness" in N.M. Const., art. II, § 4 are not sufficient to state a claim under this section. Waiver of immunity based on such constitutional grounds would emasculate the immunity preserved in the Tort Claims Act. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App.), cert. denied, 117 N.M. 328, 871 P.2d 984 (1994).

Immunity waived under 41-4-5 NMSA 1978. — Section 41-4-5 NMSA 1978, which waives immunity for negligent operation or maintenance of a motor vehicle, watercraft, or aircraft, applies to all public employees, including law enforcement officers. This section, which applies only to law enforcement officers, waives immunity only for the acts enumerated in this provision, such as assault and battery. Wilson v. Grant Cnty., 117 N.M. 105, 869 P.2d 293 (Ct. App. 1994).

Harm result of accident. — In plaintiff's wrongful death suit against the state and a law enforcement officer, no waiver of immunity existed where the harm allegedly caused by the officer was clearly the result of an accident rather than an intentional tort, and the officer's decisions did not support an inference of an intention to engage in unlawful conduct that invaded the protected interests of others. Caillouette v. Hercules, Inc., 113 N.M. 492, 827 P.2d 1306 (Ct. App.), cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

V. CLAIMS COVERED.

A. IN GENERAL.

Claim for negligent misrepresentation. — Plaintiff's allegations against officers of a county detention center based on their negligent misrepresentations in making an employment recommendation about a former employee state a viable claim for relief against the county. Davis v. Bd. of Cnty. Comm'rs, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172.

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 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 authority and ceased to act in behalf of the town. Salazar v. Town of Bernalillo, 62 N.M. 199, 307 P.2d 186 (1956).

Sexual harassment and invasion of privacy. — Because sexual harassment and invasion of privacy are not among the enumerated torts for which immunity is waived, the prisoner's claims fail. Ramer v. Place-Gallegos, 118 N.M. 363, 881 P.2d 723 (Ct. App. 1994).

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 rape by a criminal suspect following the suspect's 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 Cnty. Dist. Attorney's Office, 105 N.M. 554, 734 P.2d 794 (Ct. App.), cert. quashed, 106 N.M. 35, 738 P.2d 907 (1987).

The plaintiff's allegations that the officers were negligent in failing to forward the paperwork necessary to prosecute the man who later raped her and in failing to develop a policy to prevent the release of such prisoners back into the community at large met the requirement of alleging that the officers failed to exercise the care of reasonably prudent and qualified officers in an activity undertaken for the safety of others, and the allegations are therefore sufficient to state a claim under the Tort Claims Act. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

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).

Liability for failure to detain intoxicated driver. — Law enforcement officers may be liable if they fail to detain an intoxicated driver who then acts with the requisite level of intent to commit a battery while driving intoxicated. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App.), cert. denied, 117 N.M. 328, 871 P.2d 984 (1994).

Officer's unlawful entry. — Chief of police's deliberate and unlawful intrusion into a person's home to effect the arrest of a spouse constituted a trespass actionable under this section. Montes v. Gallegos, 812 F. Supp. 1165 (D.N.M. 1992).

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).

B. DUTY TO INVESTIGATE.

Class of persons to be protected by duty to investigate. — In creating the duty to investigate, the legislature did not limit the traditional tort concept of foreseeability that would otherwise define the intended beneficiaries of the statute; all persons who are foreseeably at risk within the general population are within the class of persons to be protected by the duty to investigate. Torres v. State, 119 N.M. 609, 894 P.2d 386 (1995).

When any person of the public, regardless of geographic location, is foreseeably at risk of injury by a party reported to be in violation of the criminal law, officers undertaking the investigation of the crime owe that person a duty to exercise the care ordinarily exercised by prudent and qualified officers. Torres v. State, 119 N.M. 609, 894 P.2d 386 (1995).

Foreseeability of criminal act. — Since it is not unlikely that a murderer would flee the city in which the crime was committed and, given modern-day transportation, that this person would flee across state lines, and since the police knew or should have known that it is possible that a person who kills randomly with no motive would kill again, the harm in this case was not so removed from the conduct of the defendants that the court may say as a matter of law that the victims were unforeseeable; thus foreseeability is a question for the jury to determine by giving thought to, among other things, the time, space, and distance between the alleged failure to investigate and the deaths of the two victims. Torres v. State, 119 N.M. 609, 894 P.2d 386 (1995).

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. Bd. of Cnty. Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

Liability for failure to bring criminals before court. — The statutory obligations that officers cooperate with prosecutors and bring defendants before the courts are primarily designed to protect the public by ensuring that dangerous criminals are removed from society and brought to justice; accordingly, as with the duty to investigate crimes under Section 29-1-1 NMSA 1978, the duties of cooperating with prosecutors, diligently filing complaints, and bringing defendants before the courts inure to the benefit of private individuals, and the violation of these statutory duties may give rise to a cognizable claim under the Tort Claims Act. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

C. TRAINING AND SUPERVISION.

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. Corrs. Corp. of Am., 112 N.M. 247, 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. N. M. State Police, 112 N.M. 249, 814 P.2d 117 (Ct. App. 1991), cert. quashed, 113 N.M. 352, 826 P.2d 573 (1992).

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. Cnty. of Bernalillo, 944 F.2d 710 (10th Cir. 1991).

Law reviews. — 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).

For note, "Liability of Law Enforcement Officers While in the Line of Duty: *Wilson v. Grant County,*" see 25 N.M.L. Rev. 329 (1995).

For note, "An Employer's Duty to Third Parties When Giving Employment Recommendations - *Davis v. Board of County Commissioners of Dona Ana County,*" see 30 N.M.L. Rev. 307 (2000).

For article, "What Does the Natural Rights Clause mean to New Mexico?", see 39 N.M. L. Rev. 375 (2009).

For note, "Trends in New Mexico Law: 1994–95 Tort Law – Evolution and Duty in New Mexico: Torres v. State," see 26 N.M. L. Rev. 585 (1996).

For article, "Reticent Revolution: Prospects for Damage Suits under the New Mexico Bill of Rights," see 25 N.M. L. Rev. 173 (1995).

For note, "Torts — Sovereign Immunity: Caillouette v. Hercules," see 25 N.M. L. Rev. 423 (1993).

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.

Admissibility of evidence of polygraph test result, or offer or refusal to take test, in action for malicious prosecution, 10 A.L.R.5th 663.

Immunity of police or other law enforcement officer from liability in defamation action, 100 A.L.R.5th 341.

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.

Appealability, under collateral order doctrine, of order denying qualified immunity in 42 USCS § 1983 or Bivens action for damages where claim for equitable relief is also pending - post-Harlow cases, 105 A.L.R. Fed. 851.

Construction and application of Federal Tort Claims Act provision (28 USCA § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 A.L.R. Fed. 605.

41-4-13. Exclusions from waiver of immunity; community ditches or acequias; Sanitary Projects Act associations.

All community ditches or acequias, and their public employees acting lawfully and within the scope of their duties, and all associations created pursuant to the Sanitary Projects Act [Chapter 3, Article 29 NMSA 1978] are 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; 2006, ch. 54, § 1; 2006, ch. 55, § 1.

ANNOTATIONS

The 2006 amendment, effective May 17, 2006, provided that public employees of community ditches or acequias acting lawfully and within the scope of their duties are excluded from the waiver of immunity of liability and changed the statutory reference from Sections 5-14-6 through 5-14-12 NMSA 1953 to Sections 41-4-6 through 41-4-12 NMSA 1978.

Laws 2006, ch. 54, § 1 and Laws 2006, ch. 55, §1 enacted identical amendments to this section. The section was set out as amended by Laws 2006, ch. 55, §1. *See* 12-1-8 NMSA 1978.

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.

ANNOTATIONS

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.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Fraudulent concealment. — The doctrine of fraudulent concealment applies to toll Section 41-4-15 NMSA 1978. Armijo v. Regents of Univ. Of N.M., 103 N.M. 183, 704 P.2d 437 (Ct. App. 1984), rev'd in part on other grounds, 103 N.M. 174, 704 P.2d 428 (1985).

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.), cert. denied, 111 N.M. 416, 806 P.2d 65 (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.), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991).

The language of Subsection A of this section and Section 41-5-13 NMSA 1978 are both very different than the language of Section 37-1-8 NMSA 1978. Maestas v. Zager, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, cert. granted, 2005-NMCERT-001,rev'd 2007–NMSC-003, 141 N.M. 154, 152 P.3d 141.

Claims allowed not limited. — Subsection A of this section required the additional words "resulting in loss, injury or death" because the claims allowed under the Tort Claims Act are not limited to only one act or occurrence. Maestas v. Zager, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, cert. granted, 2005-NMCERT-001, 137 N.M. 18, 106 P.3d 579, rev'd 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

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.), cert. quashed sub nom. Carrie Tingley Hosp. v. Tafoya, 100 N.M. 327, 670 P.2d 581 (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.), cert. quashed sub nom. Carrie Tingley Hosp. v. Tafoya, 100 N.M. 327, 670 P.2d 581 (1983).

No relation back. — The amended complaint sought damages against the state, the department of corrections and its employees under the Tort Claims Act, and because the original complaint was a nullity, there was no relation back. DeVargas v. State ex rel. N. M. Dep't of Corrs., 97 N.M. 563, 642 P.2d 166 (1982).

Relation back of amendments. — An action for malpractice and wrongful death brought under the Tort Claims Act by the natural parents of a deceased child 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 NMRA and Paragraph A of Rule 1-017 NMRA). Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

General savings provision inapplicable. — The general savings provision of Section 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 an action under this article. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied sub nom. Haney v. Albuquerque Police Dep't, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds by 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 sub nom. Haney v. Albuquerque Police Dep't, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds by Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

When last day of limitation period falls on Saturday. — Rule 1-006A NMRA, which provides that if the last day of a statutory time period falls on a Saturday, Sunday, or legal holiday, the period runs until the next day that is not a Saturday, Sunday or legal holiday, supersedes former Section 12-2-2G NMSA 1978 (now Section 12-2A-7 NMSA 1978), which only extends the time period to the following Monday if the last day falls on a Sunday. Therefore, a claim under the Torts Claim Act was not barred by the two-year statute of limitations of this section when the last day of the two-year period fell on a Saturday and the plaintiff filed a claim on the following Monday. Dutton v. McKinley Cnty. Bd. of Comm'rs, 113 N.M. 51, 822 P.2d 1134 (Ct. App. 1991).

Application of Arizona statute. — New Mexico, as the forum state, is not required to recognize Arizona's statute of limitations attaching or the sovereign immunity granted to its public employees. Therefore, the one-year limitations period applicable to Arizona public employees is not applicable to actions involving these employees when the cause of action accrues in New Mexico. Sam v. Estate of Sam, 2004-NMCA-018, 135 N.M. 101, 84 P.3d 1066, rev'd, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761.

II. APPLICABILITY.

Tort Claims Act statute of limitations. — Where child was eight years old when she was assaulted and statute of limitations required that she file suit by age ten, it was unreasonable as a matter of law to expect the child to comply with the requirements of the statute limitations at such a young age and the application of the statute to the child violated her right to due process of law. Campos v. Davis, 2006-NMSC-020, 139 N.M. 474, 134 P.3d 761.

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, Section 37-1-8 NMSA 1978, or for miscellaneous claims, Section 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 Section 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. N. M. Dep't of Corrs., 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, Section 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, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985).

For New Mexico, the United States Supreme Court has identified Section 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 officials. Walker v. Maruffi, 105 N.M. 763, 737 P.2d 544 (Ct. App.), cert. denied, 105 N.M. 707, 736 P.2d 985 (1987).

Public capacity determined by facts. — District court correctly applied the law when it estopped the doctor from asserting the statute of limitations defense under this section because by choosing to place the doctor at a private institution, and not identify him as a public employee working in a public capacity, the state engaged in conduct that conveyed the indisputable impression to persons wishing to assert a claim that the doctor was an employee of the private institution; as such, the claim was timely filed within the statute of limitations for actions against private entities, Section 41-5-13 NMSA 1978. Hagen v. Faherty, 2003-NMCA-060, 133 N.M. 605, 66 P.3d 974, cert. denied, 133 N.M. 593, 66 P.3d 962 (2003).

Act limited to New Mexico public employees. — The Tort Claims Act specifies that only public employees employed by New Mexico governmental entities, not simply any governmental entity, are covered by the Act. Sam v. Estate of Sam, 2004-NMCA-018, 135 N.M. 101, 84 P.3d 1066, rev'd, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761.

Application of section to action by subrogated insurance company. — Because a subrogated insurance company is considered to be standing in the shoes of the insured, the two-year statute of limitations in a subrogated action governed by this section begins to run when the insured's cause of action arises. Health Plus v. Harrell, 1998-NMCA-064, 125 N.M. 189, 958 P.2d 1239, cert. denied, 125 N.M. 145, 958 P.2d 103 (1998).

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).

Deadline does not apply to child incapable of meeting it. — As a matter of due process, a child who is incapable of meeting the deadline in this section cannot have that deadline applied to bar the child's right to legal relief; therefore, dismissal of claim filed shortly after child's ninth birthday is reversed. Jaramillo v. Bd. of Regents, 2001-NMCA-024, 130 N.M. 256, 23 P.3d 931.

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).

Tort Claims Act statute of limitations applies to states sued in New Mexico courts. — In the interests of comity, New Mexico will extend the tort claims statute of limitations to states with similar tort claims acts when they are sued in New Mexico district courts. Sam v. Estate of Sam, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761.

III. ACCRUAL OF ACTION.

Accrual of action. — Section 41-4-15A NMSA 1978 is a discovery-based statute of limitations that accrues when a plaintiff knows or with reasonable diligence should have known of the injury and its cause. Maestas v. Zager, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

Abuse of process. — A malicious-abuse-of-process claim accrues immediately upon the improper use of process. Plaintiff's malicious-abuse-of-process claim accrued when police sergeant defendant filed an amended criminal complaint. Pursuant to the Section 41-4-15A NMSA 1978, plaintiff had two years from that point to file his state tort claims. Mata v. Anderson, 685 F.Supp.2d 1223 (D.N.M. 2010) , affirmed by 635 F.3d 1250 (10th Cir. 2011).

False arrest and false imprisonment. — The statute of limitations for claims of false arrest and false imprisonment begins to run, under New Mexico law, when the imprisonment ends. Where plaintiff filed her complaint within two years of the end of her imprisonment, her NMTCA claims are timely. Gose v. Bd. of Cnty. Comm'rs of the Cnty. of McKinley, 727 F.Supp.2d 1256 (D.N.M. 2010)/

The temporal focus of Subsection A of this section seems to be on the date of the occurrence rather than the loss, injury, or death. Maestas v. Zager, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, cert. granted, 2005-NMCERT-001,rev'd, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

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).

Where, in 1998, the municipality constructed a flood retention pond next to plaintiff's building; in 2004, plaintiff's tenant informed plaintiff that the northeast side of the foundation of the building was substantially cracking, that the ground around the around it was saturated with water, and that the tenant believed that the retention pond caused the damage; and plaintiff filed suit against the municipality for damages in 2008, plaintiff's claims against the municipality were time barred because the tenant's information was sufficient to notify plaintiff, more than three years before plaintiff filed suit, of both serious structural damage requiring further investigation and a causal link between the retention pond and the injury to plaintiff's property. Yurcic v. City of Gallup, 2013-NMCA-039, 298 P.3d 500.

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 an ankle, and it was certain at that time that plaintiff 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. Vill. of Corrales, 111 N.M. 721, 809 P.2d 635 (Ct. App.), cert. denied, 111 N.M. 77, 801 P.2d 659 (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. Vill. of Corrales, 111 N.M. 721, 809 P.2d 635 (Ct. App.), cert. denied, 111 N.M. 77, 801 P.2d 659 (1990).

Time presents factual matter. — Where plaintiffs' complaint alleges that the work took place in the last week of July and into the first week of August 2001, and the city does not appear to dispute this factual claim, but argues that the clean-up work was commenced in the last week of July 2001 and therefore the trigger for the statute of limitations was the date the work began, plaintiffs' allegation about the time the work was performed and when the time the injury manifested itself presents a factual matter that must be resolved. Henderson v. City of Tucumcari, 2005-NMCA-077, 137 N.M. 709, 114 P.3d 389, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Law reviews. — 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).

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

For note and comment, "Statutes of Limitations Applied to Minors: The New Mexico Court of Appeals Balance of Competing State Interests to Favor Children," see 35 N.M. L. Rev. 535 (2005).

For note, "Tort Law — Either the Parents or the Child may Claim Compensation for the Child's Medical and Non-medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M. L. Rev. 373 (1993).

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 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.

ANNOTATIONS

Constitutional right to access courts not violated. — The 90-day notice provision of the Tort Claims Act does not violate the constitutional right of access to the courts. The legislative purposes requiring timely and reasonable notice to a governmental entity of potential claims are rationally related to legitimate governmental interests such as: (1) to allow investigation of a matter while the evidence is fresh; (2) to allow questioning of witnesses; (3) to protect against stimulated or aggravated claims; or (4) to allow consideration of whether a claim should be paid or not. Powell v. N. M. State Hwy. & Transp. Dep't, 117 N.M. 415, 872 P.2d 388 (Ct. App.), cert. denied, 117 N.M. 524, 873 P.2d 270 (1994).

Due process. — The notice requirement is not unreasonably short, thus not constituting a denial of due process. Ferguson v. N. M. State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

The period of giving notice does not deny an incapacitated victim due process of law. Ferguson v. N. M. State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Application of the notice provision of Subsection A to any minor, whatever the circumstances, would not, in every circumstance, violate due process. Erwin v. City of Santa Fe, 115 N.M. 596, 855 P.2d 1060 (Ct. App. 1993).

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.), cert. denied, 94 N.M. 674, 615 P.2d 991 (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).

Section inapplicable to claims only against public employee. — Where a police officer was sued individually in federal court for violation of plaintiff's constitutional rights, the officer asked the municipality to provide a defense and gave a copy of the complaint to the municipal attorney; the municipality refused to provide a defense; the municipality had actual notice of the federal action and was asked to provide a defense within the time for filing an answer to the complaint; the municipality did not dispute that the officer acted within the scope of the officer's employment; the officer defended the federal action pro se; and the officer and plaintiff settled the federal claims; and plaintiff did not give the municipality written notice of the incident within ninety days after the incident occurred, Section 41-4-16 NMSA 1978 does not require notice to be given by a claimant who sues only a governmental employee and the municipality was required to defend and indemnify the officer and pay the judgment against the officer. Niederstadt v. Town of Carrizozo, 2008-NMCA-053, 143 N.M. 786, 182 P.3d 769, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

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. N. M. State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

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. N. M. Dep't of Parks & Recreation, 106 N.M. 368, 743 P.2d 124 (Ct. App. 1987).

The notice required 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. Dutton v. McKinley Cnty. Bd. of Comm'rs, 113 N.M. 51, 822 P.2d 1134 (Ct. App. 1991).

Although the plaintiff claimed that the department had actual notice of this claim because of: (1) the information contained in a police report, (2) information derived from the conversation between a maintenance foreman and the police officer investigating the accident, and (3) the department's special knowledge concerning the hazards of blunt-edged guardrails, there was no evidence that the department had notice that this particular accident was likely to result in litigation against the department, or that the plaintiff considered the accident to be the department's fault. The above factors did not satisfy the requirement of actual notice. Powell v. N. M. State Hwy. & Transp. Dep't, 117 N.M. 415, 872 P.2d 388 (Ct. App.), cert. denied, 117 N.M. 524, 873 P.2d 270 (1994).

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. N. M. 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.), cert. denied, 105 N.M. 707, 736 P.2d 985 (1987).

Notice begins to run when injury manifests itself. — Where the language of this section's notice provisions and the statute of limitations, Section 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. Univ. of N.M. Med. Ctr., 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. Univ. of N.M. Med. Ctr., 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.), cert. quashed sub nom. Carrie Tingley Hosp. v. Tafoya, 100 N.M. 327, 670 P.2d 581 (1983).

The 90-day notice provision does not apply to minors who are incapable themselves of meeting that responsibility, and minors may not be held to such notice when their parents or other relatives are shown to be unable to provide notice for them. Rider v. Albuquerque Pub. Sch., 1996-NMCA-090, 122 N.M. 237, 923 P.2d 604.

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 sufficient. — 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.), cert. denied, 94 N.M. 674, 615 P.2d 991 (1980).

Police report not "actual notice". — An accident report prepared by the state police does not constitute actual notice to the state and to all state agencies. Mere notice of an accident will not necessarily put the government entity on notice that it may become the defendant in a lawsuit. Marrujo v. N. M. State Hwy. Transp. Dep't, 118 N.M. 753, 887 P.2d 747 (1994).

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).

Report may serve as notice if agency has knowledge of potential liability. — When the governmental entity allegedly at fault has knowledge of the facts and circumstances of an occurrence, it may have knowledge of its own potential liability, and a particular statement by a victim that there may be a claim is not required. Lopez v. State, 1996-NMSC-071, 122 N.M. 611, 930 P.2d 146.

Notice provisions operate as statutes of limitations since they are conditions precedent to filing a suit. Ferguson v. N. M. State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

If governmental entity creates condition that causes injury, notice is still required of a claim for damages. This section operates in conjunction with Section 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.), cert. quashed sub nom. Carrie Tingley Hosp. v. Tafoya, 100 N.M. 327, 670 P.2d 581 (1983).

Actual notice of accident. — An evidentiary hearing may be required to decide the threshold issue whether, from actual notice of an occurrence, a governmental entity was on notice that it could be subject to a claim. Lopez v. State, 1996-NMSC-071, 122 N.M. 611, 930 P.2d 146.

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. N. M. 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. N. M. 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 (now workers' 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.), cert. denied, 94 N.M. 674, 615 P.2d 991 (1980).

Federal preemption. — The Tort Claims Act (41-4-1 NMSA 1978 et seq.) notice-of-claim requirement is preempted by the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, and, therefore, is not applicable to an Emergency Act claim. Godwin v. Mem'l Med. Ctr., 2001-NMCA-033, 130 N.M. 434, 25 P.3d 273, cert. quashed, 132 N.M. 193, 46 P.3d 100, and cert. denied, 537 U.S. 885, 123 S. Ct. 118, 154 L. Ed. 2d 144 (2002).

Summary judgment inappropriate. — Where undisputed facts of the case allow the trier of fact to draw equally logical but conflicting inferences from the facts, summary judgment on the issue of whether the department of corrections had actual notice of the occurrence as required by subsection B is not appropriate. Calloway v. N. M. Dep't of Corr., 117 N.M. 637, 875 P.2d 393 (Ct. App.), cert. denied, 118 N.M. 90, 879 P.2d 91 (1994).

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. — 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.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions, 45 A.L.R.5th 109.

Persons or entities upon whom notice of injury or claim against state or state agencies may or must be served, 45 A.L.R.5th 173.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant, 53 A.L.R.5th 617.

Sufficiency of notice of claim against local political entity as regards time when accident occurred, 57 A.L.R.5th 689.

Waiver of, or estoppel to assert, failure to give or defects in notice of claim against state or local political subdivision - modern status, 64 A.L.R.5th 519.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Law 1981, ch. 73, § 8 provided that all references in law to the corrections and criminal rehabilitation department shall be construed to be references to the corrections department.

Expert testimony is required to establish the standard of care for monitoring inmates in prisons. — Where plaintiff, who was an inmate at a county detention center and who was assaulted and raped by three inmates, sued defendants for failing to protect plaintiff from the assault; plaintiff claimed that the area in which plaintiff was assaulted was an architectural blind spot that could not be covered by video surveillance, as well as not being directly monitored by guards, and that jurors could use common knowledge to find that it is negligence to allow inmates in an area that was not properly subject to surveillance or monitoring, either due to the existence of a blind spot or lack of guards; and defendant did not offer any testimony as to the standard of care for monitoring of inmates, jail design, video surveillance or any other factors that underlie those standards; the district court properly granted summary judgment for defendants because expert testimony was required in order for a jury to make a decision regarding the standard of care of the monitoring by prison officials and the mere fact that plaintiff was assaulted did not prove that prison monitoring fell below the required standard of care. Villalobos v. Dona Ana Bd. of Cnty. Comm'rs, 2014-NMCA-044.

41-4-17. Exclusiveness of remedy.

A. The Tort Claims Act 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.

ANNOTATIONS

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 Section 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. Cnty. of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

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. Cnty. 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 Section 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).

Parties. — The exclusive remedy provision in Subsection B did not bar recovery from the state transportation division of the state board of education because plaintiffs settled their claims against defendants connected with a county and school district. Gallegos v. State Bd. of Educ., 1997-NMCA-040, 123 N.M. 362, 940 P.2d 468, cert. denied, 123 N.M. 215, 937 P.2d 76.

Joinder. — 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. N. M. 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. N. M. 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), rev'd on other grounds, Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677 (1986).

Governmental entity not entitled to reimbursement from employee. — A school district was not entitled to reimbursement from an employee of federal funds it lost due to the employee's negligence in failing to comply with federal regulations. Daddow v. Carlsbad Mun. Sch. Dist., 120 N.M. 97, 898 P.2d 1235 (1995).

Mandamus proceedings not prohibited. — The Tort Claims Act does not interfere with the traditional right to bring a mandamus action against a government official for failure to perform a required duty. Bd. of Cnty. Comm'rs v. Risk Mgmt. Div., 120 N.M. 178, 899 P.2d 1132 (1995).

Injunction. — Although the Tort Claims Act would not bar a claim for injunctive relief, an injunction will generally not lie if there is an adequate remedy at law. El Dorado Utils., Inc. v. Eldorado Area Water and Sanitation Dist., 2005-NMCA-036, 137 N.M. 217, 109 P.3d 305.

Law reviews. — 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 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.

ANNOTATIONS

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. Cnty. of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Federal jurisdiction barred. — Inmate could not pursue 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.), cert. denied, 498 U.S. 873, 111 S. Ct. 198, 112 L. Ed. 2d 159 (1990).

Venue provisions are mandatory. — The second sentence of Subsection B, relating to venue of actions against public entities or employees other than the state and its employees, was mandatory as applied to action against board of county commissioners. Williams v. Bd. of Cnty. Comm'rs, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

Suit against state hospital in federal court not permitted. — Congress does not have the power to make statutes such as the Emergency Medical Treatment and Active Labor Act (EMTALA) applicable to state-run hospitals without the state's express

consent. As indicated by this section, Sections 41-4-2 NMSA 1978 and 41-4-4 NMSA 1978, New Mexico has not consented to be sued in federal court for violations of EMTALA, nor for any other tort. Ward v. Presbyterian Healthcare Servs., 72 F. Supp. 2d 1285 (D.N.M. 1999).

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 Section 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 Section 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 for 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. Sch. 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.

A. Unless limited by Subsection B of this section, in any action for damages against a governmental entity or a public employee while acting within the scope of the employee's duties as provided in the Tort Claims Act, the liability shall not exceed:

(1) the sum of two hundred thousand dollars ($200,000) for each legally described real property for damage to or destruction of that legally described real property arising out of a single occurrence;

(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 real property damage and medical and medically related expenses as permitted under the Tort Claims Act.

B. The total liability for all claims pursuant to Paragraphs (1) and (3) of Subsection A of this section that arise out of a single occurrence shall not exceed seven hundred fifty thousand dollars ($750,000).

C. Interest shall be allowed on judgments against a governmental entity or public employee for a tort for which immunity has been waived under the Tort Claims Act at a rate equal to two percentage points above the prime rate as published in the Wall Street Journal on the date of the entry of the judgment. Interest shall be computed daily from the date of the entry of the judgment until the date of payment.

D. 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, § 17; 1977, ch. 386, § 14; 1991, ch. 205, § 3; 2004, ch. 108, § 1; 2007, ch. 121, § 1.

ANNOTATIONS

The 2007 amendment, effective July 1, 2008, increased the maximum liability from $100,000 to $200,000 for damage or destruction of each legally described real property; and limited the total liability for all claims arising out of a single occurrence to not more that $750,000.

Applicability. — Laws 2007, ch. 121, § 2 provided that Laws 2007, ch. 121, §1 applied only to claims for damages from torts committed on or after July 1, 2008.

The 2004 amendment, effective May 19, 2004, added Subsection B and redesignated former Subsection B as present Subsection C.

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).

The cap on damages is constitutional. — The cap on damages does not violate substantive due process or equal protection and does not encroach on the right to trial by jury or the Separation of Powers Clause. Wachocki v. Bernalillo Cnty. Sheriff’s Dep't,

2010-NMCA-021, 147 N.M. 720, 228 P.3d 504, aff'd, 2011–NMSC-039, 150 N.M. 650, 265 P.3d 701.

Cap on damages. — In considering the constitutionality of the cap on damages in Subsection A(2), the trial court was mistaken in limiting the facts applicable solely to the defendant city; the city had the burden of demonstrating that enforcement of the cap was substantially related to an important state interest, and the trial court should have considered evidence on the relationship of the cap to public treasuries as an indivisible and statewide whole, both at the time the cap was enacted and at the time the causes of action accrued; Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990) is withdrawn. Trujillo v. City of Albuquerque, 119 N.M. 602, 893 P.2d 1006 (1995).

Because the statutory cap on tort recoveries against the state affects economic interests, not fundamental rights, the appropriate level of constitutional scrutiny in an equal protection challenge is rational basis review, not the intermediate scrutiny necessary for statutes affecting fundamental rights. Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Wrongful death action brought by a personal representative is a single claim. — A personal representative, whether consisting of one or more individuals, is the "person" for purposes of Paragraph 3 of Subsection A of Section 41-4-19 NMSA 1978 because under the Wrongful Death Act, Section 41-2-1 NMSA 1978 et seq., the personal representative of the deceased person replaces the deceased person and has the sole right to pursue the action on behalf of the statutory beneficiaries. A wrongful death action brought by a personal representative on behalf of multiple statutory beneficiaries is a single claim under Paragraph 3 of Subsection A of Section 41-4-19 NMSA 1978, rather than multiple claims under Paragraph 4 of Subsection A of Section 41-4-19 NMSA 1978. Estate of Lajeuenesse v. UNM Bd. of Regents, 2013-NMCA-004, 292 P.3d 485, cert. quashed, 2013-NMCERT-001.

Where the personal representative of the decedent sued defendants for the wrongful death of the decedent based on the negligent medical care provided by defendants; no claims were made by any person other than the personal representative; and the jury awarded plaintiff damages of $750,000, the district court properly applied the monetary limitation of Paragraph 3 of Subsection A of Section 41-4-19 NMSA 1978, rather than multiple claims limitation under Paragraph 4 of Subsection A of Section 41-4-19 NMSA 1978, to reduce the verdict to $400,000 because the wrongful death action was a single claim, not multiple claims. Estate of Lajeuenesse v. UNM Bd. of Regents, 2013-NMCA-004, 292 P.3d 485, cert. quashed, 2013-NMCERT-001.

Double costs provision of Rule 1-068 NMRA does not conflict with the Tort Claims Act. — The double costs awarded under Paragraph A of Rule 1-068 NMRA are not punitive damages or prejudgment interest and are not prohibited by Subsection D of Section 41-4-19 NMSA1978. Estate of Lajeuenesse v. UNM Bd. of Regents, 2013-NMCA-004, 292 P.3d 485, cert. quashed, 2013-NMCERT-001.

Recovery of costs. — The legislature, in Section 39-3-30 NMSA 1978, gives express authority, without exception, to the recovery of costs against any losing party, including the state. Kirby v. N. M. State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App.), cert. denied, 98 N.M. 51, 644 P.2d 1040 (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), overruled in part on other grounds, Folz v. State, 115 N.M. 639, 857 P.2d 39 (Ct. App.), cert. denied, 115 N.M. 602, 856 P.2d 250 (1993).

An award of postjudgment interest on judgments against a governmental entity is not permitted under this article. Yardman v. San Juan Downs, Inc., 120 N.M. 751, 906 P.2d 742 (Ct. App.), cert. denied, 120 N.M. 636, 904 P.2d 1061 (1995).

"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).

In an action against a county race track by a jockey who was injured when the horse veered, causing the jockey to fall and strike a post and track rail, the county's failure to replace the rail with a safer system and negligent placement of an exit gap on the rail were not separate occurrences; the plaintiff's injuries, which were alleged to have been caused by successive negligent acts or omissions that combined concurrently to create a risk of harm, constituted a single occurrence. Yardman v. San Juan Downs, Inc., 120 N.M. 751, 906 P.2d 742 (Ct. App.), cert. denied, 120 N.M. 636, 904 P.2d 1061 (1995).

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).

Applicability to claim under federal law. — The Tort Claims Act (Section 41-4-1 NMSA 1978 et seq.) limits the damages available under the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C.S. § 1395dd, by placing a "cap" on damages

recoverable under the act from a public hospital. Godwin v. Mem'l Med. Ctr., 2001-NMCA-033, 130 N.M. 434, 25 P.3d 273, cert. quashed, 132 N.M. 193, 46 P.3d 100, and cert. denied, 537 U.S. 885, 123 S. Ct. 118, 154 L. Ed. 2d 144 (2002).

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 note, "Tort Law – Either the Parents or the Child may claim Compensation for the Child's Medical and Non-Medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M. L. Rev. 373 (1993).

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.

41-4-20. 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 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler to correct an apparently incorrect reference and is not part of the law.

Existence of insurance as waiver of immunity. — 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 Sch. 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 Section 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 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.

ANNOTATIONS

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 Section 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., Inc. 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), overruled in part by Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).

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 the "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 of the general services department:

(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 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 insure or provide certificates of coverage to school bus contractors and their employees, notwithstanding Subsection F 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 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

(9) 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 twenty-five thousand dollars ($25,000) shall be made unless the settlement has first been approved in writing by the director of the risk management division of the general services department. This subsection shall not be construed to limit the authority of an insurance carrier, covering any liability under the Tort Claims Act, to compromise, adjust and settle claims against governmental entities or their public employees.

D. Claims against the public liability fund shall be made in accordance with rules or regulations of the director of the risk management division of the general services department. 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; 1996 (1st S.S.), ch. 3, § 5; 2000, ch. 27, § 4; 2001, ch. 177, § 1.

ANNOTATIONS

Cross references. — For state board of finance, *see* 6-1-1 NMSA 1978.

For general services department, *see* 9-17-3 NMSA 1978.

For risk management division, *see* 15-7-2 NMSA 1978.

For powers of the risk management division in regard to the Tort Claims Act, *see* 15-7-3 NMSA 1978.

The 2001 amendment, effective June 15, 2001, substituted "twenty-five thousand dollars ($25,000)" for "five thousand dollars ($5,000)", in Subsection C.

The 2000 amendment, effective March 6, 2000, added Subsection B(7) and redesignated the remaining paragraphs in Subsection B accordingly, deleted "including any transfers to the fund from the risk reserve" following "reason to believe that the fund" from the second sentence in Subsection D, and deleted former Subsection E, concerning excess cash balances in the public liability fund.

The 1996 amendment, effective March 21, 1996, inserted "of the general services department" in several places throughout the section; in Subsection A, deleted former Paragraphs (7) and (8) which provided for the creation of a retention fund and to cover personal injury liability risks of governmental entities, redesignated the remaining paragraphs and made related changes, and deleted "group" preceding "insurance" in the first sentence of Paragraph (7); in Subsection D, inserted "public liability" preceding "fund" in the first sentence, and inserted "including any transfers to the fund from the risk reserve" in the second sentence; and added Subsection E.

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.

Coverage under all-risk insurance, 30 A.L.R.5th 170.

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 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.

ANNOTATIONS

Compiler's notes. — The reference to Subsection E of 41-4-3 NMSA 1978 in Subsection E is probably incorrect, since Subsection F of 41-4-3 NMSA 1978 now relates to public employees, following the 1993 amendment to that section.

Cross references. — For county assessor, *see* Chapter 4, Article 39 NMSA 1978.

For department of finance and administration, *see* 9-6-3 NMSA 1978.

For general services department, *see* 9-17-3 NMSA 1978.

For risk management division, *see* 15-7-2 NMSA 1978.

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).

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).

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 Section 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).

Private insurers. — Nothing in the Tort Claims Act suggest the legislature intended to extend the protection of Section 15-7-9 NMSA 1978, regarding confidentiality of records, to funds held by private insurers. Bd. of Comm’rs v. Las Cruces Sun-News, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and it is not part of the law.

Cross references. — For home rule municipality, *see* N.M. Const., art. X, § 6.

For 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 Section 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.

Governmental tort liability for detour accidents, 1 A.L.R.5th 163.

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.

ANNOTATIONS

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 Section 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.

ANNOTATIONS

Compiler's notes. — This section was originally enacted as 41-4-27 NMSA 1978 by Laws 1981, ch. 268, § 2, but was recompiled as 41-4-28 NMSA 1978 in light of the enactment of 41-4-27 NMSA 1978 by Laws 1981, ch. 118, § 2.

Cross references. — For 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 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

41-4-30. Liability coverage; certain community land grants.

Notwithstanding the provisions of Paragraph (1) of Subsection A of Section 41-4-25 NMSA 1978 to the contrary, a community land grant governed as a political subdivision of the state upon application to the risk management division of the general services department shall be authorized to purchase coverage for any risk for which immunity has been waived under the Tort Claims Act through the public liability fund, exclusive of coverage of an activity conducted by the community land grant that is determined by the director of the risk management division pursuant to division rules to be a business enterprise.

History: Laws 2010, ch. 22, § 1.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 22 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

ARTICLE 5
Medical Malpractice Act

41-5-1. Short title.

Chapter 41, Article 5 NMSA 1978 may be cited as the "Medical Malpractice Act".

History: 1953 Comp., § 58-33-1, enacted by Laws 1976, ch. 2, § 1; 1992, ch. 33, § 1.

ANNOTATIONS

The 1992 amendment, effective April 1, 1992, substituted "Chapter 41, Article 5 NMSA" for "This act".

Applicability. — Laws 1992, ch. 33, § 17 made the provisions of the act applicable only to occurrences arising on and after April 1, 1994.

Temporary provisions. — Laws 1992, ch. 33, § 15, effective March 6, 1992, provided that for the purposes of the Medical Malpractice Act, a health care provider who qualified for medical malpractice liability insurance pursuant to the provisions of the Medical Malpractice Act in effect prior to April 1, 1992 shall remain subject to the terms and provisions of the act that existed on the date of qualification and further provided that upon the date of renewal for a health care provider's policy of medical malpractice liability insurance or the date of continuation of coverage for health care providers who maintain a cash deposit with the superintendent of insurance, the provisions of the Medical Malpractice Act in effect on the dates of renewal or continuation shall apply.

Purpose of act. — This act's limitation of health care provider liability reflects a concern by the legislature for the health of New Mexico citizens as affected by the availability of physicians and malpractice coverage. Lester ex rel. Mavrogenis v. Hall, 1998-NMSC-047, 126 N.M. 404, 970 P.2d 590.

Scope. — 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 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).

Representation required in malpractice action. — A non-attorney parent was required to be represented by counsel in order to bring a medical malpractice claim on behalf of his minor son. Chisholm v. Rueckhaus, 1997-NMCA-112, 124 N.M. 255, 948 P.2d 707, cert. denied, 124 N.M. 268, 949 P.2d 282 (1997).

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 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 note, "Foreseeability vs. Public Policy Considerations in Determining the Duty of Physicians to Non-Patients - *Lester v. Hall,*" see 30 N.M.L. Rev. 351 (2000).

For article, "An Economic Model Costing 'Early Offers' Medical Malpractice Reform: Trading Noneconomic Damages for Prompt Payment of Economic Damages", see 35 N.M.L. Rev. 259 (2005).

For note and comment, “Statutes of Limitations Applied to Minors: The New Mexico Court of Appeals Balance of Competing State Interests to Favor Children,” see 35 N.M. L. Rev. 535 (2005).

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 physician 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 practitioner 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.

Liability for incorrectly diagnosing existence or nature of pregnancy, 2 A.L.R.5th 769.

Liability of hospital, physician, or other medical personnel for death or injury to child caused by improper postdelivery diagnosis, care, and representations, 2 A.L.R.5th 811.

Liability of physician, nurse, or hospital for failure to contact physician or to keep physician sufficiently informed concerning status of mother during pregnancy, labor, and childbirth, 3 A.L.R.5th 123.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by inadequate attendance or monitoring of patient during and after pregnancy, labor, and delivery, 3 A.L.R.5th 146.

Liability of doctor or other health practitioner to third party contracting contagious disease from doctor's patient, 3 A.L.R.5th 370.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper choice between, or timing of, vaginal or cesarean delivery, 4 A.L.R.5th 148.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during vaginal delivery, 4 A.L.R.5th 210.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper treatment during labor, 6 A.L.R.5th 490.

Liability of hospital, physician, or other medical personnel for death or injury to mother caused by improper postdelivery diagnosis, care, and representations, 6 A.L.R.5th 534.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper diagnosis and treatment of mother relating to and during pregnancy, 7 A.L.R.5th 1.

Joint and several liability of physicians whose independent negligence in treatment of patient causes indivisible injury, 9 A.L.R.5th 746.

Malpractice in treatment of skin disease, disorder, blemish, or scar, 19 A.L.R.5th 563.

Arbitration of medical malpractice claims, 24 A.L.R.5th 1.

Medical malpractice in connection with breast augmentation, reduction or reconstruction, 28 A.L.R.5th 497.

Medical malpractice: negligent catheterization, 31 A.L.R.5th 1.

Medical malpractice physician's admission of negligence as establishing standard of care and breach of that standard, 42 A.L.R.5th 1.

Medical malpractice in connection with diagnosis, care, or treatment of diabetes, 43 A.L.R.5th 87.

Liability of pharmacist who accurately fills prescription for harm resulting to user, 44 A.L.R.5th 393.

Malpractice: Physician's liability for injury or death resulting from side effects of drugs intentionally administered to or prescribed for patient, 47 A.L.R.5th 433.

Malpractice in diagnosis and treatment of male urinary tract and related organs, 48 A.L.R.5th 575.

Liability of health maintenance organizations (HMOs) for negligence of member physicians, 51 A.L.R.5th 271.

Malpractice in diagnosis or treatment of meningitis, 51 A.L.R.5th 301.

Recovery for emotional distress based on fear of contracting HIV or AIDS, 59 A.L.R.5th 535.

Coverage of professional-liability or -indemnity policy for sexual contact with patients by physicians, surgeons, and other healers, 60 A.L.R.5th 239.

Medical-malpractice countersuits, 61 A.L.R.5th 307.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 65 A.L.R.5th 357.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 A.L.R.5th 591.

Physical injury requirement for emotional distress claim based on false positive conclusion on medical test diagnosing disease, 69 A.L.R.5th 411.

Right to recover money lent for gambling purposes, 74 A.L.R.5th 369.

Contributory negligence or comparative negligence based on failure of patient to follow instructions as defense in action against physician or surgeon for medical malpractice, 84 A.L.R.5th 619.

Malpractice by medical or health professions, contributory negligence, comparative negligence, or assumption of risk, other than failing to reveal medical history or follow instructions, as defense in action against physician or surgeon for medical malpractice, 108 A.L.R.5th 385, §§ 3[d], 5[a, c], 6, 7[b], 15.

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 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.

ANNOTATIONS

Medical Malpractice Act held constitutional. Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493 (Ct. App. 1984), rev'd in part on other grounds, 102 N.M. 482, 697 P.2d 482 (1985).

Malpractice claims under this article do not include claims of criminal sexual assault not committed in the course of rendering professional health care services. N. M. Physicians Mut. Liab. Co. v. LaMure, 116 N.M. 92, 860 P.2d 734 (1993).

Limits of recovery. — This section is not arbitrary and capricous and is rationally related to legislative goal of ensuring a source of recovery for victims of medical

malpractice and curbing runaway medical costs, relying in part on Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305. Fed. Exp. Corp. v. United States, 228 F. Supp 2d 1267 (D.N.M. 2002).

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, 14 A.L.R.5th 695.

Coverage of professional-liability or -indemnity policy for sexual contact with patients by physicians, surgeons, and other healers, 60 A.L.R.5th 239.

41-5-3. Definitions.

As used in the Medical Malpractice Act:

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.

ANNOTATIONS

Communication between medical personnel. — Communication between medical personnel is not a matter that requires expert knowledge to understand the standard of care involved and a party may be able to establish that a departure from the standard of ordinary care occurs when a clerical error affects the timeliness or accuracy of a diagnosis. Zamora v. St. Vincent Hospital, 2014-NMSC-035.

Where plaintiff was admitted to defendant's emergency room with abdominal pain; a contract radiologist performed an abdominal scan on plaintiff; the radiology report concluded that defendant had a diverticular abscess and that cancer was a possibility; the emergency physician and surgeon never received the radiologist's report; plaintiff was diagnosed with colon cancer fourteen months later; plaintiff sued defendant alleging that as a consequence of defendant's failure through an administrative inadequacy to forward the radiology report to the surgeon, plaintiff was treated for a diverticular abscess, allowing the cancer to grow; and defendant claimed that plaintiff failed to present expert testimony regarding the standard of care of communication between medical personnel, expert testimony was not required to establish the standard of care because the communication of the diagnosis by one doctor to another is subject to an ordinary negligence standard of care, which does not require expert testimony. Zamora v. St. Vincent Hospital, 2014-NMSC-035.

Malpractice claim. — The controlling inquiry in determining whether a claim constitutes a "malpractice claim" under the Medical Malpractice Act is whether the gravamen of the claim is predicated upon the allegation of professional negligence. Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 2011-NMCA-112.

Claim for equitable indemnification was a malpractice claim. — Where a patient sued a medical center and a doctor who practiced at the medical center for malpractice and the medical center sued the doctor for equitable indemnification based upon the claim that the doctor negligently caused and was partially liable for the patient's injuries, the equitable indemnification claim was a malpractice claim as that term is used in the Medical Malpractice Act. Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 2011-NMCA-112.

Defendants other than physicians. — This section's broad definition of health care provider is evidence that the legislature intended to impose liability beyond the context of the physician-patient relationship. When an individual is obliged as a condition of future or continued employment to submit to a medical examination, that examination creates a duty between the examining health care provider and the examinee. Baer v. Regents of Univ. of Cal., 118 N.M. 685, 884 P.2d 841 (Ct. App. 1994).

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.), cert. denied, 101 N.M. 362, 683 P.2d 44 (1984).

Malpractice required. — The New Mexico Medical Malpractice Act covers injuries arising out of negligence and does not cover claims not based on acts of malpractice. Cordray v. Cnty. of Lincoln, 320 F.Supp.2d 1171 (D.N.M. 2004).

Functional test to distinguish medical or professional negligence from ordinary negligence. — If an act involves the use of special knowledge or skill to make a judgment call as to the appropriate thing to do or not to do, then the act is of a professional nature and claims based on the act must be brought and pursued as a medical or professional negligence action and requires expert testimony to assess the resultant act or failure to act. If not, the act is not of a professional nature and expert testimony is not required. Richter v. Presbyterian Healthcare Servs., 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

Timeliness of delivery of laboratory reports. — Expert testimony is required where a plaintiff's claims address the timeliness or urgency of the delivery system of laboratory reports, including any timeliness claims that involve the efficiency and design of the delivery system, except when the required timing is set by a known standard such as an internal policy, contract or governmental regulation. Richter v. Presbyterian Healthcare Servs., 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

Maintenance of hospital charts. — Hospitals have a clearly established duty to maintain their patient's medical charts in good order, including the duty to post completed lab tests as received. Assessing a hospital's compliance with its charting duties does not require expert testimony. Richter v. Presbyterian Healthcare Servs., 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

Ordinary negligence in delivering laboratory reports. — Where decedent died when decedent developed a heart arrhythmia during surgery in 2005; the heart arrhythmia was caused by an undiagnosed condition called pheochromocytoma; in 2001, the decedent's physicians ordered lab tests that were diagnostic of pheochromocytoma; the lab results were never read or acted upon by the physicians; plaintiff sued the hospital and the laboratory for negligent delivery of the lab results in 2001; plaintiff did not raise any matters involving urgency; and plaintiff showed that the laboratory had a routine procedure for delivering lab report to physicians, plaintiff's claims against the hospital and the laboratory could be pursued as ordinary negligence claims and did not require expert testimony. Richter v. Presbyterian Healthcare Servs., 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

Opinion of treating physician as to negligence of another treating physician. — Where decedent died when decedent developed a heart arrhythmia during surgery in 2005; the heart arrhythmia was caused by an undiagnosed condition called

pheochromocytoma; prior to surgery, decedent's consulting surgeon ordered lab tests that would have disclosed the pheochromocytoma; the consulting surgeon scheduled surgery to be conducted by the operating surgeon; the operating surgeon conducted the surgery before the lab results had been received and despite decedent's high potassium levels that posed a chance of death during surgery; and plaintiff sought to elicit opinions from the consulting surgeon as to which acts of the operating surgeon were negligent; the district court did not abuse its discretion in excluding the consulting surgeon's opinions as to the operating surgeon's negligence. Richter v. Presbyterian Healthcare Servs., 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

Failure to present expert testimony on the standard of medical care. — Where decedent died when decedent developed a heart arrhythmia during surgery in 2005; the heart arrhythmia was caused by an undiagnosed condition called pheochromocytoma; prior to surgery, lab tests had been ordered that would have disclosed the pheochromocytoma; the surgeon conducted the surgery before the lab results had been received and despite decedent's high potassium levels that posed a chance of death during surgery; to establish the standard of care for the surgeon's conduct, plaintiff offered the testimony of an interventional radiology expert who testified that there was no standard practice that an interventional radiologist would use to address the complication that occurred in decedent's surgery; and plaintiff called a general surgeon to establish the standard of care applicable to decedent's surgery, but failed to lay a foundation for the general surgeon's opinion, plaintiff failed to present expert testimony on the standard of care and the district court did not err in directing a verdict in favor of the surgeon. Richter v. Presbyterian Healthcare Servs., 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

Comparative negligence of non-parties. — Where decedent died when decedent developed a heart arrhythmia during surgery in 2005; the heart arrhythmia was caused by an undiagnosed condition called pheochromocytoma; in 2001, the decedent's physicians ordered lab tests that were diagnostic of pheochromocytoma; the lab results were never read or acted upon by the physicians; in 2005, prior to surgery, lab tests had been ordered that would have disclosed the pheochromocytoma; the surgeon conducted the surgery before the lab results had been received; and the district court permitted the jury to compare the alleged negligence of the decedent's 2001 physicians, who were non-parties in the case, with the negligence of the decedent's 2005 surgeons, comparative negligence principles required the district court to consider the comparative negligence of the non-party 2001 physicians. Richter v. Presbyterian Healthcare Servs., 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For note, "Tort Law – New Mexico Limits Recovery of Negligent Infliction of Emotional Distress to Sudden, Traumatic Accidents — Fernandez v. Walgreen Hastings Co.," see 30 N.M. L. Rev. 363 (2000).

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.

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice, 12 A.L.R.5th 1.

Venue of wrongful death action, 58 A.L.R.5th 535.

Coverage of professional-liability or -indemnity policy for sexual contact with patients by physicians, surgeons, and other healers, 60 A.L.R.5th 239.

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.

ANNOTATIONS

Cross references. — For jurisdictional amount in magistrate court, *see* 35-3-3 NMSA 1978.

For commencement of action in district court, *see* Rule 1-003 NMRA.

For commencement of action by complaint in magistrate court, *see* Rule 2-201 NMRA.

This section refers to jurisdiction, not venue, and Section 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". — 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), cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985), overruled on other grounds by 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.

A. To be qualified under the provisions of the Medical Malpractice Act, 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 issued by an authorized insurer in the amount of at least two hundred thousand dollars ($200,000) per occurrence or for an individual health care provider, excluding hospitals and outpatient health care facilities, 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 or policy as required by this subsection, the deposit or policy 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 or outpatient health care facilities electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on a risk assessment of each hospital or outpatient health care facility, each hospital's or outpatient health care facility'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. A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against it.

History: 1978 Comp., § 41-5-5, enacted by Laws 1992, ch. 33, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1991, ch. 264, § 2 repealed former 41-5-5 NMSA 1978, as amended by Laws 1991, ch. 264, § 1, and enacted a new 41-5-5 NMSA 1978, effective July 1, 1992.

Laws 1992, ch. 33, § 2 repealed former 41-5-5 NMSA 1978, as amended by Laws 1991, ch. 264, § 1, and as enacted by Laws 1991, ch. 264, § 2, and enacted a new section, effective April 1, 1992.

Applicability. — Laws 1992, ch. 33, § 17, effective March 6, 1992, makes the provisions of the act applicable only to occurrences arising on and after April 1, 1994.

Temporary provisions. — Laws 1991, ch. 264, § 12, effective July 1, 1991, provided 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.

Statute of limitations. — The Medical Malpractice Act's statute of limitations, Section 41-5-13 NMSA 1978, does not apply to health care providers that have not qualified under Subsection A of this section. Roberts v. Sw. Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992).

Grant of summary judgment in favor of the hospital was reversed even though summary judgment was granted in favor of the doctor; the hospital could not take advantage of the statute of limitation in Section 41-5-13 NMSA 1978, as it was not a qualified healthcare provider under Subsection C of this section. Juarez v. Nelson, 2003-NMCA-

011, 133 N.M. 168, 61 P.3d 877, overruled on other grounds by Tomlinson v. George, 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105.

Accrual of cause of action where provider has not qualified. — In medical malpractice actions where the health care provider is not qualified under the Medical Malpractice Act, the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause. Roberts v. Sw. Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992).

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 Reg'l Hosp., 110 N.M. 378, 796 P.2d 599 (1990).

Federal hospital. — Although a federal hospital did not file proof of its financial responsibility as required by Paragraph A(1) and never paid into the patient's compensation fund as required by Paragraph A(2), it is a "qualified health care provider" under this section, as the financial responsibility of the United States is assured and its failure to contribute to a compensation fund is immaterial because (unlike qualified providers) it must pay its liabilities without resort to the compensation fund. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

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).

41-5-6. Limitation of recovery.

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 six hundred thousand dollars ($600,000) per occurrence. In jury cases, the jury shall not be given any instructions dealing with this limitation.

B. The value of accrued medical care and related benefits shall not be subject to the six hundred thousand dollar ($600,000) 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.

E. For the purposes of Subsections A and B of this section, the six hundred thousand dollar ($600,000) aggregate amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall apply only to malpractice occurring on or after April 1, 1995.

History: 1978 Comp., § 41-5-6, enacted by Laws 1992, ch. 33, § 4.

ANNOTATIONS

Repeals and reenactments. — Laws 1992, ch. 33, § 4 repealed former 41-5-6 NMSA 1978, as enacted by Laws 1992, ch. 33, § 3, and enacted a new section, effective April 1, 1995.

Laws 1991, ch. 264, § 4 repealed former 41-5-6 NMSA 1978, as amended by Laws 1991, ch. 264, § 3, and enacted a new 41-5-6 NMSA 1978, effective July 1, 1992.

Laws 1992, ch. 33, § 3 repealed former 41-5-6 NMSA 1978, as amended by Laws 1991, ch. 264, § 3, and as enacted by Laws 1991, ch. 264, § 4, and enacted a former section, effective April 1, 1992.

Applicability. — Laws 1992, ch. 33, § 17, effective March 6, 1992, made the provisions of the act applicable only to occurrences arising on and after April 1, 1994.

Cap on medical malpractice damages is constitutional. — The cap on medical malpractice damages does not violate the right to trial by jury under Article II, Section 12 of the New Mexico Constitution, the separation of powers clause in Article III, Section 1 of the New Mexico Constitution, the equal protection clause of the United States Constitution, or the due process clause of the United States Constitution. Salopek v. Friedman, 2013-NMCA-087.

Limits of recovery. — This section is not arbitrary and capricous and is rationally related to legislative goal of ensuring a source of recovery for victims of medical malpractice and curbing runaway medical costs, relying in part on Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305; Fed. Express Corp. v. United States, 228 F. Supp 2d 1267 (D.N.M. 2002).

Federal hospital. — Although not a "qualified health care provider" under 41-5-5 NMSA 1978, the liability of a federal hospital, operating in New Mexico, is subject to the $600,000 cap in Subsection A, but not the $200,000 cap in Subsection D, which assumes that the amount of damages in excess of $ 200,000 would be paid by the compensation fund into which the federal government did not contribute. Haceesa v. United States, 309 F.3d 722 (10th Cir. 2002).

Applicability. — Where it was held that tribal law controlled in a malpractice action against the United States, the New Mexico medical malpractice cap did not apply. Cheromiah v. United States, 55 F. Supp. 2d 1295 (D.N.M. 1999).

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 as defense in action against physician or surgeon for malpractice, 50 A.L.R.2d 1043.

Liability of chiropodist, 80 A.L.R.2d 1278.

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, 26 A.L.R.5th 245.

Recovery, 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.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper diagnosis and treatment of mother relating to and during pregnancy, 7 A.L.R.5th 1.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 A.L.R.5th 245.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 65 A.L.R.5th 357.

70 C.J.S. Physicians and Surgeons §§ 124, 127.

41-5-6.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 33, § 18 repealed 41-5-6.1 NMSA 1978, as enacted by Laws 1991, ch. 264, § 5, relating to amount recoverable, effective March 6, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 41-5-6 NMSA 1978.

41-5-7. Future medical expenses.

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 future medical care and related benefits, and evidence relating to the value of future medical care 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 six hundred thousand dollar ($600,000) limitation imposed in Section 41-5-6 NMSA 1978.

D. Payment 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 or 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 precludes the award of punitive damages to a patient. Nothing in this subsection authorizes 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 1992, ch. 33, § 5; 1992, ch. 33, § 6.

ANNOTATIONS

Repeals and reenactments. — Laws 1991, ch. 264, § 7 repealed former 41-5-7 NMSA 1978, as amended by Laws 1991, ch. 264, § 6, and enacted a new 41-5-7 NMSA 1978, effective July 1, 1992.

Laws 1992, ch. 33, § 5 repealed former 41-5-7 NMSA 1978, as amended by Laws 1991, ch. 264, § 6, and as enacted by Laws 1991, ch. 264, § 7, and enacted a new section, effective April 1, 1992.

The 1992 amendment, effective April 1, 1995, in Subsection C, substituted "six hundred thousand dollars ($600,000)" for "five hundred thousand dollar ($500,000)".

Applicability. — Laws 1992, ch. 33, § 17, effective March 6, 1992, made the provisions of the act applicable only to occurrences arising on and after April 1, 1994.

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.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 A.L.R.4th 13.

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, 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 NMRA].

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.

ANNOTATIONS

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.

ANNOTATIONS

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 is not assignable.

History: 1953 Comp., § 58-33-12, enacted by Laws 1976, ch. 2, § 12.

ANNOTATIONS

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 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and it is not part of the law.

Compiler's notes. — The "effective date of the Medical Malpractice Act," referred to in the first sentence, is February 27, 1976.

Cross references. — For tolling of limitations period while matter under consideration of panel, *see* 41-5-22 NMSA 1978.

Amended application adding a new party does not relate back to the original filing date. — The filling of an application with the medical review commission as to one provider does not toll the limitations period as to another provider who was not named in the original application and for whom the statutory period in which to file a cause of action has passed. Meza v. Topalovski, 2012-NMCA-002, 268 P.3d 1284.

Where plaintiff wrongly named a health care provider in an application before the medical review commission; plaintiff amended the application to name the correct health care provider; and the amended application to add the correct health care provider was filed more than three years after the date of the alleged malpractice by the correct health care provider, the original application did not toll the statute of limitations for the untimely application filed against the originally unnamed health care provider. Meza v. Topalovski, 2012-NMCA-002, 268 P.3d 1284.

Section 41-5-13 NMSA 1978 is an occurrence-based statute of repose rather than a discovery-based statute of limitations. Meza v. Topalovski, 2012-NMCA-002, 268 P.3d 1284.

Section 41-5-13 NMSA 1978 is a statute of repose and terminates the right to any action after the specified three-year limitation period has elapsed. Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 2011-NMCA-112, 267 P.3d 70.

Occurrence rule governs claims under the Medical Malpractice Act. — Where a patient sued a medical center and a doctor who practiced at the medical center for medical malpractice; the malpractice occurred on December 9 and 10, 2004; the three-year limitation period expired on December 10, 2007; the patient filed the complaint on December 4, 2007 and served the medical center on December 11, 2007, one day after the expiration of the three-year limitation period; and the medical center filed a third party complaint against the doctor for equitable indemnification on December 22, 2008, the medical center's claim for equitable indemnification was barred. Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 2011-NMCA-112, 267 P.3d 70.

Dismissal without prejudice and reinstatement of complaint. — In a medical malpractice action, where defendant performed eye surgery on plaintiff on April 28, 2003; plaintiff filed a complaint for personal injuries and medical malpractice on April 27, 2006; at the time plaintiff filed the complaint, defendant's insurance carrier had improperly cancelled defendant's insurance; after defendant's insurance company reinstated defendant's insurance, plaintiff and defendant stipulated to an order of dismissal of plaintiff's complaint; on March 20, 2008, the district court interpreted the order of dismissal as a dismissal of plaintiff's complaint, without prejudice, solely for the purpose of permitting plaintiff to obtain a review of the case by the medical malpractice commission; and reinstated plaintiff's complaint, the district court's interpretation of the order of dismissal was not an abuse of discretion and plaintiff's complaint was not barred by the three-year limitation period provided in Section 41-5-13 NMSA 1978, and the three-year limitation period provided in Section 37-1-8 NMSA 1978 stopped running at the time plaintiff filed the complaint on April 27, 2006. Pacheco v. Cohen, 2009-NMCA-070, 146 N.M. 643, 213 P.3d 793, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Constitutionality. — This section violates neither the equal protection nor the due process constitutional guarantees. Cummings v. X-Ray Assocs., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321.

Due process claim. — The constitutionality of the statute of repose, which serves to cut off a malpractice claimant's right to seek recovery, will not be evaluated under the strict-scrutiny test; the claimant's due process claim requires only a rational-basis analysis. Cummings v. X-Ray Assocs., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321.

Section violates due process. — This section violates due process because it allows medical malpractice claimants an unreasonably short period of time within which to

bring an accrued cause of action. Garcia ex rel. Garcia v. La Farge, 119 N.M. 532, 893 P.2d 428 (1995).

The provision in this section that requires a minor who experienced malpractice before the age of six to bring a claim under the Medical Malpractice Act by his or her ninth birthday violates due process. Jaramillo v. Heaton, 2004-NMCA-123, 136 N.M. 498, 100 P.3d 204, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 100 P.3d 807.

Section does not violate equal protection. — Where a patient sued a medical center and a doctor who practiced at the medical center for medical malpractice; the three-year limitation period expired on December 10, 2007; the patient filed the complaint on December 4, 2007 and served the medical center on December 11, 2007, one day after the expiration of the three-year limitation period; and the medical center's third party complaint against the doctor for equitable indemnification, which was filed on December 22, 2008, was barred, the preclusive effect of Section 41-5-13 NMSA 1978 did not violate the medical center's due process rights. Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 2011-NMCA-112, 267 P.3d 70.

This section, as a statute of repose, does not implicate equal protection considerations because it operates uniformly upon all medical malpractice plaintiffs. Garcia ex rel. Garcia v. La Farge, 119 N.M. 532, 893 P.2d 428 (1995).

Rational basis for classification. — The classification of health care providers created by this section is supported by a rational basis. Cummings v. X-Ray Assocs., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321.

Assuring adequate malpractice insurance. — By offering to qualified health care providers certain benefits that are not available to those who are not qualified, the legislature furthers its stated goal of assuring adequate malpractice insurance coverage in the New Mexico medical profession; this section was reasonably drafted to further a legitimate government interest. Cummings v. X-Ray Assocs., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321.

Section does not violate prohibition against special legislation. — This section does not violate the prohibition against special legislation because it was within the competence of the legislature to determine that the high costs of malpractice insurance distinguish the class of health care providers from the class of tortfeasors generally. Garcia ex rel. Garcia v. La Farge, 119 N.M. 532, 893 P.2d 428 (1995).

Malpractice action does not implicate fundamental rights. — A malpractice claim is an attempt by a patient to obtain something he or she does not yet possess: monetary compensation for an injury caused by the negligence of a health care practitioner. As such, a medical malpractice claim generally does not, for the patient, implicate any fundamental rights such as First Amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in the deprivation of life, liberty or property. Cummings v. X-Ray Assocs., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321.

Section not applicable to non-qualified health care providers. — The Medical Malpractice Act's statute of limitations does not apply to health care providers that have not qualified under Subsection A of Section 41-5-5 NMSA 1978. Roberts v. Sw Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992).

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. quashed, 98 N.M. 336, 648 P.2d 794 (1982), and cert. denied, 459 U.S. 1016, 103 S. Ct. 377, 74 L. Ed. 2d 510 (1982), overruled on other grounds, Roberts v. Sw. Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992); Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985), 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.), cert. denied, 105 N.M. 421, 733 P.2d 869 (1987).

Construction with Tort Claims Act. — District court correctly applied the law when it estopped the doctor from asserting the statute of limitations defense under Section 41-4-15 NMSA 1978 because by choosing to place the doctor at a private institution, and not identify him as a public employee working in a public capacity, the state engaged in conduct that conveyed the indisputable impression to persons wishing to assert a claim that the doctor was an employee of the private institution and therefore the limitation for private entities applied. Hagen v. Faherty, 2003-NMCA-060, 133 N.M. 605, 66 P.3d 974, cert. denied, 133 N.M. 593, 66 P.3d 962 (2003).

Occurrence rule governs claims under the Medical Malpractice Act. — The accrual date in which a patient must file a claim for medical malpractice is the date of the act or occurrence of the medical malpractice even if the patient is oblivious of any harm. Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 2011-NMCA-112, 267 P.3d 70, cert. granted, 2011-NMCERT-010.

When cause of action accrues. — Occurrence rule governs claims under the Medical Malpractice Act. — The accrual date in which a patient must file a claim for medical malpractice is the date of the act or occurrence of the medical malpractice even if the patient is oblivious of any harm. Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 2011-NMCA-112, 267 P.3d 70.

In medical malpractice actions where the health care provider is not qualified under the Medical Malpractice Act, the cause of action accrues when the plaintiff knows or with

reasonable diligence should have known of the injury and its cause. Roberts v. Sw Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992).

The triggering event of this section is determined by the occurrence rule. This event is unrelated to the accrual date of the cause of action, and does not entail whether the injury has even been discovered. In this sense, if, four years after the occurrence of medical malpractice, a patient learns they have been injured, their claim is forever barred because this section functions as a statute of repose. Cummings v. X-Ray Assocs., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321.

When cause of action for negligently prescribed medication accrues. — In a wrongful prescription case, the term "act of malpractice" refers to the discrete act taken by a health care provider of prescribing medication to a patient, not to any subsequent act of the patient and the three-year statute of limitations in Section 41-5-13 NMSA 1978 begins to run on the date medication is prescribed. Chavez v. Delgado, 2014-NMCA-014, cert. denied, 2013-NMCERT-012.

Where, on November 11, 2008, the patient requested a prescription for Simvastatin and the physician wrote the prescription; the next day, the physician called the prescription to the patient's pharmacy; the patient filled the prescription on December 3, 2008; on December 8, 2008, the patient was hospitalized with drug-induced rhabdomyolysis, purportedly caused by the interaction of Simvastatin and another medication the patient was taking; the patient died on February 21, 2010; and plaintiffs filed suit on December 1, 2011, the three-year statue of limitations began to run on November 11, 2008, the day the physician prescribed Simvastatin to the patient, and plaintiffs' claims against the physician were barred. Chavez v. Delgado, 2014-NMCA-014, cert. denied, 2013-NMCERT-012.

Fraudulent concealment. — There is no fraudulent concealment exception to the occurrance rule in this section; thus the statute of limitations did not toll for a plaintiff who filed an action more than three years after the act of malpractice, where she learned of the negligent act within the three-year period and in adequate time to file a malpractice action within three years, exercising ordinary diligence. Tomlinson v. George, 2003-NMCA-004, 133 N.M. 69, 61 P.3d 195, aff'd, 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105.

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 the physician failed to disclose, and (2) that the patient did not know, or could not have known through the exercise of reasonable diligence, of the patient's cause of action within the statutory period. Kern ex rel. v. St. Joseph Hosp., 102 N.M. 452, 697 P.2d 135 (1985).

Fraudulent concealment requires a plaintiff to demonstrate that the defendant physician knew of the alleged negligent act and concealed the negligent act from the patient or

had material information pertinent to discovery of the negligent act which the defendant failed to disclose. Tomlinson v. George, 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105.

Fraudulent concealment requires that the plaintiff demonstrate that he or she did not know, and could not have discovered through the exercise of reasonable diligence, his or her cause of action during the statutory period. Tomlinson v. George, 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105.

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. 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).

Fraudulent concealment inapplicable. — If a plaintiff discovers the injury within the time limit, fraudulent concealment does not apply because the defendant's actions have not prevented the plaintiff from filing the claim within the time period and the equitable remedy is not necessary. Tomlinson v. George, 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105.

Statute of repose is not tolled by fraudulent concealment when the plaintiff knew of his or her cause of action within the statutory period. Tomlinson v. George, 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105.

Metastasis of cancer not relevant trigger. — The plain language of this section establishes the date of the act of malpractice as the only relevant factor, without any reference to any subsequent harm; in New Mexico, the patient's awareness of metastasis of cancer is not the trigger for purposes of the statute of limitations. Cummings v. X-Ray Assocs., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321.

Claim barred. — An action by an employee against the physician employed by the employer to perform the medical examination was time barred since the examination occurred more than three years preceding the filing of the cause of action; however, an action against the employer was not barred since the employee was subsequently

examined by a physician's assistant at the direction of the employer within the time period. Baer v. Regents of Univ. of Cal., 118 N.M. 685, 884 P.2d 841 (Ct. App. 1994).

Business entities qualify as health care providers. — Professional corporations and other types of professional medical organizations under which a medical professional operates are eligible to qualify as "health care providers" under the Medical Malpractice Act, Section 41-5-1 NMSA 1978 et seq., and are entitled to the benefits of the act when they are sued for medical malpractice as long as they employ or consist of members who are licensed or certified by the state to provide the medical services listed in Subsection A of Section 41-5-3 NMSA 1978. Baker v. Hedstrom, 2013-NMSC-043, aff'g on other grounds, 2012-NMCA-073.

Business entities, such as professional corporations and limited liability companies, that are involved in the medical treatment of patients and that are neither hospitals nor outpatient health care facilities, qualify as health care providers. Baker v. Hedstrom, 2012-NMCA-073, 284 P.3d 400, cert. granted, 2012-NMCERT-007.

Evidence insufficient to toll statute of limitations. — See Ealy v. Sheppeck, 100 N.M. 250, 669 P.2d 259 (Ct. App. 1983), overruled in part by Juarez v. Nelson, 2003-NMCA-011, 133 N.M. 168, 61 P.3d 877.

The statute of limitations was not tolled by fraudulent concealment on the part of the doctor as two different people told the individual that the doctor did not do all that he could have for the individual's husband. Juarez v. Nelson, 2003-NMCA-011, 133 N.M. 168, 61 P.3d 877, overruled on other grounds by Tomlinson v. George, 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105.

Dismissal without prejudice. — Where the court had entered a stipulated order staying the proceedings until 30 days after the medical review commission rendered a decision on plaintiff's claim, and defendant filed a motion to lift the stay after plaintiff did not file an application with the commission, because the statute of limitations had run, the dismissal without prejudice effectively dismissed the case on a permanent basis. Belser v. O'Cleireachain, 2005-NMCA-073, 137 N.M. 623, 114 P.3d 303, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

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).

For note and comment, "Statutes of Limitations Applied to Minors and the New Mexico Court of Appeals' Balance of Competing State Interests to Favor Children," see 35 N.M. L. Rev. 535 (2005).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R.2d 320, 70 A.L.R.4th 535.

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.

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice, 12 A.L.R.5th 1.

Medical malpractice statutes of limitation minority provisions, 71 A.L.R.5th 307.

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.

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.

ANNOTATIONS

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 by Grantland v. Lea Reg'l Hosp., 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.

ANNOTATIONS

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).

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).

Decision by medical review commission was not jurisdictional prerequisite to the filing of a complaint in court against a qualified health care provider for medical malpractice. Rupp v. Hurley, 2002-NMCA-023, 131 N.M. 646, 41 P.3d 914, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

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 Reg. Hosp., 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 plaintiff's 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.), cert. denied, 101 N.M. 362, 683 P.2d 44 (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.), cert. denied, 101 N.M. 362, 683 P.2d 44 (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 claim with the commission before filing a complaint in district court. Otero v. Zouhar, 102 N.M. 482, 697 P.2d 482 (1985), overruled on other grounds, Grantland v. Lea Reg. Hosp., 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 Reg. Hosp., 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.

ANNOTATIONS

Limitation on authority of director. — The director does not have any discretion to redact an applicant's legal claims or factual averments in a medical malpractice action from an application to the commission. Kucel v. N. M. Med. Review Comm'n, 2000-NMCA-026, 128 N.M. 691, 997 P.2d 823, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

Amended application adding a new party does not relate back to the original filing date. — The filing of an application with the medical review commission as to one provider does not toll the limitations period as to another provider who was not named in the original application and for whom the statutory period in which to file a cause of action has passed. Meza v. Topalovski, 2012-NMCA-002, 268 P.3d 1284.

Where plaintiff wrongly named a health care provider in an application before the medical review commission; plaintiff amended the application to name the correct health care provider; and the amended application to add the correct health care provider was filed more than three years after the date of the alleged malpractice by the correct health care provider, the original application did not toll the statute of limitations for the untimely application filed against the originally unnamed health care provider. Meza v. Topalovski, 2012-NMCA-002, 268 P.3d 1284.

Mailing decision to claimant's attorney suffices. — Mailing of the final decision of the medical review commission to a claimant in care of claimant's 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.), cert. denied, 100 N.M. 689, 675 P.2d 421 (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 by Grantland v. Lea Reg. Hosp., 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.

ANNOTATIONS

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.

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. 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 fund and any income from the fund shall only be expended for the purposes of and to the extent provided in the Medical Malpractice Act. 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 1992, ch. 33, § 9; 1997, ch. 109, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1990, ch. 111, § 2 repealed former 41-5-25 NMSA 1978, as amended by Laws 1990, ch. 111, § 1, relating to patient's compensation fund, and enacted a new 41-5-25 NMSA 1978, effective July 1, 1991.

Laws 1990, ch. 111, § 3 repealed Laws 1989, ch. 324, § 43 which enacted 41-5-25 NMSA 1978 to become effective on July 1, 1990.

Laws 1991, ch. 264, § 9 repealed former 41-5-25 NMSA 1978, as amended by Laws 1991, ch. 264, § 8, and enacted a new 41-5-25 NMSA 1978, effective July 1, 1992.

Laws 1991, ch. 264, § 10 repealed former 41-5-25 NMSA 1978, as enacted by Laws 1991, ch. 264, § 9, and enacted a new 41-5-25 NMSA 1978, effective July 1, 1993.

Laws 1992, ch. 33, § 7 repealed former 41-5-25 NMSA 1978, as amended by Laws 1991, ch. 264, § 8, and as enacted by Laws 1991, ch. 264, § 10, and enacted a new section, effective April 1, 1992.

Laws 1992, ch. 33, § 8 repealed former 41-5-25 NMSA 1978, as enacted by Laws 1992, ch. 33, § 7, and enacted a new section, effective April 1, 1993.

Laws 1992, ch. 33, § 9 repealed former 41-5-25 NMSA 1978, as enacted by Laws 1992, ch. 33, § 8, and enacted a new section, effective April 1, 1994.

The 1997 amendment, effective June 20, 1997, added the third sentence in Subsection A.

Applicability. — Laws 1992, ch. 33, § 17, effective March 6, 1992, made the provisions of the act applicable only to occurrences arising on and after April 1, 1994.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

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.

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.

ANNOTATIONS

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, 14 A.L.R.5th 695.

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.

41-5-26.1. Birthing workforce retention fund created.

A. The "birthing workforce retention fund" is created in the state treasury. The purpose of the fund is to provide malpractice insurance premium assistance for certified nurse-midwives or physicians whose insurance premium costs jeopardize their ability to continue their obstetrics practices in New Mexico. The fund shall consist of appropriations, gifts, grants and donations to the fund. The fund shall be administered

by the department of health, and money in the fund is appropriated to the department of health for the purpose of making awards pursuant to the provisions of this section.

B. The department of health shall develop procedures and rules for the application for and award of money from the birthing workforce retention fund, including criteria upon which to evaluate the need of the applicant and the merits of the application. The rules shall require that the applicant be a certified nurse-midwife licensed in New Mexico or a physician licensed in New Mexico and that the applicant demonstrate need by showing that medicaid patients or indigent patients constitute at least one-half of the obstetric practice of the applicant and that malpractice insurance premiums have increased every year for two years. The certified nurse-midwife or physician shall have a malpractice liability insurance policy in force. Subject to availability of funds, an award shall not be less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) and shall be disbursed based on the percentage of medicaid patients or indigent patients seen in the practice. Priority for the awarding of money from the birthing workforce retention fund shall be in the following order:

(1) to certified nurse-midwives; and

(2) to family practice physicians and obstetricians.

C. The department of health shall annually report to the legislative finance committee on the status of the birthing workforce retention fund.

D. Disbursements from the birthing workforce retention fund shall be made by warrant of the department of finance and administration pursuant to vouchers signed by the secretary of health or the secretary's authorized representative. Any unexpended or unencumbered balance remaining in the fund at the end of a fiscal year shall not revert but shall remain to the credit of the fund.

History: Laws 2008, ch. 73, § 1.

ANNOTATIONS

Effective dates. — Laws 2008, ch. 73 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 14, 2008, 90 days after the adjournment of the legislature.

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 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 three hundred fifty thousand dollars ($350,000) 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; 1997, ch. 108, § 1.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, substituted "three hundred fifty thousand dollars ($350,000)" for "two hundred fifty thousand dollars ($250,000)" in the last sentence.

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.

41-5-29. Reports.

On January 31 of each year, the superintendent shall, upon request, provide a written report to all interested persons of the following information:

A. the beginning and ending calendar year balances in the patient's compensation fund;

B. the total amount of contributions to the patient's compensation fund; and

C. any other information regarding the patient's compensation fund that the superintendent considers to be important.

History: 1978 Comp., § 41-5-29, enacted by Laws 1992, ch. 33, § 10.

ANNOTATIONS

Applicability. — Laws 1992, ch. 33, § 17, effective March 6, 1992, made the provisions of the act applicable only to occurrences arising on and after April 1, 1994.

Severability . — Laws 1992, ch. 33, § 16, effective March 6, 1992, provided that if any part or application of the act is held invalid, the remainder or its application to other situations or persons shall not be affected.

ARTICLE 6
Professional Liability Fund Act

(Repealed by Laws 1976, ch. 5, § 15.)

41-6-1 to 41-6-14. Repealed.

ANNOTATIONS

Repeals. — Laws 1976, ch. 5, § 15 repealed 41-6-1 to 41-6-14 NMSA 1978, the Professional Liability Fund Act, as enacted by Laws 1976, ch. 5, §§ 1 to 14, effective July 1, 1981.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Sections 41-7-1 to 41-7-6 NMSA 1978, formerly 30-34-1 to 30-34-6 NMSA 1978, were recompiled to be included with other tort, rather than criminal, provisions.

Cross references. — For immunity from liability for employers for statements in references of former employees, *see* 50-12-1 NMSA 1978.

Actual injury to reputation is required. — Actual injury to reputation must be shown as part of a plaintiff's prima facie case in order to establish liability for defamation. Evidence of humiliation and mental anguish, without evidence of actual injury to reputation, is insufficient to establish a cause of action for defamation. Smith v. Durden, 2012-NMSC-010, 276 P.3d 943, rev'g 2010-NMCA-097, 148 N.M. 679, 241 P.3d 1119.

Where defendants published an anonymous letter that accused plaintiff, who was a priest, of several acts of pedophilia and plaintiff was unable to demonstrate actual injury to plaintiff's reputation because plaintiff was not suspended from plaintiff's position nor did plaintiff suffer adverse employment consequences or other related losses from the publication of the letter, plaintiff's claim of defamation was precluded as a matter of law. Smith v. Durden, 2012-NMSC-010, 276 P.3d 943, rev'g 2010-NMCA-097, 148 N.M. 679, 241 P.3d 1119.

Absolute-privilege defense general rule. — The absolute-privilege defense is available when an alleged defamatory statement is made to achieve the objects of litigation and is reasonably related to the subject matter of the judicial proceeding. As part of the absolute-privilege analysis, the court will consider the extent to which the recipient of the statement had an interest in the judicial proceeding. When the statement precedes litigation of the judicial proceeding, the privilege is available only if the proceeding in question is contemplated in good faith and under serious consideration at the time the statement is made. Helena Chem. Co. v. Uribe, 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Absolute-privilege defense does not apply to statements to news reporters. — Statements made to news media recipients who are wholly unrelated to and have no interest in a judicial proceeding are not protected by absolute privilege. Helena Chem. Co. v. Uribe, 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Where community residents held a public meeting to discuss litigation against plaintiff for a toxic tort and a press conference was held after the toxic tort action was filed; news reporters were invited and attended both the public meeting and the news conference; and an attorney who represented the plaintiffs in the toxic tort action and a plaintiff to the toxic tort action made defamatory statements about plaintiff at the public meeting and at the news conference, the defamatory statements were not entitled to

absolute-privilege protection, because the statements were made to news reporters who had been invited to hear the statements but who had no relation to or interest in the judicial proceeding. Helena Chem. Co. v. Uribe, 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Elements of a defamation claim. — The general elements of defamation in New Mexico are a defamatory communication, published by the defendant, to a third person, of an asserted fact, of and concerning the plaintiff, and proximately causing actual injury to the plaintiff. An injury specific to the plaintiff's reputation is not a required element. Smith v. Durden, 2010-NMCA-097, 148 N.M. 679, 241 P.3d 1119, cert. granted, 2010-NMCERT-010, 149 N.M. 65, 243 P.3d 1147.

Humiliation and mental anguish. — Evidence of humiliation and mental anguish are actual injuries that are compensable if proved by a plaintiff even when that plaintiff does not prove harm to plaintiff's reputation. Smith v. Durden, 2010-NMCA-097, 148 N.M. 679, 241 P.3d 1119, cert. granted, 2010-NMCERT-010, 149 N.M. 65, 243 P.3d 1147.

Republication of internet publications. — Where, in 2003, the defendant posted comments on the defendant's website which stated that plaintiff knowingly solicited the defendant to commit a federal crime by offering the defendant the job of breaking into a news website that had written something unflattering about the plaintiff and in 2006, the defendant posted comments on the defendant's website which recapped the 2003 incident; added that even after the plaintiff was informed that the plaintiff was requesting a criminal act, the plaintiff nevertheless offered to pay for its performance; stated that the defendant's only recourse against the plaintiff for the unlawful request was to make fun of the plaintiff on the defendant's website; contained the content of an email exchange between the defendant and a staff member of the student newspaper at the University of Florida in which the staff member stated details of a dispute between the plaintiff and the newspaper related to whether a play by the plaintiff featured dancing penises and condoms; and stated that the plaintiff had been on "America's Funniest Home Videos" and that the plaintiff is proud to be know as the Wedgie Woman, the 2006 website posting could be viewed as a republication of the 2003 website posting which gave rise to a new cause of action for defamation that restarted the statute of limitations because the 2006 website posting contained substantive additions to the 2003 website posting and substantially altered the content of the 2003 website posting. Woodhull v. Meinel, 2009-NMCA-015, 145 N.M. 533, 202 P.3d 126, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

Communications Decency Act. — Where the defendant's website was housed on a third-party's server which made the defendant's website accessible on the Internet to multiple users, the defendant's was a user of an interactive computer service; the defendant made defamatory claims against the plaintiff in the defendant's website and used specific defamatory words in reference to the plaintiff, the defendant was the publisher or speaker of information; and instead of merely editing an email from a third party that contained defamatory information, the defendant requested potentially defamatory material for the defendant's own stated purpose of making fun of the plaintiff

and incorporated the email into an overall larger posting containing the defendant's own thoughts and contributions, the defendant was an original content provider and the defendant was not immune from liability under the Communications Decency Act of 1966, 47 U.S.C. §230 (1998). Woodhull v. Meinel, 2009-NMCA-015, 145 N.M. 533, 202 P.3d 126, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

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 § 264 et seq.

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.

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 - neutral or laudatory depiction of subject, 59 A.L.R.4th 502.

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.

Who is "public official" for purposes of defamation action, 44 A.L.R.5th 193.

Libel and slander: charging one with breach or nonperformance of contract, 45 A.L.R.5th 739.

Defamation: publication of letter to editor in newspaper as actionable, 54 A.L.R.5th 443.

Liability for statement or publication charging plaintiff with killing of, cruelty to, or inhumane treatment of animals, 69 A.L.R.5th 645.

Liability of internet service provider for internet or e-mail defamation, 84 A.L.R.5th 169.

Libel and slander: Statements regarding labor relations or disputes, 94 A.L.R.5th 149.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

41-7-3. [Uniformity of interpretation.]

This act [41-7-1 through 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

41-7-4. [Short title.]

This act [41-7-1 through 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

41-7-5. [Retroactive effect.]

This act [41-7-1 through 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

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 the owner from liability if the owner has used due care in preventing broadcasts by those 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 § 370.

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 through 41-8-6 NMSA 1978] may be cited as the "Arson Reporting Immunity Act".

History: Laws 1979, ch. 117, § 1.

ANNOTATIONS

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:

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 tthrough 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. 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.

ANNOTATIONS

Compiler's notes. — 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 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 through 41-9-7 NMSA 1978] may be cited as the "Review Organization Immunity Act".

History: Laws 1979, ch. 169, § 1.

ANNOTATIONS

Act's qualified immunity replaces common law absolute immunity. — This act abolishes any common-law absolute immunity available to review organization participants prior to its enactment, establishing instead a qualified immunity. Leyba v. Renger, 114 N.M. 686, 845 P.2d 780 (1992).

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:

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, by an emergency medical services system or provider as defined in the Emergency Medical Services Act [24-10B-1 through 24-10B-11 NMSA 1978], 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; 1993, ch. 161, § 12.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, inserted "by an emergency medical services system or provider as defined in the Emergency Medical Services Act" in the introductory language of Subsection E.

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.

ANNOTATIONS

Act's qualified immunity replaces common law absolute immunity. — This act abolishes any common-law absolute immunity available to review organization participants prior to its enactment, establishing instead a qualified immunity. Leyba v. Renger, 114 N.M. 686, 845 P.2d 780 (1992).

Applicability of section. — In order to assert the protection of this section, an individual must be providing information to the review organization. Thus, since the facts were not disputed that the alleged defamatory statements were made during conversations with individuals who were not members of the review organization, this section did not apply. Leyba v. Renger, 874 F. Supp. 1218 (D.N.M. 1994).

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.

ANNOTATIONS

Act's qualified immunity replaces common law absolute immunity. — This act abolishes any common-law absolute immunity available to review organization participants prior to its enactment, establishing instead a qualified immunity. Leyba v. Renger, 114 N.M. 686, 845 P.2d 780 (1992).

Applicability of section. — Under this section, liability for statements is limited to those motivated by malice and is also limited to a person who is either a member of or an employee of the review organization, or a person who acts in an advisory capacity to or furnishes counsel or services to the review organization. Leyba v. Renger, 874 F. Supp. 1218 (D.N.M. 1994).

Immunity under the federal Health Care Quality Improvement Act. — The Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 -11152 (1986) creates a rebuttable presumption of immunity from damages for participants of professional peer review actions if the review process is reasonable. To rebut the presumption, plaintiff must show that the fact-finding process was not reasonable in its totality. The act does not require that participants at every level of a peer review action perform an independent investigation of the facts. Participants in later stages of the review process are entitled to rely on information gathered in earlier stages. The presumption of reasonableness is not overcome simply by identifying one piece of factually questionable evidence upon which a peer review committee relied or by questioning the integrity or motivations of individuals conducting the peer review. The failure of professional peer review to comply with defendant’s applicable peer review process does not render the fact-finding process unreasonable. Summers v. Ardent Health Servs., LLC, 2011-NMSC-017, 150 N.M. 123, 257 P.3d 943, rev'g 2010-NMCA-026, 147 N.M. 506, 226 P.3d 20.

Investigation by plaintiff’s medical peers was reasonable as a matter of law. — Where defendant suspended plaintiff’s medical privileges based on plaintiff's use of inappropriate sexually explicit language with patients; defendant claimed immunity from suit under 42 U.S.C. §11112 of the Health Care Quality Act of 1986; the suspension was based primarily on a consideration by an ad hoc review committee of notes taken by a case manager during a telephone interview of the complaining patient after the patient had been discharged from the hospital; neither the case manager nor the complaining patient were ever contacted or questioned by defendant regarding the incident; and plaintiff’s privileges were suspended after two investigations by separate ad hoc committees that included a review of the records of plaintiff’s patients, reviews of the ad hoc committee reports by defendant’s medical executive committee, an appeal to a professional review committee at which plaintiff presented evidence and cross-examined witnesses, a final review by defendant’s appellate review committee, and a review by defendant’s board of trustees of the entire record, the fact-finding process conducted by defendant was reasonable as a matter of law. Summers v. Ardent Health Servs., LLC, 2011-NMSC-017, 150 N.M. 243, 257 P.3d 943, rev'g 2010-NMCA-026, 147 N.M. 506, 226 P.3d 20.

41-9-5. Confidentiality of records of review organization.

A. Except as provided in Subsection B of this section, 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 the review organization. No person described in Section 41-9-4 NMSA 1978 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 the review organization, in a judicial appeal from the action of the review organization or when subpoenaed by the New Mexico medical board. 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 the person's knowledge, but a witness cannot be asked about opinions formed by the witness as a result of the review organization's hearings.

B. Information, documents or records that were not generated exclusively for, but were presented during, proceedings of a review organization shall be produced to the New Mexico medical board by the review organization or any other person possessing the information, documents or records in response to an investigative subpoena issued pursuant to Section 61-6-23 NMSA 1978 and shall be held in confidence by the New Mexico medical board pursuant to 61-6-34 NMSA 1978. Nothing in this section shall be construed to permit the New Mexico medical board to issue subpoenas requesting that any person appear to testify regarding what transpired at a meeting of a review organization or opinions formed as a result of review organization proceedings.

History: Laws 1979, ch. 169, § 5; 2011, ch. 121, § 1.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, required health care review organizations to respond to subpoenas issued by the medical board for non-testimonial information, documents and records presented at proceedings of the organization.

Private right of action. — A member of a peer review organization can bring a private cause of action for an alleged violation of the confidentiality provisions of Section 41-9-5 NMSA 1978. Yedidag v. Roswell Clinic Corp., 2013-NMCA-096, cert. granted, 2013-NMCERT-009.

Where plaintiff, who was employed as a surgeon by defendant, attended a peer review meeting together with other physicians and members of defendant’s administration and management staff; during the meeting, plaintiff participated in the review of a colleague’s surgical care and treatment of a patient; plaintiff questioned the colleague about the surgical treatment of the patient and the events that led to the patient’s death; after the meeting ended, two members of defendant’s staff who were present at the meeting reported to members of defendant’s administration and management staff who

where not present at the meeting that plaintiff had engaged in unprofessional and aggressive behavior at the meeting by verbally attacking the colleague whose case was under review and engaging in disruptive behavior; and two days after the meeting, defendant terminated plaintiff for unprofessional behavior and language and disruptive behavior, plaintiff had a private cause of action against defendant for the alleged violation of Section 41-9-5 NMSA 1978. Yedidag v. Roswell Clinic Corp., 2013-NMCA-096, cert. granted, 2013-NMCERT-009.

Trial court is required to make a finding on exclusivity. — Where the defendant showed that credentialing and quality management documents were acquired by a review organization in the exercise of its duties and functions, and the district court, following an in camera review of the documents, found that the documents were "innocuous and routine", the court's finding was insufficient to support the court's determination that the defendant had failed to satisfy its burden of proof that the documents were generated exclusively for peer review and for no other purpose. Chavez v. Lovelace Sandia Health Sys., 2008-NMCA-104, 144 N.M. 578, 189 P.3d 711.

Criticality not shown. — Where credentialing and quality management documents that were acquired by a review organization in the exercise of its duties and functions were not harmful to the defendant on the issue of liability and contained information that the plaintiff could obtain from discoverable hospital and personnel records, the plaintiff failed to satisfy his burden of showing that the documents were critical to his cause of action. Chavez v. Lovelace Sandia Health Sys., 2008-NMCA-104, 144 N.M. 578, 189 P.3d 711.

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. Sw. Cmty. Health Servs. v. Smith, 107 N.M. 196, 755 P.2d 40 (1988).

Under the doctrine of "self-critical analysis" immunity, as contemplated by this section, records relating to a morbidity and mortality review are confidential and not subject to discovery in a medical malpractice action. Weekoty v. United States, 30 F. Supp. 2d 1343 (D.N.M. 1998).

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. Sw. Cmty. 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 NMRA. Sw. Cmty. 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.

Scope and extent of protection from disclosure of medical peer review proceedings relating to claim in medical malpractice action, 69 A.L.R.5th 559.

41-9-6. Penalty for violation.

Any disclosure other than that authorized by the Review Organization Immunity Act 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 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.

ANNOTATIONS

Severability. — Laws 1979, ch. 169, § 8 provided for the severability of the act if any part or application thereof was held invalid.

ARTICLE 10
Food Donors Liability

41-10-1. Short title.

This act [41-10-1 through 41-10-3 and 41-10-4 NMSA 1978] may be cited as the "Food Donors Liability Act".

History: Laws 1981, ch. 100, § 1.

ANNOTATIONS

Compiler's notes. — "This act" refers to Laws 1981, ch. 100, §§ 1 through 3. Laws 1993, ch. 133, § 1 enacted a new section of the Food Donors Liability Act which was compiled as 41-10-4 NMSA 1978.

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:

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, retail and wholesale businesses and community colleges which give or otherwise provide food, directly or indirectly, to the needy or indigent.

History: Laws 1981, ch. 100, § 2; 1989, ch. 168, § 1; 1993, ch. 133, § 2.

ANNOTATIONS

Cross references. — For Section 170 of the Internal Revenue Code, *see* 26 U.S.C. § 170.

The 1993 amendment, effective June 18, 1993, inserted "and community colleges" in Subsection E and made a minor stylistic change.

The 1989 amendment, effective June 16, 1989, substituted "170" for "70" in Subsection C, and added Subsection E.

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.

ANNOTATIONS

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.

41-10-4. Community college culinary programs as distributors of food.

Culinary programs at community colleges may prepare food to be delivered off campus for donation to social service agency clients or food provider programs to the needy, indigent or hungry.

History: Laws 1993, ch. 133, § 1.

41-10-5. Donated game meat products.

A. Wild game meat products may be donated by hunters, taken to a commercial meat processor for preparation and delivery to charitable, religious or other nonprofit organizations and served for human consumption at no charge if transported, stored and processed according to procedures established by the department of environment.

B. For purposes of this section, "wild game" means deer, elk, antelope, caribou, ibex, oryx and Barbary sheep.

History: Laws 1997, ch. 78, § 1.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 78 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 20, 1997, 90 days after adjournment of the legislature.

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 [60-3A-1 NMSA 1978] 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.

ANNOTATIONS

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),

overruling the adoption of intermediate scrutiny analysis, but approving the result, Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305 (1998).

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 Section 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).

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., 112 N.M. 800, 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., 112 N.M. 800, 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., 112 N.M. 800, 819 P.2d 1358 (Ct. App. 1991).

Subsection E applies to all social hosts. — The Liquor Liability Act does not limit the liability of a social host to private settings, but permits a cause of action against a social host who recklessly provides alcohol to a guest when the alcohol is consumed in a licensed establishment. Delfino v. Griffo, 2011-NMSC-015, 150 N.M. 97, 257 P.3d 917.

Liquor licensee and social host have concurrent liability. — The Liquor Liability Act permits a cause of action against a liquor licensee and a social host for the same events. Delfino v. Griffo, 2011-NMSC-015, 150 N.M. 97, 257 P.3d 917.

Factors establishing a social host/guest relationship. — Social hosting need not occur in a home. One may host in a bar or restaurant where the actual delivery of the alcoholic beverages to guests is performed by a licensed server. Factors that determine whether one is a social host in a public establishment are whether the alleged social host exercised some control over the guests and the provision of the alcohol consumed by the guests, whether the alleged social host convened the gathering for a specific purpose or benefit to the social host, and whether the alleged social host intended to act as a host of the event by arranging for the service of and full payment of all food and

beverages served to the guests. Delfino v. Griffo, 2011-NMSC-015, 150 N.M. 97, 257 P.3d 917.

Defendants were acting as social hosts. — Where the representatives of individual pharmaceutical companies invited an employee of a doctor's office to a business luncheon that was organized for business purposes under the corporate policies of the pharmaceutical companies that authorized the representatives to entertain physicians and their staff through the purchase of food and alcohol in order to develop business goodwill and to increase sales; the representatives arranged the business luncheon, paid for all of the many alcohol beverages the employee consumed over an eight-hour period at multiple licensed establishments, accompanied the employee at and between the multiple establishments, and escorted the employee to the employee's car at the end of the evening; and the employee struck plaintiff's car shortly after leaving the representatives, the pharmaceutical companies were acting as social hosts. Delfino v. Griffo, 2011-NMSC-015, 150 N.M. 97, 257 P.3d 917.

Selling or giving liquor to minors. — An allegation of a breach of Section 60-7B-1.1 NMSA 1978 (now Section 60-7B-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 plaintiff's recovery completely, but serves only to reduce the amount of 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 serving liquor to the customer who drove the vehicle. Murphy v. Tomada Enters., Inc., 112 N.M. 800, 819 P.2d 1358 (Ct. App. 1991).

Common law dram shop claims not preempted. — Section 41-11-1 NMSA 1978 does not preempt all common law claims against non-licensee tavernkeepers. Mendoza v. Tamaya Enters., Inc., 2011-NMSC-030, 150 N.M. 258, 258 P.3d 1050, aff'g 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903.

Types of common law dram shop claims. — The common law recognizes a third-party claim and a patron claim against non-licensee tavernkeepers for over service of alcohol. Mendoza v. Tamaya Enters., Inc., 2011-NMSC-030, 150 N.M. 258, 258 P.3d 1050, aff'g 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903.

Proof required to recover under common law dram shop claims. — A patron common law claim requires proof of gross negligence and reckless disregard for the safety of the patron. A third-party common law claim requires proof of simple negligence. Mendoza v. Tamaya Enters., Inc., 2011-NMSC-030, 150 N.M. 285, 258 P.3d 1050, aff'g 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903.

Suit by passenger of a motor vehicle sues as a third party. — A passenger sues as a third party, whether under Section 41-11-1 NMSA 1978 or common law, and must prove that the tavern was negligent and that the passenger's damages were proximately caused by the tavern. Mendoza v. Tamaya Enters., Inc., 2011-NMSC-030, 150 N.M. 285, 258 P.3d 1050, aff'g 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903.

Suit by driver of a motor vehicle sues as a patron. — An intoxicated driver sues as a patron, whether under Section 41-11-1 NMSA 1978 or common law, and must prove that the tavern acted with gross negligence and in reckless disregard for the driver's safety and that the driver's damages were proximately caused by the tavern. Mendoza v. Tamaya Enters., Inc., 2011-NMSC-030, 150 N.M. 285, 258 P.3d 1050, aff'g 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903.

Dram shop liability. — Where decedents attended a wedding reception at a Pueblo casino where decedents were served alcoholic beverages and became intoxicated; casino employees continued to serve alcohol to decedents despite their apparent intoxication; decedents left the casino and were killed when their vehicle left the road and rolled over; the casino was licensed to sell alcohol by the Pueblo; and the Pueblo liquor ordinance imposed a duty not to serve alcohol to an intoxicated person, plaintiffs could pursue third-party and patron common law dram shop causes of action against defendant. Mendoza v. Tamaya Enters., Inc., 2011-NMSC-030, 150 N.M. 285, 258 P.3d 1050, aff'g 2010-NMCA-074, 148 N.M. 534, 238 P.3d 903.

Proof of "reasonably apparent" intoxication. — The reasonably-apparent prong in the Dram Shop Liability Act creates an objective standard. Estate of Gutierrez v. Meteor Monument, LLC, 2012-NMSC-004, 268 P.3d 515.

Circumstantial evidence at a time other than the time of service may be sufficient to prove what was reasonably apparent to the server regarding the level of a patron's intoxication at the time the patron was served. Estate of Gutierrez v. Meteor Monument, LLC, 2012-NMSC-004, 268 P.3d 515.

Proof of the identity of the server who actually sold or served alcohol to the patron is not a prerequisite to proving dram shop liability. Estate of Gutierrez v. Meteor Monument, LLC, 2012-NMSC-004, 268 P.3d 515.

Sufficient evidence of "reasonably apparent" intoxication. — Where the decedent was killed in a collision with the driver's vehicle; the driver was a daily patron of defendant's business, worked at defendant's business, was usually visibly intoxicated by 3:00 p.m., and bought beer only at defendant's place of business; defendant's

employees knew that the driver was an alcoholic, that the driver consumed alcohol while working, that defendant had been drinking all day on the day of the accident, and that the driver drove away from work after having consumed alcohol; on the day of the accident, the driver consumed seven twelve-ounce cans of beer and a twenty-four-ounce can of malt liquor at defendant's place of business; the collision occurred approximately one hour after the driver left defendant's place of business; at the accident scene, the driver appeared to be intoxicated, had slurred speech, blood shot eyes, and failed field sobriety tests; three and one-half hours after the accident, the driver's blood alcohol level was 0.09 gms/100ml.; and there was no evidence identifying the employee who served the driver alcohol at defendant's place of business, there was sufficient evidence to support a jury finding that the driver was intoxicated at the time defendant's employees sold the driver beer and that it was reasonably apparent that the driver was intoxicated. Estate of Gutierrez v. Meteor Monument, LLC, 2012-NMSC-004, 268 P.3d 515.

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 note, "Tort Law - The Application of the Rescue Doctrine Under Comparative Negligence Principles: *Govich v. North American Systems, Inc.*," see 23 N.M.L. Rev. 349 (1993).

For article, "Bartlett Revisited: New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability – Part One," see 33 N.M.L. Rev. 1 (2003).

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.

Social host's liability for death or injuries incurred by person to whom alcohol was served, 54 A.L.R.5th 313.

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.

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.

ARTICLE 13
Governmental Immunity

41-13-1. Short title.

Sections 2 through 4 [41-13-1 through 41-13-3 NMSA 1978] of this act may be cited as the "Governmental Immunity Act".

History: Laws 1999, ch. 268, § 2.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 268 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

41-13-2. Definitions.

As used in the Governmental Immunity Act:

A. "employment" includes services provided by an immune contractor;

B. "governmental entity" means the state or a local public body;

C. "immune contractor" means a person that:

(1) is an independent contractor; and

(2) contracts with a governmental entity to provide:

(a) care for children in the custody of the human services department, corrections department or department of health, as a licensed foster parent, excluding foster parents certified by a licensed child placement agency; or

(b) services to the children, youth and families department or the corrections department as a licensed medical, psychological or dental arts practitioner;

(3) is a member of:

(a) a state or local selection panel established pursuant to the Juvenile Community Corrections Act [Chapter 33, Article 9A NMSA 1978];

(b) a state or local selection panel established pursuant to the Adult Community Corrections Act [Chapter 33, Article 9 NMSA 1978];

(c) the board of directors of the New Mexico comprehensive health insurance pool;

(d) a medical review board, a committee or panel established by the educational retirement board or the retirement board of the public employees retirement association;

(e) the board of directors of the New Mexico educational assistance foundation; or

(f) the board of directors of the New Mexico student loan corporation; or

(4) is a volunteer, employee or board member of a court-created special advocate program;

D. "local public body" means a political subdivision of the state and its agencies, instrumentalities and institutions and a water and natural gas association organized pursuant to Chapter 3, Article 28 NMSA 1978;

E. "public employee" means a natural person that is an officer or employee of a governmental entity; and

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

History: Laws 1999, ch. 268, § 3.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 268 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

41-13-3. Governmental civil immunity established.

A governmental entity, a public employee and an immune contractor are not liable for damages arising out of a claim based upon tort, contract or other civil law claim and caused directly or indirectly by the failure or malfunction of computer hardware, computer software, microchip controlled firmware or other equipment affected by the failure to accurately or properly process dates or times if the failure or malfunction:

A. occurred before December 31, 2005;

B. occurred within the scope of employment of the public employee or within the scope of the contract or the volunteer service program of the immune contractor; and

C. was unforeseeable or was foreseeable but the plan or design, or both, for identifying and preventing it was prepared and implemented in good faith and with the exercise of ordinary care.

History: Laws 1999, ch. 268, § 4.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 268 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

ARTICLE 14
Space Flight Informed Consent

41-14-1. Short title. (Repealed effective July 1, 2021.)

Chapter 41, Article 14 NMSA 1978 may be cited as the "Space Flight Informed Consent Act".

History: Laws 2010, ch. 8, § 1; 2013, ch. 131, § 1.

ANNOTATIONS

Delayed repeals. — Laws 2013, ch. 131, § 4 amended Laws 2010, ch. 8, § 5 to provide that the Space Flight Informed Consent Act is repealed effective July 1, 2021.

The 2013 amendment, effective June 14, 2013, added the NMSA chapter and article for the Space Flight Informed Consent Act; and at the beginning of the sentence, changed "this act" to "Chapter 41, Article 14 NMSA 1978".

41-14-2. Definitions. (Repealed effective July 1, 2021.)

As used in the Space Flight Informed Consent Act:

A. "crew" means an employee of a space flight entity who performs activities in the course of that employment directly relating to the launch, reentry or other operation of or in a launch vehicle or reentry vehicle that carries human beings;

B. "launch" means placing or trying to place a launch vehicle or reentry vehicle and any payload, crew or participant in a suborbital trajectory, in earth orbit in outer space or otherwise in outer space. "Launch" includes activities involved in the preparation of a launch vehicle or payload for launch when those activities take place at a launch site in New Mexico;

C. "launch vehicle" means:

(1) a vehicle built to operate in, or place a payload or human beings in, outer space; or

(2) a suborbital rocket;

D. "participant" means an individual who is not crew and who is carried within a launch vehicle or reentry vehicle;

E. "participant injury" means an injury sustained by a participant, including bodily injury, emotional distress, death, property damage or any other loss arising from the participant's participation in space flight activities;

F. "payload" means an object that a person undertakes to place in outer space by means of a launch vehicle or reentry vehicle, including components of the vehicle specifically designed or adapted for that object;

G. "reenter" or "reentry" means to purposefully return or attempt to return a reentry vehicle and its payload, crew or participants from earth orbit or from outer space to earth;

H. "reentry vehicle" means a vehicle, including a reusable launch vehicle, designed to return from earth orbit or outer space to earth substantially intact;

I. "space flight activities" means:

(1) activities, including crew training, involved in the preparation of a launch vehicle, payload, crew or participant for launch;

(2) the conduct of a launch;

(3) activities, including crew training, involved in the preparation of a reentry vehicle and payload, crew or participant; and

(4) the conduct of a reentry; and

J. "space flight entity" means:

(1) a public or private entity holding a United States federal aviation administration launch, reentry, operator or launch site license, permit or other authorization for space flight activities; or

(2) a manufacturer or supplier of components, services or vehicles used by the entity that has been reviewed by the United States federal aviation administration as part of issuing such a license, permit or authorization.

History: Laws 2010, ch. 8, § 2; 2013, ch. 131, § 2.

ANNOTATIONS

Delayed repeals. — Laws 2013, ch. 131, § 4 amended Laws 2010, ch. 8, § 5 to provide that the Space Flight Informed Consent Act is repealed effective July 1, 2021.

The 2013 amendment, effective June 14, 2013, defined additional terms to expand the application of the act; added Subsections A through C and E through H; in Subsection I, in the introductory sentence, after "means", deleted "launch services or reentry services as those terms are defined in 49 U.S.C. Section 70102"; added Paragraphs (1) through (4) of Subsection I; in Paragraph (1) of Subsection J, after "launch site license", added "permit or other authorization"; and added Paragraph (2) of Subsection J.

41-14-3. Limited liability. (Repealed effective July 1, 2021.)

A. Except as provided in Subsection B of this section, a space flight entity is not liable for injury to or death of a participant resulting from the inherent risks of space flight activities so long as the warning contained in Section 41-14-4 NMSA 1978 is distributed and signed as required. Except as provided in Subsection B of this section, a participant or participant's representative may not maintain an action against or recover from a space flight entity for the loss, damage or death of the participant resulting exclusively from any of the inherent risks of space flight activities.

B. Subsection A of this section does not prevent or limit the liability of a space flight entity if the space flight entity:

(1) commits an act or omission that constitutes willful, wanton or reckless disregard for the safety of the participant and that act or omission proximately causes injury, damage or death to the participant;

(2) has actual knowledge or reasonably should have known of a dangerous condition on the land or in the facilities or equipment used in the space flight activities and the danger proximately causes injury, damage or death to the participant; or

(3) intentionally injures the participant.

C. A space flight entity shall present to and file with the spaceport authority a certificate of insurance coverage in the amount of at least one million dollars ($1,000,000) that covers liability by the space flight entity for all space flight activities. No space flight entity that fails to maintain the insurance requirements of this section shall receive any of the protections afforded by the Space Flight Informed Consent Act.

D. The limitation on legal liability provided to a space flight entity by the Space Flight Informed Consent Act is in addition to any other limitation of legal liability otherwise provided by law.

History: Laws 2010, ch. 8, § 3; 2013, ch. 131, § 3.

ANNOTATIONS

Delayed repeals. — Laws 2013, ch. 131, § 4 amended Laws 2010, ch. 8, § 5 to provide that the Space Flight Informed Consent Act is repealed effective July 1, 2021.

The 2013 amendment, effective June 14, 2013, changed the circumstances under which a space flight entity is liable under the act; in the title, deleted "civil immunity for space flight entities" and added "Limited liability"; in Subsection A, in the first sentence, after "Section", deleted "4 of the Space Flight Informed Consent Act" and added "41-14-4 NMSA 1978"; in Paragraph (1) of Subsection B, after "omission that constitutes", deleted "gross negligence or" and after "wanton or", added "reckless"; and added Subsection C.

41-14-4. Warning and acknowledgment required. (Repealed effective July 1, 2021.)

A. A space flight entity providing space flight activities to a participant, whether the activities occur on or off the site of a facility capable of launching a suborbital flight, shall have each participant sign a warning statement. The warning statement shall contain, at a minimum, the following statement:

"WARNING AND ACKNOWLEDGMENT

I understand and acknowledge that under New Mexico law, there is no liability for injury to or death sustained by a participant in a space flight activity provided by a space flight entity if the injury or death results from the inherent risks of the space flight activity. Injuries caused by the inherent risks of space flight activities may include, among others, death, bodily injury, emotional injury or property damage. I assume all risk of participating in this space flight activity.".

B. Failure to provide the warning statement requirements in this section to a participant shall prevent a space flight entity from invoking the immunity provided by this section with regard to that participant.

History: Laws 2010, ch. 8, § 4.

ANNOTATIONS

Delayed repeals. — Laws 2013, ch. 131, § 4 amended Laws 2010, ch. 8, § 5 to provide that the Space Flight Informed Consent Act is repealed effective July 1, 2021.

Effective dates. — Laws 2010, ch. 8 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.