UNANNOTATED

Uniform Jury Instructions — Civil

PREFACE — CIVIL RULE

1-051. Instructions to juries.

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

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

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

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

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

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

G. **Preparation and request for instructions.** Any party may move the court to give instructions on any point of law arising in the cause. At any time before or during the trial, the court may direct counsel to prepare designated instructions. The attorneys for the parties shall confer in good faith prior to the settling of instructions by the court and shall prepare a single set of instructions upon which the parties agree. Such instructions as well as instructions tendered by the parties shall be in writing and shall consist of an original to be used by the court in instructing the jury, adequate copies for

the parties, and one (1) copy for filing in the case on which the judge shall note "given" or "refused" as to each instruction requested. Copies of instructions tendered by the parties shall indicate who tendered them. All copies of instructions shall also contain a notation "UJI Civil No. _____" or "Not in UJI Civil" as appropriate. (The instructions which go to the jury room shall contain no notations.)

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

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

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

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

THE CONCEPT OF JURY INSTRUCTIONS

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

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

In accordance with Rule 1-051, it is necessary that the trial court use the instructions contained in this pamphlet where appropriate and that it adopt the style and philosophy of this pamphlet where no applicable instruction is stated. It is well established, of course, that it is the advocate's job to prepare jury instructions and that a failure to do so ordinarily forecloses one's ability to assign as error the court's refusal to give a particular instruction. *Durrett v. Petritsis*, 82 N.M. 1, 474 P.2d 487 (1970). This rule applies even where the instruction in question is one which the trial court would have been legally required to give had a request been made. *Montoya v. Winchell*, 69 N.M. 177, 364 P.2d 1041 (1961).

GENERAL HISTORY AND ACKNOWLEDGMENTS

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

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

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

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

The committee sustained a severe loss in November of 1964 with the untimely death of Henry A. Kiker, Jr., who had been a faithful member and hard-working participant since the designation of the committee in January of 1962. To Mr. Kiker, a leader of the "plaintiff's bar", had been assigned most of the knotty problems involving instructions in the field of tort law and automobile accident liability in particular. The committee appreciated the calm, deliberate thoroughness of Mr. Kiker, and the bench and bar of this state for years to come will be deeply indebted to his work which is incorporated in the published instructions.

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

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

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

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

After completion of the Contracts chapter the committee took up work on insurance bad faith actions, now contained in Chapter 17. The work continued with other subjects which appear in the 1991 Replacement Pamphlet: family purpose doctrine, revision of Chapter 15, statutes and ordinances, infliction of emotional distress, prima facie tort and

punitive damages. As this work continued the membership of the committee changed. James R. Toulouse and Stuart D. Shanor joined the committee in 1988. Carl J. Butkus, Patrick A. Casey and David P. Garcia joined the committee in 1989. As a result of reappointment and resignations, the committee in 1991 is composed of Bruce Hall, chairman, Edward R. Ricco, Gordon J. McCulloch, Rebecca Sitterly, Honorable Joe H. Galvan, Stuart D. Shanor, Joseph Goldberg, Patrick A. Casey and David P. Garcia.

[Revised, effective November 1, 1991.]

HOW TO USE

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

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

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

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

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

[As amended, effective November 1, 1991.]

CHAPTER 1
Instructions Before Trial

Introduction

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

To properly perform its function, the jury needs information about the case and about the law at the outset of the trial, from time to time during the course of the trial, and before commencing its final deliberations. The preliminary instructions in this chapter will provide the venire and the jury with a blueprint to make their experience more comprehensible.

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

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

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

13-101. Voir dire orientation statement.

Good [morning] [afternoon] ladies and gentlemen:

You have been summoned here as prospective jurors.

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

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

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

13-102. Recompiled.

13-102A. Introduction of court and staff.

I am Judge _____. My bailiff, who will escort you and assist in communicating with the court, is _____. [My administrative assistant is _____.] If you need anything during the trial [either] the bailiff [or the

assistant] would be happy to help. The court [reporter] [monitor] is _____. This person makes a record of everything said in court.

[Approved, effective March 1, 2005.]

13-103. Recompiled.

13-103A. Scheduling during trial.

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

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

[Approved, effective March 1, 2005.]

13-104. Recompiled.

13-104A. Voir dire orientation statement.

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

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

USE NOTES

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

[Approved, effective March 1, 2005.]

13-105. Recompiled.

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

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

USE NOTES

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

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

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

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

13-106. Recompiled.

13-106A. Voir dire explanation.

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

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

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

13-107. Recompiled.

13-107A. Voir dire questioning by court.

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

I will first introduce the parties to the lawsuit.

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

Do any of you know the plaintiff?

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

Do any of you know the defendant?

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

I will now introduce the attorneys for the parties.

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

Do you know the attorney for the plaintiff?

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

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

Do you know the attorney for the defendant?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Do any of you have any physical or other impairments, taking of scheduled medications, that need to be addressed? And I say this not to exclude you from service; however, there are special arrangements we can make for certain situations to assist you if you are selected as a juror.

The lawyers may now ask some questions.

USE NOTES

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

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

[13-104 NMRA; as amended, effective January 1, 1987; recompiled as amended, effective March 1, 2005; as amended by Supreme Court Order No. 07-8300-022, effective November 1, 2007; as amended by Supreme Court Order No. 08-8300-012, effective June 13, 2008.]

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

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

13-108. Recompiled.

13-108A. Oath to empaneled jury.

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

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

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

13-109. Introduction to preliminary instructions.

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

[Approved, effective March 1, 2005.]

13-110. Conduct of jurors.

Your job is to find and determine the facts in this case, which you must do solely on the evidence received in court. There are important rules you must follow during the trial.

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

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

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

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

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

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

not ignore your backgrounds, including professional, vocational, and educational experience.

Seventh, because you are only to consider the evidence presented during the trial of this case, you may not refer to print or electronic resources before rendering your verdict. This means that you may not use a computer, telephone, smartphone, or any other electronic device to email, text, comment on, or research any issue that may arise during these proceedings. You may not use internet dictionaries, Google, Safari, Yahoo, Wikipedia, or any other search engine to research any issue, the parties, witnesses, or attorneys. This prohibition includes the use of blogs and social networking sites, such as Facebook, LinkedIn, Twitter, YouTube, Snapchat, and any and all others. Again, you may rely only on the evidence presented in the trial of this case.

Last, there are at least two sides to every lawsuit. It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this trial you exercise your judgment impartially and without regard to any sympathy, prejudice, or any actual or implicit bias of which you are or may become aware.

These restrictions apply at all times during the trial, recesses, deliberations, and when you are away from the courthouse—twenty-four (24) hours a day, seven (7) days a week—until you return a verdict in open court and are discharged by me.

[Approved, effective March 1, 2005; as amended by Supreme Court Order No. 08-8300-012, effective June 13, 2008; by Supreme Court Order No. 11-8300-003, effective March 21, 2011; as amended by Supreme Court Order No. 22-8300-029, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — "Juror misconduct . . . includes activity by members of the jury which is inconsistent with the instructions by the court." *State v. Mann*, 2002-NMSC-001, ¶ 22, 131 N.M. 459, 39 P.3d 124. Juror misconduct also includes members of the jury making an unauthorized visit to the scene or referring to material not in evidence and against the instructions of the court. *See State v. Melton*, 1984-NMCA-115, ¶¶ 4-17, 102 N.M. 120, 692 P.2d 45. However, jurors are allowed to "take into consideration their knowledge and impressions founded upon experience in their everyday walks of life." *Mann*, 2002-NMSC-001, ¶ 32.

13-110A. Instruction to jury.[1]

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

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

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

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

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

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

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

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

USE NOTES

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

2. Use only the applicable alternative or alternatives.

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

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

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

13-110B. Pre-deliberation oath to interpreter.

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

USE NOTES

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

[Adopted by Supreme Court Order No. 08-8300-043, effective December 31, 2008; as amended by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

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

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

13-110C. Use of interpreter.[1]

No matter what language people speak, they have a right to have their testimony heard and understood. You are about to hear a trial in which a court-certified interpreter will interpret for one or more of the [witnesses]. The interpreter is required to remain neutral. The interpreter is required to interpret what is spoken, or translate documents, between English and _____ (*specify other language*) accurately and fairly to the best of the interpreter's skill and judgment.

Some of you may speak or understand _____ (*specify other language*). Ordinarily because the court-certified interpreters must abide by an oath and with standards and the ethics of their profession, their interpretation is presumed to be accurate. However, if based on your understanding of _____ (*specify other language*), you firmly believe that the interpreter has incorrectly interpreted either a question or a witness's response to the question, you may give the bailiff a note before the witness leaves the stand stating your concern. I will decide whether and how to address your concern.

If I decide to leave the interpretation as expressed by the interpreter you must only consider the interpreter's English interpretation, even if you still disagree with the

interpreter's interpretation. What the witness(es) may have said in _____ (*specify other language*), before the interpreter's interpretation, is not evidence and may not be used by you in any way in your deliberations.

You must evaluate the interpreted testimony as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's interpreted testimony even if you think the witness speaks some English.

USE NOTES

1. This instruction is to be used whenever a witness interpreter is necessary. The instruction may be adapted for use with signed language or other types of interpreters.

[Adopted by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

13-111. Note taking permitted.

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

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

[Approved, effective March 1, 2005.]

13-112. Questions by jurors.

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

not give it any further consideration, and please do not hold it against either side that you did not get an answer.

[Approved, effective March 1, 2005.]

13-113. The court.

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

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

[Approved, effective March 1, 2005.]

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

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

USE NOTES

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

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

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

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

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

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

USE NOTES

See UJI 13-114 NMRA.

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

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

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

USE NOTES

See UJI 13-114 NMRA.

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

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

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

USE NOTES

See UJI 13-114 NMRA.

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

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

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

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

USE NOTES

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

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

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

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

13-119. Opening statements.

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

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

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

Appendix Chapter 1

APPENDICES

Appendix 1. Sample preliminary instructions to the venire.

LADIES AND GENTLEMEN:

Good [morning] [afternoon] ladies and gentlemen:

You have been summoned here as prospective jurors.

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

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

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

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

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

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

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

necessary under the terms of the contract, but was excluded from coverage because it was experimental.

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

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

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

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

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

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

(*To those selected.*)

Please stand for the administration of your oath.

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

Other examples of statements of the case

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

Slip and fall

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

Automobile accident

The plaintiff says that he was injured in an auto collision at the Albuquerque intersection of Washington and Lomas on July 17 last year. He says that defendant was negligent and violated the law by failing to stop at a red light. Defendant denies that the light was red and says that plaintiff was negligent in failing to keep a proper lookout. Defendant also says that the City was negligent in placing a traffic control box on the northeast corner of the intersection that blocked his view of traffic coming from plaintiff's direction. And defendant says that plaintiff failed to exercise ordinary care to minimize or lessen his damages.

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

Duty of a driver

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

Ordinary care

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

Negligence

The term "negligence" may relate either to an act or a failure to act. An act, to be "negligence," must be one which a reasonably prudent person would foresee as

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

Violation of statute

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

Duty to keep a proper lookout

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

Mitigation of damages

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

Medical negligence

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

Wrongful termination of employment

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

[Approved, effective March 1, 2005.]

CHAPTER 2
Instructions During Trial

Introduction

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

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

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

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

13-201. Recess instruction.

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

USE NOTES

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

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

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

13-202. Discussion of exhibits prohibited.

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

USE NOTES

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

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

Committee commentary. — *See* committee commentary to UJI 13-201 NMRA.

13-203. Deposition testimony.

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

USE NOTES

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

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

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

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

13-204. Interrogatories.

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

USE NOTES

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

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

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

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

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

USE NOTES

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

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

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

reliability of information used by expert witnesses in arriving at their opinions. *Cf.* UJI 13-209, 13-213.

13-206. Recompiled.

13-207. Witness interviewed by attorney.

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

USE NOTES

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

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

13-208. Insurance has no bearing.

The [possible] existence of any insurance or employment-related benefits has no bearing on whether [a] [the] defendant [was negligent] [is liable] or on the amount of any damages that may be awarded to [a] [the] plaintiff.

[You have heard evidence that (*plaintiff, defendant, etc.*) [was insured] [was covered by certain employment benefits]. You may consider this evidence only for the purpose of proving (*agency, ownership or control, bias or prejudice of a witness, etc.*). You must not consider the existence of insurance or other benefits in determining any other issue in this case.]

USE NOTES

The first paragraph of this instruction should be given in all cases, with the first bracketed term included, to instruct the jury that it may not consider the presence or absence of insurance, whether liability insurance, health insurance, or employment-related benefits for either the plaintiff or the defendant, in determining liability or damages. *See Safeco Ins. Co. v. United States Fid. & Guar. Co.*, 1984-NMSC-045, ¶¶ 17-19, 101 N.M. 148, 679 P.2d 816; Rule 11-411 NMRA. The bracketed words “was negligent” or “is liable” should be chosen depending on whether negligence or some other basis of liability is asserted.

In a case where evidence of insurance has been admitted pursuant to Rule 11-411 after the court’s consideration of such evidence under Rule 11-403 NMRA, the entire instruction should be read, with the first bracketed term excluded, near the time of the disclosure and again at the close of trial. The proper purpose for use of the evidence, stated with precision and clarity, should be inserted in the second paragraph.

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

This instruction may also be used as a curative instruction in the event evidence of insurance is introduced inadvertently rather than for a permissible purpose. In such a case, the second paragraph of the instruction should be modified to inform the jury that it must not consider the existence of insurance in determining any issue.

[As amended, effective January 1, 1987; March 1, 2005; as amended by Supreme Court Order No. 21-8300-017, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — This instruction follows the ruling of the Supreme Court in *Safeco Ins. Co.*, 1984-NMSC-045. When the reference to insurance is neither inadvertent nor for permissible purposes, mistrial may be the appropriate remedy. *See id.*

[As amended by Supreme Court Order No. 21-8300-017, effective for all cases filed or pending on or after December 31, 2021.]

13-209. Hypothetical question.

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

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

USE NOTES

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

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

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

Hypothetical questions must be based on facts in evidence (or which the propounding attorney assures the court will be put into evidence) and, if not, then the opinion of the expert should be stricken. *Winder v. Martinez*, 88 N.M. 622, 545 P.2d 88 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); *Landers v. Atchison, T. & S.F. Ry.*,

68 N.M. 130, 359 P.2d 522 (1961); *Sanchez v. Board of County Comm'rs*, 63 N.M. 85, 313 P.2d 1055 (1957); 2 Wigmore on Evidence, § 680; Jones on Evidence, § 415, p. 781 (5th ed.).

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

No uniform instruction.

USE NOTES

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

[As amended, effective January 1, 1987.]

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

13-211. Oath to witness.

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

USE NOTES

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

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

Committee commentary. — Rule 11-603 NMRA of the Rules of Evidence provides that, "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so". However, there is no judicial ruling regarding a specific form of oath. Section 14-13-1 NMSA 1978 provides requirements of an oath, and Section 14-13-2 NMSA 1978 provides requirements for an affirmation in lieu of an oath by anyone having conscientious scruples against an oath. However, in UJI 14-122 and in UJI 14-123 the Supreme Court of New Mexico has provided an oath in substantially the same form as provided in this instruction.

13-212. Oath to interpreter.

Do you solemnly swear or affirm that you will truly and impartially interpret or translate from English to _____ (*name of language*) and from _____ (*name of language*) to English all questions and answers and matters pertaining to this cause in an understandable manner using your best skills and judgment in accordance with the standards and ethics of the interpreter profession, under penalty of law?

USE NOTES

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

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

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

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

NMSA 1978, Section 34-1-7, states that the courts may appoint interpreters and translators to interpret the testimony of witnesses. Under NMSA 1978, Section 38-10-8, "Every interpreter appointed pursuant to the provisions of the Court Interpreters Act, before entering upon his duties, shall take an oath that he will make a true and impartial interpretation or translation in an understandable manner using his best skills and judgment in accordance with the standards and ethics of the interpreter profession."

For persons who require a signed language interpreter, there is a separate oath. *See* UJI 13-212A NMRA.

[As amended by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

13-212A. Oath to signed language interpreter.

Do you solemnly swear or affirm that you will make a true interpretation in an understandable manner to the deaf person for whom you are appointed, under penalty of law?

USE NOTES

This is the form of oath that should be given to signed language interpreters.

[Adopted by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — NMSA 1978, Section 38-9-9, requires that every interpreter appointed under the provisions of the Deaf Interpreter Act, Sections 38-9-1 to 38-9-10, shall take an oath before interpreting for the deaf person.

[Adopted by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

13-213. Expert testimony.

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

USE NOTES

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

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

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

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

13-214. Objections.

It is the job of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper. I will sustain objections if the question or evidence sought is improper for you to consider. When I "sustain" an objection, the question or evidence is not allowed. You must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered. If I "overrule" an objection, then the question or evidence will be allowed.

USE NOTES

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

[Approved, effective March 1, 2005.]

13-215. Request for Admission.

A request for admission is a written statement of [fact] [opinion of fact] [or] [the application of law to fact] asked by one party to another party using pretrial requests. You are to consider any such admitted statement as conclusively established for the purpose of the trial. The following have been admitted as true:

_____ (*name of party*) admits that:

(*list admitted statements of fact(s), opinion of fact(s), or the application(s) of the law to fact(s)*).

USE NOTES

This instruction should be used when an admission to a request is offered at trial, and may be repeated at the close of the case. *See* Rule 1-036 NMRA. The purpose of such a request is to seek an admission of fact, opinion of fact, or an application of law to fact to narrow the disputed issues at trial and to avoid the need for admitting further evidence on that issue. In an appropriate case, counsel may decide to formally offer the admission(s) into evidence. This instruction should be read when the admission is first presented to the jury.

[Adopted by Supreme Court Order No. 21-8300-016, effective for all cases pending or filed on or after December 31, 2021.]

CHAPTER 3
Issues; Burden of Proof; Causation; Evidence

Introduction

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

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

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

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

13-301. Preliminary statement.

MEMBERS OF THE JURY:

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

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

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

USE NOTES

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

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

Part A
Statement of Issues, Burden of Proof

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

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

A Defective Product, [and]

Breach of Warranty, [and]

Breach of Contract, [and]

Fraudulent Misrepresentation, [and]

Etc.)

USE NOTES

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

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

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

[As amended, effective March 1, 2005.]

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

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

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

_____
_____.

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

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

USE NOTES

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

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

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

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

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

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

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

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

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

[As amended, March 1, 2005.]

Committee commentary. — *See* the Use Note and committee commentary to UJI 13-302A NMRA.

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

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

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

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

Another party was negligent, [and]

A non-party was negligent, [and]

Etc.).

USE NOTES

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

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

Committee commentary. — *See* the committee commentary under UJI 13-302A NMRA.

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

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

_____
_____.

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

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

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

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

[As a counterclaim, the defendant(s) seek(s) compensation from the plaintiff(s) for damages which defendant(s) say(s) were caused by _____ (*theory of counterclaim by name*). To establish _____ (*theory of counterclaim by name*) on the part of [a] plaintiff(s), the defendant(s) [has] [have] the burden of proving [at least one of] [each of] the following:

_____
_____.

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

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

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

USE NOTES

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

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

Committee commentary. — *See* committee commentary to UJI 13-302A NMRA.

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

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

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

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

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

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

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

USE NOTES

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

[As amended, effective March 1, 2005.]

13-302F. Special verdict form; examples.

EXAMPLE A

INSTRUCTION NO. _____

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

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

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

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

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

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

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

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

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

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

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

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

2. Plaintiff failed to keep a proper lookout.

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

The plaintiff denies what defendants say.

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

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

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

These are denied.

SPECIAL VERDICT

On the questions submitted, the jury finds as follows:

Question No. 1: Was defendant Doe negligent?

Answer: _____ (*Yes or No*)

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

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

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

Answer: _____ (*Yes or No*)

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

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

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

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

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

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

Answer: _____ (*Yes or No*)

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

Answer: _____ (*Yes or No*)

Question No. 7: Were the acts of defendant Roe either [malicious], [willful], [wanton], [reckless], [fraudulent] [or] [in bad faith]?

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

Question No. 8: Were the acts of defendant Smith either [malicious], [willful], [wanton], [reckless], [fraudulent] [or] [in bad faith]?

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

Question No. 9: Were the acts of defendant Doe either [malicious], [willful], [wanton], [reckless], [fraudulent] [or] [in bad faith]?

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

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

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

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

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

_____
Foreperson

EXAMPLE B

INSTRUCTION NO. _____

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

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

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

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

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

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

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

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

1. The decedent failed to keep a proper lookout.

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

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

The plaintiffs deny what the defendants say.

EXAMPLE C

INSTRUCTION NO. _____

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

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

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

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

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

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

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

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

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

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

Public Utility Company denies what Ajax says about such negligence.

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

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

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

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

[As amended, effective January 1, 1987; November 1, 1991; March 1, 2005, as amended by Supreme Court Order No. 13-8300-021, effective for all cases pending or filed on or after December 31, 2013.]

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

No specific instruction drafted.

Committee commentary. — The committee has not included a specific instruction on theories, contentions, proximate cause and burdens of proof for crossclaims or third-party claims. Where there would be no conflict or confusion in the instruction or the special verdict form, crossclaims and third-party claims may be included in the single instruction contemplated for all parties under UJI 13-302A through 13-302E NMRA, as suggested for counterclaims. (*See* Use Note, UJI 13-302A NMRA.) However, crossclaims and third-party claims may well have to be treated as separate lawsuits. In that event, the jury should be told that there is a separate lawsuit and be given a separate series of instructions in accordance with UJI 13-302A through 13-302F NMRA for that separate lawsuit. [Revised, effective March 1, 2005.]

Part B
Burden of Proof

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

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

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

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

USE NOTES

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

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

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

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

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

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

Part C
Causation

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

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

USE NOTES

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

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

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

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

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. 08-8300-061, effective February 2, 2009; by Supreme Court Order No. 11-8300-003, effective March 21, 2011.]

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

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

The committee feels that the but-for clause may be unnecessary or inappropriate in particular cases, such as when the plaintiff cannot show, more likely than not which one of multiple negligent acts was the cause of injury, *e.g.*, *Summers v. Tice*, 33 Cal.2d 80,

199 P.2d 1 (1948), or when multiple acts each may be a cause of indivisible injury regardless of the other(s). *E.g.*, Restatement (Second) of Torts, Section 432(2). In the former situation, it will be for the trial court to decide whether the burden of proof on causation may be more appropriately shifted to the defendant; in the latter situation, the trial court might determine that the "cause-in-fact" element of causation is more adequately expressed through use of the terms "contributes to bringing about", "explanation for", "the reason that". The present instruction leaves these issues for determination by the trial court, in each case pending controlling guidance from the Court.

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

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

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

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

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

13-306. Independent intervening cause.

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

USE NOTES

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

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 08-8300-061, effective February 2, 2009.]

Committee commentary. — This principle was defined in *Thompson v. Anderman*, 59 N.M. 400, 411, 285 P.2d 507 (1955). *See also Shephard v. Graham Bell Aviation Serv., Inc.*, 56 N.M. 293, 243 P.2d 603 (1952). *Torres v. El Paso Electric Co.*, 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386, dramatically limits the application of independent

intervening cause under New Mexico law. The clause is to be used when there is an unforeseeable force, not in operation at the time the defendant acted, that is not a concurrent cause of the plaintiff's injury. *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, 130 N.M. 532, 27 P.3d 1019. Independent intervening cause is not appropriate when a defendant is merely arguing lack of causation. A criminal act does not necessarily constitute an independent intervening cause if that act was foreseeable and resulted from the defendant's negligence. *See Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 32, 134 N.M. 43, 73 P.3d 181.

[As amended by Supreme Court Order No. 11-8300-003, effective March 21, 2011.]

Part D
Evidence

13-307. Rules of evidence.

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

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

USE NOTES

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

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

Committee commentary. — The judge is prohibited from commenting to the jury upon the evidence or the credibility of the witnesses, see Rule 11-107; but, whether requested or not, the judge may take judicial notice of adjudicative facts not subject to reasonable dispute. See Rule 11-201.

13-308. Circumstantial evidence.

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

USE NOTES

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

[As amended, effective January 1, 1987.]

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

CHAPTER 4
Agency; Respondeat Superior

Introduction

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

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

A. Employer-employee (generally)

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

B. Employee or independent contractor (generally)

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

C. Corporation acts through employees

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

D. Principal-agent

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

E. Partnerships

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

[As amended, effective January 1, 1987.]

13-401. Agent; principal; definition.

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

USE NOTES

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

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

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

[As amended, effective January 1, 1987.]

13-402. Liability of principal.

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

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

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

USE NOTES

Always use this instruction with UJI 13-401.

[As amended, effective November 1, 1991.]

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

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

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

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

Punitive damages are the subject of *Samadan Oil Corp. v. Neeld*, 91 N.M. 599, 577 P.2d 1245 (1978), and *Cornell v. Albuquerque Chem. Co.*, 92 N.M. 121, 584 P.2d 168 (Ct. App. 1978). A master or principal is liable for punitive damages if it can be shown that the principal is guilty of wrongful motives.

[As revised, effective November 1, 1991.]

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

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

The person performing the work is the employee.

USE NOTES

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

[As amended, effective January 1, 1987.]

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

13-404. Independent contractor.

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

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

USE NOTES

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

[As amended, effective November 1, 1991.]

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

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

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

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

USE NOTES

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

[As amended, effective January 1, 1987.]

Committee commentary. — The employer is bound by the acts of an employee committed or performed within the course and scope of employment.

[As revised, effective November 1, 1991.]

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

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

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

USE NOTES

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

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

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

13-407. Scope of employment; definition.

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

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

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

USE NOTES

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

[As amended, effective January 1, 1987.]

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

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

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

13-408. Apparent authority; reliance.

The defendant, _____ *(name of alleged employer)*, may, if there has been no actual employment, with right to control, nonetheless be liable for the acts or omissions of _____ *(name of alleged apparent employee)*, if:

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

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

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

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

USE NOTES

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

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

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

13-409. Corporation acts through employees.

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

USE NOTES

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

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

[As amended, effective November 1, 1991.]

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

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

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

No instruction drafted.

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

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

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

92 N.M. at 421.

See also committee commentary to UJI 13-411 NMRA.

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

No instruction drafted.

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

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

action sued the partnership for acts and omissions of the partnership, the liability of the partners was of necessity vicarious.

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

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

No instruction drafted.

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

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

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

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

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

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

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

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

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

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

DIRECTION FOR USE

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

[Approved, effective March 21, 2005.]

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

CHAPTER 5
Animals

Introduction

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

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

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

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

13-501. Trespassing livestock.

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

USE NOTES

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

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

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

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

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

This instruction does not apply in a herd law district.

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

[As amended, effective November 1, 1991.]

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

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

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

Gallegos v. Allemand, 49 N.M. 97, 157 P.2d 493, 158 A.L.R. 373 (1945): Plaintiff owned 14,000 *fenced* acres; defendant owned 300 unfenced acres separated by three miles of land owned by one Vigil; defendant grazed 50 head on his "totally insufficient" pasture, and without objection by Vigil, the 50 head grazed Vigil's land, but also plaintiff's land. Reversed, holding for defendant, because no evidence that defendant "turned" his cattle upon (plaintiff's) lands *"knowing"* that they would *necessarily* enter the lands of (plaintiff) and that the (defendant) intended that they should do so. Court noted that inference of "intention and knowledge" of grazing on plaintiff's land not proven as record failed to show that defendant's and Vigil's lands afforded insufficient pasturage.

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

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

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

or bronco blood) over eighteen (18) months of age from running at large within 3 miles of any city, town or village.

The Herd Law, 47-13-11, 1953 Comp. [77-12-11 NMSA 1978], provides: "Any owner or holder of livestock in [herd law district] *who shall permit* such livestock to run at large on any public road within any such herd law district shall be guilty of a misdemeanor . . . ". This statute is applicable in automobile collision with animal in herd law district. No New Mexico cases. See 59 A.L.R.2d 1330; *Scarbrough v. Wooten*, 23 N.M. 616, 170 P. 743 (1918) where the court stated that "[t]he act prohibits the running at large of livestock in those precincts which have adopted a herd law, and whether or not the trespass was willful is not material, except as affecting the amount of damages. Chapter 94, Laws 1909, prohibits trespass by livestock, and subjects owners to liability for damages without regard to whether the trespass was willful".

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

13-502. Legal fence.

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

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

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

USE NOTES

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

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

Section 8 [77-16-8 NMSA 1978] describes the requirements of a stone, adobe or woven wire fence.

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

13-503. Livestock on fenced highway.

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

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

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

USE NOTES

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

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

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

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

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

The mere fact that an animal is on the highway, of itself, is not evidence of negligence. *Mitchell v. Ridgway*, 77 N.M. 249, 421 P.2d 778 (1966); *Steed v. Roundy*, 342 F.2d 159

(10th Cir. 1965); *Hyrum Smith Estate Co. v. Peterson*, 227 F.2d 442 (10th Cir. 1955); *Poole v. Gillison*, 15 F.R.D. 194 (E.D. Ark. 1953).

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

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

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

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

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

13-504. Riding animals on highway after dark.

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

USE NOTES

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

Committee commentary. — *See* Section 66-7-363A NMSA 1978.

13-505. Livestock on unfenced highway.

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

USE NOTES

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

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

Committee commentary. — An example of the type of specific negligence required would be putting salt or minerals on the highway so that the cattle had to get on the highway in order to reach the salt or minerals. Another example would be where the roundup of the cattle was held on the highway or the cattle were being detained on the highway.

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

13-506. Liability of dog owner.

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

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

USE NOTES

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

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

Reference to the case of *Perkins v. Drury*, 57 N.M. 269, 258 P.2d 379 (1953), should be made by the trial lawyers and the court in any case involving a claim of damages as the result of an attack by a domestic animal. It is apparent that the common law prevails in this area in New Mexico. Scienter on the part of the defendant is required. The vicious

propensity of the dog must have been previously manifested against a human being. It is insufficient that the dog exhibited vicious tendencies toward other animals.

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

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

CHAPTER 6
Common Carriers

Introduction

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

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

[As amended, effective January 1, 1987.]

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

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

USE NOTES

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

[As amended, effective January 1, 1987.]

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

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

No instruction drafted.

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

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

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

USE NOTES

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

[As amended, effective January 1, 1987.]

Committee commentary. — The word "use" was adopted in preference to the word "provide" or some other synonymous word because not all common carriers provide facilities for boarding or alighting and because a common carrier, in some instances, may be required to use an area specified by a municipality or other governing authority.

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

13-604. Duty of carrier; facilities.

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

USE NOTES

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

[As amended, effective January 1, 1987.]

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

13-605. Ordinary care.

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

[As amended, effective January 1, 1987.]

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

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

CHAPTER 7
Condemnation; Eminent Domain

Introduction

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

[As amended, effective January 1, 1987.]

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

This is a condemnation proceeding.

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

(Here give common, lay description and location of property.)

The date of the taking was _____ *(here state legal date of taking).*

The condemning authority contends the damages of _____ are $ _____.

The [owner] [tenant] claims the damages are $ _____.

Each party has the burden of proving its claims by the greater weight of the evidence, which means that you must be persuaded, considering all of the evidence in the case, that the claims on which the party has the burden of proof are more likely true than not true.

It is your duty to determine, from the greater weight of the evidence, the amount of money damages to be paid the [owner] [tenant] as just compensation for the taking.

USE NOTES

In completing the blanks in this instruction it is not necessary to use the full legal name of condemning authority or legal description of the property involved. All that is necessary is reasonable identification.

This instruction is the "statement of issues" to be used in eminent domain proceedings in lieu of UJI 13-302 NMRA. The issues to be decided by the jury in each case should be delineated in simple, concise, understandable terms.

When a leasehold estate is involved, in lieu of the word "owner" use the word "tenant".

[As amended, effective January 1, 1987.]

Committee commentary. — As practically all condemnations are filed under the alternative procedure (Section 42-2-1 NMSA 1978 et seq.), rather than under the Eminent Domain Code (Section 42A-1-1 NMSA 1978 et seq.), this instruction is framed for the alternative procedure. The committee has not prepared instructions under the commissioners' de novo appeal procedure (42A-1-21 NMSA 1978) but leaves this to the court and counsel, should such a case arise. In this connection, *see Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961), involving a commissioners' appeal proceeding, together with the cases cited therein, as well as 2 Nichols, Eminent Domain § 432, p. 1139 (2d ed.); 27 Am. Jur. 2d Eminent Domain § 668 et seq. Also *see Wells v. Arch Hurley Conservancy Dist.*, 89 N.M. 516, 554 P.2d 678 (Ct. App. 1976) and *U.S. v. 46,672.96 Acres of Land*, 521 F.2d 13 (10th Cir. 1975).

13-702. Power to condemn; constitution.

The _____ *(here state the name of the condemning authority)* has the right by law to condemn the property involved in this case.

The property was taken for public use.

The Constitution of New Mexico provides that private property shall not be taken for public use [or damaged] without just compensation.

USE NOTES

This basic instruction should be given in all cases, followed by either the supplemental instructions on full taking, or supplemental instructions for partial taking or instructions relating to situations where there is no taking but damages result to the property.

[As amended, effective January 1, 1987.]

Committee commentary. — N.M. Const., art. XI, § 18, makes corporations, like individuals, subject to the eminent domain power.

See N.M. Const., art. II, § 20. For "just compensation", *see Board of Comm'rs v. Gardner*, 57 N.M. 478, 260 P.2d 682 (1953).

From the procedural standpoint, there are two alternative methods of condemning property for public use: (1) The commissioner method with a jury trial de novo on appeal, (2) the direct method. (*See* Sections 42-2-1 through 42-2-16 NMSA 1978.) These instructions are applicable under either procedural method adopted, although not specifically drafted for commissioner-type procedure.

The constitutional provision does not require payment in advance of the taking. *State Hwy. Comm'n v. Ruidoso Tel. Co.*, 73 N.M. 487, 389 P.2d 606 (1963); *Timberlake v. Southern Pac. Co.*, 80 N.M. 770, 461 P.2d 903 (1969).

Section 42-2-6 NMSA 1978 provides that no order of entry to any property being taken from a private property owner for rights-of-way may be granted until there is deposited with the clerk of the court the amount offered as just compensation. The section also provides conditions for disbursement of the deposit and defines the amount of the minimum award.

13-703. Full taking; fair market value.

In this case, the owner's entire parcel was taken. The owner is entitled to money damages equal to the fair market value of the property on the date of taking.

USE NOTES

This instruction will be used only where all of a given property was taken, and the problems of partial taking or residual damage are absent.

The definition of fair market value, UJI 13-711 NMRA, will be given, along with other appropriate instructions.

This instruction is not to be used when UJI 13-707 or 13-709 NMRA is used.

[As amended, effective January 1, 1987.]

Committee commentary. — The measure of damages for a full taking is the fair market value of the land. *State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 84 N.M. 424, 504 P.2d 634 (1972); *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961); *Board of Comm'rs v. Gardner*, 57 N.M. 478, 260 P.2d 682 (1953); and *Board of County Comm'rs v. Slaughter*, 49 N.M. 141, 158 P.2d 859 (1945).

The term "money damages" is all-inclusive and is intended to include "just compensation" under N.M. Const. Art. II, § 20, and "measure of compensation and damages", as used in § 42A-1-24 NMSA 1978.

The word "property", as used in this chapter, includes real property, personal property and all interests therein.

There are many ways to determine damages, including, but not limited to, sales and income.

13-704. Partial taking; fair market value.

In this case, only a part of the defendant's property was taken. The money damages to be paid the owner for the property actually taken is the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remaining property immediately after the taking.

USE NOTES

This instruction is not appropriate in cases involving partial condemnation of leaseholds. If a case is presented where there are multiple defendants owning separate properties, it is suggested that "each owner's" be inserted in lieu of the singular possessive.

[As amended, effective January 1, 1987.]

Committee commentary. — *See State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 84 N.M. 424, 504 P.2d 634 (1972); *El Paso Elec. Co. v. Pinkerton*, 96 N.M. 473, 632 P.2d 350 (1981); *City of Clovis v. Ware*, 96 N.M. 479, 632 P.2d 356 (1981). Where multiple interests are involved in a single tract, each party with a separate interest may be entitled to a separate trial. If multiple interests in a single tract are tried in a single lawsuit, then each defendant is entitled to an instruction applicable to defendant's interest, as parties are always entitled to instructions on theories of the case when supported by the evidence.

[As revised, effective November 1, 1991.]

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

In addition to the money damages to be paid to the owner for the property actually taken, you shall determine whether the owner should also recover special items of money damages in connection with the remaining property. In so doing, you shall first determine whether the following special items of claimed damages have been proved by the owner:

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

(a) Change of grade;

(b) Loss of view;

(c) Impaired ingress, egress and circuitous indirect access, etc.;

(d) Cost of fencing;

(e) Reestablishment of parking areas and signs;

(f) Loss of fertilizing;

(g) Reestablishment of irrigation works;

(h) Relocation expenses.)

Any damages so proved must be reduced to the extent it is proved by the _____ *(here state name of condemning authority)* that the proposed _____ *(insert type of project)* project will result in benefits to the remaining property. If you find that any, or all, of the owner's claimed items of special damages have been proved, then you shall consider whether the _____ *(here state name of condemning authority)* has proved that the proposed project will benefit the remaining property in any of the following particulars:

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

(a) Improved access;

(b) Increased or decreased traffic flow;

(c) Desirability for commercial use.)

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

USE NOTES

This instruction, as indicated by the catchline, is to be used only when an issue is presented by the owner as to damages to the remaining property, whether caused by or in connection with the taking. When this instruction is utilized, it should be used in conjunction with UJI 13-704, which would be applicable in determining the base amount of compensation to be paid the owner for the property actually taken. In the event multiple parties, owning separate properties, are involved, the words "each owner" should be used. In inverse condemnation proceedings, the words "owner" and "condemning authority" should be reversed since the condemnee is the moving party.

The New Mexico Supreme Court has not completely delineated the limits of special damages recoverable but it would seem those enumerated would be applicable as well as others which may be pertinent in a particular case.

[As amended, effective January 1, 1987.]

Committee commentary. — *See State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 84 N.M. 424, 504 P.2d 634 (1972), as to the applicability of 22-9-9.1, 1953 Comp. (now Section 42A-1-26 NMSA 1978) to this instruction. The court in Hesselden held that the instruction as to damage to the remainder tract should specifically set forth claimed consequential or special items of damage. Under the provisions of Section 42A-1-26 NMSA 1978, general or special benefits can be considered only as an offset against damages to the remaining property. *See also* 6 Fla. Stat. Ann. § 73.071 for a comparable uniform instruction used in Florida.

As to damages, *see Board of County Comm'rs v. Harris*, 69 N.M. 315, 366 P.2d 710 (1962), where a change in highway grade making access difficult was held compensable. *See also Board of Trustees v. Spencer*, 75 N.M. 636, 409 P.2d 269 (1965), dealing with disruption of irrigation water supply and *City of Clovis v. Ware*, 96 N.M. 479, 632 P.2d 356 (1981) (placement of a sewage treatment facility diminishing the value of the remaining tract is compensable).

As to benefits, *see City of Albuquerque v. Chapman*, 76 N.M. 162, 413 P.2d 204 (1966); *Board of Trustees v. Spencer*, supra; *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961); and *City of Tucumcari v. Magnolia Petroleum Co.*, 57 N.M. 392, 259 P.2d 351 (1953).

13-706. Entire taking of leasehold; damages to landlord.

The owner of the property taken is also the landlord under a lease on the property for a term ending _____.

The owner-landlord is entitled to recover money damages for the total of the following:

(1) The net rental loss due for cancellation of the lease for the remaining term;

(2) The depreciated value of the improvements the landlord would have owned at the end of the lease term; and

(3) The fair market value of the land at the end of the lease term.

All damages awarded for the above items shall be discounted to present value as of the date of taking.

The term "net rental loss", as used in this instruction, means the total rent payable by the tenant less the total expenses, if any, payable by the landlord for the balance of the lease term.

USE NOTES

When this instruction is given, the blank in the first paragraph will need to be completed.

Committee commentary. — This instruction and the following instructions, relating to landlord-tenant, are drafted in contemplation that the trial court will instruct on the separate interests of each party and submit separate verdicts accordingly. In the past, many courts relied on a single verdict representing the aggregate of all interests and estates, utilizing the theory that property subject to a lease should be appraised and valued as unencumbered by the lease to ensure that total damages awarded do not exceed the fee value. The committee is of the opinion that such an approach ignores the reality that the existence of a currently enforceable lease has a definite effect on the value of the property which any prospective buyer would consider. One author in commenting on this problem states that to evaluate the property as a whole tends to plunge the valuation question "into a semantic bog which is not very helpful for analytical purposes". Polasky, The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477, 490. See also Hitchens, The Valuation in Condemnation Proceedings, 17 U. Miami L. Rev. 245 (1963). The fact that, in a particular situation, the separate valuation of the interests of the landlord and the tenant may result in a value exceeding the unencumbered fee is not due to the multiple ownership of the property, but results from the particular nature of the leasehold itself, such as where land is leased to a financially responsible tenant at a high rental. Nichols, Eminent Domain §§ 12.36, 12.42; *Cleveland Allerton Hotel, Inc. v. Commissioner*, 166 F.2d 805 (6th Cir. 1948); and *In re Appropriation for Hwy. Purposes*, 166 Ohio St. 249, 142 N.E.2d 219 (1957). In this connection, the committee has carefully considered Section 42-2-15 D NMSA 1978, which would permit a trial court to submit the claims of the landlord and the tenant in a single charge, and then apportion the award between the separate interests. For the reasons above stated, the committee feels such an approach would deny full and complete compensation. In addition, this approach would contravene Section 42A-1-26 NMSA 1978, where recovery of damages to the remainder tract in a partial taking can include damages which "might otherwise be deemed noncompensable." *See* 6 Fla. Stat. Ann. § 73.071 for a comparable uniform instruction used in Florida.

Finally, it should be understood that this instruction assumes the nonexistence of a condemnation clause in the lease. If the lease contains a condemnation clause, then this instruction will have to be redrafted to conform therewith.

Ordinary business expenses, payable by the landlord, might include utility expenses, taxes, repairs, janitorial services, etc.

13-707. Entire taking of leasehold; damages to tenant.

In this case, the taking of the property resulted in the termination of the lease.

The tenant is entitled to recover money damages for the total of the following:

(1) The value, at the time of taking, of all improvements and fixtures owned by the tenant which have been taken; and

(2) The fair rental value of the remaining term of the lease, less the total rent due the landlord for the same term, discounted to present value, as of the date of taking.

USE NOTES

When this instruction is given, it is not necessary to use UJI 13-703.

UJI 13-712 should be used with this instruction.

Committee commentary. — Where there is an entire taking, the lease is deemed terminated by the condemnation, and, except for the value of the leasehold improvements owned by the tenant, the tenant is entitled to no compensation unless the fair rental value of the property exceeds the contract rental. See generally 2 Nichols, Eminent Domain § 5.23(1), pp. 38, 39; 4 Nichols, Eminent Domain §§ 12.42(1)-(3), pp. 163-177. The termination occurs by means of paramount title and gives the tenant no claim against the landlord for the fact of termination itself. 2 Nichols, Eminent Domain § 5.23(3).

See committee commentary to UJI 13-709 NMRA.

Paragraph (2) of this instruction should be given only if fair rental value exceeds the contract rental stipulated in the lease.

If the property is taken under the Relocation Assistance Act (Section 42-3-1 NMSA 1978 et seq.), then certain additional relocation expenses can be recovered, as provided for in such act.

13-708. Partial taking of leasehold; damages to landlord.

The owner of the property being taken is also the landlord under the lease on the property for a term of years ending _____.

The owner-landlord is entitled to recover money damages for the sum total of the following:

(1) The depreciated value of improvements taken and which the landlord would have owned at the end of the lease;

(2) The value of the land taken and which the landlord would have owned at the end of the lease; and

(3) The cost of restoration of the remaining premises, if required by the lease agreement.

USE NOTES

This instruction, as indicated by the catchline, is to be used only when an issue is presented by the lessor as to damages caused by the taking or in connection with the remaining property. When this instruction is utilized, it should be used in conjunction with UJI 13-704, which would be applicable in determining the amount of compensation to be paid to lessor for the property actually taken. In the event that multiple parties, leasing separate properties, are involved, the words "each lessor" should be used. In inverse condemnation proceedings, the words "lessor" and "condemning authority" should be reversed since the condemnee is the moving party.

[As amended, effective January 1, 1987.]

Committee commentary. — *See State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co.*, 84 N.M. 424, 504 P.2d 634 (1972), as to the applicability of Section 42-1-1 (now 42A-1-1) NMSA 1978 et seq., to this instruction, which case holds that the instruction, as to damage to the remainder tract, should specifically set forth claimed consequential or special items of damage. Under the provisions of Section 42-1-1 (now 42A-1-1) NMSA 1978 et seq., general or special benefits can be considered *only* as an offset against damages to the remaining property. *See also* 6 Fla. Stat. Ann. § 73.071 for a comparable uniform instruction used in Florida.

As to damages, *see Board of County Comm'rs v. Harris*, 69 N.M. 315, 366 P.2d 710 (1962), where a change in highway grade, making access difficult, was held compensable. *See also Board of Trustees v. Spencer*, 75 N.M. 636, 409 P.2d 269 (1965), dealing with disruption of irrigation water supply.

As to benefits, *see City of Albuquerque v. Chapman*, 76 N.M. 162, 413 P.2d 204 (1966); *Board of Trustees v. Spencer*, supra; *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961); and *City of Tucumcari v. Magnolia Petroleum Co.*, 57 N.M. 392, 259 P.2d 351 (1953).

13-709. Partial taking of leasehold; damages to tenant.

At the time of the taking, the tenant had a lease on the property for a term ending _____.

The tenant is entitled to recover money damages for the value of the leasehold loss, which you find to have resulted from the taking. You shall determine any loss as follows: from the fair rental value of the lease property immediately before the taking, subtract the fair rental value of the remaining lease property immediately after the taking. [From the resulting loss of the fair rental value, subtract the reduction in rent provided for in the condemnation clause of the lease.]

[The tenant is also entitled to the value of the loss resulting from the taking or devaluation of the fixtures and improvements which were owned by the tenant.]

Damages for leasehold loss should be discounted to present value as of the date of taking.

USE NOTES

This instruction, as indicated by the catchline, is to be used only when an issue is presented by the lessee as to damages caused by the taking to, or in connection with, the remaining property. When this instruction is utilized, it should be used in conjunction with UJI 13-705, which is applicable in determining the amount of compensation to be paid lessee for the property actually taken. In the event that multiple parties, leasing separate properties are involved, the words "each lessee" should be used. In inverse condemnation proceedings, the words "lessee" and "condemning authority" should be reversed since the condemnee is the moving party.

Committee commentary. — For the tenant's right to recover damages for that part of the land taken, see 1 American Law of Property § 354 (1953); 4 Nichols, Eminent Domain § 12.42(2), note 2; and 43 Iowa Law Rev. 279, 283-84 (1954).

See also committee commentary under UJI 13-706 and 13-708 NMRA.

Concern may arise over restoration or relocation expenses and, in this connection, *see Board of Trustees v. B.J. Serv.*, Inc., 75 N.M. 459, 406 P.2d 171 (1965) and Section 42-1-1 (now 42A-1-1) NMSA 1978 et seq., which provides that all elements, enhancing or diminishing fair market value, should be considered, even though some damages in themselves might otherwise not be compensable. *See* Section 42A-1-26 NMSA 1978.

13-710. Damages without taking.

In this case, none of the owner's property was taken. However, if you find that the property was damaged by the project, you should award the owner the difference

between the fair market value of the property immediately before the damage and the fair market value immediately after the damage.

USE NOTES

If the jury finds owner entitled to compensation where no land was taken, but damage was suffered, then the above instruction, giving the measure or yardstick of damages, is proper. Instances of liability in such cases are rare, but do exist, as in the Harris case below.

Committee commentary. — This instruction would normally only be used in inverse condemnation cases. *See* 42A-1-29 NMSA 1978.

See Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961), where no land was taken, but owner recovered under "before and after rule", where damage resulted from change in grade of street, making access to business more difficult.

Also *see Public Serv. Co. v. Catron*, 98 N.M. 134, 646 P.2d 561 (1982), where the court held that the owner of private property may obtain compensation, even without an actual taking, if the owner can show consequential damages and the damage is different in kind, and not merely degree, from that suffered by the public in general. This is consistent with the court's earlier holding in *McClure v. Town of Mesilla*, 93 N.M. 447, 601 P.2d 80 (Ct. App. 1979).

13-711. Fair market value; definition.

Fair market value is considered to be the highest amount of cash a willing seller would take, and a willing buyer would offer, for the property if it were offered for sale in the open market for a reasonable time to find a purchaser, buying with knowledge of all the uses to which the property is suitable or adaptable; the seller not being required to sell nor the purchaser being required to purchase.

USE NOTES

This instruction is necessary in every condemnation case, except when the only property interest involved is that of the tenant.

Committee commentary. — New Mexico authority supporting this definition will be found in *Board of Comm'rs v. Gardner*, 57 N.M. 478, 260 P.2d 682 (1953) and *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961) and *El Paso Elec. Co. v. Pinkerton*, 96 N.M. 473, 632 P.2d 350 (1981). The *Yandell* case pointed out, however, that in condemnation cases the element of the willing seller is lacking. *See also Allen v. McClellan*, 75 N.M. 400, 405 P.2d 405 (1965), *rev'd on other grounds*, 77 N.M. 801, 427 P.2d 677 (1967).

13-712. Fair rental value; definition.

Fair rental value is considered to be the highest amount of cash a willing owner would take and a willing tenant would offer for the lease of the property if it were offered for lease in the open market for a reasonable time to find a tenant, leasing with knowledge of all the uses to which the property was suitable or adaptable; the owner not being required to lease nor the tenant being required to rent.

The rent actually paid is one factor which you may consider, along with all the other evidence of fair rental value at the time of taking.

USE NOTES

This instruction should be used when there is an entire taking of property under lease for determination of just compensation for the tenant. It should also be used when there has been a partial taking and resulting damages to the tenant are to be determined, if the lease is not terminated by the partial taking.

This instruction is to be used with UJI 13-707 and 13-709 NMRA.

Committee commentary. — The foregoing instruction has not, heretofore, been included in uniform instructions or stock instructions because the rule of law, prior to the adoption of the alternative procedures (Section 42-2-1 NMSA 1978 et seq.), was that only one award was given and the court apportioned that amount between the landlord and the tenant. This may still be the federal rule, but it is not the New Mexico rule. Such procedure can result in inequities to the tenant and, therefore, the committee has prepared an instruction comparable to the fair market value instruction which is applicable to the landlord. *See* committee commentary to UJI 13-707 and 13-711.

13-713. Present value; determination; discount.

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages by making allowance for the fact that any award you make would, if properly invested, earn interest. To determine "present value", you should, therefore, allow a reasonable discount for the earning power of such money and arrive at the present cash value of the total money damages, if any.

Damages, not arising in the future, shall not be discounted.

USE NOTES

This instruction should be given whenever the term "present value" is used in the body of the instruction, such as in UJI 13-707 and 13-709 NMRA.

Committee commentary. — This instruction is taken from the chapter on damages and applies to all cases where discount is required in order to determine present value. *See also State ex rel. State Hwy. Comm'n v. Steinkraus*, 76 N.M. 617, 417 P.2d 431 (1966).

13-714. Consideration of land uses.

In determining damages, you will consider the uses made of the property at the time of taking and also the highest and best uses for which the property may have been suitable and adaptable in the near future.

USE NOTES

This instruction is proper where there is evidence that the location of the property and its adaptability for special uses affects the market value.

Committee commentary. — For authority from the federal bench involving condemnation of New Mexico lands, *see United States v. Cox*, 190 F.2d 293 (10th Cir.), cert. denied, 342 U.S. 867, 72 S. Ct. 107, 96 L. Ed. 652 (1951). *See also State ex rel. State Hwy. Comm'n v. Pelletier*, 76 N.M. 555, 417 P.2d 46 (1966); *City of Albuquerque v. Chapman*, 76 N.M. 162, 413 P.2d 204 (1966); and *United States v. Jaramillo*, 190 F.2d 300 (10th Cir. 1951); and *U.S. v. 46,672.96 Acres of Land*, 521 F.2d 13 (10th Cir. 1975).

In *U.S. v. 77,819.10 Acres of Land*, 647 F.2d 104, cert. denied, 456 U.S. 926, 102 S. Ct. 1971, 72 L. Ed. 2d 441 (1981), the court held that the standard in determining whether the owner has demonstrated an alternative highest and best use is whether there is a reasonable probability that the land is physically adapted for such use and there is a need for such use in the reasonably near future.

In *U.S. v. 46,672.96 Acres of Land*, more or less, supra, the court held that where the market for a particular use of land is created solely as a result of the project for which the land is condemned, the value based on that use must be excluded.

13-715. Expert testimony.

A witness who, by education or experience, has become expert in the appraisal of property is permitted to state an opinion as to [market value] [rental value] [damages] [other].

You should consider such expert opinion received in evidence and give it such weight as you think it deserves, or you may reject it entirely.

USE NOTES

Juries are entitled to be informed as to the status of expert witnesses. This instruction or that in the chapter referring to witnesses should be used when the court has permitted expert testimony.

[As amended, effective January 1, 1987.]

Committee commentary. — Testimony of "experts" on other sales is hearsay and sometimes of questionable validity, but the courts have held that there is a practical need of proof and, therefore, in a proper situation, the general use restrictions on hearsay evidence have been relaxed. *City of Santa Fe v. Gonzales*, 80 N.M. 401, 456 P.2d 875 (1969); *State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry.*, 76 N.M. 587, 417 P.2d 68 (1966); *City of Albuquerque v. Chapman*, 76 N.M. 162, 413 P.2d 204 (1966); *El Paso Elec. Co. v. Pinkerton*, 96 N.M. 472, 632 P.2d 350 (1981). *See also* 12 A.L.R.3d 1064.

13-716. Landowner's or tenant's value testimony.

An [owner] [tenant] may testify to the [fair market value] [fair rental value] of [his] [her] [its] property, and that testimony may be considered by you the same as that of any other witness expressing an opinion as to the [fair market value] [fair rental value] of the property.

USE NOTES

The landowner or the tenant has the right to express an opinion as to the fair market value of the property. Selection of the bracketed material will depend upon whether it is the landowner or the tenant testifying. When either testifies, the instruction is appropriate.

[As amended, effective November 1, 1991.]

Committee commentary. — *See City of Albuquerque v. Ackerman*, 82 N.M. 360, 482 P.2d 63 (1971), and *State ex rel. State Hwy. Comm'n v. Chavez*, 80 N.M. 394, 456 P.2d 868 (1969). *See also* 20 Am. Jur. Evidence § 892, p. 751.

13-717. Comparable sales.

The price paid for similar or comparable property in the open market may be considered by you in determining the value of the property condemned or damaged. You may give such evidence the weight you deem proper; or you may reject it entirely.

USE NOTES

This instruction is proper when the jury has heard testimony of witnesses on actual sales.

Committee commentary. — For a statement of the general rule supporting the above instruction, see 27 Am. Jur. 2d Eminent Domain § 692. *See also State ex rel. State Hwy. Comm'n v. Tanny*, 68 N.M. 117, 359 P.2d 350 (1961).

The purchase price of the property actually involved in the condemnation may be material.

See 15 Nichols, Eminent Domain § 21-3(1) (1962 ed.). *See also State ex rel. State Hwy. Comm'n v. Bassett*, 81 N.M. 345, 467 P.2d 11 (1970) and *State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry.*, 76 N.M. 587, 417 P.2d 68 (1966).

13-718. Minimum and maximum values.

In determining [market value] [rental value], you must base your findings on the evidence that has been presented to you. You may not render a verdict in an amount less than the lowest, nor more than the highest, estimate of damages.

In this case, the lowest estimate of damages was $ _____ and the highest estimate was $ _____.

USE NOTES

Material bracketed in the instruction will need to be selected depending upon the particular circumstances of the case. The dollar blanks will need to be completed by the trial court.

Committee commentary. — This is a proper guide to the jury as the verdict rendered should not be based upon whim or caprice, but based upon evidence adduced at the trial.

13-719. Access; loss of.

The _____ *(insert name of condemning authority)* may control, regulate and designate reasonable access to and from the owner's property, but, if such control, regulation or designation is unreasonable, the owner is entitled to compensation for such limitation of this access.

USE NOTES

If the court finds a fact issue present on the question of reasonableness, then the above instruction would appear to be proper.

Committee commentary. — With one exception, no New Mexico case is to be found allowing compensation for loss of access to an existing highway system. The exception is *Board of County Comm'rs v. Harris*, 69 N.M. 315, 366 P.2d 710 (1961), where a change of a highway grade, making access difficult, was held compensable. Nevertheless, in the decision next discussed, denying compensation, the court announced the principle contained in the above instruction on "Access".

Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945), holds that damage to defendant's business, resulting from a change of a highway, diverting traffic away from defendant's property, is noncompensable.

A series of recent cases, developing as a result of interstate highway projects, uniformly holds that the right of direct access to the highway is subject to reasonable traffic regulations. As long as there is access to the highway system, although involving circuity of travel (which may be considerable), no damage results. As above mentioned, however, the court in these cases recognizes the principle that an "unreasonable interference" with the property owner's access, under the circumstances of a particular case, might become compensable. *See State ex rel. State Hwy. Comm'n v. Mauney*, 76 N.M. 36, 411 P.2d 1009 (1966); *State ex rel. State Hwy. Comm'n v. Lavasek*, 73 N.M. 33, 385 P.2d 361 (1963); *State ex rel. State Hwy. Comm'n v. Danfelser*, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964); *State ex rel. State Hwy. Comm'n v. Silva*, 71 N.M. 350, 378 P.2d 595 (1962); and *State ex rel. State Hwy. Comm'n v. Brock*, 80 N.M. 80, 451 P.2d 984 (1968); *Hill v. State Hwy. Comm'n*, 85 N.M. 689, 516 P.2d 199 (1973).

13-720. Monetary interest on amount of award.

You are not to add interest to the amount of the award, in arriving at your verdict. The court will add interest from the proper date.

USE NOTES

To eliminate a possible element of doubt as to whether the award carries interest, this instruction is recommended.

Committee commentary. — Under the direct method of condemnation, interest accrues on the compensation fixed by judgment from the date the petition was filed. *See* 42-2-15 NMSA 1978.

In *State Hwy. Dep't v. First Nat'l Bank*, 91 N.M. 240, 572 P.2d 1248 (1977), it was held that the trial court erred in including in the amount eligible to bear interest the sum of the accrued interest on the unpaid balance of the award from the date of the petition to the date of entry of judgment in the second trial.

13-721. Remote and speculative elements.

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

USE NOTES

This is a basic instruction which will be requested by one side or the other in the usual condemnation action.

Committee commentary. — This follows the same principle expressed in other instructions on the measure of damages, wherein appears the caution that "your verdict must be based upon proof and not speculation, guess or conjecture".

13-722. Special responsibility of jury.

The owner of property is usually reluctant to have [his] [her] [its] property taken. Thus, [he] [she] [it] is not a willing seller. Nevertheless, [he] [she] [it] is entitled to recover for damage to the property caused by the taking. You should exercise care and good judgment in determining damages so that both the defendant and the plaintiff are treated fairly. Each defendant should receive and the plaintiff should pay just compensation, as required by law.

USE NOTES

In the foregoing instruction, it is assumed that the plaintiff is the state or other governmental agency and, thus, is either taking the land involved or causing damage thereto and the defendant is the landowner, landlord or tenant. When the tenant is involved in the condemnation proceedings, the word "owner" should be stricken and modification should be made to show that it is the tenant who is reluctant to have his interest in the property taken, or to lose his leasehold. In the appropriate case, perhaps other designations of the parties may be required.

[As amended, effective November 1, 1991.]

Committee commentary. — Generally, in a condemnation action, the only issue left for the determination of the jury, after all of the evidence has been presented, is the amount to be awarded. Thus, the above special cautionary instruction is justified.

13-723. Jury view.

You are permitted to use the knowledge gained by your view of the property to interpret the evidence in the case.

USE NOTES

When a jury view is made, a special instruction needs to be given to the jury before they go to the scene, and the foregoing instruction can be included in the final instructions before oral arguments.

Committee commentary. — *See Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 457, 367 P.2d 938 (1961); *Board of Comm'rs v. Gardner*, 57 N.M. 478, 260 P.2d 682 (1953) and *Board of County Comm'rs v. Little*, 74 N.M. 605, 396 P.2d 591, 594 (1964), wherein the court in a nonjury case said:

The fact trier is permitted to use the knowledge gained by a view of the premises, not only to interpret the evidence offered, but also as independent evidence of the facts as these appear to him.

See also City of Truth or Consequences v. Pietruszka, 81 N.M. 3, 462 P.2d 137 (1969).

Jury views are seldom used by the district courts anymore. They are of questionable assistance to a jury which, now, usually has plats, diagrams, drawings and pictures from every conceivable angle. Frequently, the scene has changed considerably at the time of trial from what the facts were at the time of the taking. The granting or denying of a jury view is within the sound discretion of the court.

In *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 98 N.M. 570, 651 P.2d 105 (1982), a case in which the parties had agreed to a jury view of the property, it was held that the condemnee was not entitled to reversal where the condemnors had improperly marked one spot on the easement with a red flag. The record showed that the condemnee had picked the spot, the condemnors marked it, there was no claim that the flags were in the wrong place or that the distance was improperly measured and the trial court had instructed the jury that the spot marked was not necessarily a typical spot.

13-724. Verdict in condemnation-eminent domain cases.

VERDICT

We find for the defendant [property owner] [landlord] [tenant] in the sum of $ _____.

_____
Foreperson

USE NOTES

This form of a verdict should be sufficient in most cases. If there is a tenant, as opposed to an owner, then the necessary change should be made in the form of verdict.

If there should be a case where the jury might find within the realm of the evidence, a zero verdict then, of course, they can so indicate with this verdict. The jury already has been informed by UJI 13-718 as to the minimum and maximum limits of their verdict.

[As amended, effective November 1, 1991.]

Committee commentary. — Verdicts are generally left to the special chapter in the pamphlet containing verdicts, but in condemnation actions, generally, there can be but one form of verdict and, therefore, the draft of a verdict is included here for the benefit of the court and the bar.

CHAPTER 8
Contracts and UCC Sales

Introduction

These instructions cover common law contracts actions. Former Chapter 17 (Uniform Commercial Law (UCC)) was deleted in 1991. The remaining UCC instructions pertaining to the sale of goods in this chapter were withdrawn in 2017. Practitioners are encouraged to consult the UCC, Sections 55-1-101 to 55-12-111 NMSA 1978, in drafting appropriate instructions for cases involving the sale of goods under the UCC.

The instructions in this contracts chapter are divided into five subdivisions. First are the instructions dealing with the formation of a contract. These instructions include not only definitional elements, but also instructions addressing modification of a contract and the rights and obligations of third parties to a contract. Second are the instructions dealing with breach of contract. Third are the instructions dealing with interpretation of contract terms. Fourth are the instructions dealing with defenses available to breach of contract claims. Fifth are the instructions dealing with remedies available for breach of contract.

The instructions in this chapter have been written in an attempt to personalize the instructions to the names of the parties and to tailor the instructions to the particular factual disputes arising from the claimed breach of contract. Therefore, the instructions seek to avoid the use of the terms “plaintiff” and “defendant” or “promisor” and “promisee” or “seller” and “buyer.” Instead, the names of the parties should be inserted. Similarly, the instructions call for the insertion of the particular contract terms that are in dispute or the particular ways in which the parties claim that the contract has been breached. As with other chapters in these instructions, the key to the use of the instructions lies in the proper use of the “theory of the case” instruction, UJI 13-302 NMRA, which should bear a large share of the burden of focusing the jury's attention on what is in dispute and what law should apply. The theory of the case instruction should be followed only by those instructions that are pertinent to the particular matters in dispute. Definitional instructions should be used only where a matter is in dispute and the definition is essential to guide the jury to the proper determination of the factual issue.

Definitional instructions can be incorporated in the statement of issues and, where this is done, need not be repeated. This technique is especially useful in contract actions to reduce the instructions given to the jury. When preparing instructions under this chapter the trial court and counsel are encouraged to study and employ the recommendations of the Supreme Court in *Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, ¶¶ 8-9, 108 N.M. 722, 779 P.2d 99.

As a final caution, most contractual issues are determined by the trial court and not the jury. The inclusion of an instruction in this chapter does not mean that the issue should be submitted to the jury. Jury submission requires a genuine issue of fact arising from conflicting evidence. Where reasonable minds may not differ upon an issue the trial court makes the determination as a matter of law. Contract actions more than other civil cases give rise to issues properly determined by the judge and not the jury.

Breach of contract claims will often arise in disputes that touch on other areas of the law as well. Agency questions may be involved, requiring the inclusion of instructions from Chapter 4 (Agency; Respondeat Superior). Negligence or other tort questions such as fraud or misrepresentation may arise, requiring instructions from Chapters 14 (Products Liability) or 16 (Tort Law—Negligence). Chapter 14 (Products Liability) also contains instructions which may implicate implied warranties as set forth in Article 2 of the UCC.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-801. Contract; definition.

A contract is a legally enforceable promise [set of promises]. In order for a promise [set of promises] to be legally enforceable, there must be an offer, an acceptance, consideration, and mutual assent.

[Any of these four requirements, although not expressly stated, may be found in the surrounding circumstances, including the parties' words or actions, the parties' conduct, the parties' course of dealing, the parties' course of performance, or from custom.]

In this case, the parties agree that there [was] [were] _____ (*insert element(s) parties agree were met*). What is in dispute is whether there [was] [were] _____ (*insert element(s) parties do not agree were met*).

USE NOTES

When the existence of a contract presents a question for a jury, this instruction should be given. The element(s) not in dispute and in dispute should be inserted as the parentheticals in the instruction indicate. The bracketed language in the second paragraph should be included in the instruction given to a jury, to the extent the evidence warrants, when a case presents a jury question as to the existence of an implied contract. Additionally, instructions for any element(s) in question should be given. *See* UJI 13-805 to 13-814, UJI 13-816 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — "The existence of a contract between parties is generally a question of law to be decided by the trial court." *Rio Grande Conservancy Dist.*, 1983-NMCA-047, ¶ 22, 99 N.M. 802, 664 P.2d 1000, *overruled on other grounds by Montoya v. Akal Sec. Inc.*, 1992-NMSC-056, 114 N.M. 354. However, "when the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the jury to determine whether the contract did in fact exist." *Segura v. Molycorp, Inc.*, 1981-NMSC-116, ¶ 24, 97 N.M. 13, 636 P.2d 284.

Ordinarily, “a legally enforceable contract requires evidence supporting the existence of an offer, an acceptance, consideration, and mutual assent.” *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 6, 137 N.M. 57, 107 P.3d 11 (internal quotation marks and citation omitted); accord *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 918 P.2d 7; *cf. Hydro Conduit Corp. v. Kimble*, 1990-NMSC-061, ¶ 21, 110 N.M. 173, 793 P.2d 855 (distinguishing quasi-contracts or contracts implied in law); *see also* Restatement of (Second) Contracts § 4, cmt. b, at 15 (1979) (“[Q]uasi-contracts are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice.”).

A contract may be express or implied. Hydro Conduit Corp., 1990-NMSC-061, ¶ 21; *accord Orion Technical Res., LLC*, 2012-NMCA-097, ¶ 9, 287 P.3d 967. “An implied contract may be found in written or oral representations, in the conduct of the parties, or in a combination of representations and conduct.” *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, ¶ 20, 135 N.M. 128, 85 P.3d 252, ***aff’d on other grounds***, 2005-NMSC-003, 137 N.M. 192; *see also Orion*, 2012-NMCA-097, ¶¶ 8-9, 287 P.3d 967 (explaining that an implied contract also may be found from circumstances, including the parties’ course of dealing or course of performance, as well as from custom). The legal effect and the elements of express and implied contracts are the same. 1 R. Lord, Williston on Contracts § 1:5, at 33, 37-38 (4th ed. 2007).

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-802. Contract; material terms.

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

USE NOTES

This instruction should be given in every case where one party claims that a contract has not been formed because there has not been agreement on a material term. This instruction should be given with UJI 13-816.

[Adopted, effective November 1, 1991.]

Committee commentary. — If a term is material with respect to either the contract as a whole (*see* UJI 13-816 NMRA) or to the intent of a party, then the absence of this term from the contract could negate the existence of a contract. *Trujillo v. Glen Falls Insurance Co.*, 88 N.M. 279, 540 P.2d 209 (1975); *Silva v. Noble*, 85 N.M. 677, 515 P.2d 1281 (1973); UJI 13-808. Where a party claims that a material term is missing, the jury question is whether that term was essential to the party's intent to contract at the time the party made the decision to contract. *Bogle v. Potter*, 72 N.M. 99, 380 P.2d 839 (1963); *Jones v. United Minerals Corp.*, 93 N.M. 706, 604 P.2d 1240 (1979).

13-803. Withdrawn.

13-804. Contract; intentions of the parties.

You should determine the intentions of the parties by examining their language and conduct, the objectives they sought to accomplish, and the surrounding circumstances.

USE NOTES

This instruction should be given where the existence and/or terms of a contract are subject to varying factual interpretation. This instruction should be given in conjunction with UJI 13-825.

[Adopted, effective November 1, 1991.]

Committee commentary. — The intentions of the parties may be ascertained from the language used, the parties' conduct, and surrounding circumstances. *Secura v. Kaiser Steel Corp.*, 102 N.M. 535, 697 P.2d 954 (Ct. App. 1984). The jury should focus on the parties' intentions up to the time the parties formed their purported contract. *Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980).

13-805. Offer; definition.

An offer is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

First, the communication must have included a proposal by _____ (*name of offeror*) showing _____'s (*name of offeror*) willingness to contract;

Second, the material terms of that proposal must have been reasonably certain;

Third, the terms must have been communicated to _____ (*name of offeree*); and

Fourth, by the communication _____ (*name of offeror*) must have intended to give _____ (*name of offeree*) the power to create a contract by accepting the terms.

In this case, the parties agree that: [include here the conditions which are not in dispute]. What is in dispute is: [include here the conditions that are in dispute].

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 14-8300-006, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — While each of the four requirements just described must be present, it is not necessary that each element be expressly stated. *See* UJI 13-802 NMRA.

The issue may arise whether a particular communication constitutes an offer or only an invitation to deal. New Mexico courts have used the term "proposal" in describing the communications which may constitute offers. *See, e.g., Naranjo v. Paull*, 1990-NMCA-111, ¶ 14, 111 N.M. 165, 803 P.2d 254 ("In the law of contracts an offer is a proposal setting forth the essential terms of the prospective transaction."). The requirement that the communication must empower the offeree to create a contract by an acceptance distinguishes an offer from preliminary negotiations. *See* Restatement (Second) of Contracts § 26. Conduct which resembles an offer may not be so intended because there is an intent not to affect legal relations, *see id.* § 18, or because the actor does not intend to engage in the conduct, *see id.* § 19, or because the proposal is not addressed to the recipient or is not received by the addressee, *see id.* §§ 23, 26 comment a.

A proposal by the offeror is not an offer until it is made known to the offeree who thereby is in a position to accept or to reject the offer. *Foster v. Udall*, 335 F.2d 828, 831 (10th Cir. 1961); Restatement (Second) of Contracts § 26. In addition, "[e]ven though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the proposed contract are reasonably certain." *Las Cruces Urban Renewal Agcy. v. El Paso Elec. Co.*, 1974-NMSC-004, ¶ 14, 86 N.M. 305, 523 P.2d 549; Restatement (Second) of Contracts § 32.

[As amended by Supreme Court Order No. 14-8300-006, effective for all cases filed or pending on or after December 31, 2014.]

13-806. Offer; revocation; effect of performance.

An offer may be withdrawn at any time before notice of its acceptance has been received. To have withdrawn an offer, _____ (*name of offeror*) must have notified _____ (*name of offeree*) that the offer was withdrawn.

Once notice of withdrawal has been received, the offer may no longer be accepted and any attempt to accept thereafter will not be effective. If _____ (*name of offeree*) was notified that the offer was withdrawn, _____ (*name of offeree*) could no longer accept the offer.

[If, however, the offer allows for acceptance by performance, the offer cannot be withdrawn once performance has begun. Instead, a reasonable amount of time must be given to allow completion of performance. If _____ (*name of offeree*) had started performing before _____ (*name of offeree*) received notice of _____'s (*name of offeror*) withdrawal of the offer, then _____ (*name of offeree*) must be given reasonable time to complete the performance. What constitutes reasonable time should be determined by you from the surrounding circumstances.]

[If the offer made by _____ (*name of offeror*) was accompanied by a promise not to revoke the offer and consideration was given for that promise, then the offer cannot be withdrawn by _____ (*name of offeror*).]

USE NOTES

The first two paragraphs of this instruction should be used where an offeror claims to have revoked the offer. The third paragraph should be given where the offeree claims that the offeree has justifiably relied on the offer by beginning the performance requested by the offeror. The fourth paragraph of this instruction should be used when the offeree claims that the offeree gave consideration in exchange for the offeror's promise not to revoke the offer and that an "option contract" was therefore created.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 14-8300-006, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — The offeror is master of the offer. Except for offers given for consideration (*see* UJI 13-814 NMRA) the offeror has the power to revoke the offer at any time prior to an acceptance by the offeree. *McCoy v. Alsup*, 1980-NMCA-035, ¶ 10, 94 N.M. 255, 609 P.2d 337; *Tatsch v. Hamilton-Erickson Manufacturing Co.*, 1966-NMSC-193, ¶ 15, 76 N.M. 729, 418 P.2d 187. A revocation must be communicated to the offeree to be effective. *See McCoy*, 1966-NMSC-193, ¶ 15.

An offeror may, however, promise not to revoke an offer. If this promise not to revoke is supported by consideration or is otherwise justifiably relied on, an "option contract" is created and the offeror cannot effectively revoke the offer. *See* Restatement (Second) of Contracts § 87; J. A. Farnsworth, Contracts § 3.23.

[As amended by Supreme Court Order No. 14-8300-006, effective for all cases filed or pending on or after December 31, 2014.]

13-807. Acceptance; definition.

An acceptance is a statement or conduct made by one party to the other, showing that party's agreement to the terms of the other party's offer. For _____ to have accepted _____'s offer, [he] [she] [it] must have informed _____ by a statement or conduct that [he] [she] [it] agreed to the terms of the offer.

USE NOTES

This instruction should be given in conjunction with whichever additional acceptance instructions are necessary to resolve the particular dispute. If it is contended that a purported acceptance changed the terms of the offer, then this instruction should be given with UJI 13-808 NMRA. If it is contended that the offeree failed to respond in the way called for within the offer, then this instruction should be given with UJI 13-810

NMRA. Where it is contended that an offer was accepted by silence (UJI 13-811 NMRA), or by performance (UJI 13-812 NMRA), or that the offer was revoked (UJI 13-813 NMRA), the appropriate instruction should be given.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — For there to be a contract, the offer must be accepted unconditionally and unqualifiedly by the offeree. *Corr v. Braasch*, 1981-NMSC-137, 97 N.M. 279, 639 P.2d 566; *Pickett v. Miller*, 1966-NMSC-050, 76 N.M. 105, 412 P.2d 400. The acceptance must be to all terms. *Tatsch v. Hamilton-Erickson Mfg. Co*., 1966-NMSC-193, 76 N.M. 729, 418 P.2d 187. The offer can be accepted only by the offeree. *Polhamus v. Roberts*, 1946-NMSC-033, 50 N.M. 236, 175 P.2d 196; Restatement (Second) of Contracts § 52 (1981).

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-808. Acceptance; terms of the offer.

If _____ (*name of offeree*) responded to an offer by conditioning acceptance on new terms that added, varied or changed any term of the offer, the response was a rejection of the original offer and operated as a new offer that could be accepted or rejected by _____ (*name of offeror*). [If the new terms were reasonably implied by the original offer, however, the response operated as an acceptance of the original offer despite the additional or different terms.]

[If _____'s (*name of offeree*) response to an offer included additional or different terms but did not condition acceptance on agreement to those terms, the response operated as an acceptance of the original offer.]

USE NOTES

This instruction should be given only when a purported acceptance includes terms that differ from the offer. Only the bracketed portions relevant to the case should be used.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — An offer must be accepted unconditionally and unqualifiedly by the offeree. *Pickett v. Miller*, 1966-NMSC-050, ¶ 9, 76 N.M. 105, 412 P.2d 400. "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an

acceptance but is a counter-offer." Restatement (Second) of Contracts, § 59 (1981); *see also Polhamus v. Roberts*, 1946-NMSC-033, ¶ 18, 50 N.M. 236, 175 P.2d 196.

An acceptance is not inoperative because conditional, if the requirement of the condition could be implied from the offer. *See Pickett v. Miller*, 1966-NMSC-050, ¶ 9, 76 N.M. 105, 109, 412 P.2d 400, 403; Restatement (Second) of Contracts, § 59, Comment b. A conditional acceptance is also operative if the condition was within the manifested intention of the parties. *See Tatsch v. Hamilton-Erickson Mfg. Co.*, 1966-NMSC-193, ¶ 11, 76 N.M. 729, 418 P.2d 187 (where a supplier's offer to provide school desks was conditional upon the project architect's acceptance of the supplier's brand of desk and the supplier made the conditional nature of the offer clear to the contractor, the contractor was empowered to accept supplier's offer on the condition that the project architect would approve the substituted product).

If the offeree accepts the offer unconditionally but requests a change or addition, making it plain that granting the request is not a condition of the acceptance, then, assuming that the time and manner of acceptance was authorized, the offeree's acceptance creates a contract. *Polhamus*, 1946-NMSC-033, ¶ 21; Restatement (Second) of Contracts, § 61 ("An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms."); Restatement (Second) of Contracts, § 59, Comment a. ("[A] definite and seasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms.").

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-809. Withdrawn.

13-810. Acceptance; manner of acceptance.

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

USE NOTES

This instruction should be used with UJI 13-807 NMRA when the offeree's method of communicating a purported acceptance is at issue. If the offeror claims that he or she requested a particular form of acceptance, the entire instruction should be given. If the only issue is whether the acceptance was reasonably communicated, give only the first part of the instruction.

[Adopted, effective November 1, 1991.]

Committee commentary. — Unless a particular method of acceptance is required in the offer, acceptance can be made in any reasonable way. *Silva v. Noble*, 85 N.M. 677, 515 P.2d 1281 (1973); *Pickett v. Miller*, 76 N.M. 105, 412 P.2d 400 (1966); *Polhamus v. Roberts*, 50 N.M. 236, 175 P.2d 196 (1946). The reasonableness of the method of acceptance is a question of fact to be determined by the jury, depending upon what would reasonably be expected by prevailing business usages and other circumstances. *Polhamus v. Roberts*, supra; Restatement (Second) of Contracts § 65. An oral or formal acceptance is not always necessary. *Keeth Gas Co., Inc. v. Jackson Creek Cattle Co.*, 91 N.M. 87, 570 P.2d 918 (1973).

13-811. Acceptance; when silence is acceptance.

The silence or inaction of _____ (*name of offeree*) constitutes acceptance only if:

[_____ (*name of offeree*) accepted the benefit[s] of the offer, after a reasonable opportunity to reject the benefit[s], knowing that _____ (*name of offeror*) expected compensation in return];

[or]

[_____ (*name of offeror*) stated or gave _____ (*name of offeree*) reason to understand that the offer could be accepted through silence or inaction and _____ (*name of offeree*) intended to accept the offer through silence or inaction];

[or]

[Where because of past dealings between the parties, it is reasonable that _____ (*name of offeree*) should have notified _____ (*name of offeror*) that [he] [she] [it] did not intend to accept the offer].

USE NOTES

When a case presents a jury question as to whether a party's silence or inaction constituted acceptance of an offer, this instruction should be given. The bracketed language should be inserted to the extent warranted by the evidence in a case.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Ordinarily, silence or inaction does not constitute acceptance of an offer. However, in the circumstances addressed by the instruction, silence or inaction may be found to constitute acceptance. The circumstances are ones which give rise to a duty on the part of the offeree to speak if the offeree does not intend to accept the offer. *See Garcia v. Middle Rio Grande Conservancy Dist.*, 1983-NMCA-

047, ¶ 22, 99 N.M. 802, 664 P.2d 1000 ("Silence is acceptance . . . only when there is a duty to speak."); see generally Restatement (Second) of Contracts § 69 (1981) (discussing the circumstances and identifying potential limitations on their applicability).

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-812. Acceptance; performance as acceptance; notification of the offeror; partial performance.

If _____ (*name of offeror*) invited acceptance of the offer through a return promise or through performance, and _____ (*name of offeree*) began the invited performance, such performance was an acceptance of the offer.

[Unless the offer required _____ (*name of offeree*) to notify _____ (*name of offeror*) about the beginning of performance, no notification was necessary for the performance to be acceptance.]

[If _____ (*name of offeree*) had reason to know that _____ (name of offeror) had no adequate means of learning of the performance with reasonable promptness and certainty, _____'s (*name of offeror*) contractual obligation[s] [was] [were] discharged unless:

[_____ (*name of offeree*) exercised reasonable diligence to notify _____ (*name of offeror*) of the acceptance];

[or]

[_____ (*name of offeror*) learned of the acceptance within a reasonable time];

[or]

[the offer indicated notification of acceptance was not required].]

USE NOTES

In a case which presents a jury question as to whether an offer was accepted through an invited performance, this instruction should be given. The bracketed language should be included to the extent the evidence in the case warrants.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — "Acceptance of an offer is a manifestation of assent to the terms of the offer in a manner invited or required by the offer." *Orcutt v. S & L Paint*

Contractors, Ltd., 1990-NMCA-036, ¶ 13, 109 N.M. 796, 791 P.2d 71 (citing Restatement (Second) of Contracts § 50 (1981).) The offeror may invite or require acceptance through performance. *See* Restatement (Second) of Contracts § 50; *see also Long v. Allen*, 1995-NMCA-119, ¶ 6, 120 N.M. 763, 906 P.2d 754 (citing Restatement (Second) of Contracts § 30 (form of acceptance invited), as another source of guidance on the issue). This instruction was drafted to address the first scenario in which the offeror invites acceptance through performance.

Acceptance through performance is invited when the offer invites the offeree to choose between acceptance by promise and acceptance by performance. *Long*, 1995-NMCA-119, ¶ 6 (citing the Restatement (Second) of Contracts § 62); *see also id*. ¶ 4 (citing Restatement (Second) of Contracts § 32 for the proposition that, in case of doubt, the offeree may accept through either a promise to perform or through performance). "[T]he tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance" which "operates as a promise to render complete performance." Restatement (Second) of Contracts § 62.

Acceptance through performance is required when the offer limits the manner of acceptance to performance. *See Marchiondo v. Scheck*, 1967-NMSC-222, 78 N.M. 440, 432 P.2d 405; *see also Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-016, ¶ 18 n.2, 121 N.M. 622, 916 P.2d 822 (citing *Marchiondo*, 1967-NMSC-222, and the Restatement (Second) of Contracts § 45, as sources of guidance on the issue). In such a case, the tendering or beginning of performance operates as an acceptance for an option contract. *See Marchiondo*, 1967-NMSC-222, Restatement (Second) of Contracts § 45.

For an acceptance through performance to be effective, the offeree need not notify the offeror about the performance unless certain circumstances are present. One of the circumstances is when the offeror requires such notification. *See Long*, 1995-NMCA-119, ¶ 7 (citing Restatement (Second) of Contracts § 54). Additionally, if the offeree has reason to know that the offeror does not have adequate means of learning of the performance with reasonable promptness and certainty, the offeror's contractual duty is discharged unless (1) the offeree exercises reasonable diligence to notify the offeror of the acceptance; (2) the offeror learns of the performance within a reasonable time; or (3) the offer indicates that notification of acceptance is not required. *See id*.

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-813. Acceptance; timeliness of acceptance; power of revocation.

In order for a communication to be an acceptance, it must have been received by _____ [within the time period established by the offer] [within a reasonable time] [before the offer was withdrawn by _____]. [What

constitutes a reasonable time should be determined by you from the surrounding circumstances.]

USE NOTES

Use only those bracketed parts of the first sentence which are relevant to the evidence. The bracketed last sentence should only be used where the reasonableness of the time is at issue.

[Adopted, effective November 1, 1991.]

Committee commentary. — The timeliness of an acceptance is a question of fact depending upon the circumstances of the case. *Balboa Const. Co., Inc. v. Golden*, 97 N.M. 299, 639 P.2d 586 (1981). An offer not given for consideration may be withdrawn at any time prior to unconditional acceptance by the offeree. *K. L. House Const. Co., Inc. v. Watson*, 84 N.M. 783, 508 P.2d 592 (1973).

There is some question as to whether an acceptance occurs when an offeree complies with the terms of the offer, or whether acceptance occurs when the offeror receives notification of the offeree's acceptance. According to the Restatement (Second) of Contracts § 63 and § 68 comment a, there is no requirement that the acceptance be received by the offeror where the offeree complies with the manner and medium of acceptance requested by the offeror and the acceptance is out of the offeree's control (e.g., in the mail).

13-814. Consideration; definition.

Consideration is any bargained-for benefit or advantage to _____ *(promisor)* which was a reason why _____ *(promisor)* wanted to enter into the contract, or any loss or detriment to _____ *(promisee)*, which _____ *(promisor)* desired _____ *(promisee)* to suffer or which was a reason for _____ *(promisor)* to enter into the contract. Consideration may consist of a return promise, an act, a forbearance, or the creation, modification, or destruction of a legal relation.

USE NOTES

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

[Adopted, effective November 1, 1991.]

13-815. Promissory estoppel; definition.

_____ (*name of the plaintiff*) [also] seeks damages based upon a claim of promissory estoppel. To establish this claim, _____ (*name of the plaintiff*) must prove all of the following:

1. that _____ (*name of the defendant*) made a promise to _____ (*name of the plaintiff*);

2. that _____ (*name of the plaintiff*) relied on the promise and it was reasonable for [him] [her] to do so;

3. that the promise caused _____ (*name of the plaintiff*) to change his or her position by _____ (*insert action or forbearance of the plaintiff*);

4. that the change in position was substantial;

5. that _____ (*name of the defendant*) knew or should have known that _____ (*name of the plaintiff*) would _____ (*insert action or forbearance*) after _____ (*name of the defendant*) made the promise.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 12-8300-033, effective for all cases filed or pending on or after January 7, 2013.]

Committee commentary. — This instruction was amended in 2011 to be consistent with New Mexico case law. *See Strata Prod. Co. v. Mercury Exploration Co.*, 121 N.M. 622, 628, 916 P.2d 822, 828 (1996) (listing the elements of promissory estoppel as "(1) An actual promise must have been made which in fact induced the promisee's action or forbearance; (2) The promisee's reliance on the promise must have been reasonable; (3) The promisee's action or forbearance must have amounted to a substantial change in position; (4) The promisee's action or forbearance must have actually been foreseen or reasonably foreseeable to the promisor when making the promise; and (5) enforcement of the promise is required to prevent injustice); *Magnolia Mountain Ltd. P'ship v. Ski Rio Partners,* 2006-NMCA-027, ¶ 25, 139 N.M. 288, 131 P.3d 675. The last element of the cause of action was omitted from the jury instruction because it is a question for the court. Even where a promise is not supported by traditional consideration, it may be enforceable against the promisor under the doctrine of "promissory estoppel." *See, e.g*., *Eavenson v. Lewis Means, Inc.*, 105 N.M. 161, 730 P.2d 464 (1986); Restatement (Second) of Contracts § 90 (1981). The New Mexico courts in adopting promissory estoppel have commented favorably on the Restatement version of the doctrine. *See Eavenson, supra.* "Promissory estoppel," as a theory, should be distinguished from the doctrine of "equitable estoppel." The latter doctrine may also be appropriate in a contracts situation. *See, e.g., Capo v. Century Insurance Co.*, 94 N.M. 373, 610 P.2d 1202 (1980).

Where the promise is enforced under promissory estoppel, the court may limit damages or the remedy, "as justice requires." Restatement (Second) of Contracts § 90(1). Usually, damages under a "promissory estoppel" theory are limited to "reliance damages." *See* J. A. Farnsworth, *Contracts* § 2.19 (1982). Some of the factors which may be considered in determining the extent to which the remedy should be limited or expanded are referred to in comment b to Restatement (Second) of Contracts § 90. Where the claim of promissory estoppel arises in the context of a charitable pledge, there is no need for any reliance on the part of the promisee in order to make the promise enforceable. *See* Restatement (Second) of Contracts § 90(2).

Where an oral promise is sought to be enforced under promissory estoppel, the statute of frauds is not a defense. *See Eavenson, supra*; Restatement (Second) of Contracts § 139; J. A. Farnsworth, *Contracts* § 6.12 (1982).

[As amended by Supreme Court Order No. 12-8300-033, effective for all cases filed or pending on or after January 7, 2013.]

13-816. Mutual assent; definition.

Mutual assent requires a showing of agreement by the parties to the material terms of the contract. Mutual assent may be shown by the parties' written or spoken words, by their acts or failures to act, or some combination thereof. Ordinarily, when one party makes an offer, and the other party accepts the offer, there is mutual assent.

[When the parties attach materially different meanings to the words of an offer, there is no mutual assent if:

1. Neither party knows or has reason to know the meaning attached by the other; or

2. Each party knows or has reason to know the meaning attached by the other.]

USE NOTES

When the existence of mutual assent presents a question for a jury, this instruction should be given. The bracketed language should be included when a case presents a jury question as to whether a misunderstanding resulted in the absence of mutual assent required for the formation of a contract.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — "It is elementary in contract law that mutual assent ordinarily must be expressed by parties to an agreement before a contract is made." *Orcutt v. S&L Paint Contractors, Ltd.*, 1990-NMCA-036, ¶ 11, 109 N.M. 796, 791 P.2d 71 (citing *Trujillo v. Glen Falls, Inc.*, 1975-NMSC-046, 88 N.M. 279, 540 P.2d 209). "Mutual assent is based on objective evidence, not the private, undisclosed thoughts of

the parties. In other words, what is operative is the objective manifestations of mutual assent by the parties, not their secret intentions." *Pope v. The Gap, Inc.*, 1998-NMCA-103, ¶ 13, 125 N.M. 376, 961 P.2d 1283 (citations omitted); *accord Trujillo*, 1975-NMSC-046, ¶ 7; *see also Gutierrez v. Sundancer Indian Jewelry, Inc.*, 1993-NMCA-156, ¶ 43, 117 N.M. 41 (Hartz, J., dissenting) ("Often it is written that a contract requires a 'meeting of the minds.' The phrase creates problems because it can readily be interpreted to refer to the unconveyed thoughts of the parties."). Mutual assent may be manifested in whole or in part by the written or spoken language used by the parties or by the parties' acts or failure to act. *Trujillo*, 1975-NMSC-046, ¶ 7; *see also* Restatement (Second) of Contracts §§ 18-19 (1981). "The manifestation of mutual assent to an exchange ordinarily takes the form of an offer by one party followed by an acceptance by another." *Orcutt*, 1990-NMCA-036, ¶ 11.

"The Restatement (Second) of Contracts explains the effect of misunderstandings on contracts." *Pope*, 1998-NMCA-103, ¶ 13. "There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither knows or has reason to know of the meaning attached by the other; or (b) each party knows or has reason to know the meaning attached by the other." Restatement (Second) of Contracts § 20(1), at 58-59 (1981); *see also* 1 R. Lord, Williston on Contracts, § 3:4, at 285 (4th ed. 2007); *cf.* Restatement (Second) of Contracts § 20(2) and comments c & d thereto (explaining, in part, when a misunderstanding does not prevent the formation of a contract).

Secondary sources explain when, despite a manifestation of assent by a party, fraud, duress, mistake, or another invalidating cause may render the resulting contract voidable. *See, e.g.*, Restatement (Second) of Contracts § 19. Since invalidating causes are in the nature of an affirmative defense, a separate jury instruction should be drafted for any applicable defense.

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-817. Modification of contract; definition.

Modification of a contract occurs when the parties intend to continue the contractual relationship but wish to change one or more of the terms of the contract. In order for the modification to be effective, there must be mutual assent of the parties to the modification, [and _____ (*name of party to the contract*) must have:

[done something [he][she][it] was not already obligated to do]; or

[promised to do something [he][she][it] was not already obligated to do]; or

[not done something [he][she][it] otherwise could have done]; or

[promised not to do something [he][she][it] otherwise could have done].]

[Even a contract that requires modifications to be in writing may be modified orally. However, the oral modification must be proven by clear and convincing evidence.]

USE NOTES

This instruction should be given when the validity of a contract modification is at issue. Use the first set of bracketed language when there is an issue as to whether a party benefitting from the modification gave consideration for it, including whichever of the four bracketed choices are supported by the evidence. Use the second set of bracketed language when an oral modification is alleged to have been made to a written contract with terms requiring that modifications be in writing. In such a case, the jury should also be instructed that an oral modification must be proven by clear and convincing evidence. *See* UJI 13-405 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — "[I]n the absence of a prohibiting statute, [a] written contract may be orally modified by the parties who made the original agreement." *Wendell v. Foley*, 1979-NMCA-052, ¶ 11, 92 N.M. 702, 594 P.2d 750. A course of dealing may also modify an agreement. *See Medina v. Sunstate Realty, Inc.*, 1995-NMSC-002, ¶ 14, 119 N.M. 136, 889 P.2d 171; *Wal-Go Assoc. v. Leon*, 1981-NMSC-022, 95 N.M. 565, 624 P.2d 507 (lessor's policy always to redeposit lessee's checks modified contract so that lessee was not in breach when its check was returned marked "insufficient funds"). Because New Mexico still adheres to the pre-existing duty rule, new consideration is necessary whenever a change benefits only one party. *See, e.g., Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 11, 124 N.M. 613, 954 P.2d 45.

The ability of the parties to modify a contract orally may be circumscribed by their written agreement. *Danzer v. Prof'l Insurers, Inc.*, 1984-NMSC-046, 101 N.M. 178, 679 P.2d 1276 (oral modification of a written contract failed because contract called for modification in writing of the party to be charged). Nevertheless, a contract that requires modifications to be in writing may be modified orally if there is clear and convincing evidence that an oral modification was made. *See Medina*, 1995-NMSC-002, ¶¶ 12-15 (holding the trial court erred in excluding evidence of oral modification of a contract requiring modifications to be in writing); *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 23, 136 N.M. 74, 105 P.3d 294; *Powers v. Miller*, 1999-NMCA-080, ¶ 10, 127 N.M. 496, 984 P.2d 177 (requiring that oral modifications to written contracts that specify that modifications must be in writing must be proven by clear and convincing evidence).

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-818. Assignment and delegation; definition and presumptions.

[An assignment is an act or an expression that is intended to transfer a right under the contract to another person. Unless the parties have agreed otherwise, _____ *(the assignor)* is entitled to assign [his] [her] rights and interest under the contract. If _____ *(the assignor-obligee)* has made an assignment to _____ *(the assignee)*, then _____ *(the assignee)* is entitled to receive the benefits of the contract and is entitled to enforce _____'s *(the obligor)* obligations under the contract.]

[A delegation is a transfer of a duty or an obligation under the contract to another. Normally, if a person assigns [his] [her] rights and interests under the contract, [he] [she] also delegates [his] [her] duties of performance. Therefore, unless the language and conduct of _____ *(the assignor)* and _____ *(the assignee)*, and the surrounding circumstances, show that _____ *(the assignor)* did not intend to delegate [his] [her] duties to _____ *(the assignee)*, then _____ *(the assignee)* is also obligated to perform _____'s *(the assignor)* duties under the contract.]

USE NOTES

Where questions of fact arise as to whether an assignment or delegation has occurred, the jury should be given the general definition of assignment or delegation or both, in conjunction with UJI 13-804 and 13-819 as applicable.

[Adopted, effective November 1, 1991.]

Committee commentary. — As a general rule, "assignment" refers only to rights or interests under a contract. Unless a contrary intention appears from the language or the circumstances, an "assignment of the contract" is both an assignment of the assignor's rights and a delegation of the assignor's duties. *Paperchase Partnership v. Bruckner*, 102 N.M. 221, 693 P.2d 221 (1985); Restatement (Second) of Contracts § 328 (1979). A provision prohibiting assignment of the contract, however, bars only the delegation of duties, unless a contrary intent is clearly shown. *Paperchase Partnership v. Bruckner*, supra; Restatement (Second) of Contracts § 322. This follows from the law favoring the right to assignment. *See Cowan v. Chalamidas*, 98 N.M. 14, 644 P.2d 528 (1982), in which lessees to a commercial lease were contractually bound to enter into a subleasing agreement only upon consent of the lessor. The court held that the lessor's consent could not arbitrarily or unreasonably be withheld.

To be enforceable, an assignment must manifest an intention to transfer some right or interest. *Nickell v. United States ex. rel. D.W. Falls, Inc.*, 355 F.2d 73 (10th Cir. 1966).

The assignment must describe the subject matter with sufficient particularity to make it identifiable. *Benton v. Albuquerque Nat'l Bank*, 103 N.M. 5, 701 P.2d 1025 (Ct. App. 1985); *Nickell v. United States*, supra.

13-819. Partial assignment of a contractual right; no instruction drafted.

Committee commentary. — Section 326(1) of the Restatement (Second) of Contracts (1981) provides that "an assignment of a part of a right, whether the part is specified as a fraction, as an amount, or otherwise, is operative as to that part to the same extent and in the same manner as if the part had been a separate right." The New Mexico Supreme Court has written approvingly of partial assignments, but it has not yet indicated whether New Mexico follows Section 326 or provided specific guidance regarding partial assignments. *Johnson v. Sowell*, 1969-NMSC-133, ¶ 18, 80 N.M. 677, 459 P.2d 839; *Kandelin v. Lee Moor Contracting Co.*, 1933-NMSC-058, ¶ 26, 37 N.M. 479, 24 P.2d 731.

[Adopted by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-820. Third party beneficiary; enforcement of contract.

To recover the benefits of the contract between _____ (*contract promisor*) and _____ (*contract promisee*), _____ (*third party*) must show that _____ (*contract promisee*) and _____ (*contract promissor*) intended to benefit _____ (*third party*) [either individually or as a member of a class].

USE NOTES

This instruction should be used where the third-party beneficiary seeking to enforce the contract is an intended beneficiary. The first two blanks should be filled in with the names of the immediate parties to the contract. The third blank should be filled in with the name of the third party seeking to enforce the contract. The fourth and fifth blanks should be filled in with the names of the immediate parties to the contract, and the last blank should be filled in with the name of the third party.

[Adopted, effective November 1, 1991; amended by Supreme Court Order No. 08-8300-043, effective December 31, 2008.]

Committee commentary. — New Mexico has long recognized that persons who are third parties to a contract may still have rights to enforce that contract where at least the contract promisee so intended. *See Hamill v. Maryland Casualty Co.*, 209 F.2d 338 (10th Cir. 1954). It is not necessary that the third party be named in the contract or specifically identified to be able to enforce it. Id.; *see also Valdez v. Cilleson & Son Inc.*, 105 N.M. 575, 734 P.2d 1258 (1987). The "paramount indicator" that a third party may

have rights to enforce the contract is the intent of the contract promisee that the third party have the right to enforce it. Id. at 581; see Restatement (Second) of Contracts § 302. It is not necessary that the third party be specifically or individually intended to be able to enforce the contract; it is sufficient that the third party be a member of a class of intended beneficiaries. Valdez, 105 N.M. at 581, 734 P.2d at 1264. In appropriate cases, parole evidence may be used to show that at least one of the parties to a contract intended it to benefit third parties. Id.; see UJI 13-825.

A third-party beneficiary to a contract has enforceable rights under the contract, even though not in privity with the contracting parties. *Casias v. Continental Gas Co.*, 1998-NMCA-083, ¶ 11, 125 N.M. 297, 960 P.2d 839. A party claiming third-party beneficiary status has the burden of proving that the actual parties to the contract intended to benefit the third party, either individually or as a member of a class of beneficiaries. *Valdez v.Cilleson & Sons, Inc.*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987). Such intent must appear either from the contract itself or from some evidence that the person claiming to be a third-party beneficiary is an intended beneficiary. *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 20, 139 N.M. 201, 131 P.3d 51. In addition, the intent to benefit may be implied if the very nature of the agreement is to benefit the third party. *See Flores v. Baca*, 117 N.M. 306, 310-11, 871 P.2d 962, 966-67 (1994) (explaining that surviving family members may be implied in fact to be the intended beneficiaries of funeral and burial contracts). Third-party beneficiary status, however, is not conferred on a mere incidental beneficiary who derives benefit under the contract but cannot establish that the contracting parties intended to confer the benefit. *Fleet Mortgage Corp. v. Schuster*, 112 N.M. 48, 50, 811 P.2d 81, 83 (1991). If the case involves the rights of statutory beneficiaries, the jury may also have to be instructed on the multi-factor balancing test set forth in *Leyba v. Whitley*, 120 N.M. 768, 775, 907 P.2d 172, 179 (1995).

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

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

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

USE NOTES

This instruction should be used only when the third party seeking to enforce the contract is a "creditor" beneficiary of the contract obligee. In all other situations where a third party seeks to enforce a contract, UJI 13-820 should be used.

[Adopted, effective November 1, 1991.]

Committee commentary. — A third party is a "creditor beneficiary" and is thereby entitled to enforce a contract directly if the contract obligates the promisor to satisfy the promisee's existing debt or obligation to the third party. *See* Restatement (Second) of Contracts § 302 (1); *Kennedy v. Lynch*, 85 N.M. 479, 513 P.2d 1261 (1973); *Lawrence Coal Co. v. Shanklin*, 25 N.M. 404, 183 P. 435 (1919).

13-822. Breach of contract; definition.

For you to find _____ liable to _____, you must find that _____ breached [his] [her] contract with _____. A person may breach a contract by

[failing to perform a contractual obligation when that performance is called for (unless that performance is otherwise excused)]

or

[announcing ahead of time that he or she will not perform a contractual obligation when the time for that performance comes due].

USE NOTES

One or both of the bracketed instances of breach should be given, depending on what claims of breach the evidence raises. The bracketed limitation in the "failure of performance" instance should be given only if called for by the claims of the parties. This instruction should be given in conjunction with one or both of UJI 13-823, 13-824 NMRA.

[Adopted, effective November 1, 1991.]

Committee commentary. — A contract calls upon each party to the contract to perform some promise or obligation. The full performance of that promise or obligation satisfies that party's obligations under the contract and thereby constitutes a discharge. *See* J. A. Farnsworth, Contracts § 8.8. The failure of a party to the contract to perform satisfactorily his or her contract promise or duty, on the other hand, constitutes a breach of the contract, giving rise to a remedy, typically damages. The breach of a contract promise or duty should be distinguished from the failure to satisfy a condition on performance. The failure to satisfy a condition does not constitute a breach of contract, but rather will result in relieving the other party to the contract of having to perform some or all of that party's obligations under the contract. *See* Restatement (Second) of Contracts §§ 224, 225. It is only a breach of the contract, however, which gives rise to the remedy of damages.

The promise or obligation which is breached may be either expressed in the contract or implied, such as any obligation of good faith or implied warranties of quality. See J. A. Farnsworth, Contracts § 8.15. The breach may occur either through a total failure to

perform or a negligent or incomplete performance. *Cochrell v. Hiatt*, 97 N.M. 256, 638 P.2d 1101 (Ct. App. 1981). The announced intention not to perform a contract obligation when it becomes due (repudiation) may constitute a breach of contract. *See McKinney v. Gannett Co., Inc.*, 817 F.2d 659 (10th Cir. 1987); UJI 13-824.

13-823. Breach of contract; failure to perform.

_____ (*name of party asserting material breach*) contends that there has been a material breach of the contract. A material breach occurs when a party fails to do something that is so important to the contract that the failure to perform that obligation defeats an essential purpose of the parties in making the agreement.

_____ (*name of party asserting material breach*) has the burden of proving that _____ (*name of opposing party*) committed a material breach.

Material breach by one party excuses the other party from performing its obligations under the contract.

USE NOTES

This instruction should be used in cases where a party seeks to be released from its contractual obligations because the other party committed a prior material breach of the contract. In such cases, the question whether a breach was "material" is ordinarily an issue of fact to be submitted to the jury.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 14-8300-006, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. —

"[N]ot every breach of a contract or failure exactly to perform–certainly not every partial failure to perform–" gives the other party the right to be released from its remaining obligations under a contract. *Samples v. Robinson*, 1954-NMSC-091, ¶ 14, 58 N.M. 701, 275 P.2d 185 (citation and quotation omitted). Rather, the breach "must go to the root of the contract" or must involve "matters which would render the performance of the remainder a thing different in substance from that which was contracted for." *Id.* The Restatement (Second) of Contracts "provides a useful framework for analyzing whether a breach of contract is material." *Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-155, ¶ 18, 126 N.M. 69, 966 P.2d 777. Restatement (Second) of Contracts § 241, entitled "Circumstances Significant in Determining Whether a Failure is Material," lists the following five factors:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Although a non-material breach of contract does not release the other party from its contractual obligations, it may give rise to a claim for damages. *Samples*, 1954-NMSC-091, ¶ 14.

[As amended by Supreme Court Order No. 14-8300-006, effective for all cases filed or pending on or after December 31, 2014.]

13-824. Breach of contract; repudiation of contractual obligation.

It is a breach of contract if, before performance became due, _____ (*promisor*) announced or otherwise demonstrated [his] [her] [its] intention not to perform a contractual obligation [where _____ (*promisee*) had not fully carried out [his] [her] [its] contractual obligations].

USE NOTES

The bracketed part of the instruction should be given only when the evidence and claims of the parties raise the issue. The blanks should be filled in with the names of the parties.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Where the time has not yet arrived for contract performance, the contract performer may still breach by announcing ahead of time that he or she will not perform the contract obligation. Such an announcement is typically called a "repudiation" or "anticipatory repudiation" or "renunciation." Any such repudiation must be clear and unequivocal. *See Viramontes v. Fox*, 1959-NMSC-020, 65 N.M. 275, 335 P.2d 1071. Expressions of doubt or concern about performance are insufficient to constitute a repudiation. J. A. Farnsworth, Contracts § 8.21. The repudiation need not be explicit. It may be signified by either words or conduct. *Id*. For example, where a contract performer intentionally destroys or abandons the only means available to him or her for performance, such action may constitute a repudiation. The

repudiation must relate to a material duty rather than to an insignificant one. *See* Restatement (Second) of Contracts § 250 (1981).

The repudiation is not automatically a breach, but it may be treated as such at the election of the promisee. *See* J.A. Farnsworth, Contracts § 8.21. In order to treat a repudiation as a breach, the other party must so signify in some reasonable way, thus constituting an "acceptance" of the repudiation. *See Ostic v. Mackmiller*, 1949-NMSC-042, 53 N.M. 319, 207 P.2d 1008. Until there has been such an "acceptance" of the repudiation, the contract performer may retract the repudiation. An anticipatory repudiation also may suspend or discharge the promisee's obligation to perform his or her duties. *See U.S. Potash Co. v. McNutt*, 70 F.2d 126 (10th Cir. 1934).

The announcement of prospective nonperformance will not constitute a breach of contract where the repudiating party has received his or her full exchange prior to repudiation.

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-825. Ambiguity in term or terms; general rule of interpretation.

There is a dispute as to the meaning of the following term[s] in the contract: (*Fill in term or terms*). You shall give the term[s] that meaning which you find to be most reasonable, taking into consideration all the circumstances, including the following:

[the intentions of the parties];

[the words that the parties used];

[the purposes the parties sought to achieve];

[custom in the trade];

[the parties' course of dealing];

[the parties' course of performance];

[whether a party, at the time the contract was entered into, knew or should have known that the other party interpreted the term[s] differently].

USE NOTES

A court must make a preliminary determination as a matter of law that a contract contains an ambiguity before this instruction is given. If such a determination is made, the term(s) in dispute should be inserted after the colon in the first sentence of the instruction. The bracketed language regarding the circumstances that the jury may

consider in resolving the ambiguity should be included as the evidence in the case warrants. The evidence also may warrant the giving of additional instructions, including UJI 13-804 NMRA (Contract; intention of the parties); UJI 13-826 NMRA (Custom in the trade); UJI 13-827 NMRA (Course of dealing); and UJI 13-828 NMRA (Course of performance).

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Whether a contract contains an ambiguity presents a preliminary question of law for a court to decide. *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 12, 114 N.M. 778, 845 P.2d 1232; *see also C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 17, 112 N.M. 504, 817 P.2d 238. "If the court determines that the contract is reasonably and fairly susceptible of different constructions, an ambiguity exists." *Mark V, Inc.*, 1993-NMSC-001, ¶ 12.

Once a contract is found to be ambiguous, the meaning to be assigned to the unclear term(s) presents a question of fact. *Id.* If evidence is proffered regarding the facts and circumstances surrounding the contract and the evidence is in dispute, turns on witness credibility, or is susceptible to conflicting inferences, the meaning must be resolved by a jury (or the court as the fact finder in the absence of a jury). *Id.* "[T]he [jury] may consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties' intent." *Id.* ¶ 13; *see also Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1 (showing that a jury also may consider evidence regarding the purposes the parties sought to achieve, trade custom, course of dealing, and course of performance). The jury must decide whether the proffered evidence "supports one interpretation rather than the other." *McNeill v. Rice Eng'g & Operating, Inc.*, 2003-NMCA-078, ¶ 13, 133 N.M. 804, 70 P.3d 794; *cf. Mark V, Inc.*, 1993-NMSC-001, ¶ 13 (Under the parol evidence rule, "evidence should not be received when its purpose or effect is to contradict or vary the agreement's terms.").

The jury must resolve the ambiguity before deciding breach and damages. *C.R. Anthony Co.*, 1991-NMSC-070, ¶ 11.

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-826. Custom in the trade.

A custom in the trade is any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties.

USE NOTES

This instruction should be given in conjunction with UJI 13-825 NMRA when there is a dispute as to the meaning of an ambiguous term or terms in a contract and there has been a sufficient showing of a trade custom to submit the evidence to the jury to consider in resolving the dispute.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Evidence of a trade custom is admissible for the factfinder to consider in determining the meaning of an ambiguous term in a contract. *See Allsup's v. Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1. A trade custom may be proved through witness testimony and other evidence. *Romero v. H.A. Lott, Inc.*, 1962-NMSC-037, ¶ 12, 70 N.M. 40, 369 P.2d 777; *see also Briggs v. Zia Co.*, 1957-NMSC-074, ¶¶ 6-10, 63 N.M. 148, 315 P.2d 217. Guidance regarding the roles of the trial court and the jury when a party seeks to rely on evidence of trade custom may be found in 12 Richard A. Lord, Williston on Contracts § 34:19 (4th ed. 2012).

[Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-827. Course of dealing.

A course of dealing is a manner of dealing between the parties in previous transactions which it is reasonable to regard as establishing the parties' common understanding of the meaning of the term[s] in dispute.

USE NOTES

This instruction should be given in conjunction with UJI 13-825 NMRA when there is a dispute as to the meaning of an ambiguous term or terms in a contract and there has been a sufficient evidentiary showing of a prior course of dealing between the parties to submit the evidence to the jury to consider in resolving the dispute.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Evidence of a prior course of dealing between the parties is admissible for the factfinder to consider in determining the meaning of an ambiguous term in a contract. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1. For a course of dealing to be shown, the parties must have previously dealt with one another in similar transactions in a manner that supports the conclusion that the dealings evince the parties' understanding of the contractual term(s) in question. *See* 2 Zachary Wolfe, Farnsworth on Contracts § 7.16 (4th ed. 2019). A course of dealing, which involves conduct prior to the contract in

question, should not be confused with a course of performance, which involves the parties' performance of the contract at issue. *Id.*

[Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-827A to 13-827F. Withdrawn.

13-828. Course of performance.

A course of performance is the way the parties have conducted themselves in the performance of the contract which it is reasonable to regard as establishing the parties' common understanding of the meaning of the term[s] in dispute.

USE NOTES

This instruction should be given in conjunction with UJI 13-825 NMRA when a question of interpretation exists as to a term or terms in a contract and evidence is submitted concerning the parties' course of performance under the contract.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Evidence of how the parties have performed the obligations of the contract at issue is admissible for the factfinder to consider in determining the meaning of an ambiguous term in the contract. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1. The conduct of the parties after the contract is made may indicate the meaning that they attach to the term(s) in question. 2 Zachary Wolfe, Farnsworth on Contracts § 7.16 (4th ed. 2019). A course of performance, which involves the parties' performance of the contract at issue, should not be confused with a course of dealing, which involves conduct prior to the contract in question. *Id.*

[Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-828A to 13-828F. Withdrawn.

13-829. Workmanlike manner.

Where a person contracts to perform work of a particular skill, [he] [she] promises to exercise the judgment and to display the quality of workmanship which is standard to that field of work.

USE NOTES

This instruction should be given when a question of fact arises as to whether a person failed to exercise the judgment or to produce the product which could be expected from any person working in that field. Situations where the parties have contracted for more or less than the standard in the industry can be argued to the jury without further instruction or may give rise to an instruction on waiver.

[Adopted, effective November 1, 1991.]

Committee commentary. — The standard of "workmanlike manner" includes both the promises that the work done will be of a quality comparable to the standard in the industry and that the judgment exercised by the skilled worker will equal that industry standard. *Wendenburg v. Allen Roofing Co., Inc.*, 104 N.M. 231, 719 P.2d 809 (1986); *Andrila v. Milligan*, 52 N.M. 65, 191 P.2d 716 (1948). What that standard of judgment may be in professional services may be difficult to ascertain. *See State ex rel. Risk Mgt. v. Gathman-Matotan Architects & Planners, Inc.*, 98 N.M. 790, 653 P.2d 166 (Ct. App.) (architects held to reasonable skill standard, but not held to warrant fitness for a particular purpose in design plans), cert. quashed, 99 N.M. 47, 653 P.2d 878 (1982). But *see First Nat. Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985) (lawyer held to such skill, prudence, and diligence as lawyers of ordinary skill and capacity); *Sanchez v. Martinez*, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982) (insurance agent held to standard requiring purchase of insurance for clients or notification of non-insurance); *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 647 P.2d 433 (Ct. App. 1982) (real estate broker held to duty of communicating information).

The standard for performance in a workmanlike manner does not prevent the parties from agreeing to performance which is either below or above industry standards. *See Martin v. Foster*, 81 N.M. 583, 470 P.2d 304 (1970) (housing contract providing for superior workmanship could be enforced according to its terms); *Moss Theatres, Inc. v. Turner*, 94 N.M. 742, 616 P.2d 1127 (Ct. App. 1980) (where contractor had discussed potential problems of fencing with buyer, contractor not liable held for fence's subsequent failure, despite industry standard revealed in building code).

13-830. Implied warranty to use reasonable skill.

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

USE NOTES

UJI 13-829 and 13-830 are similar in their statement of the standard of performance required by contracts to perform services. Either or both may be used as appropriate to the evidence and the pleadings.

[Adopted, effective November 1, 1991.]

Committee commentary. — New Mexico implies in every contract to perform services a warranty that those services will be rendered in conformity to the standard of care within the profession or trade. *Clear v. Patterson*, 80 N.M. 654, 459 P.2d 358 (1969); *State ex rel. Risk Mgt. Div. v. Gathman-Matotan Architects & Planners, Inc.*, 98 N.M. 790, 653 P.2d 166 (Ct. App. 1982), cert. quashed, 99 N.M. 47, 653 P.2d 878 (1982). While the standard of performance required by the warranty sounds in tort, its origin is the contractual undertaking.

13-831. Reasonable time.

_____ was obligated to perform the contract within a reasonable time. What is a reasonable time should be determined by you from the surrounding circumstances.

[Adopted, effective November 1, 1991.]

Committee commentary. — Where the contract is silent on time of performance, the law implies that a reasonable amount of time is the proper standard. *Hagerman v. Cowles*, 1908-NMSC-015, ¶ 3, 14 N.M. 422, 94 P. 946; *accord Smith v. Galio*, 1980-NMCA-134, ¶ 5, 95 N.M. 4; *cf. Edward H. Snow Dev. Co. v. Oxsheer*, 1956-NMSC-119, 62 N.M. 113, 305 P.2d 727 (rule not applied by court asked to equitably decree specific performance of a deferred payment provision in an agreement which stated that payment of the balance owed was to be made from time to time at the convenience of the purchaser). "It is sometimes a question of law for the court whether a contract has been performed in a reasonable time, as when it depends upon the construction of a written contract only, or upon undisputed extrinsic facts[.]" *Hagerman*, 1908-NMSC-015, ¶ 4. But when the answer to the question "depends upon disputed facts extrinsic to the contract," the issue implicates a question of fact for a jury (or the court as the finder of fact in the absence of a jury) to decide. *See id.; see also Smith*, 1980-NMCA-134, ¶ 6; *see, e.g., Cowles v. Hagerman*, 1910-NMSC-052, 15 N.M. 600, 110 P. 843.

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-832. Good faith and fair dealing.

In every contract, there is an implied promise of good faith and fair dealing. The implied promise protects the parties' reasonable expectations under the contract. The implied promise is breached only when a party seeks to prevent the contract's performance or to withhold the contract's benefits from the other party. The implied promise of good faith and fair dealing does not change the express terms of the contract. It does not add terms to the contract. It does not prohibit the parties from doing what the contract expressly allows them to do.

To prove that _____ (*name of the defendant*) breached the promise of good faith and fair dealing, _____ (*name of the plaintiff*) must prove that _____ (*name of the defendant*) acted in bad faith in [performing] [enforcing] the contract or wrongfully and intentionally used the contract to harm _____ (*name of the plaintiff*).

USE NOTES

If there is an at-will employment relationship, there is no covenant of good faith and fair dealing regarding termination and this instruction will not be given. *See Melnick v. State Farm Mut. Auto. Ins. Co*., 1988-NMSC-012, ¶ 13, 106 N.M. 726, 749 P.2d 1105 (pointing out that New Mexico courts "do not recognize a cause of action for breach of an implied covenant of good faith and fair dealing in an at-will employment relationship"). If there is a factual issue as to whether an at-will employment relationship regarding termination exists, the jury will need to be instructed that the covenant of good faith and fair dealing does not apply if the jury determines the employment relationship was at-will. Under these circumstances, a special verdict form should be used to guide the jury.

[Adopted by Supreme Court Order No. 12-8300-011, effective May 12, 2012; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — The New Mexico Supreme Court has held that this duty requires that "[w]hether express or not, every contract in New Mexico imposes the duty of good faith and fair dealing upon the parties in the performance and enforcement of the contract." *Cont'l Potash, Inc. v. Freeport-McMoran, Inc*., 1993-NMSC-039, ¶ 64, 115 N.M. 690, 858 P.2d 66. Although the courts have consistently stated that every contract contains an implied covenant of good faith and fair dealing, it may not be applied in an at-will employment relationship. *See Melnick v. State Farm Mut. Auto. Ins. Co*., 1988-NMSC-012, ¶ 13, 106 N.M. 726, 749 P.2d 1105. "[T]he implied covenant of good faith and fair dealing cannot be used to overcome or negate an express term contained within a contract." *Sanders v. Fedex Ground Package Sys., Inc*., 2008-NMSC-040, ¶ 8, 144 N.M. 449, 188 P.3d 1200 (citing *Cont'l Potash, Inc*., 1993-NMSC-039, ¶ 67). However, the implied covenant imposes on the parties the requirement "'that neither party do anything that will injure the rights of the other to receive the benefit of their agreement.'" *Sanders*, 2008-NMSC-040, ¶ 7 (quoting *Bourgeous v. Horizon Healthcare Corp*., 1994-NMSC-038, ¶ 16, 117 N.M. 434, 872 P.2d 852). Put in more positive terms, the "implied covenant of good faith and fair dealing protects the reasonable expectations of the parties to a contract arising from its terms." *Sanders*, 2008-NMSC-040, ¶ 1. In this sense, one function of the covenant is "to enforce the spirit of deals." *Id*. ¶ 9.

"The breach of this covenant requires a showing of bad faith or that one party wrongfully and intentionally used the contract to the detriment of the other party." *Cont'l Potash, Inc*., 1993-NMSC-039, ¶ 64; *see also Jaynes v. Strong-Thorne Mortuary, Inc*., 1998-

NMSC-004, ¶ 13, 124 N.M. 613, 954 P.2d 45 (same). Thus, some degree of culpable conduct is required to constitute bad faith. "Although negligent conduct is not sufficient to constitute a breach of the covenant," *Jaynes*, 1998-NMSC-004, ¶ 13 (citing *Paiz v. State Farm Fire and Cas. Co*., 1994-NMSC-079, ¶ 31, 118 N.M. 203, 880 P.2d 300), when "the breaching party is consciously aware of, and proceeds with deliberate disregard for, the potential of harm to the other party" such conduct is sufficient to constitute a breach. *Id*.

[Adopted by Supreme Court Order No. 12-8300-011, effective May 12, 2012; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-834. Misrepresentation.

_____ (*name of defendant*) claims that the contract upon which _____ (*name of plaintiff*) relies is void because of misrepresentation by _____ (*name of plaintiff*).

To establish the defense of misrepresentation, _____ (name of defendant) must prove all of the following:

1. That _____ (*name of plaintiff*) made a misrepresentation;

2. That the misrepresentation was [fraudulent] [or] [material];

3. That _____ (*name of defendant*) would not have entered into the contract if [he][she][it] had known that the representation was untrue; and

4. That _____ (*name of defendant*)'s reliance on the misrepresentation was justified.

[A material misrepresentation is any untrue statement upon which the other party did in fact rely in entering into the contract, and without which the other party would not have entered into the agreement.]

[A misrepresentation is fraudulent if one party makes it with the intent to deceive and to cause the other party to act on it. If a fraudulent misrepresentation is at issue, it must be proven by clear and convincing evidence.]

USE NOTES

Use this instruction when the defendant contends that a contract is void because of a misrepresentation by the plaintiff. Include the first bracketed paragraph when a material misrepresentation is alleged. Include the second bracketed paragraph when a fraudulent misrepresentation is alleged. If the defendant contends that the misrepresentation was fraudulent, the jury should also be instructed that a fraudulent

misrepresentation must be proven by clear and convincing evidence. *See* UJI 13-405 NMRA.

[Adopted by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Misrepresentations by one party as to a writing can make a contract voidable by the other party. *See, e.g., Gross Kelly & Co. v. Bibo*, 1914-NMSC-085, ¶¶ 17, 35, 19 N.M. 495, 145 P. 480. "In order for this to occur, the recipient of the misrepresentation must show that (1) there was a misrepresentation that was (2) material or fraudulent and which (3) induced the recipient to enter into the agreement, and that (4) the recipient's reliance on the misrepresentation was justified." *Sisneros v. Citadel Broadcasting Co.*, 2006-NMCA-102, ¶ 10, 140 N.M. 266, 142 P.3d 34.

The contractual defense does not require fraud, or that the misrepresentations be intentional. "The rule in New Mexico is that irrespective of the good faith with which a misrepresentation of material fact is made, if it is justifiably relied on by one seeking rescission of the contract, such rescission should be allowed." *Jones v. Friedman*, 1953-NMSC-051, ¶ 22, 57 N.M. 361, 251 P.2d 1131; *see also Maxey v. Quintana*, 1972-NMCA-069, ¶ 9, 84 N.M. 38, 499 P.2d 356 ("Rescission may be effected without regard to the good faith with which a misrepresentation is made."). However, when the misrepresentation is not material, fraudulent intent must be shown. *See Sisneros*, 2006-NMCA-102, ¶ 10; *cf. McElhannon v. Ford*, 2003-NMCA-091, ¶ 15, 134 N.M. 124, 73 P.3d 827 ("[R]escission may be allowed in certain cases of non-fraudulent, but material, nondisclosure.").

The burden of proof is different depending on whether fraud or misrepresentation is at issue. Where the misrepresentations are fraudulent, the defendant must prove the defense under the higher clear and convincing standard. *See, e.g., McLean v. Paddock*, 1967-NMSC-165, ¶ 16, 78 N.M. 234, 430 P.2d 392 (requiring the defense of fraud to be proven by clear and convincing evidence), *overruled on other grounds by Duke City Lumber Co., Inc. v. Terrel*, 1975-NMSC-041, ¶ 7, 88 N.M. 299, 540 P.2d 229.

[Adopted by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-835. Illegality; enforceability of contractual obligations.

There was in force in the State of New Mexico at the time this contract was entered into a certain [statute] [ordinance] [regulation] which provided:

(*set out statutory language*)

If [making the contract] [performing the contract] [violated] [would violate] the [statute] [ordinance] [regulation], then _____ (*name of defendant*) is excused from [his] [her] [its] obligation[s] under the contract.

USE NOTES

This instruction is to be used when the defendant has asserted that the making or performance of the contract violated public policy as expressed in a statute, ordinance, or regulation and there is evidence to support a finding that the violation occurred. Before the instruction is given, however, the court must determine as a matter of law that the public policy allegedly violated is of sufficient importance to justify invalidating the contract. Where the evidence warrants, the court should instruct on excuse or justification with respect to violation of the statute or ordinance as provided in UJI 13-1503 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — A contract made or performed in violation of a statute may be unenforceable on public policy grounds. *See DiGesu v. Weingart*, 1978-NMSC-017, ¶ 7, 91 N.M. 441, 575 P.2d 950; *Granger v. Caviness*, 1958-NMSC-106, ¶¶ 6, 10, 64 N.M. 424, 329 P.2d 439; *Davis v. Savage*, 1946-NMSC-011, ¶ 42, 50 N.M. 30, 168 P.2d 851; *City of Artesia v. Carter*, 1980-NMCA-006, ¶ 12, 94 N.M. 311, 610 P.2d 198. The statute itself may so provide.

In many instances, however, the effect of the violation, if proved, must be determined by the court. In making this determination, the court should balance the public policy that is alleged to have been violated against the interest in enforcing the contract. *See* Restatement (Second) of Contracts § 178 (1981); 6A Corbin, Contracts § 1375 (1962); *State ex rel. Balderas v. ITT Educ. Servs.*, 2018-NMCA-044, ¶ 13, 421 P.3d 849. Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case. *Berlangieri v. Running Elk Corp.*, 2002-NMCA-060, ¶ 11, 132 N.M. 332, 48 P.3d 70. The court should examine the subject matter, object, and purpose of the statute, the wrong or evil which it is intended to remedy or prevent, and the class of persons sought to be controlled in order to ascertain whether the legislature intended to invalidate contracts in violation of the statute. *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, ¶ 15, 81 N.M. 161, 464 P.2d 891; *see also Niblack v. Seaberg Hotel Co.*, 1938-NMSC-018, ¶¶ 15-16, 42 N.M. 281, 76 P.2d 1156; *Douglass v. Mutual Benefit Health & Accident Ass'n*, 1937-NMSC-097, ¶ 25, 42 N.M. 190, 76 P.2d 453.

Where a contract is made up of several provisions, one of which is illegal, if the illegal provision can be eliminated without destroying the symmetry of the contract as a whole, that provision will be voided, and the remainder of the contract will be enforced. *Forrest Currell*, 1970-NMSC-018, ¶ 16; *Arch, Ltd. v. Yu*, 1988-NMSC-101, ¶ 14, 108 N.M. 67, 766 P.2d 911; *Garcia v. Bd. of Regents*, 2016-NMCA-052, ¶ 20, 373 P.3d 998.

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-836. Accord and satisfaction.

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

USE NOTES

This instruction is applicable to the defense traditionally labeled "accord and satisfaction," as well as to other defenses which go beyond strict accord and satisfaction, such as "novation," "substituted contract," or "executory accord." When applicable, this defense may require use of UJI 13-805 through 13-813 NMRA (offer and acceptance).

[Adopted, effective November 1, 1991.]

Committee commentary. — A party to a contract may agree to accept something different in satisfaction of the other party's contractual obligations. When this occurs, the other party to the contract is discharged from his or her original contractual obligation. *National Old Line Insurance Co. v. Brown*, 107 N.M. 482, 760 P.2d 775 (1988). This type of discharge or relief from contractual duty may take different forms and be subject to different characterizations such as "substituted contract," "novation," "accord and satisfaction" or "executory accord". *See* J. A. Farnsworth, Contracts § 4.24 (1982). It is the substance of the transaction and not its characterization which is important, however, and for purposes of convenience the term "accord and satisfaction" will be employed throughout to apply to all transactions where discharge of a contract duty occurs through acceptance of something in substitution. Discharge by means of this defense, however, occurs only when what is accepted in satisfaction of the contract obligation in fact occurs.

For an accord and satisfaction to relieve a party's original obligations under a previous contract, it must be shown that the obligee accepted the accord as full satisfaction for the debt or obligation owed. *Albuquerque Nat. Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982); *Sparks v. Melmar Corp.*, 93 N.M. 201, 598 P.2d 1161 (1979); *Smith Const. Co. v. Knights of Columbus, Council No. 1226*, 86 N.M. 50, 519 P.2d 286 (1974). Accord and satisfaction is an affirmative defense which must be pleaded effectively or raised during the proceedings. *Gallup Gamerco Coal Co. v. Irwin*, 85 N.M. 673, 515 P.2d 1277 (1973).

The substituted performance need not be performed by the original contract obligor who is discharged from the contractual duty. Thus, a contract obligor will be discharged from performance if the obligee agrees to accept performance by a third party in substitution. *See* Restatement (Second) of Contracts, § 278.

13-837. Incapacity.

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

[_____ was a minor when [he] [she] entered into the contract. Therefore, if _____ demonstrated [within a reasonable time after reaching majority] that [he] [she] does not intend to be bound by the contract, then [he] [she] is excused from the obligation to perform the contract.]

USE NOTES

The bracketed paragraphs are to be used as alternatives depending on whether the claim of incapacity arises from minority or some physical, mental or other infirmity. The first bracketed paragraph addresses incapacity arising from infirmity. The list of disabling causes is not intended to be exhaustive. Other categories may be used if supported by the law and the facts. The bracketed language in the second alternative paragraph is to be used only if the evidence creates a fact issue as to the timeliness of the minor's claimed disaffirmance. If the fact of the contract obligor's minority at the time the contract was entered into is at issue, the instruction will have to be rewritten appropriately. *See* UJI 13-839 NMRA regarding undue influence.

[Adopted, effective November 1, 1991.]

Committee commentary. — There is a presumption of competency which must be overcome with evidence that a person was incompetent at the time the contract was made. Estate of Head, 94 N.M. 656, 615 P.2d 271 (Ct. App. 1980). Proof of lack of capacity is not precluded by the parole evidence rule. *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973). Incapacity does not arise just because the contract obligor was inexperienced or ignorant about the subject matter of the contract. Rather, this defense arises only when the contract obligor, because of some infirmity or specific cause, was incapable of appreciating the very fact that he or she was entering into a contract.

What constitutes a "reasonable time" for purposes of disaffirmation after reaching majority will vary depending on the circumstances. *See Terrace Co. v. Calhoun*, 347 N.E.2d 315, 319 (Ill. 1976). Where suit is brought on the contract, however, the contract obligor, if he or she has reached majority, must make an election to disaffirm or otherwise lose the defense. Incapacity should not be confused with undue influence, which is addressed in UJI 13-839.

13-838. Duress.

If _____ entered into the contract under duress, then [he][she] is excused from performing [his][her] obligations under the contract.

[_____ is duress, if under the circumstances it induces the other person to enter into a contract that [he][she] otherwise would not have entered into.]

[Duress is intentional action by one person presenting such a serious business or financial loss or injury to the other person to the contract that he or she has no reasonable choice or alternative. _____ has the burden of proving duress by clear and convincing evidence.]

USE NOTES

This instruction should be given when a party has raised a triable issue of duress as a defense to the obligations to perform a contract duty. The bracketed paragraphs are alternatives. The second alternative bracketed paragraph should be used when the claim of duress arises from "business duress" or "economic compulsion." The first alternative bracketed paragraph should be used in all other instances. In the first alternative, the court should fill in the wrongful conduct which is claimed to constitute the act causing duress. *See* Commentary for examples of wrongful conduct.

[Adopted, effective November 1, 1991.]

Committee commentary. — Contracts entered into by the force of duress are not enforceable against the party whose conduct was influenced by the duress. *See* Restatement (Second) of Contracts § 174. Wrongful acts which will constitute duress extend to "economic compulsion" or "business duress," in which a person is presented with such a severe business or financial loss as to present no reasonable alternative but to enter into a contract which he or she otherwise would not have. In the case of "business duress," at least, the party claiming the defense must prove its elements by clear and convincing evidence.

The conduct claimed to cause the duress must be wrongful, although not necessarily criminal. *See* Restatement (Second) of Contracts § 176. Examples of wrongful conduct are (1) physical threats to life or safety; (2) imprisonment; (3) destruction of goods or things of value; (4) institution of criminal proceedings; or (5) bad faith threat to breach a contract or fail to perform a duty. *See generally* J. A. Farnsworth, Contracts §§ 4.16, 4.17.

13-839. Undue influence.

If _____ (*name of party claiming undue influence*) entered into the contract through undue influence, then [he] [she] [it] is excused from performing [his] [her] [its] obligations under the contract. “Undue influence” is the abuse of a position of trust or a dominant position in a relationship by one party which persuades the other party to enter into the contract.

USE NOTES

This instruction is intended for use in contract cases and is not intended for use in its present form in other situations, such as gifts, wills, etc. If the contract in question is a written release of claims, the jury also should be instructed that undue influence must be proven by clear and convincing evidence. *See* UJI 13-304 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Undue influence is not susceptible to a fixed formula. *Brown v. Cobb*, 1949-NMSC-016, 53 N.M. 169, 204 P.2d 264 (legatees sue to cancel decedent's ranch lease); Restatement (Second) of Contracts § 177 (1981). While influence alone is not prohibited, undue influence will relieve the party of that contract obligation. *Nance v. Dabau*, 1967-NMSC-173, 78 N.M. 250, 430 P.2d 747 (suit brought by widow's guardian to set aside deeds and contracts). Many cases involve either a confidential or fiduciary relationship. *Shultz v. Ramey*, 1958-NMSC-099, 64 N.M. 366, 328 P.2d 937 (suit to cancel farm lease with son-in-law); *Salazar v. Manderfield*, 1943-NMSC-005, 47 N.M. 64, 134 P.2d 544 (suit to cancel deed to fiduciary); *Cardenas v. Ortiz*, 1924-NMSC-039, 29 N.M. 633, 226 P. 418 (suit to cancel deed to farm). However, a formal fiduciary or confidential relationship is not required; a person may also occupy a "position of trust" with respect to another "where there exists such trust and confidence between the parties of whatever character that confidence may be as enables the person in whom such confidence is reposed to exert it or so influence the opposite person with the result that some transaction financially beneficial to the person trusted takes place." *Cardenas*, 1924-NMSC-039, ¶ 10; *see also Beals v. Ares*, 1919-NMSC-067, ¶ 88, 25 N.M.459, 185 P. 780 (holding that the "number or character" of relationships giving rise to undue influence "are not defined by law"). Undue influence may also occur where one party unfairly persuades another party who is under the domination of the person exercising the persuasion. Restatement (Second) of Contracts § 177(1).

Undue influence must be contrasted with the concept of "duress" (*see* UJI 13-838 NMRA) or "incapacity" (*see* UJI 13-837 NMRA). Duress focuses on threats which induce fear and hence the deprivation of free will. Undue influence focuses on improper influence of a weaker or dependent party by a person who, through a special relationship, abuses his or her favorable position to influence the weaker party into an agreement that he or she normally would not enter. "Undue influence" does not need to rise to the level of "duress," nor is fraud or actual misrepresentation required.

A confidential or fiduciary relationship, coupled with suspicious circumstances, raises a presumption of undue influence and causes the burden of proof to shift. *Nance v. Dabau*, 1967-NMSC-173, 78 N.M. 250, 430 P.2d 747; *Walters v. Walters*, 1920-NMSC-021, 26 N.M. 22, 188 P. 1105 (ill father transferred all properties to his son who promised to treat brothers and sisters equally); *see* Rule 11-301 NMRA. Parent and child relationship or kinship alone is not sufficient to raise a presumption of undue

influence. *Giovannini v. Turrietta*, 1966-NMSC-103, 76 N.M. 344, 414 P.2d 855 (deed by mother to son and daughter did not create confidential relationship); *Trujillo v. Trujillo*, 1966-NMSC-019, 75 N.M. 724, 410 P.2d 947 (parents conveyed farm to son who worked it for sixteen years before parents sought to recover it).

Where the undue influence arises from a fiduciary relationship, a special instruction may be necessary to define the term. "A confidential or fiduciary relationship exists 'whenever trust and confidence is reposed by one person in the integrity and fidelity of another.'" *In re Ferrill*, 1981-NMCA-074, ¶ 6, 97 N.M. 383, 640 P.2d 489 (quoting 94 C.J.S. Wills § 230 at 1078 (1956)).

Where the contract in question is a written release of claims, undue influence must be proven by clear and convincing evidence. *P. Mendenhall v. Vandeventer*, 1956-NMSC-064, 61 N.M. 277, 299 P.2d 457 (written release settling all injuries and property damages resulting from a car accident); *Quintana v. Motel 6*, 1984-NMCA-134, 102 N.M. 229, 693 P.2d 597; *Hendren v. Allstate Ins. Co.*, 1983-NMCA-129, 100 N.M. 506, 672 P.2d 1137.

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-840. Impossibility or impracticability of performance.

When the performance of a contract obligation becomes impossible or unreasonably burdensome because of circumstances or events beyond the _____ *(promisor's)* control which are substantially and materially different from what both _____ *(plaintiff)* and _____ *(defendant)* reasonably anticipated would exist, then the _____ *(promisor)* is excused from performing that contractual obligation.

[Adopted, effective November 1, 1991.]

Committee commentary. — Ordinarily the promisor bears the risk that a contractual promise may become more burdensome or less desirable than anticipated. The law may relieve the promisor of this risk, however, where "[a]n extraordinary circumstance . . . make[s] performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance." Restatement (Second) of Contracts ch. 11 intro. note (1981).

The defense of impossibility or impracticability does not apply where the contract either expressly or implicitly allocates to a party the risk that the extraordinary circumstance at issue would occur. Rather, the defense arises when the occurrence contravenes a basic assumption on which the contract was made. *See id*. § 261 cmt. b.

A good discussion of the principles underlying the doctrine of impossibility or impracticability of performance can be found in chapter 11 of the Restatement (Second) of Contracts.

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-841. Hindrance; prevention; excuse for nonperformance.

A party to a contract who prevents the other party from performing a contractual obligation cannot take advantage of the non-performance. The party prevented from performing is excused from the obligation to perform.

USE NOTES

This instruction is to be used where one party prevents either fulfillment of a condition precedent to performance or performance itself. The instruction should be modified if a party contends that it was wrongfully hindered, as opposed to prevented, from performing.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — "A party to a contract cannot take advantage of his own act or omission to escape liability thereon." *Gibbs v. Whelan*, 1952-NMSC-005, ¶ 10, 56 N.M. 38, 239 P.2d 727. In keeping with that principle, "[a] party to a contract, who prevents its performance by the adverse party, cannot rely on the adverse party's non-performance to defeat his liability. The party who has been prevented from discharging his part of the obligation is to be treated as though he had performed it." *Estate of Griego v. Reliance Standard Life Ins. Co.*, 2000-NMCA-022, ¶ 27, 128 N.M. 676, 997 P.2d 150 (in part, paraphrasing *Nat'l Old Line Ins. Co. v. Brown*, 1988-NMSC-071, ¶ 21, 107 NM. 482, 760 P.2d 775 (internal quotation marks and citation omitted)). In other words, the party who prevents the other party from performing cannot use the non-performance to avoid the contract or to claim a breach of contract. Instead, the non-performance is excused.

The foregoing principles may apply when a party prevents fulfillment of a condition precedent to performance, *see Dechert v. Allsup's Convenience Stores, Inc.*, 1986-NMSC-074, 104 N.M. 748, 726 P.2d 1378 (discussing but finding principle inapplicable) or performance of a contractual obligation, *Gibbs*, 1952-NMSC-005, ¶ 12.

Further guidance regarding the doctrine of prevention, as it relates to a party who wrongfully prevents or hinders the other party from performing under the contract, may be found in the Restatement (Second) of Contracts § 245 (1981) as well as 13 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston §§ 39:3-12 (4th ed. 2013).

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

13-842. Waiver.

Waiver is the voluntary giving up of a known right. A waiver may be express or implied from a person's statements or conduct. If _____ waived [his] [her] right to _____ *(identify contractual right)*, then _____ is excused from [his] [her] obligation to comply with that condition of [his] [her] performance.

[Adopted, effective November 1, 1991.]

Committee commentary. — The elements of waiver are an existing right, knowledge of such right, and an intention to relinquish or surrender that right. *Talley v. Security Service Corp.*, 99 N.M. 702, 663 P.2d 361 (1983). But *see* Restatement (Second) of Contracts § 84 comment b (promisor need not always know his/her legal rights nor intend the legal effect of his/her promise).

Waiver usually arises in the context of conditions (such as timeliness) attached to the contract obligor's performance rather than in the context of the performance itself. *See, e.g.*, *Green v. General Accident Insurance Co.*, 106 N.M. 523, 746 P.2d 152 (1987). It is not clear, however, that absent a "novation," "accord and satisfaction" or the like, a party may "waive" the other party's contract performance.

Waiver covered by this instruction is waiver which occurs by a voluntary act whose effect is intended. The instruction addresses both waiver which may be found in the express declaration and implied from a party's representations that fall short of such declaration or from conduct. Waiver may also be presumed or implied contrary to the intention of a party from a course of conduct showing waiver by estoppel. To prove waiver by estoppel a party must show that he/she was misled to his/her prejudice by the conduct of the other party into the honest and reasonable belief that such waiver was intended. *Hale Contracting Co., Inc. v. United N.M. Bank*, 110 N.M. 712, 799 P.2d 581 (1990). UJI 13-842 does not cover waiver by estoppel; counsel and the trial court must draft an appropriate instruction where this doctrine is available on the evidence.

13-843. Contracts; measure of damages; general instruction.

If you should decide in favor of _____ (*name of party asserting breach*) on [any of] [his] [her] [its] claim[s] of breach of contract, then you must fix the amount of money which will reasonably and fairly compensate _____ (*name of party asserting breach*) for damages that resulted from _____'s (*name of opposing party*) breach.

1. _____ (*name of party asserting breach*) seeks direct damages for the following:

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

Direct damages are damages that arise naturally and necessarily as the result of the breach. The direct damages you award for breach of contract must be the amount of money that will place _____ (*name of party asserting breach*) in the position [he] [she] [it] would have been in if the contract had been performed.

[2. In addition to direct damages, _____ (*name of party asserting breach*) also seeks to recover damages for the following:

(NOTE: Here insert the proper elements of other categories of damages which may be sought, such as consequential or incidental damages.)]

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

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This instruction provides the basic framework for all compensatory damages instructions in contracts cases. As drafted, this instruction is intended for use in common-law contracts cases.

The elements of damages should be customized to fit the facts and claims involved in the case. Part 1 of this instruction is intended to address direct contract damages (also called general damages). Part 2 of this instruction is intended to be used only if some of the damages being sought constitute consequential or incidental damages.

In Part 1 of the instruction, depending on the facts of the case, parties may need to draft the appropriate element(s) to be inserted. Elements of direct damages for cases involving construction contracts and personal employment contracts appear in this chapter. *See* UJI 13-850 NMRA (Damages to owner; contracts for construction); UJI 13-851 NMRA (Damages; personal employment).

In Part 2, if the court determines as a matter of law that any of the damages being sought constitute consequential damages, then UJI 13-843A NMRA should be inserted. Likewise, any appropriate elements of incidental damages should be inserted into Part 2.

If multiple parties are asserting claims, counterclaims, or cross-claims for breach of contract, then separate versions of UJI 13-843 NMRA should be given in connection with each party’s claim.

If the party asserting breach is seeking punitive or nominal damages, then separate instructions for those damages should be given. An instruction for punitive damages in contract cases appears in this chapter. *See* UJI 13-861 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No.15-8300-005, effective for all cases filed or pending on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — The purpose of allowing damages for breach of contract is to restore to the injured party what was lost by the breach and what he or she reasonably could have expected to gain had there been no breach. *Allen v. Allen Title Co*., 1967-NMSC-113, 77 N.M. 796, 427 P.2d 673; *Brown v. Newton*, 1955-NMSC-029, 59 N.M. 274, 282 P.2d 1113. Damages based on a "rough estimate" by a witness are insufficient to support a judgment. Rather damages must be of a kind and character susceptible of proof, and the amount of damages allowed must be subject to reasonable ascertainment and not based on speculation or guesswork. *Louis Lyster, Gen. Contractor, Inc. v. Town of Las Vegas*, 1965-NMSC-097, 75 N.M. 427, 405 P.2d 665. Proof does not have to be to a mathematical certainty, however. *Eccher v. Small Bus. Admin*., 643 F.2d 1388, 1392 (10th Cir. 1981). The elements of damages must be the natural and foreseeable consequences of the breach, as contemplated by the parties at the time of making the contract. *State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, 86 N.M. 757, 527 P.2d 798; *Mitchell v. Intermountain Cas. Co*., 1961-NMSC-138, 69 N.M. 150, 364 P.2d 856; *Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, ¶ 32, 119 N.M. 436, 891 P.2d 1190 ("Even though the amount of damages need not be proven with mathematical certainty, neither can it be based on surmise, conjecture, or speculation."), *overruled in part on other grounds, Sunnyland Farms v. Cent. N.M. Elec. Coop., Inc*., 2013-NMSC-017, 301 P.3d 387.

There are different categories of damages that may be available to compensate the injured party for breach of contract. "Damages 'that arise naturally and necessarily as the result of the breach' are 'general damages,' which give the plaintiff whatever value he or she would have obtained from the breached contract." *Sunnyland Farms*, 2013-NMSC-017, ¶ 11 (quoting *Camino Real Mobile Home Park P'ship*, 1995-NMSC-013, ¶ 20). General damages are also called "direct damages." *See, e.g*., Richard A. Lord, *Williston on Contracts* § 64:1 (4th ed. 2009).

"In some circumstances, the plaintiff can also recover for 'consequential damages' or 'special damages,' which are not based on the capital or present value of the promised performance but upon benefits it can produce or losses that may be caused by its absence." *Sunnyland Farms*, 2013-NMSC-017, ¶ 11 (citations and internal quotation marks omitted).

Further, a plaintiff may be able to recover incidental damages, which "include costs incurred in a reasonable effort, whether successful or not, to avoid loss, as where a party pays brokerage fees in arranging or attempting to arrange a substitute

transaction." Restatement (Second) of Contracts § 347 cmt. c (1981). As to damages for breach of contract generally, *see* Restatement (Second) of Contracts §§ 346-356.

[As amended by Supreme Court Order No. 15-8300-005, effective December 31, 2015; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-843A. Special or consequential damages.

In addition to direct damages, _____ (*name of party asserting breach*) also seeks to recover damages for _____ (*describe damages alleged to have happened as the result of special circumstances, beyond the ordinary course of events, that the breaching party had reason to know*).

To recover for these alleged damages, _____ (*name of party asserting breach*) must prove the following:

1. When the contract was made, _____ (*name of opposing party*) had reason to know that these damages would probably result from [his] [her] [its] breach;

2. These damages were in fact caused by _____ (*name of opposing party*)'s breach of contract; and

3. The amount of damages.

USE NOTES

This instruction should be inserted into Part 2 of UJI 13-843 NMRA if the court determines as a matter of law that any of the elements of damages being sought constitute consequential damages (also called special damages). As drafted, this instruction is intended for use in common-law contracts cases.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases filed or pending on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — In *Sunnyland Farms v. Cent. N.M. Elec. Coop., Inc*., 2013-NMSC-017, ¶ 16, 301 P.3d 387, the New Mexico Supreme Court clarified the rule for determining whether a party may recover consequential damages in a contract case. The Court held "that the proper test for consequential damages in New Mexico is the *Hadley* [*v. Baxendale*, 156 Eng. Rep. 145, 9 Ex. 341 (1854)] standard as interpreted in Restatement (Second) of Contracts Section 351." *Id*. Under this test, "a defendant is liable only for those consequential damages that were objectively foreseeable as a probable result of his or her breach when the contract was made." *Id*.

[Adopted by Supreme Court Order No. 15-8300-005, effective December 31, 2015; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-844. Withdrawn.

13-845. Withdrawn.

13-846. Withdrawn.

13-847. Withdrawn.

13-848. Withdrawn.

13-849. Withdrawn.

13-850. Damages to owner; contracts for construction.

For [defective] [and] [or] [unfinished] construction [The reasonable cost of completing the construction called for in the contract.]

[The difference between the value of the construction called for in the contract and the value of the performance that has been received.]

USE NOTES

The two bracketed paragraphs reflect alternative measures of damages. The first bracketed paragraph represents the favored measure of damages and should be used, unless the court finds special circumstances require use of the second paragraph. The second bracketed paragraph is to be used only where completion of the contract would involve unreasonable waste of money.

[Adopted, effective November 1, 1991.]

Committee commentary. — The purpose of contract damages is to, and the normal measure of damages will, put the breached party in the same position he or she would have occupied had the contract been completed. The first bracketed paragraph, providing damages measured against what the reasonable cost of substituted performance would be, will typically accomplish this goal and therefore should normally be given. *See* Restatement (Second) of Contracts § 348, the substance of which has been adopted in New Mexico. *See Chavez v. Gribble*, 83 N.M. 688, 496 P.2d 1084 (1972); *Montgomery v. Karavas*, 45 N.M. 287, 114 P.2d 776 (1941) (adopting § 346 of the Restatement of Contracts, substantially similar to § 348 of the Restatement (Second)).

The second bracketed paragraph should be given only in the unusual situation where the normal measure of damages will cause economic waste; that is, where the cost of correcting the incomplete or defective performance will be disproportionate to the added economic value to the building. *See Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921) (tearing out nonconforming piping in completed building would involve a cost disproportionate to the added value of putting in conforming pipe).

13-851. Damages; personal employment.

The [unpaid balance of the] contract price, less [the greater of] [the amount _____ actually earned from other employment in the time made available as a result of the breach] [or] [the amount _____ could through the exercise of reasonable diligence have earned, in the time made available as a result of the breach, from employment of the same quality as [his] [her] employment under the breached contract].

USE NOTES

This instruction should be given with UJI 13-843 NMRA when the claim for damages arises from breach of an employment contract. The portion in braces should be given only when the breaching party raises mitigation of damages as an affirmative defense; in that case, UJI 13-860 NMRA should also be given.

Within the braces, the appropriate bracketed language should be selected, depending on whether the mitigating amount was actually earned from other employment obtained in place of the breached contract or was income that could reasonably have been earned during the period of the breach through employment similar to that under the breached contract. If both elements of mitigation are included, the first bracketed phrase should usually be incorporated into the instruction together with the bracketed "[or]". Under the proper facts, however, both elements of mitigation could appropriately be deducted from damages, and the instruction would have to be modified.

This instruction may be supplemented when other relief, such as reliance damages, is requested. It is intended to provide a common, but not an exclusive, instruction for breach of employment agreements.

[Adopted, effective November 1, 1991.]

Committee commentary. — Ordinary rules for measuring damages for breach of contract may be applied in an employment context. *Board of Education of Alamogordo Public School District No. 1 v. Jennings*, 102 N.M 762, 701 P.2d 361 (1985). Damages may include lost wages while unemployed, the cost and inconvenience of searching for a new job, moving costs for relocating, as well as any other actual pecuniary losses, and possibly punitive damages. *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), rev'd in part, 101 N.M. 687, 687 P.2d 1038 (1984).

The doctrine of mitigation (also called "avoidable consequences") in wrongful discharge cases is based on the principle that a wrongfully discharged employee will not be permitted to remain idle at his previous employer's expense when suitable work is available and will not be placed in a better position by the award of damages than he would have occupied had the contract been performed. Consequently, income that the employee earned or reasonably could have earned from similar employment during the period of the breach will be deducted from damages. *See Jennings*, supra; *Spurck v. Civil Service Board*, 231 Minn. 183, 42 N.W. 2d 720 (1950). Employment is "similar" if it is of the same quality. *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970). Also, income that the employee actually earned from any other employment during the period of the breach will be deducted. *Jennings*, supra; Spurck, supra. Income in mitigation of damages must, however, relate to employment that the employee could not have pursued had he remained employed under the breached contract, rather than to activities which the employee could have undertaken while also continuing with the original employment. *See Sandler v. U.S. Development Co.*, 44 Wash. App. 98, 721 P.2d 532 (1986); *Soules v. Independent School District No. 518*, 258 N.W. 2d 103 (Minn. 1977).

13-852. Reliance damages.

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

[Adopted, effective November 1, 1991.]

13-860. Mitigation of damages.

A party may not recover damages for any loss which the party reasonably could have avoided.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — "The legal rule of mitigation is designed to discourage persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts, or from actively increasing loss where prudence suggests that such activity cease." *Hickey v. Griggs*, 1987-NMSC-050, ¶ 22, 106 N.M. 27, 738 P.2d 899; *accord Skeen v. Boyles*, 2009-NMCA-080, ¶ 31, 146 N.M. 627, 213 P.3d 531. In general, then, the party injured by a breach of contract must make reasonable efforts to mitigate its damages. *See Pillsbury v. Blumenthal*, 1954-NMSC-066, ¶ 10, 58 N.M. 422, 272 P.2d 326; *see also Skeen*, 2009-NMCA-080, ¶ 31 ("It is an established principle in New Mexico law that an injured party has a responsibility to mitigate its damages, or run the risk that any award of damages will be offset by the amount attributable to its own conduct." (internal quotation marks and citation omitted)); *accord Brown v. Newton*, 1955-NMSC-029, ¶ 19, 59 N.M. 274, 282

P.2d 1113. However, the circumstances of a case may impact whether and when the rule of mitigation applies. *See, e.g., Brown*, 1955-NMSC-029 (no duty to mitigate where opposing parties' conduct prevented mitigation); *Skeen*, 2009-NMCA-080 (no immediate duty to mitigate where defaulting party represented that it would cure the breach). *See also* Restatement (Second) of Contracts § 350 (1981); 11 *Corbin on Contracts* § 57.11 (2005) (both providing further guidance on the rule of mitigation).

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018.]

13-861. Punitive damages.

In this case, _____ (*name of party making claim for punitive damages*) seeks to recover punitive damages from _____ (*name of party against whom punitive damages are sought*). You may consider punitive damages only if you find that _____ (*party making claim*) should recover compensatory damages. Not every breach of contract warrants punitive damages.

Only if you find that _____ (*name of party against whom punitive damages are sought*) breached the contract and that [his] [her] [its] conduct in committing the breach was [malicious], [reckless], [wanton], [oppressive], [or] [fraudulent] [rather than being legitimate or justified in the circumstances], then you may award punitive damages against [him] [her] [it].

[Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful.]

[Reckless conduct is the intentional doing of an act with utter indifference to the consequences.]

[Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's rights.]

[Fraudulent conduct consists of a misrepresentation of fact that the maker knows to be untrue [or that is made recklessly], by which the maker intends to deceive another for the purpose of causing the other to act in reliance on the misrepresentation, and on which the other does rely.]

Punitive damages are awarded for the limited purpose of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature and enormity of the wrong and such aggravating and mitigating circumstances as may be shown. The property or wealth of the defendant is a legitimate factor for your consideration. The amount awarded, if any, must be reasonably related to the injury and to the damages given as compensation and not disproportionate to the circumstances.

USE NOTES

Appropriate bracketed language should be selected depending on the type of conduct alleged to support punitive damages and, as to the bracketed phrase regarding a "legitimate or justified" breach in the second paragraph, on whether there is evidence that any breach that occurred was committed for a legitimate or justifiable reason. For punitive damages in insurance bad faith cases, *see* UJI 13-1718 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.

Committee commentary. — Unlike some other jurisdictions, New Mexico determines the availability of punitive damages in contract cases, as in tort cases, based on "the quality of the conduct constituting the breach itself." *See Romero v. Mervyn's*, 1989-NMSC-081, ¶¶ 31-33, 109 N.M. 249, 784 P.2d 992. New Mexico case law "clearly establish[es] that, in contract cases not involving insurance, punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights." *Id.* ¶ 23.

Contract law is to be distinguished from tort law with respect to punitive damages, however, in that a breach of contract may not be a basis for punitive damages even if the breach is intentional and "even if the other party will clearly be injured by the breach." *Bogle v. Summit Inv. Co.*, 2005-NMCA-024, ¶ 28, 137 N.M. 80, 107 P.3d 520. New Mexico law acknowledges this fact by distinguishing "'wrongful' breaches . . . from those committed intentionally for legitimate business reasons." *Romero*, 1989-NMSC-081, ¶ 26; *see also McGinniss v. Honeywell, Inc.*, 1990-NMSC-043, ¶ 31, 110 N.M. 1, 791 P.2d 452 (noting that "even if deliberate, the breach may be justified in some sense if the promisee can be fully compensated for the loss and the benefit to the promisor from the breach may provide society with a net gain -- i.e., the breach may be 'efficient'"); *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P.*, 1998-NMCA-005, ¶ 42, 124 N.M. 440, 952 P.2d 435 (*Hartz, J.*, concurring in part and dissenting in part).

Generally, the case law indicates that the kind of conduct targeted by punitive damages is "[o]verreaching, malicious, or wanton conduct" that "is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships." *Romero*, 1989-NMSC-081, ¶ 34; *see also Constr. Contracting & Mgmt., Inc. v. McConnell*, 1991-NMSC-066, ¶ 16, 112 N.M. 371, 815 P.2d 1161 (stating that a breach that is fully compensated and results in a net social gain will not support punitive damages "unless there is an intention to inflict harm on the nonbreaching party or conduct which violates community standards of decency"). This instruction thus differs from the instruction regarding punitive damages in tort, UJI 13-1827 NMRA, by allowing for the possibility that the breaching party may offer evidence to show that the breach was committed for a legitimate or justifiable reason.

New Mexico precedent indicates that "a party's inability to perform a contract without incurring a substantial financial loss would constitute a legitimate business reason" for nonperformance. *Constr. Contracting*, 1991-NMSC-066, ¶ 16. Other grounds that would expose a breaching party to compensatory but not punitive damages have yet to be defined. *See Cafeteria Operators*, 1998-NMCA-005, ¶ 49 (*Hartz, J.*, concurring in part and dissenting in part). In some cases, the court may be called upon to determine whether a reason offered by a breaching party to justify nonperformance of a contract is supported by sufficient evidence to be presented to the jury and whether the reason offered would, if established, provide a legally sufficient basis to avoid punitive damages for the breach.

In addition to breaches that are malicious in that they are intended to cause harm, *see Constr. Contracting*, 1991-NMSC-066, ¶ 16, New Mexico precedent indicates that punitive damages are justified where a party breaches a contract after making the contract with knowledge it would not be performed or with a conscious disregard for whether it would be performed, *Romero*, 1989-NMSC-081, ¶¶ 36-37, or attempts to avoid any obligation by breaching while "believing that the wronged party cannot afford to contest the matter in court," *id.* ¶ 33 & n.6, or adopts a construction of an ambiguous contract that is "unreasonable and . . . in wanton disregard of [the other party's] rights," *Pub. Serv. Co. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 43, 131 N.M. 100, 33 P.3d 651.

The language defining malicious, reckless, and wanton conduct in the bracketed parts of the instruction is taken from UJI 13-1827. The language defining fraudulent conduct is taken from *Prudential Insurance Co. v. Anaya*, 1967-NMSC-132, ¶ 9, 78 N.M. 101, 428 P.2d 640. Oppressive conduct is not defined in New Mexico case law. A definition will have to be added by the court where conduct alleged to be oppressive is at issue. The Committee suggests the following definition may be appropriate in some contexts: "Oppressive conduct is marked by an unjust use of power or advantage."

[As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

APPENDICES

Note: The sample instructions set forth in these appendices include definitional instructions where possible in the statement of issues, *see Gallegos v. Citizens Ins. Agency, Inc.*, 108 N.M. 722, 779 P.2d 99 (1989), and only those instructions, or portions thereof, that are pertinent to the particular matters in dispute, *see* Introduction to Chapter 8 of the Uniform Jury Instructions - Civil. "Stock" instructions are omitted and damage instructions are only provided where especially helpful to the practitioner. Also, some instructions require a threshold determination by the court, *see, e.g.*, UJI 13-825 NMRA.

Appendix 1. Sample Contracts Instructions.

Statement of facts

John Garcia owns his own business in which he sells his services as a computer programmer and a consultant in computer software design. He entered into a contract with Albuquerque Construction Company to design a computer software system for use by the Albuquerque Construction Company in their accounting and bookkeeping functions, general ledger functions, account receivables and accounts payable functions, inventorying and capital asset control. The contract called for Mr. Garcia to be paid in installments according to certain “milestones.” The last “milestone” required payment of $7,500 upon satisfactory installation of the software in Albuquerque Construction Company’s computer. The contract included the following terms:

Article III

Seller shall design, prepare and install the software in buyer’s computer within a reasonable time after buyer has provided seller with the “detailed statement of criteria” called for and described in Article II of this contract.

Article IV

Seller agrees to provide to buyer, at no additional cost, adequate instruction manuals on the software, training of buyer’s personnel upon installation of the software and backup and consultation services for one year after installation of the software.

Albuquerque Construction Company provided Garcia with the “detailed statement of criteria” on February 15, 1988. Garcia did not deliver and install the software until October 30, 1988. Albuquerque Construction claims that this delay was unreasonable and in breach of contract. Garcia installed the software in Albuquerque Construction’s computer, held a one-day training session for Albuquerque Construction’s staff, and provided Albuquerque Construction with a training manual. Because of the delay in the installation, however, Albuquerque Construction refused to pay Garcia the last $7,500 installment on the purchase price of the software. In addition, Albuquerque Construction claims that because of the delay in the installation, it was required to expend $11,000 in additional outside accounting services that would not have been expended if the software had been installed by July 1, 1988, the commencement of Albuquerque Construction’s fiscal year. Finally, in December 1988, a power surge wiped out a considerable part of the data base on Albuquerque Construction’s computer. Albuquerque Construction believed that it had its database “backed up” in a backup file but was having difficulty finding the backup file on the computer’s “hard disk.” Albuquerque Construction called Garcia for “backup” assistance and consultation in finding the backup files on the hard disk. Garcia refused, claiming that the request was not for “backup” services and because Albuquerque Construction did not pay the last $7,500 milestone. As a consequence, Albuquerque Construction Company hired someone for $3,500 to retrieve the backup files.

Albuquerque Construction brought suit against Garcia for damages, claiming breach of contract in the late delivery and in the failure to provide backup. Garcia defended in counterclaim for the $7,500 payment at the final milestone.

[13-302A NMRA] **Statement of theory for recovery;** [13-302B NMRA] **Statement of factual contentions of plaintiff, causation and burden of proof;** [13-302C NMRA] **Statement of denial and affirmative defense;** [13-302D NMRA] **Statement of factual contentions of defendant, causation and burden of proof.**

In this civil action Albuquerque Construction Company seeks compensation from Mr. John Garcia for damages which Albuquerque Construction Company claims were proximately caused by the breach by Mr. Garcia of the contract entered into between Mr. Garcia and Albuquerque Construction Company.

To establish its claim of breach of contract on the part of Mr. Garcia, Albuquerque Construction Company has the burden of proving one or more of the following contentions:

1. That Mr. Garcia failed to deliver and install the computer software within a "reasonable time" as required by the contract; or

2. That Mr. Garcia failed to provide "backup" or "consultation" services as required by the contract.

In addition, Albuquerque Construction Company contends and has the burden of proving that any breach of contract caused Albuquerque Construction Company to incur damages as a consequence of Mr. Garcia's breach of contract.

Mr. Garcia denies that he breached any of his contract obligations to Albuquerque Construction Company. Specifically, Mr. Garcia:

1. Denies that he did not deliver and install the computer software within a "reasonable time;" and

2. Contends that any requests made by Albuquerque Construction Company were not for "backup" services and, therefore, he did not fail to provide backup services as called for under the contract.

In addition, as to the claim of breach of contract for failure to provide backup services, Mr. Garcia contends and has the burden of proving that he was excused from performing any backup services because Albuquerque Construction Company itself breached the contract by failing to make the final payment to Mr. Garcia.

In addition, Mr. Garcia counterclaims against Albuquerque Construction Company under the contract, claiming that Albuquerque Construction Company breached its contract obligations to Mr. Garcia by failing to pay the called for final payment of $7,500.

To establish his claim for breach of contract on the part of Albuquerque Construction Company, Mr. Garcia has the burden of proving that Albuquerque Construction Company failed to pay $7,500 as called for under the contract. Albuquerque Construction Company denies that it breached any contract obligation to Mr. Garcia and contends and has the burden of proving that it is excused from paying Mr. Garcia $7,500 because Mr. Garcia failed to perform his obligations under the contract.

[13-822 NMRA] **Breach of contract; definition.**

For you to find Mr. Garcia liable to Albuquerque Construction Company, you must find that Mr. Garcia breached his contract with Albuquerque Construction Company. A person may breach a contract by failing to perform a contractual obligation when that performance is called for (unless that performance is otherwise excused).

[13-823 NMRA] **Breach of contract; failure to perform.**

Albuquerque Construction Company contends that there has been a material breach of the contract. A material breach occurs when a party fails to do something that is so important to the contract that the failure to perform that obligation defeats an essential purpose of the parties in making the agreement.

Albuquerque Construction Company has the burden of proving that Mr. Garcia committed a material breach.

Material breach by one party excuses the other from performing its obligations under the contract.

[13-825 NMRA] **Ambiguity in term or terms; general rule of interpretation.**

There is a dispute as to the meaning of the following term in the contract: backup services. You shall give the term that meaning which you find to be most reasonable, taking into consideration all the circumstances, including the following:

the intentions of the parties,

the words that the parties used,

the purposes the parties sought to achieve,

custom in the trade, and

whether a party, at the time the contract was entered into, knew or should have known that the other party interpreted the term differently.

[13-826 NMRA] **Custom in the trade.**

A custom in the trade is any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties.

[13-831 NMRA] **Reasonable time.**

Mr. Garcia was obligated to perform the contract within a reasonable time. What is a reasonable time should be determined by you from the surrounding circumstances.

[13-822 NMRA] **Breach of contract; definition.**

For you to find Albuquerque Construction Company liable to Mr. Garcia, you must find that Albuquerque Construction Company breached its contract with Mr. Garcia. A person may breach a contract by failing to perform a contractual obligation when that performance is called for (unless that performance is otherwise excused).

[13-823 NMRA] **Breach of contract; failure to perform.**

Mr. Garcia contends that there has been a material breach of the contract. A material breach occurs when a party fails to do something that is so important to the contract that the failure to perform that obligation defeats an essential purpose of the parties in making the agreement.

Mr. Garcia has the burden of proving that Albuquerque Construction Company committed a material breach.

Material breach by one party excuses the other from performing its obligations under the contract.

[13-843 NMRA] **Contracts; measure of damages; general instruction.**

If you should decide in favor of Albuquerque Construction Company on either of its claims for breach of contract, then you must fix the amount of money which will reasonably and fairly compensate Albuquerque Construction Company for damages that resulted from Mr. Garcia's breach.

1. On its claim that Mr. Garcia failed to deliver and install the computer software within a "reasonable time" as required by the contract, Albuquerque Construction Company seeks direct damages for the following:

$11,000 it paid for additional outside accounting services.

2. On its claim that Mr. Garcia failed to provide "backup" or "consultation" services as required by the contract, Albuquerque Construction Company seeks direct damages for the following:

$3,500 it paid to retrieve the backup files.

Direct damages are damages that arise naturally and necessarily as the result of the breach. The direct damages that you award for breach of contract must be the amount of money that will place Albuquerque Construction Company in the position it would have been in if the contract had been performed.

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

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

[13-843 NMRA] **Contracts; measure of damages; general instruction.**

If you should decide in favor of Mr. Garcia for his claim for breach of contract, then you must fix the amount of money which will reasonably and fairly compensate Mr. Garcia for damages that resulted from Albuquerque Construction Company's breach.

1. Mr. Garcia seeks direct damages for the following: Albuquerque Construction Company's failure to pay the last $7,500 milestone.

Direct damages are damages that arise naturally and necessarily as the result of the breach. The direct damages that you award for breach of contract must be the amount of money that will place Mr. Garcia in the position he would have been in if the contract had been performed.

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

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Appendix 2. Sample formation of contract instructions.

Statement of facts

Smith, an avid hunter, owns a prize hunting dog named Zeke that is much admired by his friend Jones. Smith is in the National Guard. An international conflict erupts in the Middle East, and Smith's unit is activated. Anticipating a long absence from the country, Smith writes to his friend: "I feel bad about having to put Zeke in a kennel. I would sell

him to a good home if I could get $500 for him." Jones writes back immediately: "Five hundred is a fair price for Zeke, but things are pretty tight here and I wish you would take $400 and my old shotgun instead."

The Middle East conflict is unexpectedly brief, and several days later Smith writes to Jones: "I am back to civilian life already. Thank goodness I won't be selling Zeke." Jones claims never to have received this letter. The next month, Jones comes to visit Smith and brings $400 cash and his shotgun. Smith refuses to part with Zeke. Jones pulls out some more cash and offers Smith $500, still to no avail. Zeke is worth $1000. Jones sues Smith for damages for breach of contract.

[13-302A NMRA] **Statement of theory for recovery; [13-801 NMRA] Contract; definition.**

In this civil action the plaintiff Jones seeks compensation from the defendant Smith for damages that plaintiff says were caused by breach of contract.

A contract is a legally enforceable promise. In this case, the parties dispute whether there was an offer and an acceptance.

[13-302B NMRA] **Statement of factual contentions of plaintiff, causation and burden of proof.**

To establish his claim of breach of contract on the part of Smith, Jones has the burden of proving each of the following:

1. Smith offered to sell Jones his dog for $500.

2. Jones accepted Smith's offer.

3. Smith refused to sell the dog to Jones.

Jones also contends and has the burden of proving that such breach of contract was a cause of his damages.

[13-302C NMRA] **Statement of denial and affirmative defense.**

Smith denies that he offered to sell his dog to Jones. In the alternative, Smith contends and has the burden of proving that he withdrew any offer to sell the dog before Jones accepted the offer or that Jones failed to accept the offer within a reasonable time.

[13-805 NMRA] **Offer; definition.**

An offer is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

First, the communication must have included a definite promise by Smith showing his willingness to contract;

Second, the material terms upon which that willingness was based must have been definite;

Third, the terms must have been communicated to Jones;

Fourth, by the communication Smith must have intended to give Jones the power to create a contract by accepting the terms.

In this case, the parties agree that the terms at issue were communicated to Jones. What is in dispute is whether the terms were definite and whether the communication was one which included a definite promise by Smith showing his willingness to contract and by which Smith intended to give Jones the power to create a contract by accepting the terms.

[13-807 NMRA] **Acceptance; definition.**

An acceptance is a statement or conduct made by one party to the other, showing that party's agreement to the terms of the other party's offer. For Jones to have accepted Smith's offer, he must have informed Smith by a statement or conduct that he agreed to the terms of the offer.

[13-808 NMRA] **Acceptance; terms of the offer.**

If Jones responded to an offer by conditioning acceptance on new terms that added, varied or changed any term of the offer, the response was a rejection of the original offer and operated as a new offer that could be accepted or rejected by Smith.

If Jones' response to an offer included additional or different terms but did not condition acceptance on agreement to those terms, the response operated as an acceptance of the original offer.

[13-806 NMRA] **Offer; revocation; effect of performance.**

An offer may be withdrawn at any time before notice of its acceptance has been received. To have withdrawn his offer, Smith must have notified Jones that the offer was withdrawn.

Once notice of withdrawal has been received, the offer may no longer be accepted and any attempt to accept thereafter will not be effective. If Jones was notified that the offer was withdrawn, Jones could no longer accept the offer.

[13-813 NMRA] **Acceptance; timeliness of acceptance; power of revocation.**

In order for a communication to be an acceptance, it must have been received by Smith within a reasonable time. What constitutes reasonable time should be determined by you from the surrounding circumstances.

[13-804 NMRA] **Contract; intentions of the parties.**

You should determine the intentions of the parties by examining their language and conduct, the objectives they sought to accomplish, and the surrounding circumstances.

[13-822 NMRA] **Breach of contract; definition.**

For you to find Smith liable to Jones, you must find that Smith breached his contract with Jones. A person may breach a contract by failing to perform a contractual obligation when that performance is called for.

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

CHAPTER 9
Federal Employers' Liability Act

INTRODUCTION

This subject is governed by N.M. Const., Article 20, Section 16, and Article 22, Section 2, and, by reference, it is covered by the Federal Employers' Liability Act, being 45 U.S.C.A. §§ 51 to 60. Constitutional provision Article 20, Section 16, according to its own language, "shall not be construed to affect the provisions of Section Two of Article Twenty-Two of this constitution, being the article upon Schedule".

N.M. Const., Article. 20, Section 16 applies to "Every person, receiver or corporation owning or operating a railroad within this state" (emphasis added). The Federal Employers' Liability Act applies to "Every common carrier by railroad while engaging in commerce between any of the several States or Territories". 45 U.S.C.A. § 51 (emphasis added).

This chapter, then, applies only to common carriers by railroad, engaging in interstate commerce. The liability of an intrastate railroad in New Mexico is within the provisions of N.M. Const., Article 20, Section 16 and is governed by that section.

The following matters should be noted relative to this chapter.

A. The Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq.

1. Negligence of railroad

The railroad is liable in damages to any employee suffering injury or death, "for such injury or death resulting in whole or in part from the negligence of " the railroad. 45 U.S.C.A. § 51 (emphasis added).

2. Contributory negligence

Contributory negligence of the employee does not bar recovery. Damages shall be "diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C.A. § 53. According to some authority, evidence of contributory negligence is admissible for reduction of damages, even though not pleaded as a defense. *Kansas City S. Ry. v. Jones*, 241 U.S. 181, 36 S. Ct. 513, 60 L. Ed. 943 (1916).

There is a proviso in 45 U.S.C.A. § 53 to the effect that contributory negligence will not defeat or diminish a recovery for damages where the death or injury is found to have been caused or contributed to by the violation by the common carrier of any statute enacted for the safety of employees. (As in the Safety Appliance Acts and the Boiler Inspection Acts, *infra.*)

3. Assumption of risk

Assumption of risk by an employee has been abolished where injury or death resulted in whole or in part from negligence of the railroad. 45 U.S.C.A. § 54. *Chavez v. Atchison, T. & S.F. Ry.*, 79 N.M. 401, 444 P.2d 586 (1968).

4. Common-Law fellow-servant doctrine

"The common-law fellow-servant doctrine has been abrogated in this jurisdiction as to railroads by section 16 of article 20 of the constitution, . " *Morstad v. Atchison, T. & S.F. Ry.*, 23 N.M. 663, 170 P. 886 (1918).

5. Causation

No mention, whatever, of causation should be made to the jury. *Eidson v. Atchison, T. & S.F. Ry.*, 80 N.M. 183, 453 P.2d 204 (1969). California uses the term "proximate cause."

6. No Third Party Involved

These proposed instructions relate only to plaintiff and defendant, and not to any third party charged with negligence. The other UJI - Civil instructions should apply to a third-party defendant.

7. Note All Sections of F.E.L.A.

45 U.S.C.A. §§ 51 to 60 should be noted. There are a vast number of cases on F.E.L.A.

8. Law of New Mexico Applies to Procedural Matters

The Supreme Court has held that " . all procedural matters, including review of verdicts for excessiveness, are governed by the law of the forum and not by the Federal Decisional Law", *Rivera v. Atchison, T. & S.F. Ry.*, 61 N.M. 314, 299 P.2d 1090 (1956); *Vivian v. Atchison, T. & S.F. Ry.*, 69 N.M. 6, 363 P.2d 620 (1961), or are governed by the common law. *Rival v. Atchison, T. & S.F. Ry.*, 62 N.M. 159, 306 P.2d 648, 64 A.L.R.2d 1098 (1957).

9. Substantive law governed by decisions of Supreme Court of United States

Issues of negligence and contributory negligence are substantive and governed by decisions of the Supreme Court of the United States. *Chavez v. Atchison, T. & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967); *Vivian v. Atchison, T. & S.F. Ry.*, 69 N.M. 6, 363 P.2d 620 (1961). Also, whether the employer and employee are engaged in interstate commerce and whether an employee is acting within the scope or course of his employment would seem to be questions of substantive law, governed by federal decisions.

10. UJI - Civil

All instructions now used in UJI - Civil should be used to supplement F.E.L.A. where necessary. The UJI - Civil instructions "Accident alone not negligence" and "corporation a party" are examples of the applicability of general UJI - Civil instructions to this chapter.

11. No affirmative defenses in F.E.L.A.

Granotis v. New York Cent. R.R., 342 F.2d 767 (6th Cir. 1965): "One of the purposes of the Federal Employers' Liability Act, as amended, was to abolish the common law defenses of assumption of risk, fellow servant rule and contributory negligence".

B. Safety Appliance Acts, 45 U.S.C.A. §§ 1-16.

Liability under the Federal Employers' Liability Act may be predicated on a carrier's violation of the Safety Appliance Acts, which were enacted to require carriers, engaged in interstate commerce, to equip their locomotives and cars with various safety devices and appliances and to maintain these in efficient condition.

The critical difference between the liability provisions of F.E.L.A. and the Safety Appliance Acts is this: Whereas F.E.L.A. requires proof of some negligence on the part of the railroad which caused or contributed to the employee's injuries, the obligations imposed on railroad carriers by the Safety Appliance Acts are absolute in nature and

are not limited to the exercise of reasonable care in maintaining the prescribed appliances. Nor is liability excused by the use of even the highest degree of care if the prescribed standards are not met. Although a breach of the Safety Appliance Acts may constitute negligence under the general liability provisions of the Federal Employers' Liability Act, the violation of any specific safety requirement, resulting in injuries to an employee, gives rise to liability on the part of the railroad, irrespective of a showing of negligence on its part.

Under the Safety Appliance Acts, to justify a recovery of damages for injury or death of an employee on the basis of the railroad's violation of the provisions of the Safety Appliance Acts, it must be shown that there was a causal connection between the injury or death and the railroad's failure to comply with the safety requirements. However, the causal relationship requirement is met when the violation at issue was the cause, in whole or in part, of the alleged injury or death.

A railroad employee who has sustained injury as a result of a violation of the Safety Appliance Acts is not barred from recovery, or even subject to diminution of damages, on the basis of contributory negligence.

C. Boiler Inspection Acts, 45 U.S.C.A. §§ 22-34.

Other statutes enacted for the safety of the railroad employees and the general public are commonly known as the Boiler Inspection Acts (45 U.S.C.A. §§ 22-34). These acts prohibit the use of any locomotive, including its parts and appurtenances, such as boilers and tenders, which is not in proper condition and safe to operate, and which has not been subjected to, and passed, periodic safety inspections. It has been said that, by these acts, the carrier is absolutely bound to furnish what under the common law, was its duty to exercise only ordinary care to provide. *Baltimore & O.R.R. v. Groeger*, 266 U.S. 521, 45 S. Ct. 169, 69 L. Ed. 419 (1925). However, the carrier is not liable for failure to furnish the best mechanical contrivances and inventions, provided that the equipment used is in proper condition and safe to operate, as required by statute. *Baltimore & O.R.R. v. Groeger, supra.*

Provided that the necessary causal relationship is found to exist, a violation of these acts constitutes negligence per se on the part of the defendant railroad. Contributory negligence on the part of the injured employee does not operate to bar his recovery nor to diminish the damages recoverable.

For other references to other jury instructions in F.E.L.A. cases, *see*: Federal Jury Practice And Instructions, Chapter 84; Illinois Pattern Jury Instructions, 2nd Ed., Chapter 160; Kansas Pattern Instructions, 2nd Ed., Chapter 16; Missouri Approved Jury Instructions, Chapter 24; Virginia Jury Instructions, Chapter 40.

[As amended, effective March 1, 2005.]

13-901. Special F.E.L.A. voir dire of jurors by court.

Plaintiff brings this action under a law known as the Federal Employers' Liability Act. The title only identifies the law and does not imply that the defendant railroad is liable.

This case involves . . .

(NOTE: The court will here briefly summarize the facts to state something equivalent to this example:

An accident occurred on _____ *(date)* at _____ *(name of location)* while the plaintiff [deceased] was an employee of the defendant railroad and was then engaged in _____ *(here briefly describe the work that plaintiff or deceased was doing at the time of the accident).)*

[The plaintiff in this case is the personal representative of _____ *(name of workman)*, deceased. The plaintiff brings this action for the benefit of _____ *(name of survivors or dependents)*].

At this time I will introduce the parties and their attorneys.

(The court then introduces the plaintiff and his attorneys, followed by the defendant representative and the defense attorneys.

NOTE: At this point, the court will pursue the voir dire examination of jurors as set forth in Chapter 1 concerning the general voir dire of jurors by the court.)

USE NOTES

The above portion of voir dire is to supplement the general voir dire under Chapter 1.

The paragraph relating to the personal representative and with reference to the deceased and survivors is only to be used where the injury to the workman resulted in his death.

Committee commentary. — The above quoted portion of a voir dire examination in F.E.L.A. cases is only to help the jury better understand the type of action involved. The probabilities are that at some point during the trial, even with reasonable precautions, there is going to be some reference to an F.E.L.A. or federal employers' liability case and, therefore, it is better that the court explain this right at the outset of the lawsuit.

45 U.S.C.A. § 51 provides that, in case of death of the employee, the liability of the carrier shall be to his or her personal representative, "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next-of-kin dependent upon such employee...".

13-902. Special F.E.L.A. statement of the case issues; claims; formula.

The plaintiff claims that [he] [she] sustained damages from personal injuries. [The plaintiff, as personal representative, claims damages because of the death of _____ *(name of deceased worker)*.

Plaintiff also claims that one or more of the following claimed acts of negligence caused or contributed to the [injury] [death] and resulting damages.

(NOTE: Here set forth, in simple form, the specific acts of negligence which are supported by the evidence, as in UJI 13-302A to 13-302F or the following examples:

(1) The defendant railroad failed to furnish the plaintiff with a reasonably safe place in which to work;

(2) The defendant railroad failed to provide the plaintiff reasonably safe tools with which to work;

(3) The defendant railroad failed to provide plaintiff with a sufficient number of fellow employees to safely perform the work assigned; and

(4) The defendant railroad's engineer was not keeping a proper lookout for workers on the track.)

The burden is on the plaintiff to prove, by the greater weight of the evidence, the following facts:

(A) That the defendant railroad was negligent in one of the particulars alleged; and

(B) That the defendant railroad's negligence caused or contributed to the [injury] [death] and resulting damage to the plaintiff.

The defendant railroad denies the plaintiff's claims and in addition asserts, as a further defense, that plaintiff was contributorily negligent in that:

(NOTE: Here set forth, in simple form, the acts of contributory negligence relied upon by the defendant which are supported by the evidence such as:

(1) The plaintiff failed to request additional help to perform [his] [her] work, which would have been given to [him] [her]; and

(2) The plaintiff failed to heed the whistle of the oncoming train and to exercise ordinary care to remove plaintiff from danger.)

The defendant railroad has the burden of proving, by the greater weight of the evidence, that the plaintiff was contributorily negligent.

The issues to be determined by you in this case are these:

(1) Was the defendant railroad negligent in any one of the particulars claimed?

If your answer to this question is "no", you will return a verdict for the defendant; but if your answer is "yes", you then have a second issue to determine, namely:

(2) Did the negligence of the defendant railroad cause or contribute to any injury and damage to the plaintiff?

If your answer to this question is "no", you will return a verdict for the defendant railroad; but if your answer is "yes", you must then find the answer to a third question, namely:

(3) Was the plaintiff guilty of some contributory negligence?

If your answer to this question is "no", then you will proceed to determine the amount of plaintiff's damages and return a verdict in the plaintiff's favor for that amount.

On the other hand, if you should find that the [plaintiff] [plaintiff's decedent] was guilty of some negligence and that [his] [her] negligence contributed to [his] [her] [injuries] [death], then you must return a verdict for the plaintiff for a reduced amount based upon a comparison of the negligence of the parties, as I will further instruct you.

USE NOTES

The paragraphs referring to contributory negligence are not applicable if the Safety Appliance Acts, 45 U.S.C.A. §§ 1-16, or the Boiler Inspection Acts, 45 U.S.C.A. §§ 23-24, are applicable.

This follows the format of UJI 13-302A to 13-302F, and should be the first instruction given to the jury at the close of the evidence and before final argument - following UJI 13-301.

The form, above, includes only contributory negligence as an affirmative defense, and contributory negligence is not an "absolute defense" in F.E.L.A. cases. Assumption of risk and fellow-servant doctrine are not available as affirmative defenses in F.E.L.A. actions.

Should the trial judge treat such defenses as "act of God" or "independent intervening cause" as absolute, affirmative defenses, rather than as "denials of causation," then the affirmative defense format found in UJI 13-302A to 13-302F can be utilized.

[As amended, effective November 1, 1991.]

Committee commentary. — The court should not instruct on a specific claim of negligence unless there is some indication that such negligence could have caused the

accident. *See Idzojtic v. Pennsylvania R.R.*, 47 F.R.D. 25 (D.C. Pa. 1969). *See also* UJI 13-302A to 13-302F.

It will be noted that this instruction does not include the elements of "proximate cause". This is in line with the suggestion found in Devitt & Blackmar, Federal Jury Practice and Instructions, notes to Section 89.12 and cited cases. *See also Eidson v. Atchison, T. & S.F. Ry*., 80 N.M. 183, 453 P.2d 204 (1969) and Federal Jury Practice and Instructions § 84.19.

[Revised, effective March 1, 2005.]

13-903. Burden of proof and greater weight of evidence, meaning of.

When I say that the burden is on a party to prove a proposition by the greater weight of the evidence, I mean that the proposition is more likely than not true.

Evenly balanced evidence is not sufficient.

If you are persuaded, considering all the evidence in the case, that a proposition on which one party has the burden of proof is more probably true than not true, then this proposition has been proved by the greater weight of the evidence.

USE NOTES

This instruction should be given in every F.E.L.A. case.

Committee commentary. — The burden of proof requirement in F.E.L.A. cases is no different from that established under New Mexico law. See Devitt & Blackmar, Federal Jury Practice and Instructions, § 89.12.

Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957): "[p]reponderance of the evidence simply means the greater weight of the evidence..."; *Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955): "... the evidence ... if it tips the scales in favor of the party on whom rests the burden of proof, even though it *barely* tips them. He is then said to have established his case by a preponderance of the evidence".

See also Federal Jury Practice and Instructions, § 84.11 and Virginia Jury Instructions, § 40.06.

13-904. The rule of liability; interstate commerce not an issue.

When an employee of a railroad is [injured] [killed] while engaged in [his] [her] employment in interstate commerce and the [injury] [death] is caused in whole or in part by the negligence of the railroad or by reason of any defect or insufficiency resulting from the railroad's negligence, the railroad is liable in damages.

USE NOTES

This instruction is to be used when it is admitted, or established by the evidence as a matter of law, that the plaintiff was employed by the railroad while engaged in interstate commerce.

[As amended, effective November 1, 1991.]

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

"Injury or death resulting in whole or in part from the negligence . . ." of the railroad means that the slightest negligence is sufficient if it played any part, however small, in causing or contributing to the injury or death (quotation from 45 U.S.C.A. § 51 with emphasis added). *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970); *Chavez v. Atchison, T. & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967); *Atchison, T. & S.F. Ry. v. Simmons*, 153 F.2d 206 (10th Cir. 1946); *Tillian v. Atchison, T. & S.F. Ry.*, 40 N.M. 80, 55 P.2d 34 (1935).

In cases under the Safety Appliance Acts and the Boiler Inspection Acts, the railroad's negligence may be immaterial, but the contributory negligence of the employee is a factor, where such contributory negligence is the sole cause. *Schmidt v. Great N. Ry.*, 7 Wash. App. 40, 497 P.2d 959 (1972).

[Revised, effective March 1, 2005.]

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

When an employee of a railroad is [injured] [killed] while engaged in [his] [her] employment in interstate commerce and the [injury] [death] is caused in whole or in part by the negligence of the railroad or by reason of any defect or insufficiency resulting from the railroad's negligence, the railroad is liable in damages.

An employee is considered as being employed by a railroad while engaging in interstate commerce when any part of [his] [her] duties shall be in the furtherance of interstate commerce or shall, in any way, directly or closely and substantially affect such commerce.

USE NOTES

This instruction is to be used only when interstate commerce is an issue.

[As amended, effective November 1, 1991.]

Committee commentary. — The question as to whether the employee was injured or killed while the railroad was engaging in interstate commerce, as distinguished from the

question of whether the employee was acting in the scope or course of employment at the time of the injury, does not seem to have been an issue in any reported New Mexico case, with the exception of *Rivera v. Atchison, T. & S.F. Ry.*, 61 N.M. 314, 299 P.2d 1090 (1956). A careful reading of Rivera, however, indicates that the basic question was whether the after-hours activity of the employee, while returning from an outdoor toilet, was within the course or scope of his employment "in interstate commerce".

13-906. A railroad acts through its employees.

The defendant railroad can act only through its officers, agents and employees. Any act or omission of an officer, agent or employee, within the scope or course of [his] [her] employment with the railroad, is the act or omission of the railroad.

USE NOTES

This instruction shall be used in every case.

[As amended, effective November 1, 1991.]

Committee commentary. — Whereas the railroad must be engaged in interstate commerce and the employee of the carrier must be so engaged at the time of injury in order to make the act applicable, 45 U.S.C.A. § 51 does not seem to require that a coemployee, whose negligence causes the injury, be so employed. This has been noted in *Glidewell v. Quincy O. & K. C.R.R.*, 208 Mo. App. 372, 236 S.W. 677 (1922); *Hines v. Keyser*, 268 F. 772 (3d Cir. 1920), cert. denied, 254 U.S. 656, 41 S. Ct. 218, 65 L. Ed. 460 (1921); *Louisville & N.R.R. v. Walker's Adm'r*, 162 Ky. 209, 172 S.W. 517 (1915); *Pedersen v. Delaware*, L. & W.R.R., 229 U.S. 146, 33 S. Ct. 648, 57 L. Ed. 1125 (1913). The federal decisions do indicate, however, that the act or omission of the officer, agent or employee must be within the scope or course of employment in order to make the railroad liable and, in this respect, are no different from New Mexico law, as embodied in this instruction and in UJI 13-409 NMRA, which it follows closely. However, note that scope or course of employment is a question of substantive law and, therefore, governed ultimately by decisions of the Supreme Court of the United States.

13-907. Scope or course of employment.

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

USE NOTES

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

[As amended, effective November 1, 1991.]

Committee commentary. — This issue is one of substantive law, governed by decisions of the federal court. However, the New Mexico cases are in accord with the general law on this point. *See* and compare cases discussed at 76 A.L.R.2d 1257-1276 and *Garcia v. Atchison, T. & S.F. Ry.*, 66 N.M. 339, 347 P.2d 1005 (1959), cert. denied, 362 U.S. 989, 80 S. Ct. 1077, 4 L. Ed. 2d 1022 (1960); *Rivera v. Atchison, T. & S.F. Ry.*, 61 N.M. 314, 299 P.2d 1090 (1956); *Atchison, T. & S.F. Ry. v. Wottle*, 193 F.2d 628 (10th Cir.), cert. dismissed, 344 U.S. 850, 73 S. Ct. 89, 97 L. Ed. 661 (1952).

13-908. Negligence; definition.

The term "negligence" may relate either to an act or to a failure to act.

An act to be negligent must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.

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

USE NOTES

A definition of negligence must be used in F.E.L.A. matters and for convenience the definition of Chapter 16 is repeated here.

[As amended, effective November 1, 1991.]

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

13-909. Contributory negligence; definition.

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

USE NOTES

This instruction should be used whenever contributory negligence is a jury issue. This instruction should be read immediately after UJI 13-908 (*see* UJI 13-908, committee commentary) in order that the jury might have a better understanding of the application of the terms.

Committee commentary. — This instruction is very similar to former U.J.I. Civ. 16.2 (withdrawn effective October 1, 1984). However, since a definition of "proximate cause" will not be given in these F.E.L.A. instructions (*see Eidson v. Atchison, T. & S.F. Ry.*, 80 N.M. 183, 453 P.2d 204 (1969) and 13-305 NMRA), it would be inappropriate here to use the term "proximately contributed."

[Revised, effective March 1, 2005.]

13-910. Ordinary care.

Ordinary care is that care which a reasonably prudent person exercises in the management of [his] [her] own affairs. "Ordinary care" is not an absolute term, but a relative one. In deciding whether ordinary care has been exercised, the conduct in question must be considered in light of all the surrounding circumstances, as shown by the evidence.

What constitutes "ordinary care" varies with the nature of what is being done. As the danger that should reasonably be foreseen increases, so the amount of care required also increases.

USE NOTES

As in Chapter 16, it is proper to give this instruction following the negligence or contributory negligence instruction.

[As amended, effective November 1, 1991.]

Committee commentary. — UJI 13-1603 NMRA, defining ordinary care, is customarily used in every case where UJI 13-1601 NMRA is also used. Here again, although what is "ordinary care" is a substantive question, governed by federal decisional law and F.E.L.A. cases, the definition of "ordinary care" found in federal cases will not vary from UJI 13-1603 NMRA.

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

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

USE NOTES

This instruction shall be given at the request of the defendant, when supported by the evidence. It is equally appropriate in cases under the Safety Appliance Acts, 45 U.S.C.A. §§ 1-16, and in cases under the Boiler Inspection Acts, 45 U.S.C.A. §§ 22-34.

Committee commentary. — In *Tillian v. Atchison, T. & S.F. Ry.*, 40 N.M. 80, 55 P.2d 34 (1935), the court held that whether the employee's injuries were caused solely by his

own negligence, in failing to recognize and heed an obvious danger, was a question of fact for the jury. *See also Miller v. Gulf, M. & O.R.R.*, 386 S.W.2d 97 (Mo. 1964); *Kenefick v. Terminal R.R. Ass'n*, 207 S.W.2d 294 (Mo. 1948).

13-912. Duty of employer as to place of work.

It was the duty of the defendant railroad to use ordinary care, under the circumstances, to furnish its employees with a safe place in which to work and to keep such place of work in a safe condition.

USE NOTES

This instruction shall be given in every case where the issue is a question of fact under the evidence.

Committee commentary. — Several New Mexico cases have involved the duty of the employer as to place of work. *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970); *McBee v. Atchison, T. & S.F. Ry.*, 80 N.M. 468, 457 P.2d 987 (Ct. App. 1969); *Chavez v. Atchison, T. & S.F. Ry.*, 79 N.M. 401, 444 P.2d 586 (1968); *Abeyta v. Atchison, T. & S.F. Ry.*, 65 N.M. 291, 336 P.2d 1051 (1959); *Wright v. Atchison, T. & S.F. Ry.*, 64 N.M. 29, 323 P.2d 286 (1958); *Rivera v. Atchison, T. & S.F. Ry.*, 61 N.M. 314, 299 P.2d 1090 (1956); *Padilla v. Atchison, T. & S.F. Ry.*, 61 N.M. 115, 295 P.2d 1023 (1956).

See also Shenker v. Baltimore & O.R.R., 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963); *New York, N.H. & H.R.R. v. Henagan*, 364 U.S. 441, 81 S. Ct. 198, 5 L. Ed. 2d 183 (1960); *Sana v. Pennsylvania R.R.*, 282 F.2d 936 (3rd Cir. 1960).

13-913. Duty to provide safe tools, etc.

It was the duty of the railroad to use ordinary care to provide its employees with safe [tools] [machinery and appliances] with which to do their work and keep [it] [them] in a safe condition. In exercising ordinary care, the railroad need not necessarily provide the latest or best [tools] [machinery and appliances] which could have been provided to do the work.

USE NOTES

This instruction shall be given in every case where the issue is a question of fact under the evidence.

Committee commentary. — *See* committee commentary to UJI 13-911 and cases cited therein. *See also McBee v. Atchison, T. & S.F. Ry.*, 80 N.M. 468, 457 P.2d 987 (Ct. App. 1969); *Bourguet v. Atchison, T. & S.F. Ry.*, 65 N.M. 207, 334 P.2d 1112 (1959); *Morstad v. Atchison, T. & S.F. Ry.*, 23 N.M. 663, 170 P. 886 (1918).

13-914. Duty to provide sufficient employees.

It was the duty of the railroad to exercise ordinary care to provide the plaintiff with a sufficient number of fellow employees to safely perform the work being done.

USE NOTES

This instruction shall be given in every case where the issue is a question of fact under the evidence.

Committee commentary. — *See* committee commentaries to UJI 13-911 and 13-912 and cases cited therein.

The leading New Mexico case on the duty to provide a sufficient number of employees is *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970), and the language of this instruction follows closely the language in that decision.

13-915. "Cause"; explained.

An injury or damage is caused, or contributed to, by an act or a failure to act when the act or failure to act played any part, no matter how small, in bringing about the injury or damage.

USE NOTES

This instruction shall be used in every case where the cause of the injury or damage is an issue.

Committee commentary. — The rule in F.E.L.A. cases is that the defendant is liable if it was guilty of the slightest negligence which played any part, however small, in causing or contributing to the injury or death. *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970); *Chavez v. Atchison, T & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967); *Atchison, T. & S.F. Ry. v. Simmons*, 153 F.2d 206 (10th Cir. 1946); *Tillian v. Atchison, T & S.F. Ry.*, 40 N.M. 80, 55 P.2d 34 (1935). [Revised, effective March 1, 2005.]

13-916. Amount of damages; injury; not death.

If you should decide for the plaintiff on the question of liability, you should first determine the amount of the plaintiff's damages [without reference to plaintiff's contributory negligence]. You must fix the amount of money which will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence of the defendant railroad:

(NOTE: Here insert the proper elements of damage such as, UJI 13-1803 through 13-1809, and UJI 13-1822 through 13-1824.)

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

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

USE NOTES

Bracketed material to be used only where contributory negligence is an issue.

[As amended, effective November 1, 1991.]

Committee commentary. — This instruction follows the format of UJI 13-1802, but it is felt that a distinct and separate instruction is necessary under this chapter because of the fact that contributory negligence does not bar a recovery under the F.E.L.A.

Similarly, in the case of an action involving a death under the F.E.L.A., an instruction may be drawn following the format of UJI 13-1817, but with the admonition that damages must first be determined without reference to the decedent's contributory negligence.

It is to be noted that the appellate review of verdicts for excessiveness is a procedural matter and thus governed by the law of the forum, not by the federal decisional law. *Vivian v. Atchison, T. & S.F. Ry.*, 69 N.M. 6, 363 P.2d 620 (1961); *Rivera v. Atchison, T, & S.F. Ry.*, 61 N.M. 314, 299 P.2d 1090 (1956).

13-917. Assumption of risk - *No instruction should be given.*

No instruction should be given.

USE NOTES

Since assumption of risk is not a defense under the F.E.L.A., no instruction should be given on this subject matter.

Committee commentary. — Counsel is not permitted to argue that the employee voluntarily works in a hazardous or ultrahazardous occupation. Under the Federal Employers' Liability Act, an employee does not
assume the risk of employment in any case where either injury or death resulted, in whole or in part, from the negligence of any of the officers, agents or employees of the railroad.

13-918. Verdict for plaintiff; comparative negligence.

In this case, the procedure to be followed in comparing the negligence of the parties and returning a verdict in favor of the plaintiff for a reduced amount based upon that comparison is:

(1) Determine the full amount of all damages sustained by the plaintiff;

(2) Determine the percentage of plaintiff's damages caused by [his] [her] own negligence and convert that percentage to dollars; and

(3) Reduce the full amount of plaintiff's damages by that portion of the total damages caused by plaintiff's own negligence and return a verdict in favor of the plaintiff for the amount remaining.

USE NOTES

If contributory negligence is not an issue, this instruction shall not be given.

[As amended, effective November 1, 1991.]

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

For New Mexico cases recognizing that contributory negligence may not defeat a recovery by plaintiff, but may merely reduce it, *see Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970); *Padilla v. Atchison, T. & S.F. Ry.*, 61 N.M. 115, 295 P.2d 1023 (1956); *Tillian v. Atchison, T. & S.F. Ry.*, 40 N.M. 80, 55 P.2d 34 (1935).

13-919. Verdict for plaintiff.

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

_____
Foreperson

USE NOTES

The full, legal caption of the case should be used on each and every verdict submitted to the jury. The verdicts, properly, should be prepared by counsel prior to settling of jury instructions.

[As amended, effective November 1, 1991.]

13-920. Verdict for defendant.

We find for the defendant.

_____
Foreperson

USE NOTES

The full, legal caption of the case should be used on each and every verdict submitted to the jury. The verdicts, properly, should be prepared by counsel prior to settling of jury instructions.

[As amended, effective November 1, 1991.]

13-921. Special interrogatories.

(*NOTE: The following is an example of a set of special interrogatories that can be used in an F.E.L.A. case.*)

These interrogatories shall be answered only in the event your verdict is for the plaintiff.

(1) What was the total amount of damages which you determined to be due to the plaintiff by reason of the injury sustained, before considering any contributory negligence on the part of [plaintiff] [decedent]?
_____ *(here state the amount)*.

(2) Did you find the [plaintiff] [decedent] guilty of any contributory negligence?
_____ *(Yes)* _____ *(No)*

If your answer to Interrogatory 2 is "no," you shall not answer Interrogatory 3. However, if your answer to Interrogatory 2 is "yes," then you should answer Interrogatory 3.

(3) If you found that the [plaintiff] [decedent] was guilty of contributory negligence, please state what proportion or percentage of the negligence on the part of the said [plaintiff] [decedent] contributed to the injuries of [plaintiff] [decedent].
_____ ***(here state the percentage)*.**

_____
Foreperson

USE NOTES

In F.E.L.A. cases special interrogatories have been commonly used, but the matter still rests in the discretion of the trial court.

[As amended, effective November 1, 1991.]

Committee commentary. — The foregoing special interrogatories are simply examples of the types of special interrogatories which can and have been used in F.E.L.A. cases.

CHAPTER 10
Defamation

13-1001. Defamation: Defined.

Defamation is a wrongful [and unprivileged] injury to [a person's] reputation.

USE NOTES

This introductory instruction is to be given in all defamation actions. If the defendant raises the defense of privilege, the first bracketed portion of the instruction should be given. Otherwise, it should be omitted.

The term "defamation" is to be used throughout the instructions instead of "libel" or "slander". Where the law varies depending upon whether written or spoken defamation is involved, the judge will select the appropriate instruction from among those contained herein. The jury need not be made aware of the distinction.

If the plaintiff is a person, the bracketed phrase "a person's" should be used. When a corporation is the plaintiff, or other forms of business organization or entities are determined to be proper plaintiffs in a defamation action, the judge should draft appropriate language for insertion here.

Committee commentary. — The word "defamation" is used throughout the instructions in preference to "libel" or "slander". Libel and slander are merely subcategories of defamation. Traditionally, libel is written defamation while slander is spoken defamation. *See* Restatement (Second) of Torts § 568 (1977). The line between libel and slander has blurred to the point that the supreme court declared that "there are good reasons for abolishing the distinction between libel and slander". *Reed v. Melnick*, 81 N.M. 608, 612, 471 P.2d 178, 182 (1970). The current instructions do not require that the distinction be made in New Mexico any longer.

The definition of defamation contained here is merely an introduction to the meaning of defamation. The instructions which follow this instruction provide the elements of a defamation action and definitions of each element. The language of this instruction is derived from a federal case applying New Mexico law: "The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation". *Gruschus v. Curtis Publishing Co.*, 342 F.2d 775, 776 (10th Cir. 1965).

In New Mexico, a corporation as well as a person may bring a defamation action: "A corporation may maintain an action for libel or slander if it has been defamed by a false

imputation about its financial soundness or business ethics". *Coronado Credit Union v. KOAT Television, Inc.*, 99 N.M. 233, 237, 656 P.2d 896, 900 (Ct. App. 1982); *see generally*, Annot., Action by Corporation for Libel or Slander, 52 A.L.R. 1199 (1928). It is unclear whether partnerships or other business entities may also be plaintiffs in defamation actions. *See Poorbaugh v. Mullen*, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982) (dictum suggesting that partnership may be a plaintiff in defamation action).

13-1002. Defamation action: Prima facie case; general statement of elements.

(A) The plaintiff claims that the following communication was defamatory and entitles the plaintiff to recover damages: _____
_____
_____

(B) To establish the claim of defamation on the part of defendant, the plaintiff has the burden of proving each of the following contentions:

[(1) The defendant published the communication; and]

[(2) The communication contains a statement of fact; and]

[(3) The communication was concerning the plaintiff; and]

[(4) The statement of fact was false; and]

[(5) The communication was defamatory; and]

[(6) The person[s] receiving the communication understood it to be defamatory; and]

[(7) The defendant [knew that the communication was false or negligently failed to recognize that it was false] [or] [acted with malice]; and]

[(8) The communication caused actual injury to the plaintiff's reputation; and]

[(9) The defendant abused [its] privilege to publish the communication.]

(C) The defendant denies the contention[s] of the plaintiff [and also claims in defense that (*the communication was true*)].

(D) To establish the defense of _____ (*theory of affirmative defenses*), the defendant has the burden of proving [at least one of] [each of] the following contention[s]:

(NOTE: List disputed factual elements relevant to affirmative defense.)

(NOTE: Repeat this format for each affirmative defense.)

(E) Related to the claims, [plaintiff] [defendant] contends and has the burden of proving that:

(NOTE: List each additional issue relevant to a party's claim or defense together with a statement of the elements of the claim or defense about which there is a factual question for the jury to resolve. For example, if plaintiff seeks punitive damages, or relies upon a theory of respondeat superior, those issues should be treated initially here.) (This [these] contention[s] is [are] denied by [plaintiff] [defendant].)

(NOTE: Repeat this format for each issue.)

(F) After considering the evidence and these instructions as a whole, you are to determine the following question[s]:

(NOTE: Here repeat the disputed contentions listed in (B) supra but now in the form of questions. For example, "Was the communication defamatory?")

If you decide that the answer to any of these questions is "No" you shall return a verdict for the defendant and against the plaintiff.

If you decide that the answer to each of the questions presented is "Yes," then [you are to determine the following question[s]:

(NOTE: Here repeat the disputed contentions listed in (C) or (D), supra, but now in the form of questions. For example, "Was the communication true?")

If you decide that the answer to this [these] question[s] is [are] "Yes", then you shall return a verdict for the defendant and against the plaintiff. If instead, you answer "No" to this [any of these] question[s], then you shall determine the amount of money that will compensate plaintiff for the plaintiff's injuries and damages in accordance with the instructions which follow, and shall return a verdict for the plaintiff in the amount you determine.

USE NOTES

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

a statement of the elements of additional issues, such as respondeat superior, that may be relevant to particular cases. UJI 13-1002(E) NMRA.

Finally, the instruction reformulates the issues in dispute into a series of questions for the jury to consider and explains to the jury the relationship of its answers to the ultimate outcome of the case. UJI 13-1002(F) NMRA. This portion of the instruction varies from UJI 13-302F NMRA in that the negligence instruction is written with the assumption that a special verdict form will be used. In contrast, UJI 13-1002(F) NMRA omits reference to special verdict forms and can be used with whatever form of verdict the court chooses to use.

This instruction merely sets out the skeletal outline of the case and the issues to be resolved by the jury. Subsequent instructions define the elements.

In Section (A), the trial judge identifies for the jury the communication which the plaintiff alleges is defamatory. If plaintiff asserts that several different communications or portions of a communication are defamatory, the trial judge should here include each such communication. If the trial judge has decided as a matter of law that a communication alleged by the plaintiff to be defamatory is not capable of supporting an action for defamation, that portion of the communication should not be included here. *See Marchiondo v. Brown,* 98 N.M. 394, 404, 649 P.2d 462, 472 (1982).

Section (B) lists each of the elements of a defamation action. Not every element should be listed for the jury in every case. Each provision of Section (B) is in brackets because the judge is to mention only those elements about which there is a factual dispute for resolution by the jury. If, for example, the defendant has admitted, or the judge has determined as a matter of law, that the defendant did publish the communication that is the subject of the action, the trial judge would not include Section (B)(1) in the list of contentions that the plaintiff has the burden of proving.

Section (B)(4) places the burden of proof of falsity upon the plaintiff. The United States Supreme Court mandates that the plaintiff bear this burden rather than the defendant bearing the responsibility of proving truth as a defense in most defamation actions. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). The provision is in double brackets because in one category of defamation case, where a private plaintiff alleges defamation and the defamatory statement was not of public concern, the former general New Mexico rule that truth is a defense is probably still applicable. In such a case, the judge will give an instruction that identifies truth as an affirmative defense. *See* UJI 13-1013 NMRA.

Section (B)(7) contains separate brackets because there are two standards of fault - negligence and malice - used in defamation actions, depending upon whether the plaintiff is a public official or figure on the one hand or a "private" person. *See Marchiondo v. Brown,* 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). The determination of which type of plaintiff is involved and thus whether the malice or negligence standard is applicable is a matter of law to be decided by the judge. *Id.* at 399, 649 P.2d at 467.

Based on this decision, the trial judge will select which of the bracketed provisions of Section (B)(7) to give. The first bracketed phrase in Section (B)(7) is to be used when the plaintiff must establish negligence. The second bracketed phrase is used when the plaintiff must establish that the defendant acted maliciously.

Section (B)(8) sets forth the requirement that plaintiff prove that the defamatory communication caused actual injury to plaintiff's reputation. New Mexico no longer allows presumed damages in defamation actions. *Poorbaugh v. Mullen,* 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), *cert. denied*, 98 N.M. 47, 653 P.2d 878 (1982).

Section (B)(9) is to be used when the defendant raises the defense of qualified privilege and the trial judge concludes that such a qualified privilege exists. *See Stewart v. Ging,* 64 N.M. 270, 274, 327 P.2d 333, 336 (1958) (trial judge decides whether qualified privilege exists). When a qualified privilege exists, plaintiff bears the burden of proof that defendant abused the privilege. *Id.* at 274-75, 327 P.2d at 336. This instruction informs the jury of the plaintiff's burden when the judge determines that defendant had a qualified privilege to publish the allegedly defamatory communication.

Section (C) introduces any affirmative defenses which the defendant relies upon, and Section (D) provides an opportunity to list in summary fashion the required elements of each defense in the same manner that Section (B) affords for the listing of the elements of the prima facie case of defamation. Because the existence of a privilege is a matter of law for the judge to decide, *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958), and truth is only infrequently a defense, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), this section may be seldom used.

Section (E) provides an opportunity for introduction of issues other than the elements of a prima facie case and the defenses asserted. For example, if the plaintiff alleges that the person who published the defamation was an employee of the defendant acting within the scope of [his] [her] employment, the respondeat superior issue and its relevant elements would be presented here together with a statement allocating the burden of proof.

Section (F) follows the format of UJI 13-302F, with the single exception that no mention is made of special verdict forms because the court is free to use a general verdict in defamation actions. *See* Rule 1-049 NMRA. After framing the relevant questions and describing the legal significance of particular findings as to each, the instruction concludes with a direction to consider issues of damages if the jury finds that plaintiff has established the elements of the action and the defendant either has raised no affirmative defense or has failed to prove the elements of the defense, or defenses.

The language contained within the brackets in the last paragraph of the instruction should be included only if there are affirmative defenses in issue; otherwise the language must be omitted, and the last paragraph will read, "If you decide . . . ."

[As amended, effective November 1, 1991; as amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008.]

Committee commentary. — The committee recommended abolishing all distinctions between libel and slander and the "per se" and "per quod" variations of each. These instructions do so. The distinctions previously made no longer make sense. Defamation spoken on national media has as much capacity for harm as a written statement published in a periodical of limited circulation. Written defamation published to a huge audience many members of which are aware of the extrinsic facts making it defamatory probably is more harmful than "per se" libel contained in a letter or other communication of limited circulation. Indeed, almost twenty-five (25) years ago, the supreme court in dictum agreed that "there are good reasons for abolishing the distinction between libel and slander" and found "arbitrary and unsatisfactory" the dichotomy between slander "per se" and "per quod". *Reed v. Melnick,* 81 N.M. 608, 612, 471 P.2d 178, 182 (1970). Since then, the court of appeals has declared that "[t]he New Mexico variation on the per se-per quod rule . . . has probably been overtaken by rulings of the United States Supreme Court." *Marchiondo v. New Mexico State Tribune Co.,* 98 N.M. 282, 289, 648 P.2d 321, 325 (Ct. App. 1981), *cert. quashed,* 98 N.M. 336, 648 P.2d 794 (1982). The supreme court, likewise, signalled its dissatisfaction with existing instructions incorporating the traditional distinction, *Marchiondo v. Brown,* 98 N.M. 394, 403, 649 P.2d 462, 471 (1982), and suggested the need for "specific uniform jury instructions to substitute for the instructions which are new in existence". *Id.* The current instructions comply with the clear import of the language in *Marchiondo.*

[Amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008.]

13-1003. Publication: Defined.

To support a claim for defamation, there must be a publication. Publication is an intentional or negligent communication to one other than the person defamed. [If, however, the communication is only to a person who knows that the communication is false, then there has been no publication.]

USE NOTES

There can be no defamation if the communication was not published. *See Bookout v. Griffin*, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982). Often, the fact of publication will be apparent, and the defendant will not deny that a publication occurred. In such cases, this instruction need not be given. Indeed, in some cases, publication will be presumed from the facts. *See, e.g.*, *Hornby v. Hunter*, 385 S.W.2d 473, 476 (Tex Civ. App. 1964) (paper with circulation of 4100: "It is not necessary that the article was read, as that can be presumed".), cited with approval in *Martinez v. Sears, Roebuck & Co.* 81 N.M. 371, 467 P.2d 37 (Ct. App.), cert. denied, 81 N.M. 425, 467 P.2d 997 (1970).

Where appropriate, the judge may supplement this instruction with a definition of the word "negligent" used in the instruction. If the negligence standard is used in UJI 13-

1009 NMRA, the judge might choose to incorporate the definition of negligence given there. If the malice standard is used in UJI 13-1009 NMRA, however, the judge should provide a definition of negligence in the instruction.

The bracketed matter informs the jury that if the communication was received only by persons who knew that the communication was false, there is not, in law, a publication; the defamation action must fail. *Id.* at 375, 467 P.2d at 41. Because publication is an element of defamation upon which the plaintiff bears the burden of proof, presumably the plaintiff must establish that at least one person to whom the alleged defamation was communicated was unaware that the communication was false. The bracketed portion of the instruction should be given when the defendant has not admitted the fact of publication and an issue of fact has arisen concerning whether any recipient of the communication believed it to be true.

Former UJI Civ. 10.26 (Repl. 1980) stated that no instruction on the issue of "republication" had been formulated because "[t]here is no New Mexico case law in point on the matter and the rulings from other states are in conflict". This observation is still true and, once again, the committee has not promulgated an instruction.

Committee commentary. — The definition of publication contained in this instruction is taken almost verbatim from *Poorbaugh v. Mullen*, 99 N.M. 11, 21, 653 P.2d 511, 521 (Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982). Poorbaugh contains a discussion of the proper interpretation of the publication requirement when the defamatory statement is jointly defamatory of a married couple, joint venturers or partners and the defendant communicates the defamatory matter only to the members of the unit jointly defamed, 99 N.M. at 21, 653 P.2d at 521. In such situations, there is no publication in law and the court should direct a verdict for the defendant. Where defendant asserts that all the recipients of the communication are covered by this exception, but a factual issue exists as to the status of one of the recipients, the judge should fashion an instruction consistent with the discussion in Poorbaugh.

13-1004. Statement of fact: Fact defined; opinion contrasted.

To support a claim for defamation, the communication by defendant must contain a statement of fact.

In contrast, statements of opinion alone cannot give rise to a finding of defamation.

[However, an opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact.]

In deciding whether the communication is or contains a statement of fact, you should consider the following:

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

(B) Whether reasonable persons would be likely to understand the communication to be a statement of the defendant's opinion or a statement of fact.

USE NOTES

In *Marchiondo v. Brown*, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982), the supreme court described the proper role of judge and jury in determining whether the alleged defamatory statement was or contained a statement of fact:

Where the statements are unambiguously fact or opinion, . . . the court determines as a matter of law whether the statements are fact or opinion. However, where the alleged defamatory remarks could be determined either as fact or opinion and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.

If the trial judge determines that, as a matter of law, the alleged defamatory statement is wholly opinion, then the court should direct a verdict for the defendant. If the judge determines that, as a matter of law, the statement is factual, there is no need to give this instruction; instead, the judge normally should omit any instruction or discussion of this issue.

Where the alleged defamation is made up of many statements, it is possible that some of the statements will be opinion as a matter of law, some will be factual as a matter of law and some will raise a jury issue as to whether they constitute facts or opinion. In such cases, the trial judge should make clear to the jury which portions of the statements the judge has ruled upon and which statements raise a jury issue as to their factual or nonfactual nature.

The bracketed instruction contained in the third paragraph should be given only when the judge determines that the alleged defamatory statement is or may be a statement of opinion, but further determines that the statement, if opinion, nonetheless may imply the existence of undisclosed facts:

It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication.

Restatement (Second) of Torts § 566 comment c (1977). In such cases, if the jury concludes that the statement is an opinion but that it implies the existence of undisclosed facts, the requirement of a factual statement, described in this instruction, is satisfied.

Committee commentary. — Statements of opinion alone cannot be the basis of an action for defamation:

Under the First Amendment, there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value to false statements of fact.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). New Mexico acknowledges this fundamental premise of defamation law: "Ideas and opinions, although incorrect or faulty in their premise, are protected by the United States constitution. False statements of fact, whether intentionally or negligently published, are unprotected". *Marchiondo v. New Mexico State Tribune Co.*, 98 N.M. 282, 291, 648 P.2d 321, 330 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982); *see also Marchiondo v. Brown*, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982) ("Opinions are protected but defamatory falsehood is not".).

In *Marchiondo v. Brown*, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982), the supreme court noted that "[t]he problem which arises under the new standard is distinguishing between an opinion and a mere statement of fact". The criteria for determining whether a statement constitutes a fact or opinion are derived from that decision.

The third paragraph addresses the special problem which arises when the communication may be classified as opinion, but may imply the existence of underlying facts. Two decisions of the court of appeals hold that the constitutional requirement that defamation actions be limited to factual statements is satisfied under these circumstances. *Kutz v. Independent Publishing Co.*, 97 N.M. 243, 638 P.2d 1088 (Ct. App. 1981); *Marchiondo v. New Mexico State Tribune Co.*, 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 321 (1982). The Supreme Court of New Mexico accepted this view in *Marchiondo v. Brown*, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982).

13-1005. Concerning the plaintiff: Defined.

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

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

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

USE NOTES

This instruction is to be used only when there is an issue of fact whether the alleged defamatory statement refers to the plaintiff.

The bracketed second paragraph should be used only when the issue arises whether a statement is concerning the plaintiff because it encompasses within its scope persons in addition to the plaintiff.

The bracketed third paragraph should be used only when the issue arises whether a statement is concerning the plaintiff because it describes a group of persons, one of whom is or may be the plaintiff.

Committee commentary. — This instruction is similar to previous instruction UJI Civ. 10.25 (Repl. 1980). The legal principle it embodies is derived from Restatement (Second) Torts § 564 (1977): "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer". *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), illustrates the proper application of the law. In *Sullivan*, the alleged defamatory publication did not mention the police commissioner by name and referred only to "truckloads of police" and the occurrence of seven "arrests". *Id.* at 289. The supreme court held that the references to the police and the arrests could not reasonably be interpreted to apply to the police commissioner personally. Id.

The second paragraph also is derived and continued from prior UJI Civ. 10.25 (Repl. 1980) as is the applicable direction for use.

The third paragraph is derived from *Poorbaugh v. Mullen*, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982), where the court first stated the rule concerning group libel and then "[b]y analogy", applied it to permit a partner to sue for libel when the alleged defamation was directed to the partnership containing the name of the plaintiff in its partnership title. The United States supreme court has approved the principle: "[W]e do not mean to suggest that the fact that more than one person is libeled by a statement is a defense to suit by a member of the group." *Rosenblatt v. Baer*, 383 U.S. 75, 82 n.6, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966).

Previous instruction UJI Civ. 10.25 (Repl. 1980) and the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 290, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), use the term "of and concerning" the plaintiff. The current instruction simplifies the wording but is not intended to change the meaning of the phrase or the requirement it embodies.

13-1006. Falsity: Defined.

[To support a claim for defamation, the communication must be false.

One or more statements of fact in the communication must be false in a material way. Insignificant inaccuracies of expression are not sufficient.]

USE NOTES

The traditional rule in New Mexico, both at common law and by statute, is that truth is an affirmative defense to an action for defamation and as such, the defendant has the burden of pleading and proof on the issue. *Eslinger v. Henderson*, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969); *see Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), cert. denied, 436 U.S. 936, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); N.M. Stat. Ann. § 38-2-9 (1978).

The United States Supreme Court has made significant inroads into this common law rule. Where the plaintiff is a public official, the plaintiff must now prove that the alleged defamatory statement is false. *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 1563, 89 L. Ed. 2d 783 (1986). A "public-figure plaintiff" must also show the falsity of the statements at issue in order to prevail on a suit for defamation. *Id.*

In Hepps, the supreme court also ruled that "at least where a newspaper published speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false". Id. at 1559. Thus, in only one type of case can New Mexico's common law rule that truth is an affirmative defense possibly continue to apply. The supreme court has not barred the treatment of truth as an affirmative defense rather than falsity as part of the plaintiff's case where the plaintiff is a private figure and the subject matter of the alleged defamation is solely a matter of private concern. *See Dun & Bradstreet Inc. v. Greenmoss Bldrs. Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (recognizing separate category of private plaintiff/subject matter not of public concern).

Until and unless the United States Supreme Court extends the ruling in Hepps to private plaintiffs asserting defamation concerning a matter not of public concern, the New Mexico common law rule that truth is a defense presumably continues to apply in defamation actions of that type. Therefore, this bracketed instruction should be given in all defamation cases except where private plaintiffs seek damages for defamatory statements that are not matters of public concern. In "private plaintiff/private concern" cases, the trial judge should omit this instruction and instead give UJI 13-1013 until the United States Supreme Court mandates otherwise, or until the New Mexico Supreme Court modifies the common law rule.

This instruction informs the jury that proof of insignificant errors in the published statement are not sufficient to prove the requisite falsity. The burden is on the plaintiff to demonstrate that the communication was false in a material aspect. The language chosen is a modification of the language of *Franklin v. Blank*, 86 N.M. 585, 588, 525 P.2d 945, 948 (1974), in which the court explained the requirement in the context of an instruction describing what was then the defense of truth:

It is not necessary to prove the literal truth of statements made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance and it is sufficient to show that the imputation is substantially true.

13-1007. Defamatory communication: Defined.

To support a claim for defamation, a communication must be defamatory.

Defamatory communications are those which tend to expose a person to contempt, to harm the person's reputation, or to discourage others from associating or dealing with [him] [her].

In deciding whether the communication was defamatory, you must consider its plain and obvious meaning.

[In determining whether the communication was defamatory, you may consider whether there are other facts in evidence known to the person to whom the communication was published which, when taken into consideration with the communication, gave it a defamatory meaning.]

USE NOTES

Sometimes a communication is so obviously defamatory that the court may declare it to be so as a matter of law. *See Marchiondo v. New Mexico State Tribune Co.*, 98 N.M. 282, 287, 648 P.2d 321, 326 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982). This instruction is to be used when the court determines that the communication, while not defamatory as a matter of law, is capable of a defamatory meaning. In such cases it is for the jury to determine whether the communication is defamatory.

The bracketed fourth paragraph applies both to spoken and written defamation. It addresses the situation where the defamatory meaning is not apparent on the face of the written or oral pronouncement. Nonetheless, if the plaintiff is able to establish that the person receiving the communication was aware of additional facts and circumstances which would render the communication defamatory, the plaintiff can still recover.

[As amended, effective November 1, 1991.]

Committee commentary. — The language in the initial three paragraphs is taken almost verbatim from the previous relevant instruction approved by the supreme court. UJI Civ. 10.11 (Repl. 1980). Its roots are found in *Colbert v. Journal Publishing Co.*, 19 N.M. 156, 142 P. 146 (1914). The language in the first paragraph is also similar to that contained in the Restatement (Second) of Torts § 559 (1977).

The bracketed fourth paragraph reflects the fact that sometimes publications "are not on their face defamatory, but . may become so when considered in connection with innuendos and explanatory circumstances". *Marchiondo v. New Mexico State Tribune Co.*, 98 N.M. 282, 288, 648 P.2d 321, 327 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982). The language contained in the third paragraph is derived from the

previous relevant instructions approved by the supreme court. UJI Civ. 10.6, 10.7 (Repl. 1980).

13-1008. Defamatory meaning understood.

To support a claim for defamation, the defamatory meaning of the communication must be understood by the person to whom it was communicated.

The defamatory meaning of a communication is that which the recipient reasonably understands it was intended to express. It is what the recipient of the communication reasonably understood the meaning to be that controls; not what the defendant may have intended to convey.

Committee commentary. — A communication will not do harm if it is not understood as defamatory by the recipient, and it will do harm if it is so understood by the recipient even if other persons might not consider the communication defamatory. This instruction, adopted from the Restatement, sets out the twin requirements that the recipient actually understand the communication to be defamatory and that the recipient's understanding be reasonable:

If the maker of the communication intends to defame the other and the person to whom it is made so understands it, the meaning so intended and understood is to be attached to it. This is true although the meaning is so subtly expressed that the ordinary person would not recognize it. On the other hand, although the person making the communication intends it to convey a defamatory meaning, there is not defamation if the recipient does not so understand it. This is true although the defamatory meaning is so clear that an ordinary person would immediately recognize it.

[Finally,] it is not enough that the particular recipient of the communication actually attaches a defamatory meaning to it. If the defamatory meaning is not intended, it must be a reasonable construction of the language.

Restatement (Second) of Torts § 563, comments a, b (1977).

13-1009. Wrongful act: Defined.

(A) [To support a claim for defamation, the defendant must have acted with malice when defendant published the communication.

Defendant acted with malice if the publication was made by defendant with knowledge that it was false or with a reckless disregard for whether it was false or not. Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

In order for you to find such knowledge of falsity or reckless disregard for whether it was false, the evidence must be clear and convincing. "Clear and convincing evidence" is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.]

(B) [To support a claim for defamation, the defendant must have been negligent when defendant published the communication. The defendant must have negligently failed to check on the truth or falsity of the communication prior to publication.

The term "negligent" may relate either to an act or a failure to act.

An act, to be "negligent," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to the reputation of another and which such a person, in the exercise of ordinary care, would not do.

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

USE NOTES

The plaintiff must prove that the defendant acted wrongfully if the plaintiff is to succeed in a defamation action. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 1997, 41 L. Ed. 2d 789 (1974). The two standards of conduct applied in New Mexico are "malice" and "negligence". *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982). If the plaintiff is a public official or a public figure, the plaintiff must prove malice as defined by the United States Supreme Court. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). In such cases, the instruction contained in alternative (A) is to be given. Other plaintiffs must prove negligence. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 480 (1982). Alternative (B) is the appropriate instruction in such cases.

Whether a plaintiff is a public figure or public official who must prove malice is a question of law for the court to resolve. *See Marchiondo v. Brown*, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982). Thus, the court resolves the issue of the status of the plaintiff before submitting the case to the jury and then submits the appropriate instruction from the alternatives presented in UJI 13-1009 NMRA.

Committee commentary. — There cannot be no-fault defamation. The United States Supreme Court has ruled that public officials and public figures must establish malice in order to succeed in a defamation action. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (public official); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (public figure). As to private plaintiffs, "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of

defamatory falsehood injurious to a private individual". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). The New Mexico supreme court has chosen the negligence standard: "[I]n cases involving non-public defamation plaintiffs . [i]n accord with *Gertz*, we adopt the ordinary negligence standard as a measure of proof necessary to establish liability for compensation for actual injury." *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). The judge and not the jury determines the status of the plaintiff and the corresponding burden the plaintiff bears to show that defendant's conduct was wrongful:

[A] plaintiff's status as either a public official, public figure, or private person is relevant in determining the standard by which an aggrieved party's proof of damages must be measured. The question of whether one is a "public figure" or a "private person" is a question of law....

Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 291, 648 P.2d 321, 330 (Ct. App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982).

The "malice" that public officials and public figures must establish is not mere ill will or personal hatred of the plaintiff by the defendant. *Compare Colbert v. Journal Publishing Co.*, 19 N.M. 156, 142 P. 146 (1914) (common law definition of malice applied in early defamation action). The applicable definition was established by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (" 'actual malice' - that is, with knowledge of falsity or with reckless disregard of whether it was false or not"). This instruction incorporates that language. The remainder of the language in the second paragraph fleshes out the meaning of malice. The phrases are derived from *St. Amant v. Thompson*, 390 U.S. 727, 730-31, 88 S. Ct. 766, 19 L. Ed. 2d 820 (1968).

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86, 84 S. Ct. 766, 19 L. Ed. 2d 820 (1964), the supreme court declared that, when the plaintiff must prove malice, the proof must be made with "convincing clarity". In New Mexico, that phrase has become equated with the "clear and convincing" evidence standard of the burden of proof which formerly was found in UJI Civ. 10.17 (Repl. 1981). This instruction incorporates the standard definition of "clear and convincing evidence" because with regard to this element of a defamation action the plaintiff's burden of proof increases from a "preponderance" [now "greater weight"] of the evidence to "clear and convincing" evidence.

In cases involving neither a public official nor a public figure, the plaintiff need not prove actual malice. It is sufficient that the plaintiff demonstrate that the defendant was negligent. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). As does the actual malice requirement, the negligence requirement focuses on the conduct of the defendant in failing to ascertain the truth or falsity of the communication prior to publication. There are other places in which the issue whether the defendant failed to exercise reasonable care might arise. The Restatement of Torts (Second) § 580B, comment b (1977) identifies four such additional areas:

(1) Negligence in publishing the communication as for example where the defendant did not intend to communicate his written views, but negligently allowed a third person to read them.

This issue is adequately addressed in the text of UJI 13-1003, which requires intentional or negligent publication.

(2) Negligence in failing to recognize that a communication not defamatory on its face was made so by extrinsic facts not known to the defendant.

Negligence here does not go to the search for truth or falsity, but rather to the issue of whether the defendant who published the false communication was negligent in failing to investigate the facts which made the statement defamatory.

The bracketed fourth paragraph of UJI 13-1007 deals with this issue.

The Restatement notes that the common law rule does not require that the plaintiff prove negligence as to this aspect of the case; instead, the general rule is that for purposes of this requirement, any violation, even a non-negligent one, can lead to liability. Restatement (Second) of Torts § 580B, comment d (1977). The drafters of the Restatement do not declare that states must impose a negligence requirement as to this issue; they merely offer the opinion that "[t]he logic of the holding in Gertz would seem to apply . . . as well and to require that there be at least negligence." Id. Absent direction from the New Mexico Supreme Court to impose a negligence requirement in situations where defamatory meaning is based only on extrinsic facts, UJI 13-1009 follows the common law rule.

(3) Negligence in composing the communication; for example, a typographical error, a slip of the tongue or the use of words with more than one meaning.

The committee is of the opinion that this issue is subsumed under the requirement that negligence or malice must be shown to have been the cause of the false statement and, thus, is encompassed within UJI 13-1009. If the statement is false only because of a typographical error, UJI 13-1009 requires that the plaintiff prove that the falsity was caused by the failure of the defendant to exercise reasonable care to check the draft of the communication to assure that it reflected the truth.

(4) Negligence in regard to the reference to the plaintiff; for example, where the defendant intended to refer to one person but was reasonably understood to have referred to the plaintiff.

The drafters of the Restatement speculate that the "logic of the holding in Gertz" might require that plaintiff prove not only that it was reasonable for the recipient of the communication to believe that it referred to plaintiff, but also that it was unreasonable for the defendant to have used words that permitted that inference. Restatement (Second) of Torts § 580B, comment d (1977). New Mexico law does not contain such a

negligence requirement and the relevant New Mexico instruction continues to permit a finding that the communication was "concerning the plaintiff" even if the defendant did not act unreasonably in permitting the recipient of the communication to reach that conclusion. UJI 13-1005 NMRA.

In sum, a private plaintiff must always prove at least negligence on the part of the defendant in failing to determine that the communication was false and in permitting the publication at all, but need not always establish negligent failure to realize that the communication was defamatory or negligence in creating the erroneous but reasonable belief that the plaintiff was the subject of the communication. These instructions reflect the current New Mexico law rather than the opinions expressed in the Restatement.

13-1010. Actual injury and compensatory damages.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for the actual injury caused by the defamatory communication.

Plaintiff claims and has the burden of proving that the defamatory communication caused one or more of the following injuries:

[(1) Loss of business profits] [;] [and]

[(2) Loss of salary] [;] [and]

[(3) Loss of the sale of plaintiff's stock] [;] [and]

[(4) Out-of-pocket expenses for _____] [;] [and]

[(5) Harm to plaintiff's good name and character among [his] [her] friends, neighbors and acquaintances] [;] [and]

[(6) Harm to plaintiff's good standing in the community] [;] [and]

[(7) Personal humiliation] [;] [and]

[(8) Mental anguish and suffering] [;] [and]

[(9) _____]

The cause of an injury is that which in a natural and continuous sequence unbroken by an independent intervening cause produces that injury, and without which the injury would not have occurred. It need not be the only cause, nor the last, nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which, in combination with it, causes the injury.

In determining the amount of damages, you may only award money to compensate for the above-listed actual injuries proved by the plaintiff to have been suffered by [him] [her]. It is not necessary for plaintiff to present evidence which assigns an actual dollar value to the injuries. In determining compensation for plaintiff's actual injuries, if any, you should follow your conscience as impartial jurors, using calm and reasonable judgment and being fair to all parties.

USE NOTES

This instruction states the measure for determining compensatory damages in all defamation actions. It encompasses only those elements of actual damages, both general compensatory damages and special damages, which are proven at trial. The instruction omits reference to presumed damages because of the uncertainty engendered by recent decisions concerning when, if ever, New Mexico can and will permit recovery for presumed, but unproven, compensatory damages. *See* committee commentary. The court should modify this instruction to include an award of presumed damages only if it is convinced that under the facts presented, New Mexico would permit an award of presumed damages in circumstances in which the United States Supreme Court would permit such an award.

The listed types of actual damages are illustrative only. The court should tailor this portion of the instruction to the instruction tendered by the plaintiff at trial.

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

Committee commentary. — The appropriate measure of compensatory damages in defamation actions is still evolving. In the past, New Mexico authorized an award of damages which could be "presumed to have resulted from" the defamatory communication. *See* UJI Civ. 10.19 (Repl. 1980). In 1973, however, the United States Supreme Court held that even when a private plaintiff sued for defamation, "the States may not permit recovery of presumed . damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of truth [because] the States have no substantial interest in securing . . . gratuitous awards of money damages far in excess of any actual injury". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). The New Mexico Supreme Court adopted this approach, limiting awards of compensatory damages to actual damages in accordance with the decision in *Gertz. Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). In 1984, a divided United States Supreme Court held that a state could allow recovery of presumed damages by a private plaintiff so long as the subject of the defamation did not involve a matter of "public concern". *Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). The opinion permits but does not compel states to allow awards of presumed damages in such cases.

The New Mexico Supreme Court has not yet determined whether New Mexico will return to the former law authorizing presumed damages in cases involving a private plaintiff and defamatory statements not of public concern. This instruction reflects the

law in *Gertz* and *Marchiondo*. It is not intended to foreclose debate concerning the law of presumed damages New Mexico might hereafter adopt in light of the *Dun & Bradstreet* decision.

This instruction limits awards of compensatory damages to "actual injury" suffered by the plaintiff. The phrase has been partially defined by the United States Supreme Court, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and the New Mexico Supreme Court has adopted the description used in *Gertz*. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982).

We need not define "actual injury", as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

[Revised, effective March 1, 2005.]

13-1011. Punitive damages.

If you find that plaintiff should recover actual damages, and if you further find clear and convincing evidence that the publication of the communication by defendant was made with knowledge of its falsity or with a reckless disregard for whether it was false or not, then you may award punitive damages.

Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

Clear and convincing evidence is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be

reasonably related to the actual damages and injury and not disproportionate to the circumstances.

USE NOTES

The requirement that clear and convincing evidence must support a verdict for punitive damages and the explanation of that standard of proof should be given here even if it was given in UJI 13-1009 in order to assure that the jury focuses on the enhanced burden of proof that must be met if punitive damages are to be awarded.

Committee commentary. — This instruction imposes the requirement of proof of knowledge of falsity or reckless disregard for truth or falsity in all cases in which punitive damages are sought. Current New Mexico law compels this standard. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). However, Marchiondo relied upon its interpretation of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) as requiring such a standard in all cases. 98 N.M. at 402, 649 P.2d at 470. The United States Supreme Court has recently distinguished Gertz and now permits states to award punitive damages to private plaintiffs who are the subject of defamation on a matter not of public concern even in the absence of malice as defined in *Gertz*. *Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). New Mexico has not yet decided whether it will take advantage of the opportunity provided by the decision in *Dun & Bradstreet* to modify the existing law of New Mexico. This instruction mirrors the existing New Mexico law.

The instruction includes a statement that malice must be proven by clear and convincing evidence. The United States Supreme Court mandates that this standard of proof of malice be met. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The definition of "clear and convincing" evidence is that previously used in other civil actions, UJI Civ. 10.17 (Repl. 1981), and now given in UJI 13-1009 when plaintiff must show malice in order to establish a prima facie case.

13-1012. Qualified privilege: Abuse of qualified privilege.

A communication is normally privileged when it consists of a good faith publication in the discharge of a public or private duty. There exists in the law a qualified privilege for communications such as the communication involved in this action. Consequently, for defendant to be liable to plaintiff, plaintiff must prove that defendant abused the privilege. Defendant abused the privilege if one of the following occurred:

[Defendant knew the statement was false] [or]

[Defendant acted with reckless disregard for the truth or falsity of the statement] [or]

[Defendant published the communication for an improper purpose] [or]

[Defendant published the communication to a person to whom it was not reasonably necessary to publish it in order to accomplish the proper purpose for which the communication was made] [or]

[Defendant published the communication when it was not reasonably necessary to do so to accomplish the proper purpose for which the communication was made] [or]

[Defendant did not believe, or did not have reasonable cause to believe, that the communication was true] [or]

[....]

USE NOTES

The trial judge decides as a matter of law whether a qualified privilege exists: "The question whether an occasion gives rise to a qualified privilege is one for the court as an issue of law". *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958). If the judge decides that a qualified privilege exists, "the question whether it was abused . is ordinarily for the jury". *Id.* at 274-275, 327 P.2d at 336. However, "where but one conclusion can be drawn from the the evidence", the court may determine as a matter of law that the privilege has been abused or that it constitutes a defense to the action. Id. at 275, 327 P.2d at 337; *Mahona-Jojanto, Inc. v. Bank of N.M.*, 79 N.M. 293, 295, 442 P.2d 783, 785 (1968). Thus, this instruction is to be given only when the court concludes as a matter of law that the facts give rise to a qualified privilege, and further concludes that there is a question of fact concerning whether the privilege has been abused.

The judge should select only those bracketed statements which are relevant to the evidence presented at trial. The listed occasions for finding an abuse of privilege are not intended to be exclusive. If appropriate, the court might conclude that additional or alternative grounds for proving abuse of privilege should be presented to the jury.

Committee commentary. — The first sentence of this instruction, defining generally the circumstances giving rise to a qualified privilege, is derived from *Bookout v. Griffin*, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982) and *Zuniga v. Sears, Roebuck & Co.*, 100 N.M. 414, 417, 671 P.2d 662, 665 (Ct. App.), cert. denied, 100 N.M. 439, 671 P.2d 1150 (1983). In these cases, the courts have omitted language found in an earlier case which defined the privilege as "one consisting of a good-faith publication in the discharge of a public or private duty when the same is legally or morally motivated". *Mahona-Jojanto, Inc. v. Bank of N.M.*, 79 N.M. 293, 295-296, 442 P.2d 783, 785-786 (1968) (emphasis added). This instruction follows the lead of the current cases by omitting the general references to legal and moral motives. Instead, the instruction lists with specificity the circumstances and motives which, when present, would constitute an abuse of privilege.

The court determines as a matter of law that a qualified privilege exists. *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958). This instruction informs the jury of the existence of the qualified privilege and assigns the burden of proof to the plaintiff to demonstrate that the privilege has been abused and thus is inapplicable. *See Zuniga v. Sears, Roebuck & Co.*, 100 N.M. 414, 418, 671 P.2d 662, 666 (Ct. App.), cert. denied, 100 N.M. 439, 671 P.2d 1150 (1983) (defendant with qualified privilege entitled to judgment because "[p]laintiff has raised no factual issue that [defendant] abused the privilege"); *Sokolay v. Edlin*, 65 N.J. Super. 112, 124-25, 167 A.2d 211, 217-218 (App. Div. 1961).

The first two listed grounds for overcoming a qualified privilege describe conduct which is malicious as defined by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Proof of this form of malice is sufficient to overcome a qualified privilege. Restatement (Second) of Torts § 600 (1977).

The third, fourth and fifth listed grounds which would constitute an abuse of privilege are derived from longstanding New Mexico precedent, *Mahona-Jojanta, Inc. v. Bank of N.M.*, 79 N.M. 293, 442 P.2d 783 (1968), the continuing validity of which has not been questioned.

The final specific ground is derived from the same precedent and has been reaffirmed in dictum in more recent decisions. *E.g., Bookout v. Griffin*, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982) ("The privilege is abused if a person said to be privileged lacks the belief, or reasonable grounds to believe, the truth of the alleged defamation"). New Mexico courts may reconsider this issue. Negligence, at least, must be proven in all defamation cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 322, 347-348, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). The plaintiff, therefore, will necessarily have proven that the defendant lacked reasonable grounds to believe that communication was true as part of the plaintiff's prima facie case. *See* UJI 13-1009. If the same proof of negligence always overcame a qualified privilege, the doctrine of qualified privilege would be moot; defendant need rely on a qualified privilege only if plaintiff has proven a prima facie case, but the proof of negligence in the prima facie case would also serve to negate the qualified privilege. *See* Sack, Libel, Slander and Related Problems, p. 442 (1980).

Many states have reconsidered the proof necessary to overcome qualified privilege and have concluded that proof of malice rather than proof of negligence is required to demonstrate abuse of privilege. *See*, *e.g., Rogozinski v. Airstream*, 377 A.2d 807 (N.J. 1977); *Jacron Sales Co., Inc. v. Sindorf*, 350 A.2d 807 (N.J. 1977); *Jacron Sales Co., Inc. v. Sindorf*, 350 A.2d 688 (Md. 1976). This is the position taken in the Restatement of Torts. Restatement (Second) of Torts §§ 600 and 601 (1977). In contrast, at least one state has declined to change its existing law, and continues to provide that proof of negligence is sufficient to overcome qualified privilege. *Banas v. Matthews International Corp.*, 502 A.2d 637 (Pa. Super. 1985). In the absence of contrary precedent, this instruction follows *Bookou*t.

[As revised, November 1, 1991.]

13-1013. Defense of truthfulness.

[Truth is a defense to this action.

To establish the defense of truth, defendant must prove that the statement was substantially true, which means that the statement was true in all material particulars.]

USE NOTES

This instruction informs the jury that the defendant has the burden of proving truth as a defense to a defamation action. It is contradictory to UJI 13-1006 which assigns to the plaintiff the burden of proving falsity as part of plaintiff's prima facie case. This instruction is used instead of UJI 13-1006 when the judge determines that the plaintiff is a private figure who is suing a media defendant for publication of defamatory matter not of public concern. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). When this instruction is given in lieu of UJI 13-1006, the court should modify UJI 13-1002(B), (C) and (D) to reflect the placement of the burden of proof of falsity upon the defendant.

The trial judge should determine whether a matter is one of private or public concern, just as the judge must determine whether a plaintiff is a public official or public figure as a matter of law. *See Marchiondo v. Brown*, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982). Criteria for determining when the communication is a matter of public concern are contained in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 2947, 86 L. Ed. 2d 593 (1985).

Committee commentary. — In New Mexico, the common law rule has been that truth is an affirmative defense to a defamation action which the defendant has the burden of pleading and proving. *Eslinger v. Henderson*, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969); *Franklin v. Blank*, 86 N.M. 585, 588, 525 P.2d 945, 948 (Ct. App. 1974). The United States Supreme Court has displaced the common law rule in many instances and requires that plaintiff bear the burden of proof of falsity when the plaintiff is a public official, *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), or a public figure. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 1563, 89 L. Ed. 2d 783 (1986). Where the plaintiff is a private figure, but the alleged defamation involves a matter of public concern, the plaintiff also must establish that the defamatory publication is false. *Id.*

The United States Supreme Court has not yet mandated that states impose the burden of proof of falsity upon private figure plaintiffs who assert that they were defamed in a communication which is not a matter of public concern. In such cases, therefore, New Mexico's common law rule has not been displaced. The defendant bears the burden of proof of falsity. This instruction rather than UJI 13-1006 is proper.

13-1014. Damages; mitigation - *No instruction submitted.*

No instruction submitted.

Committee commentary. — Previous uniform jury instructions contained an instruction authorizing the jury to consider several specific factors in determining whether to mitigate the amount of damages that would otherwise be awarded in a defamation action. UJI Civ. 10.22 (Repl. 1980). There is no New Mexico precedent authorizing or compelling the use of such an instruction. *Id.* Committee commentary. The committee is of the opinion that such an instruction is no longer necessary. Several of the factors listed in the previous instruction focused on the defendant's reliance on a source of information. These are now an integral part of the determination of whether defendant acted wrongfully and is thus subject to any liability to the plaintiff. UJI 13-1009. To repeat them as factors that could lead to mitigation of otherwise appropriate damages would unduly concentrate the jury's attention on those factors.

In addition, the previous instruction listed apologies or retractions by the defendant as well as the prior bad reputation of the defendant as factors that might mitigate damages. UJI Civ. 10.22 (5) and (7) (Repl. 1980). These issues are relevant to the determination of the amount of actual damages suffered by the plaintiff to his reputation and thus are now an integral part of the initial determination of damages. Because presumed damages are no longer authorized, *see* UJI 13-1010, there is no need to ask the jury to reduce the amount of damages otherwise recoverable because of these factors.

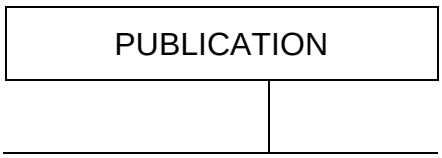
APPENDICES

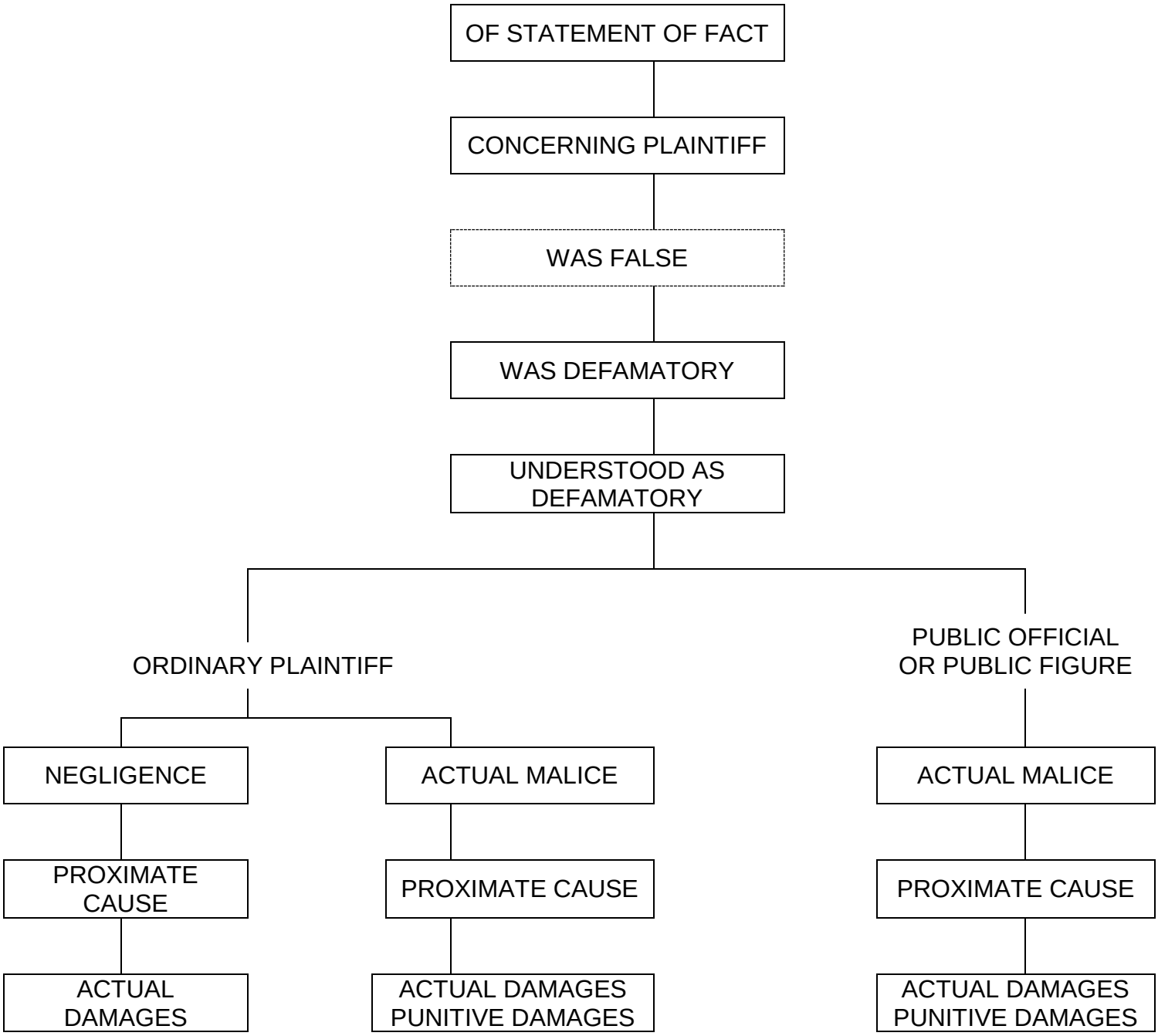
Appendix 1. Chart Of Plaintiff's Prima Facie Case.

In drafting the jury instructions for defamation actions the committee had to distinguish those issues in the plaintiff's prima facie case which the trial judge would decide from those which the jury would decide. Set out below is the committee's effort to summarize the issues of a defamation case. Those issues set out in boxes normally are issues for the jury to decide. The issues set out without boxes are for the judge to decide. The trial judge can, of course, rule on any issue normally reserved for the jury when as a matter of law there is no genuine issue of material fact for the jury to resolve.

The falsity issue is set out in a dashed box to remind the judge and counsel that while truth or falsity is for the jury to decide, it is sometime plaintiff's burden and sometime defendant's burden.

Defamation — Prima Facie Case





Appendix 2. Defamation: Public Official v. Media.

Plaintiff is a candidate for a second term as United States senator from New Mexico. The Clovis Daily Rag prints a news story which states the following:

Senator Jehosaphatt may have received $20,000 from the Excelsior National Bank in exchange for obtaining for the bank its charter as a national banking corporation. Senator Jehosaphatt's personal checking account in a Santa Fe bank reflects that six (6) months before the bank was awarded its charter, Senator Jehosaphatt's account showed a deposit of $20,000. When questioned about the deposit, the senator stated that he often deposited large sums of money in his personal checking account from his private investments and that this must have been the proceeds from the sale of a private asset. Although no private asset could be found which Senator Jehosaphatt sold near the date of the deposit, it is known that Senator Jehosaphatt and George Jacobson, President of the Excelsior National Bank, have been longtime friends and political associates, and that Senator Jehosaphatt is the owner of 20,000 shares of the bank's capital stock.

Senator Jehosaphatt was not reelected in his bid for a second term. Following a recount of the ballots which confirmed Senator Jehosaphatt's loss to his opponent in the general election, the senator sued the local newspaper for $2,000,000 in damages, claiming loss of reputation, loss of standing in the community and loss of his salary as a United States senator for the term for which he was defeated.

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

INSTRUCTIONS

13-1001. Defamation: Defined.

Defamation is a wrongful injury to a person's reputation.

13-1002. Defamation action: Prima facie case; general statement of the elements.

(A) The plaintiff claims that the following communication was defamatory and entitles the plaintiff to recover damages:

> Senator Jehosaphatt may have received $20,000 from the Excelsior National Bank in exchange for obtaining for the bank its charter as a national banking corporation. Senator Jehosaphatt's personal checking account in a Santa Fe bank reflects that six (6) months before the bank was awarded its charter, Senator Jehosaphatt's account showed a deposit of $20,000. When questioned about the deposit the senator stated that he often deposited large sums of money in his personal checking account from his private investments and that this must have been the proceeds from the sale of a private asset. Although no private asset could be found which Senator Jehosaphatt sold near the date of the deposit, it is known that Senator Jehosaphatt and George Jacobson, President of the Excelsior National Bank, have been longtime friends and political associates,

and that Senator Jehosaphatt is the owner of 20,000 shares of the bank's capital stock.

(B) To establish the claim of defamation on the part of defendant, the plaintiff has the burden of proving each of the following contentions:

(1) The communication contains a statement of fact; and

(2) The statement of fact was false; and

(3) The communication was defamatory; and

(4) The persons receiving the communication understood it to be defamatory; and

(5) The defendant acted with malice; and

(6) The communication caused actual injury to plaintiff's reputation.

(C) The defendant denies the contentions of the plaintiff.

(D) Related to the claims, plaintiff contends and has the burden of proving that he is entitled to punitive damages. To be entitled to punitive damages plaintiff must prove that the publication of the communication by defendant was made with knowledge of falsity or reckless disregard for whether it was false or not. This contention is denied by defendant.

(E) After considering the evidence and these instructions as a whole, you are to determine the following questions:

(1) Did the communication contain a statement of fact?

(2) Was the communication false?

(3) Was the communication defamatory?

(4) Did the people receiving the communication understand it to be defamatory?

(5) Did the defendant act with malice?

(6) Did the communication cause actual injury to plaintiff's reputation? If you decide that the answer to any of these questions is "No", you shall return a verdict for the defendant and against the plaintiff. If you decide that the answer to each of the questions presented is "Yes", then you shall determine the amount of money that will compensate plaintiff for the injuries and damages in accordance

with the instructions which follow, and shall return a verdict for the plaintiff in the amount you determine.

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

It is a general rule in civil cases that a party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence. To prove by the greater weight of the evidence means to establish that something is more likely true than not true. When I say, in these instructions, that the party has the burden of proof on a claim of defamation, I mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient. An exception to the general rule is that on the claims of malice and entitlement to punitive damages a higher degree of proof is required. On these claims plaintiff has the burden of proving his claims by clear and convincing evidence.

13-1004. Statement of fact: Fact defined; opinion contrasted.

To support a claim for defamation, the communication by defendant must contain a statement of fact.

In contrast, statements of opinion alone cannot give rise to a finding of defamation.

However, an opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact. In deciding whether the communication is or contains a statement of fact, you should consider the following:

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

(B) Whether reasonable persons would be likely to understand the communication to be a statement of the defendant's opinion or a statement of fact.

13-1006. Falsity: defined.

To support a claim for defamation, the communication must be false. One or more statements of fact in the communication must be false in a material way. Insignificant inaccuracies of expression are not sufficient.

13-1007. Defamatory communication: defined.

To support a claim for defamation, a communication must be defamatory.

Defamatory communications are those which tend to expose a person to contempt, to harm the person's reputation, or to discourage others from associating or dealing with him.

In deciding whether the communication was defamatory, you must consider its plain and obvious meaning.

In determining whether the communication was defamatory, you may consider whether there are other facts in evidence known to the person to whom the communication was published which, when taken into consideration with the communication, gave it a defamatory meaning.

13-1008. Defamatory meaning understood.

To support a claim for defamation, the defamatory meaning of the communication must be understood by the person to whom it was communicated.

The defamatory meaning of a communication is that which the recipient reasonably understands it was intended to express. It is what the recipient of the communication reasonably understood the meaning to be that controls, not what the defendant may have intended to convey.

13-1009. Wrongful act: defined.

To support a claim for defamation, the defendant must have acted with malice when defendant published the communication.

Defendant acted with malice if the publication was made by defendant with knowledge that it was false or with a reckless disregard for whether it was false or not. Reckless conduct is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

In order for you to find such knowledge of falsity or reckless disregard for whether it was false, the evidence must be clear and convincing. "Clear and convincing evidence" is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

13-1801. Liability must be determined before damages.

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

13-1010. Actual injury and compensatory damages.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for the actual injury caused by the defamatory communication.

Plaintiff claims and has the burden of proving that the defamatory communication caused one or more of the following injuries:

(1) Loss of salary; and

(2) Out of pocket expenses for moving; and

(3) Injury to plaintiff's good name and character among his friends, constituents, neighbors and acquaintances; and

(4) Injury to plaintiff's good standing in the community; and

(5) Personal humiliation; and

(6) Mental anguish and suffering.

The cause of an injury is that which in a natural and continuous sequence unbroken by an independent intervening cause produces that injury, and without which the injury would not have occurred. It need not be the only cause, nor the last, nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which, in combination with it, causes the injury. In determining the amount of damages, you may only award money to compensate for the above listed actual injuries proved by the plaintiff to have been suffered by him. It is not necessary for plaintiff to present evidence which assigns an actual dollar value to the injuries.

In determining compensation for plaintiff's actual injuries, if any, you should follow your conscience as impartial jurors, using calm and reasonable judgment and being fair to all parties.

13-1011. Punitive damages.

If you find that plaintiff should recover actual damages, and if you further find clear and convincing evidence that the publication of the communication by defendant was made with knowledge of its falsity or with a reckless disregard for whether it was false or not, then you may award punitive damages.

Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

Clear and convincing evidence is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the actual damages and injury and not disproportionate to the circumstances.

13-307. Rules of evidence.

The evidence which you are to consider in this case consists of the testimony of the witnesses and the exhibits admitted into evidence by the court and any facts admitted or agreed to by counsel. The production of evidence in court is governed by the rules of law. From time to time it has been my duty, as judge, to rule on the evidence; you must not concern yourselves with the reasons for these rulings. You should not consider what would or would not have been the answers to the questions which the court ruled could not be answered.

13-2004. Witness impeached.

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.

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

13-2001. Performance of your duties.

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

13-2002. Duty to follow instructions.

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

13-2003. Jury sole judges of witnesses.

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

13-1903. Jury duty to consult.

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

13-2005. Jury sole judges of facts.

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

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

13-2006. All jurors to participate.

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

13-2007. Closing arguments.

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

13-2008. No damages unless liability.

You are not to discuss damages unless you have first determined that there is liability.

13-2009. Verdict of _____.

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.

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

13-2201. Verdict for plaintiff; single parties.

We find for the plaintiff in the sum of $_____

13-2202. Verdict for defendant; single parties.

We find for the defendant.

_____
Foreperson

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

CHAPTER 11
Medical Negligence

Introduction

The instructions in this chapter address the basic elements of a medical negligence (malpractice) action against health care providers in any field of practice, *e.g.,* doctors of medicine, doctors of osteopathy, dentists, podiatrists, or chiropractors. While the term "doctor" is used in reference to all practitioners, health care providers should be referenced by specific designation where "doctor" is inappropriate. These instructions also apply to medical negligence actions against a hospital or other health care facility.

This chapter is designed to contain all the instructions necessary to instruct a jury on the basic elements of liability in a medical negligence case. Other general instructions as well as damage instructions should be combined with these instructions. UJI 13-1125 and 13-1126 provide the special interrogatories regarding future and past medical care and benefits called for by Sections 41-5-6 and 41-5-7 of the Medical Malpractice Act.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

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

In [treating] [operating upon] [making a diagnosis of] [caring for] a patient,

_____ *(name of defendant)* is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified [doctors] [_____ s *(other health care provider)*] practicing under similar circumstances, giving due consideration to the locality involved. A [doctor] [_____ *(other health care provider)*] who fails to do so is negligent.

[The only way in which you may decide whether the [doctors] [_____ s *(other health care provider)*] in this case possessed and applied the knowledge and used the skill and care which the law required of [him] [her] is from evidence presented in this trial by [doctors] [_____ s *(other health care provider)*] testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.]

USE NOTES

The name of the defendant should be inserted in the first blank. In the other blanks, the type of health care provider, such as doctor, nurse, or chiropractor, should be inserted. Bracketed language should be chosen as appropriate. The bracketed final paragraph should be omitted in those cases in which the court determines that expert testimony is not required and negligence can be determined by resort to common knowledge ordinarily possessed by the average person.

This instruction sets forth the general standard of care applicable to a medical professional. Where the defendant held himself or herself out as a specialist, UJI 13-1102 NMRA should be used instead of this instruction.

[As amended, effective January 1, 1987; November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — This chapter was revised in 1997 because, in the Committee's view, there had been sufficient development of the law and sufficient experience with the existing instructions to justify overall revisions to update and improve the medical malpractice instructions generally. Substantial comment from the bar was considered in revising these instructions.

The revised medical negligence instructions make a number of basic changes from the prior instructions covering the same subject. These basic changes include:

1. The terms "doctor," "physician," and "defendant" were used interchangeably throughout the prior instructions. A single term "doctor" has been substituted for simplicity and uniformity. Similarly, "plaintiff," "person," and "patient" as used in the prior instructions have been replaced with the single term "patient." If the existence of a

physician-patient relationship is an issue for jury determination and the court is concerned that reference to the parties as "doctor" and "patient" may be misleading to the jury, the court has the power pursuant to NMRA 1-051(D) to modify this and other instructions to refer to the parties as "plaintiff" and "defendant," by their proper names, or in other appropriate terms.

2. The term "malpractice" is no longer used. This term adds nothing to a jury's understanding of either a physician's responsibilities or a patient's rights. On the other hand, labeling this area of negligence with a term such as "malpractice" injects an element which carries with it the preconceptions of those who read or hear it. Hence, it has been eliminated. The change in no way alters the applicable standard of care which, as the instruction makes clear, in most cases is a professional standard defined by expert witnesses.

3. Reference to reasonably well-qualified practitioners in "the same field of medicine" as the defendant, previously included in the statement of the standard of care, has been eliminated. The phrase was included in the prior instruction to make clear that a physician is to be judged by the standard of care that exists in that physician's field of practice such as medicine, chiropractic medicine, or osteopathy. It was not intended to define the kind of physician who may testify as an expert in a malpractice case. That is not a jury question but one for the trial court, which must rule on whether an expert witness is qualified to testify in a case. *See* NMRA 11-702. In practice, however, the phrase was used in argument and often considered by the jury to mean that a physician could be judged only by the testimony of another physician practicing in the same specialty. This is contrary to New Mexico law. *See Vigil v. Miners Colfax Med. Ctr.,* 117 N.M. 665, 670, 875 P.2d 1096, 1101 (Ct. App.), *cert. denied sub nom. Vigil v. Tiku,* 117 N.M. 744, 877 P.2d 44 (1994); *Blauwkamp v. University of N.M. Hosp.,* 114 N.M. 228, 233, 836 P.2d 1249, 1254 (Ct. App.), *cert. denied,* 114 N.M. 82, 835 P.2d 80 (1992). Additionally, in many areas of medicine, physicians from different fields of medicine perform essentially the same procedures using the same standard of practice. Consequently, to include the phrase "the same field of medicine" places an issue before the jury that does not exist under the law. To the extent any differences between the field of practice of a qualified expert and that of the defendant go to the weight of the expert's testimony, another uniform instruction informs the jury that it is their prerogative to determine the weight to be given to the testimony of an expert witness. *See* UJI Civ. 13-213.

4. While this chapter of the Uniform Jury Instructions is intended to be complete with respect to the basic elements of liability, other instructions from the general negligence chapter may be applied in the medical negligence area as the law evolves and the circumstances make it appropriate.

5. The final paragraph is included in brackets to make it clear that expert testimony is not required if the jury can decide the matter based on its common knowledge without the need for medical or scientific expertise.

13-1102. Duty of specialist.

_____ *(name of defendant),* who held [himself] [herself] out as a specialist in _____ *(area of specialty),* having undertaken to [treat] [operate on] [make diagnosis of] [care for] a patient in this specialized field, is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified specialists practicing under similar circumstances, giving due consideration to the locality involved. A doctor who fails to do so is negligent.

[The degree of knowledge, skill, and care required of a specialist is usually higher than that required of a non-specialist, but it is never lower. Specialists are responsible for a certain base of knowledge in common with general practitioners, as well as additional knowledge in the field of their specialty.]

[The only way in which you may decide whether the doctor in this case possessed and applied the knowledge and used the skill and care which the law required of [him] [her] is from evidence presented in this trial by doctors testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.]

USE NOTES

This is the standard of care instruction applicable to a specialist. UJI 13-1101 NMRA sets forth the duty of a non-specialist general practitioner. The name of the defendant should be inserted in the first blank in the first paragraph. The area of specialty should be inserted in the second blank in the first paragraph. Bracketed language should be chosen as appropriate. The bracketed middle paragraph should be omitted unless the court determines that the issues in the case require that the jury be instructed regarding a medical specialist's responsibility for basic general knowledge in areas outside the specific area of specialty. The bracketed final paragraph should be omitted in those cases in which the court determines that expert testimony is not required and negligence can be determined by resort to common knowledge ordinarily possessed by the average person.

[As amended, effective January 1, 1987; November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — The same changes made in the general instruction on standard of care have been made in this instruction. *See* UJI 13-1101, committee commentary. In addition, the suggestions made by the Court of Appeals in *Vigil v. Miners Colfax Medical Center,* 117 N.M. 665, 875 P.2d 1096 (Ct. App.), *cert. denied,* 117 N.M. 744, 877 P.2d 44 (1994), are incorporated in the first and second paragraphs of the instruction. The second paragraph is intended to address the sort of situation posed by *Vigil - i.e.,* where a specialist is practicing in an area common to specialists and general practitioners and the argument might be made that the specialist, while subject to a higher standard of care in the area unique to his or her specialty, need not meet the level of skill required of a general practitioner in an area outside the specialty.

Because not every malpractice claim against a specialist involves such a fact pattern, however, and because the additional language might raise a false issue where the question of a specialist's responsibility for basic general knowledge is not a part of the case, the paragraph has been bracketed for use only where the court deems it appropriate.

13-1103. Duty to inform patient of need for another doctor.

If a treating doctor knows, or should know, that a doctor with other qualifications is needed for the patient to receive proper treatment, it is the duty of the treating doctor to tell the patient.

USE NOTES

This instruction should be given in conjunction with either UJI 13-1101 or 13-1102 NMRA when evidence is presented in support of plaintiff's claim of negligent failure to refer the patient to another health care provider.

[As amended, effective January 1, 1987.]

Committee commentary. — The duty stated in this instruction is one application of the doctor's duty of communication to the patient about all aspects of the patient's medical condition and treatment. A doctor breaches this duty by failing to inform the patient that the patient's condition requires treatment which is available from specialists. *Rahn v. United States*, 222 F. Supp. 775 (S.D. Ga. 1963).

[As revised, effective November 1, 1991.]

13-1104A. Informed consent.

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

USE NOTES

This instruction should be given where the patient claims lack of informed consent. *See* UJI 13-1109A NMRA for an instruction relating to lack of consent to the treatment rendered.

UJI 13-1104B NMRA must be given with this instruction. UJI 13-1104C NMRA should be given with this instruction where appropriate. Where the patient is a minor or is incapacitated, the bracketed reference to the patient's representative should be included in the instruction.

UJI 13-1116A and 13-1116B NMRA address the element of causation that is a necessary part of a claim of lack of informed consent. One of those instructions should be given with this instruction.

[Adopted effective January 1, 1987; UJI 13-1104C SCRA 1986; as amended November 1, 1991; as amended and recompiled effective August 15, 1997; approved, effective February 24, 1998; as amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008.]

Committee commentary. — The three instructions relating to a physician's duty to inform, evidence of compliance with that duty, and the duty to obtain informed consent, UJI 13-1104A, 13-1104B, and 13-1104C, have been rearranged so that they are presented in a more logical order. No substantive change is intended.

The New Mexico Supreme Court first discussed a doctor's duty of disclosure and the cause of action for its breach that has come to be called an action for "lack of informed consent" in *Woods v. Brumlop,*, 71 N.M. 221, 377 P.2d 520 (1962). The cause of action is discussed extensively in *Gerety v. Demers,*, 92 N.M. 396, 589 P.2d 180.

13-1104B. Duty to inform.

In treating [his] [her] patient, a doctor is under the duty to communicate to the patient [, or to the patient's representative when the patient is a minor or is incapacitated,] that information which a reasonably prudent patient under similar circumstances would need to know about:

1. the patient's condition; [and]

2. the alternatives for treatment; [and]

3. the inherent and potential hazards of the proposed treatment; [and]

4. the likely result if the condition remains untreated.

The duty to inform does not require a doctor to discuss with [his] [her] patient every risk of proposed treatment no matter how small or remote. [A doctor has no duty to discuss risks which the doctor can reasonably expect to be obvious or known to the patient.]

[There is no duty to inform where reasonably well-qualified doctors, acting under similar circumstances, would reasonably conclude that informing the patient of the [condition] [inherent and potential hazards of the proposed (treatment) (operation)] would seriously endanger the patient's life or health.]

USE NOTES

This instruction should be given where there is an issue of the doctor's failure to give necessary information to the patient, including cases in which the patient alleges lack of informed consent. Where the patient is a minor or is incapacitated, the bracketed reference to the patient's representative should be included in the first paragraph. Depending on the way(s) in which the information conveyed by the doctor is alleged to be deficient, the appropriate bracketed subparts of the first paragraph should be selected.

The bracketed sentence in the second paragraph should not be used unless the jury could find that the information which the patient contends was not disclosed is information which the patient already knew or is a matter of common understanding.

The bracketed third paragraph is given only where the defendant contends and the jury could find that disclosure of a risk to the patient would endanger the patient's life or health.

Where the claim is lack of informed consent, UJI 13-1104A NMRA is to be given with this instruction.

[UJI 13-1104A SCRA 1986; as amended, effective January 1, 1987; November 1, 1991; as recompiled and amended effective August 15, 1997; February 24, 1998.]

Committee commentary. — Compensable harm may be caused by the breach of the duty to inform without "informed consent" being at issue under UJI 13-1104A. For example, a doctor may negligently fail to tell a patient the nature of the patient's condition, *see* annotation at 49 A.L.R.3d 501, or the side effects of a proposed treatment that would require immediate attention, without regard to any decision to be made by the patient consenting to treatment.

13-1104C. Duty to inform; evidence.

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

USE NOTES

This instruction should be given where there is an issue of the doctor's failure to give necessary information to the patient, *see* UJI 13-1104B, including informed consent cases, and there has been expert testimony as to what information is customarily disclosed. Where the patient is a minor or is incapacitated, the bracketed reference to the patient's representative should be included in the instruction. If the trial court determines that expert testimony is required to establish the standard of care for disclosure, this instruction should not be given.

[Adopted effective January 1, 1987; UJI 13-1104B SCRA 1986; as amended, effective November 1, 1991; as amended and recompiled effective August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — Generally, the standard for disclosure is determined by the information which a reasonably prudent patient would want to have, rather than by the customary practice among medical professionals. *See Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978). Nevertheless, there may be cases in which the court determines that expert testimony is not only helpful but necessary to the jury in establishing the standard of care to be followed in disclosing the risks of a particular treatment or operation. *See id.*

13-1105. Consent.

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

USE NOTES

This instruction is to be given if there is an issue as to whether consent was given. The appropriate choice - "patient" or "patient's representative" - should be made from the bracketed terms.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — Treatment without consent is tortious. *See Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978). This instruction addresses the manner in which a patient manifests consent. *See also* Sections 24-10-1 and 24-10-2 NMSA 1978, regarding minors.

13-1105A. Consent no excuse for negligent treatment.

The fact that a doctor communicates the inherent and potential hazards of a proposed [procedure] [treatment] does not necessarily mean that those hazards, should they arise, are not the result of negligence in performing the proposed [procedure] [treatment].

The fact that a patient expressly or impliedly consents to a proposed [procedure] [treatment] does not mean that the patient consents to the negligent performance of that [procedure] [treatment] and therefore does not prevent you from considering whether the [procedure] [treatment] was negligently performed.

The fact that a patient consents to an adequately performed [procedure] [treatment] does not excuse the doctor from negligence in choosing an unnecessary or contraindicated [procedure] [treatment].

USE NOTES

Only the appropriate paragraph(s), if any, of this instruction should be given, depending on the case. Bracketed language should be selected as appropriate.

[Adopted, effective August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — This instruction is intended to clarify whether, by consenting to treatment, the patient has consented to any negligence that might occur as a part of that treatment. The Committee believes that, in the interest of avoiding any possibility of jury confusion, an instruction of this nature should be available for use in circumstances in which the trial court considers the instruction appropriate.

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

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

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — The rule expressed in this instruction was recognized in *Woods v. Brumlop,* 71 N.M. 221, 377 P.2d 520 (1962).

13-1107. Consent; not required in emergency during surgery.

Consent is not required when the patient [or patient's representative] is unable to give consent during the course of [an operation] [treatment] and an emergency arises requiring an immediate change in the [operation] [treatment] necessary for life or health.

USE NOTES

None

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

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

13-1108. Consent; competency.

When required, consent must be obtained at a time when the person giving consent is able to understand what [he] [she] is doing.

USE NOTES

Withdrawn

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — Even where consent is manifest in the words or conduct of the patient, the patient may challenge his competency to consent. *Demers v. Gerety,* 85 N.M. 641, 515 P.2d 645 (1973), *rev'd on other grounds,* 86 N.M. 141, 520 P.2d 869, on remand, 87 N.M. 52, 529 P.2d 278 (Ct. App.), *cert. denied,* 87 N.M. 47, 529 P.2d 273 (1974). Competency to consent is presumed; the patient carries the burden of persuasion where competency is challenged. *See Grannum v. Berard,* 422 P.2d 812, 25 A.L.R.3d 1434 (Wash. 1967).

13-1109A. Failure to obtain consent.

Every adult of sound mind has a right to determine what shall be done with [his] [her] own body. A doctor who [performs an operation upon] [medically treats] [examines or touches] a patient without the patient's prior consent commits a legal wrong for which [he] [she] is liable in damages. [It is also legally wrong to [perform an operation upon] [medically treat] [examine or touch] one part of the body when the patient's consent was limited to another part of the body.]

USE NOTES

This instruction states a general rule applicable to claims that the patient did not give consent to what was done, either because the patient gave no consent or because the procedure performed was substantially different from the one authorized. The bracketed final sentence is applicable where it is claimed that the patient gave consent limited to one part of the body and another body part was treated. UJI 13-1109B NMRA should be given with this instruction where the claim is that an unauthorized procedure was performed. UJI 13-1109C NMRA should be given with this instruction where appropriate.

[As amended, effective November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — The term "battery" has been eliminated from this instruction. "Battery" as a term of art is not meaningful to a jury. It is only important for the jury to know that it is legally wrong not to obtain a patient's consent.

In *Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978), the Supreme Court drew a distinction between cases involving allegations of lack of informed consent and cases where the patient contends that he or she did not agree to the particular treatment rendered. Where the only issue is whether the patient consented to what actually was done, expert testimony relating to informed consent is not relevant; the jury is not called upon to evaluate what the doctor should have told the patient but rather what in fact was communicated between the patient and the doctor.

13-1109B. Battery; validity of consent.

For a consent to be valid, the patient [or the person giving consent on [his] [her] behalf] must know and agree to the specific [treatment] [operation] [procedure] which the doctor performs.

USE NOTES

This instruction should be given with UJI 13-1109A NMRA where the claim is that the patient did not consent to the specific procedure performed.

[As amended, effective November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

13-1109C. Lack of consent; damages.

A patient need not prove that [he] [she] was physically harmed by the [operation] [treatment] [examination or touching] [procedure] to recover damages resulting from the doctor's failure to obtain the patient's consent. Damages may be awarded solely because the doctor's action was not consented to.

USE NOTES

This instruction should be given with UJI 13-1109A where the patient seeks to recover for an unconsented to touching without proof of resulting physical harm. An appropriate element of damages should be added to the general damage instruction, UJI 13-1802.

[As amended, effective November 1, 1991; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — *See Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978); *see also* Restatement (Second) of Torts § 18 (1965).

13-1110. Duty of patient.

Every patient has a duty to exercise ordinary care for the patient's own health and safety. A patient who fails to do so is negligent.

USE NOTES

This instruction should be given if there is an issue as to the patient's comparative fault, *e.g.*, by failing to follow the doctor's instructions, as a cause of the claimed injury. UJI 13-1601 and 13-1603 NMRA (negligence and ordinary care) should be given with this instruction.

[As amended, effective January 1, 1987; November 1, 1991; August 15, 1997; approved, effective February 24, 1998; as amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008.]

Committee commentary. — The principles of comparative fault apply in medical negligence cases as in other negligence cases. This instruction is intended to apply where there is evidence that the patient failed to follow reasonable medical advice or was otherwise comparatively negligent. *See* Chapter 22 for special verdict forms through which the jury can apportion fault between the physician and the patient or others whose fault may have contributed to the patient's injury.

[Amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008.]

13-1111. Alternative methods.

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

USE NOTES

"Doctor", "hospital" or other type of health care provider should be inserted into the blank in this instruction, depending on the case.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

13-1112. Health care provider not guarantor; poor results not breach of duty.

A _____ does not guarantee a good medical result.

[An unintended incident of treatment] [A poor medical result] is not, in itself, evidence of any wrongdoing by the _____. Instead, the patient must prove that the [poor medical result] [unintended incident of treatment] was caused by the _____'s negligence.

USE NOTES

"Doctor", "hospital" or other type of health care provider should be inserted into each of the blanks in this instruction, depending on the case.

The first sentence should be given in every case involving a claim of medical negligence, unless the jury could find that there was a promise of a particular medical result. The second sentence should be given in every medical negligence case.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — A bad result is not, of itself, evidence of malpractice. *Cervantes v. Forbis,* 73 N.M. 445, 389 P.2d 210 (1964). With respect to warranties of particular results, *see Toppino v. Herhahn*, 100 N.M. 585, 673 P.2d 1318 (Ct. App.), *rev'd on other grounds,* 100 N.M. 564, 673 P.2d 1297 (1983).

13-1113. Withdrawn.

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

A doctor is liable for the negligence of an assistant, nurse, doctor, technician or other person if:

1. the doctor has the right to control the manner in which the details of the particular activity giving rise to the injury are performed; and

2. the particular activity giving rise to the injury is being performed under the immediate and direct supervision of the doctor.

A doctor is not liable for the negligence of another where the doctor's only right is to make mere suggestions as to the particular activity being performed in cooperation with such other person.

USE NOTES

This instruction is to be given in cases where the doctor is claimed to be vicariously liable for the negligence of one who is not a general employee of the doctor. In cases where the doctor is claimed to be the general employer of the negligent person, the instructions contained in Chapter 4 would be applicable.

[As amended, effective January 1, 1987; August 15, 1997; approved, effective February 24, 1998.]

Committee commentary. — This instruction applies the doctrine of borrowed servant to medical negligence cases. *See Dessauer v. Memorial Gen. Hosp.,* 96 N.M. 92, 628 P.2d 337 (Ct. App. 1991).

13-1115. Termination of physician-patient relation; abandonment.

A doctor's duty to a patient who is in need of care continues until the doctor has withdrawn from the case. A doctor cannot abandon the patient who is in need of continuing care. A doctor can withdraw by giving the patient reasonable notice under the circumstances.

USE NOTES

This instruction should be given in conjunction with either UJI 13-1101 or 13-1102 NMRA when evidence is presented in support of plaintiff's claim that the doctor abandoned his care without giving reasonable notice under the circumstances.

[As amended, effective January 1, 1987.]

Committee commentary. — Because the patient-physician relationship is consensual, a physician has a right to withdraw from the patient's case provided he gives the patient reasonable notice to secure other medical attention. *Skodje v. Hardy*, 288 P.2d 471 (Wash. 1955). A physician cannot terminate the relationship simply by staying away.

13-1116A. Causation; failure to inform; condition treated.

A doctor who fails in [his] [her] duty to communicate [alternatives for treatment] [inherent and potential hazards] is liable for harm to the patient resulting from the [treatment] [operation] if a reasonably prudent patient [or patient's representative] under similar circumstances would not have consented to the [treatment] [operation] had [he] [she] known of the [alternatives for treatment] [inherent and potential hazards].

USE NOTES

Either UJI 13-1116A or 13-1116B NMRA should be given in every action based upon a lack of informed consent. The instruction appropriate to the case should be selected.

UJI 13-1116A and 13-1116B NMRA do not replace UJI 13-308 NMRA. In many cases, the general instruction on causation will still be appropriate.

[As amended, effective November 1, 1991; August 15, 1997; February 24, 1998; March 1, 2005.]

Committee commentary. — An objective approach to proximate causation in informed consent cases was adopted in *Gerety v. Demers,* 92 N.M. 396, 589 P.2d 180 (1978).

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

A doctor who fails in [his] [her] duty to communicate the [condition] [likely result if the condition remains untreated] is liable for harm which results to the patient from the untreated condition if a reasonably prudent patient [or patient's representative] under similar circumstances would have acted upon the information to avoid the harm.

USE NOTES

See Use Note, UJI 13-1116A NMRA.

[As amended, effective November 1, 1991; August 15, 1997; February 24, 1998; March 1, 2005.]

Committee commentary. — *See* committee commentary, UJI 13-1116A.

13-1117. Withdrawn.

13-1118. Circumstantial evidence of medical negligence ("Res ipsa loquitur").

To prove negligence, the patient need not prove specifically what _____[1] did or failed to do that was negligent.

The patient may prove _____'s[1] negligence by proving each of the following propositions:

1. that the injury or damage to the patient was proximately caused by _____ (name of the instrumentality or occurrence) which was _____'s[1] responsibility to manage and control; and

2. that the event causing the injury or damage to the patient was of a kind which does not ordinarily occur in the absence of negligence on the part of the _____[1] in control of [the instrumentality] or [that portion of the procedure].

[Propositions (1) and (2) must be proved by the testimony of a doctor testifying as an expert.]

If you find that each of these propositions has been proved, then you may, but are not required to, find that _____[1] was negligent.

If, on the other hand, you find that either one of these propositions has not been proved or, if you find, notwithstanding the proof of these propositions, that _____[1] used ordinary care for the safety of others in [his] [her] control and management of the _____ *(name of instrumentality or occurrence)* then the evidence would not support a finding of negligence.

FOOTNOTE

1. Insert the name of the party against whom the claim is asserted.

USE NOTES

The names of the various individuals and the name or description of the instrumentality or occurrence should be inserted in the appropriate blanks. Care should be used that the correct names are placed in the various blanks.

What was previously labeled res ipsa loquitur is applicable in a medical negligence action. The fact that there is other evidence of the specific cause of the injury does not preclude the use of this instruction. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). Exclusive control by the defendant, of the instrumentality or circumstance at issue is not a prerequisite for its use. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994), *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994). As a factual matter, two or more persons may conceivably share responsibility of the management of the object, activity, or circumstances at issue. Expert testimony is not necessary where propositions 1 or 2 are within the common knowledge of a lay person.

[Approved, effective August 1, 1999.]

Committee commentary. — Res ipsa loquitur is an appropriate instruction in a medical negligence case. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). The circumstantial evidence of medical negligence instruction has been drafted in response and is phrased in lay terms. All arcane, magic and "sacred" language, including even "res ipsa", have been eliminated. Res ipsa is a rule of circumstantial negligence and therefore has been characterized as such.

Mireles, and *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994), indicates that exclusive control of the instrumentality or circumstances giving rise to the injury is not a prerequisite for utilizing this instruction. Consequently the exclusivity requirement has been eliminated and the requirement of management and control is substituted in its place.

Under this instruction, a number of different persons might have different responsibilities as to the same patient, but if two or more physicians have the responsibility for managing one facet of an operative procedure, *i.e.*, the padding of an eye or an elbow or even share in that control, then there is no reason under the existing case law and the principles of *Bartlett* [*Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982)] and Section 41-3A-1 NMSA 1978 why the doctrine of res ipsa does not apply in those instances to both physicians.

13-1119. Recompiled.

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

In _____ *(insert description of conduct in question)*, a hospital is under a duty to use ordinary care to avoid or prevent what a reasonably prudent person would foresee as an unreasonable risk of injury to another. A hospital that fails to do so is negligent. "Ordinary care" is that care which a reasonably prudent person would use in the conduct of the person's own affairs. What constitutes ordinary care varies with the nature of what is being done. As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

In _____ *(insert description of conduct in question)*, a hospital is under a duty to possess and apply the knowledge and to use the skill and care ordinarily used in reasonably well-operated hospitals under similar circumstances, giving due consideration to the locality involved. A hospital that fails to do so is negligent. The only way in which you may decide whether the hospital in this case possessed and applied the knowledge and used the skill and care which the law required of it is from evidence presented in this trial by _____ *(insert appropriate category, e.g., hospital administrators, doctors, nurses, or other health care providers)* testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

USE NOTES

This instruction sets forth the duty of a hospital in providing patient care and describes how the hospital's compliance with that duty is assessed. It consists of two optional paragraphs. The first paragraph relates to conduct which can be evaluated by the jury without the aid of expert testimony, whereas the second concerns conduct which can be evaluated only in light of the testimony of expert witnesses. The trial court must determine which paragraph is applicable to the hospital conduct in question, depending on the particulars of the case. Different kinds of hospital conduct may be at issue in a single case, requiring both paragraphs to be given. *See* committee commentary. The conduct in question, such as "providing equipment appropriate for use in treating patients" or "developing protocols for the proper administration of certain medications", should be inserted in the blank at the beginning of the appropriate paragraph.

Where a more specific instruction from another chapter of these Uniform Jury Instructions is applicable to a claim against a hospital *(see, in particular, the premises liability instructions contained in Chapter 13)*, the specific instruction with any appropriate modifications, rather than the more general instruction contained in this chapter, should be given. In cases of hospital liability for negligence in the credentialling of staff physicians, *see Diaz v. Feil*, 118 N.M. 385, 881 P.2d 745 (Ct. App. 1994).

The bracketed final paragraph should be omitted in those cases in which the court determines that expert testimony is not required and negligence can be determined by resort to common knowledge ordinarily possessed by the average person.

[13-1119 NMRA; as amended, effective August 15, 1997; as amended and recompiled, effective September 27, 1999.]

Committee commentary. — While there is a single standard of ordinary care that a hospital must meet in order to avoid negligence liability in providing medical care to its patients, the type of testimony required to establish a breach of the hospital's duty of care differs depending on the kind of conduct that is alleged to constitute a breach. Where the matter is potentially susceptible to the common knowledge of the jury, expert testimony is not necessary to establish that the hospital's conduct was negligent. Where the issue is not within the common knowledge of the jurors, but rather lies within the purview of specialized knowledge, expert testimony is required. This principle, which applies in cases involving negligence claims against individual health care practitioners, *see* UJI 13-1101, committee commentary, is equally applicable to claims of hospital negligence.

Distinguishing claims that need not be established by expert testimony from those that must is a task to be accomplished by the trial judge on a case by case basis. In the absence of developed New Mexico authority, cases from other jurisdictions can provide guidance. *Compare, e.g., Gould v. New York City Health & Hospitals Corp.*, 490 N.Y.S.2d 87 (Sup. Ct. 1985) (where hospital rule required bedrails to be erected for patients over 50 years of age, expert testimony was not needed to support claim that violation of rule was negligent), and *Smith v. North Fulton Med. Ctr.*, 408 S.E.2d 468 (Ga. Ct. App. 1991) (claim of negligence based on failure to raise bedrails in accordance with written nursing assessment did not require expert testimony), with *Robinson v. Medical Ctr. of Cent. Ga.*, 456 S.E.2d 254 (Ga. Ct. App. 1995) (claim that hospital was negligent in particular case by failing to raise patient's bedrails required support from expert witness), and *Sexton v. St. Paul Fire & Marine Ins. Co.*, 631 S.W.2d 270 (Ark. 1982) (claim of negligence in failing to place restraint vest on patient required evaluation of professional judgment applied to patient's circumstances and hence could not be established without expert testimony).

13-1119B. Duty of hospital; granting staff privileges.

In determining whether a [physician] [_____ *(other practitioner)*] should be permitted to exercise clinical privileges as a member of the hospital staff, a hospital has a duty to exercise reasonable diligence in obtaining and acting upon information concerning the competence of [applicants to] [members of] its staff. A hospital that [grants clinical privileges to] [permits the continued exercise of clinical privileges by] an individual, when the hospital knew or reasonably should have known that the individual was not qualified to exercise those privileges with reasonable skill, is negligent.

USE NOTES

This instruction should be given where the evidence supports a claim that the hospital was negligent in granting or failing to restrict the clinical privileges of an incompetent practitioner who, in exercising those privileges, injured a patient. The appropriate bracketed language should be given. The trial court must determine whether a breach of the hospital's duty can only be established by expert testimony in the particular case at issue. The instruction should be supplemented accordingly. *See* committee commentary.

[Approved, effective September 27, 1999.]

Committee commentary. — This instruction embodies the theory of hospital liability generally known as corporate negligence, which arises when the hospital has failed to take reasonable steps to determine the qualifications or competency of a practitioner to whom it has granted clinical privileges. If the practitioner injures a patient through negligence, the hospital may be directly liable to the patient for its own negligence in allowing the injurious situation to arise. This theory is discussed in *Diaz v. Feil*, 118 N.M. 385, 881 P.2d 745 (Ct. App. 1994). *See also Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, 124 N.M. 549, 953 P.2d 722 (applying corporate negligence theory to hospital's selection of contract therapist).

The pertinent inquiry under a claim of corporate negligence "focuses on the procedures for the granting and renewal of staff privileges." *Diaz v. Feil*, 118 N.M. at 390, 881 P.2d at 750 (quoting *Pedroza v. Bryant*, 677 P.2d 166, 171-72 (Wash. 1984)). "In order to make a prima facie showing that a hospital negligently granted hospital staff privileges to a physician, or negligently retained a staff member, a plaintiff must establish that the hospital negligently failed to screen the competency of the individual, or that it negligently retained a staff member after it knew or should have known of matters involving the general competency of such individual. . . . [The hospital] would have to have had prior notice as to the treating physician's lack of competency before it could be held liable in either granting or continuing hospital staff privileges." *Diaz v. Feil*, 118 N.M. at 390, 881 P.2d at 750 (citations omitted).

New Mexico law has not specifically addressed whether expert testimony is necessary to establish a breach of the duty described in this instruction. Consistent with the approach taken in UJI 13-1119A, the trial court should determine the need for expert testimony based on the kind of conduct that is alleged to constitute a breach of the duty. For instance, a case in which the hospital entirely failed to inquire about, or utterly ignored, the existence of prior malpractice judgments against the physician presents a situation that could likely be evaluated by a lay jury under ordinary negligence standards. *Cf. Eckhardt*, 1998-NMCA-017, Para. 43 (evidence that hospital knew of practitioner's substance abuse problem and lack of recent clinical experience). On the other hand, a case in which the hospital relied on the medical judgments of physicians on its credentials committee, who recommended granting an application for clinical privileges after reviewing materials in the applicant's file, might require expert testimony

on the question whether the committee reasonably should have known of deficiencies in the applicant's competency based on the materials reviewed. *Cf. id.* (evidence that, "under the required standard of care, [the hospital's] Credentials Committee should have obtained more objective information" and more complete information regarding practitioner's fitness to serve as therapist). The trial court should supplement this instruction with language defining "reasonable diligence" either in terms of the diligence that would be exercised by a reasonably prudent person in the circumstances, or in terms of the diligence that would ordinarily be exercised in a reasonably well-run hospital as established by expert testimony. *Cf.* UJI 13-1119A.

13-1120. Recompiled.

13-1120A. Hospital vicarious liability; employees.

A hospital is responsible for injuries proximately resulting from the negligence of its employees, such as _____ *(insert appropriate terms)* [occurring within the scope of their employment].

USE NOTES

This instruction should be given when the plaintiff claims that a hospital is vicariously liable for the negligence of an employee. The name of the employee or the proper job description, such as nurses, orderlies, technicians, etc., should be inserted in the blank.

The bracketed language should be used if there is an issue regarding whether the employee was acting within his or her scope of employment. In such a case UJI 13-407 NMRA, which defines scope of employment, should be given with this instruction.

[13-1120 NMRA; as amended, effective January 1, 1987; August 15, 1997; as recompiled and amended, effective September 27, 1999.]

Committee commentary. — Principles of agency law, as expressed in Chapter 4, govern a hospital's liability for the acts of its employees. *See Dessauer v. Memorial Gen. Hosp.*, 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

13-1120B. Hospital vicarious liability; non-employees.

A hospital is responsible for injuries proximately resulting from the negligence of health care providers who are not hospital employees, such as in _____[1], if the hospital, through its conduct, created the appearance that it was the provider of these services to the public.

FOOTNOTE

1. Insert description of the applicable department, such as in "a full-service emergency room".

USE NOTES

This instruction should be given when the plaintiff claims that a hospital is vicariously liable for the negligent conduct of a non-employee practitioner providing hospital-based patient care. If the court determines that the hospital is liable as a matter of law for the acts of a non-employee practitioner, then UJI 13-405 should be used in place of this instruction.

[Approved, effective September 27, 1999.]

Committee commentary. — A hospital is liable for the negligence of independent contractors who provide patient care in the hospital, such as emergency room physicians, if they are the hospital's apparent or ostensible agents. *See Houghland v. Grant*, 119 N.M. 422, 891 P.2d 563 (Ct. App. 1995) (discussing factors from which jury could conclude that hospital created reasonable belief that emergency room physician was hospital's employee or agent including the use of non-employee doctors to further the hospital's business of providing services directly to the public and the choice of the doctor being controlled by the hospital and not the patient). Although *Houghland* arose in the context of a full service emergency room, the instruction could be applicable to other services provided by the hospital.

13-1121. Hospital liability; loaned servant exception.

A hospital is not responsible for acts or omissions of its employees where [a doctor] [or] [an operating surgeon] has assumed the exclusive right to control and supervise the activity of _____ *(hospital nurses, assistants, attendants, etc.)* [during the course of an operation] [during specific treatment under the immediate and direct control and supervision of the doctor]. It is for you to determine whether the [doctor] [surgeon] assumed the exclusive right to control the employee or whether the right of control over the employee was shared with the hospital.

[As amended, effective August 15, 1997.]

Committee commentary. — *Cf.* UJI 13-1114. The last sentence has been added to this instruction to clarify that the jury must determine who had the right to control the employee at issue.

13-1122. Hospital liability where orders followed.

The hospital is not liable when following the orders of the doctor unless the hospital knew or in the exercise of ordinary care should have known that the orders of the doctor were in error and failed to call the error to the doctor's attention.

[As amended, effective January 1, 1987; August 15, 1997.]

Committee commentary. — The situation defined by this instruction is simply a specific application of the duty of the hospital and its employees to use ordinary care required by the circumstances. *See* UJI 13-1119 [now UJI 13-1119A].

13-1123. Withdrawn.

13-1124. Withdrawn.

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

If your verdict is for the plaintiff, do you find that plaintiff is in need of future medical care and related benefits?

Answer [Yes _____] [No _____]

_____
Foreperson

USE NOTES

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

[As amended, effective November 1, 1991.]

Committee commentary. — *See* Section 41-5-7 NMSA 1978.

13-1126. Special Interrogatory No. 2 - Past medical care and related benefits.

What do you find was the value or cost of past medical care and related benefits received by the plaintiff?

Answer $ _____

_____
Foreperson

USE NOTES

This interrogatory is only to be used when the jury renders a verdict in excess of $600,000.

[As amended, effective July 21, 2000.]

Committee commentary. — *See* Section 41-5-6 NMSA 1978.

Appendix to Chapter 11.

Appendix: Sample liability of a doctor for negligence and for performance of a procedure without consent.

FACTS

After two years of experiencing lower back and sciatic pain, Norma Richards consulted Dr. Louis Paul, an orthopedic surgeon. Dr. Paul diagnosed a herniated disc at L4-L5 and recommended its removal. Ms. Richards signed a consent form permitting the removal of the disc at L4-L5. The consent outlined bleeding and infection as two of the "ordinary complications" that often accompany disc surgery.

During surgery, Dr. Paul used a posterior approach to Ms. Richards' disc. Dr. Paul not only removed that portion of that disc that had herniated out and pressed on her spinal cord, but also proceeded deeper into the disc with his rongeur until he went through the entire thickness of the disc and emerged on the anterior or stomach side of Ms. Richards' spinal column. Dr. Paul continued to remove chunks of what he thought was Ms. Richards' disc. However, he was now taking large chunks of Ms. Richards' iliac artery and iliac vein which lay on the underside of her spinal column. Ms. Richards rapidly began to lose blood pressure and ultimately her pulse. Dr. Paul subsequently guessed what had happened and called a vascular surgeon to assist him. Ms. Richards was turned over on her back, a laparotomy was performed, and her iliac artery and vein were ultimately repaired.

Ms. Richards subsequently brought suit against Dr. Paul.

INSTRUCTIONS

The instructions set forth below represent one way in which the instructions in a medical negligence case could be presented to the jury. There are other, equally acceptable, ways to arrange these instructions, provided the general design of the "302" series of instructions (UJI 13-302A through 13-302F) for the presentation of claims, defenses, and issues is followed. The goal is clarity. To that end some of the preliminary instructions have been split and their paragraphs paired with other instructions which address the same issue. The UJI numerical sequence has been disregarded and the logic of the instructions has been the guide in their sequencing. The terms "Plaintiff" and "Defendant" have been eliminated and the names of the parties inserted in their stead. Minor changes in wording have been made where they aid intelligibility without changing the meaning of the instruction. Finally, although it may be a convenient practice to submit individual instructions on separate pages during the process of settling instructions, modern word processing capabilities should make it possible to

provide the jury with an integrated set of instructions contained on a few pages rather than fragmenting the instructions and giving the jurors numerous sheets of paper with a single instruction on each. This example is formatted accordingly. (Note: instruction references in the left margin are for the convenience of the reader in understanding this example and should not be included in a set of instructions sent to the jury.)

UJI 13-301

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

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

UJI 13-2002

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

UJI 13-2005

You are to apply the law, as stated in these instructions, to the facts as you find them and, in this way, decide the case.

Neither sympathy nor prejudice should influence your verdict.

UJI 13-2001

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

UJI 13-301

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

UJI 13-302A

In this civil action Norma Richards is seeking compensation from Dr. Louis Paul for damages which Ms. Richards claims were caused by negligence and by performance of surgery on her without her consent.

UJI 13-302B

To establish her claim of negligence against Dr. Paul, Ms. Richards has the burden of proving that Dr. Paul failed to use the skill and care required of him in performing her

back surgery, by going too far into the disc space of Ms. Richards' back, coming out on the other side of the disc, and unknowingly cutting Ms. Richards' iliac artery and vein which lay immediately beneath her spinal column.

UJI 13-302C

Dr. Paul denies Ms. Richards' contentions. Dr. Paul contends that Ms. Richards' injuries were ordinary complications of disc surgery that occurred without negligence.

UJI 13-1102

Dr. Paul held himself out as a specialist in orthopedics. Having undertaken to operate on Norma Richards in this specialized field, Dr. Paul had a duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified specialists practicing under similar circumstances, giving due consideration to the locality involved. If Dr. Paul failed to do so, he was negligent.

The only way in which you may decide whether Dr. Paul possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by doctors testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

UJI 13-1105A

The fact that a doctor communicates the inherent and potential hazards of a proposed procedure does not necessarily mean that those hazards, should they arise, are not the result of negligence in performing the proposed procedure.

The fact that a patient expressly or impliedly consents to a proposed procedure does not mean that the patient consents to the negligent performance of that procedure and therefore does not prevent you from considering whether the procedure was negligently performed.

UJI 13-1112

A doctor does not guarantee a good medical result. An unintended incident of treatment is not, in itself, evidence of any wrongdoing by the doctor. Instead, the patient must prove that the unintended incident of treatment was caused by the doctor's negligence.

UJI 13-302B

To establish Dr. Paul performed surgery on her without her consent, Norma Richards has the burden of proving that Dr. Paul performed a laporotomy on her without first obtaining her consent.

UJI 13-302C

Dr. Paul admits performing the laparotomy without obtaining Ms. Richards' consent. However, Dr. Paul says that the laparotomy was an emergency procedure for which no consent was necessary.

UJI 13-302D

To establish a defense to Ms. Richards' claim of lack of consent, Dr. Paul has the burden of proving that an emergency existed.

UJI 13-1109A

Every adult of sound mind has a right to determine what shall be done with her own body. A doctor who performs an operation upon a patient without the patient's prior consent commits a legal wrong for which the doctor is liable in damages. It is also legally wrong to perform an operation upon one part of the body when the patient's consent was limited to another part of the body.

UJI 13-1107

Consent is not required when the patient is unable to give consent during the course of an operation and an emergency arises requiring an immediate change in the operation or treatment necessary for life or health.

UJI 13-302B

Ms. Richards has the burden of proving that any negligent or wrongful conduct on the part of Dr. Paul was a cause of her injury and damages.

UJI 13-305

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

UJI 13-304

Ms. Richards has the burden of proving every essential element of her claims by the greater weight of the evidence. Similarly, Dr. Paul has the burden of proving the existence of an emergency by the greater weight of the evidence.

To prove by the greater weight of the evidence means to prove that something is more likely true than not true. When these instructions state that Norma Richards has the burden of proof, or Dr. Paul has the burden of proof, on a particular issue, they mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient.

UJI 13-1801

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

UJI 13-213

The rules of evidence do not ordinarily permit a witness to testify as to an opinion or conclusion.

However, a witness who is qualified as an expert in a subject may be permitted to state an opinion as to that subject. After considering the reasons stated for an opinion, you should give it such weight as it deserves. You may reject an opinion entirely if you conclude it is unsound.

UJI 13-307

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

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

UJI 13-2003

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

UJI 13-2004

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.

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

UJI 13-2005

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

UJI 13-302F

After considering the evidence and these instructions as a whole, the questions presented for you to answer on the special verdict form on the claim of Dr. Paul's negligence are as follows:

1. Was Dr. Paul negligent in cutting Ms. Richards' iliac vein and artery?

2. Was any negligence of Dr. Paul a cause of Norma Richards' injuries and damages?

If you answer "No" to either of these questions on the special verdict form you shall return the special verdict for Dr. Paul and against Norma Richards on the claim of negligence.

If, on the other hand, you answer "Yes" to both of these questions, you shall determine the amount of money that will compensate Norma Richards for her injury and damages. You will also answer the other questions required of you on the special verdict form which I will hand to you at the conclusion of these instructions.

After considering the evidence and these instructions as a whole, the question presented for you to answer on the special verdict form on the claim of lack of consent for surgery is as follows:

1. Was Dr. Paul required to obtain Norma Richards' consent before performing the laparotomy upon her?

If you answer "No" to that question on the special verdict form you shall return the special verdict for Dr. Paul and against Norma Richards on the claim of lack of consent for surgery.

If, on the other hand, you answer "Yes," you shall determine the amount of money that will compensate Ms. Richards for the injury and damages caused by the unconsented to procedures.

UJI 13-2008

You are not to discuss damages unless you have first determined that there is liability.

UJI 13-1802

If you decide Dr. Paul was negligent, you must determine the amount of money which will fairly compensate Norma Richards for any of the following damages proved by her to have resulted from Dr. Paul's negligence.

UJI 13-1803, to 13-1807 and 13-1825

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

2. The reasonable expense of necessary medical care, treatment, and services received.

3. The reasonable value of necessary nonmedical expenses and services which have been required as a result of the injury.

4. The nature, extent and duration of the injury.

5. The pain and suffering experienced and which will be experienced in the future as a result of the injury.

You must also determine whether as a result of Dr. Paul's negligence, Ms. Richards will need future medical care and related benefits.

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

Sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiff with fairness to both parties.

UJI 13-1821

As to loss of future earning ability, you may consider that some persons work all their lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.

UJI 13-1822

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages by making allowance for the fact that any award you might make would, if properly invested, earn interest. You should, therefore, allow a reasonable discount for the earning power of such money and arrive at the present cash value of the total future damages, if any.

Damages for any future pain and suffering are not to be so reduced.

UJI 13-2006

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

UJI 13-2007

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

UJI 13-2009

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.

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

SPECIAL VERDICT FORM

Part I - Negligence

UJI 13-2220

On the questions submitted on the claim of Dr. Paul's negligence, the jury finds as follows:

> Question No. 1: Was Dr. Paul negligent in cutting Ms. Richards' iliac vein and artery?
>
> Answer _____ (Yes or No)

If the answer to Question No. 1 is "No", your verdict is for the defendant and against the plaintiff on the claim of negligence. You are not to answer further questions in Part I. Proceed to Part II.

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

> Question No. 2: Was any negligence of Dr. Paul a cause of Norma Richards' injury and damages?
>
> Answer _____ (Yes or No)

If the answer to Question No. 2 is "No", your verdict is for the defendant and against the plaintiff on the claim of negligence. You are not to answer further questions in Part I. Proceed to Part II.

If the answer to Question No. 2 is "Yes", you are to answer Questions 3 and 4, then proceed to Part II.

> Question No. 3: In accordance with the damage instructions given by the court, we find the total amount of damages (excepting any future medical care and related benefits) suffered by Norma Richards as a result of Dr. Paul's negligence to be $_____.

UJI 13-1125

> Question No. 4: Do you find that plaintiff Norma Richards is in need of future medical care and related benefits?
>
> Answer _____ (Yes or No) Part II - Lack of Consent

On the question submitted on the claim of Dr. Paul's failure to obtain consent before performing surgery, the jury finds as follows:

> Question No. 5: Was Dr. Paul required to obtain Norma Richards' consent before performing the laparotomy upon her?
>
> Answer _____ (Yes or No)

If the answer to Question No. 5 is "No", your verdict is for the defendant and against the plaintiff on this claim. Do not answer any further questions. Your foreperson must sign this special verdict, and you will return to open court.

If the answer to Question No. 5 is "Yes", you are to answer Question No. 6. Your foreperson must then sign this special verdict, and you will return to open court.

> Question No. 6: In accordance with the damages instructions given by the court, we find the total amount of damages suffered by Norma Richards as a result of Dr. Louis Paul performing surgery without her consent to be $_____.

When as many as ten of you have agreed upon each of your answers, your foreperson must sign this special verdict, and you will return to open court.

_____
Foreperson

[As amended, effective March 1, 2005.]

CHAPTER 12
Motor Vehicles

Introduction

These instructions are applicable to the operation of vehicles on public roads as well as on private property. *See* Button v. Metz, 66 N.M. 485, 349 P.2d 1047 (1960); 62 A.L.R.2d 288.

Since these instructions are not all-inclusive, the chapters on agency, statutes and ordinances and tort law generally should be considered.

[As amended, effective January 1, 1987.]

13-1201. Duty of operator using highway.

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

USE NOTES

This instruction should be used with UJI 13-1202 and 13-1203 NMRA, if applicable, and should be followed by UJI 13-1601 and 13-1603 NMRA.

[As amended, effective January 1, 1987.]

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

13-1202. Duty of lookout and control.

It is the duty of every operator of a vehicle, at all times, [to keep a proper lookout] [and] [to maintain proper control of [his] [her] vehicle] so as to avoid placing the operator or others in danger and to prevent an accident.

USE NOTES

If the "proper lookout" phrase is used, then UJI 13-1201 and 13-1203 NMRA should be used.

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

Committee commentary. — It is the driver's duty to exercise ordinary care to see what is to be seen. *Lopez v. Maes*, 81 N.M. 693, 699, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970). At pages 700 and 701, the court makes specific reference to UJI 13-1202 and 13-1203, the same as UJI 13-902 and 13-903, respectively, in the first edition. *See also Butcher v. Safeway Stores*, 78 N.M. 593, 435 P.2d 212 (Ct. App. 1967); *Martinez v. City of Albuquerque*, 84 N.M. 189, 500 P.2d 1312 (Ct. App. 1972); and *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816, 39 A.L.R.3d 207 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969).

13-1203. Proper lookout; definition.

The duty to keep a proper lookout requires more than merely looking. It also requires a person to actually see what is in plain sight or is obviously apparent to one under like or similar circumstances.

Further, with respect to that which is not in plain sight or readily apparent, a person is required to appreciate and realize what is reasonably indicated by that which is in plain sight.

USE NOTES

This instruction is not limited in its application to motor vehicle cases. *See Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979). In a vehicle case, this instruction should be used with UJI 13-1201 NMRA and 13-1202.

[As amended, effective January 1, 1987.]

13-1204. Right-of-way at intersection; no traffic controls.

It is the duty of every driver of a vehicle to exercise ordinary care in approaching, entering and driving through an intersection.

Approaching an intersection from different highways or streets, drivers have the following right-of-way:

(1) The driver on the left must yield when the vehicle on the right is either in the intersection or so near to the intersection that there is danger of collision;

(2) The driver on the right must yield when the vehicle on the left will enter the intersection and pass beyond the driver's line of travel, if the driver on the right exercises ordinary care in approaching and entering the intersection.

Failure to yield the right-of-way at an intersection is negligence.

USE NOTES

This instruction is not to be used where traffic at an intersection is controlled by signs, devices or lights, and the instructions found in Chapter 15 are applicable.

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

Committee commentary. — This instruction reflects New Mexico's adoption, in light of the construction of 64-18-27, 1953 Comp. [repealed, Laws 1978, ch. 35, § 554; *see now* 66-7-328 NMSA 1978] and *Moore v. Kujath*, 225 Minn. 107, 29 N.W.2d 883, 175 A.L.R. 1007 (1947), of the "interval of time and distance" rule, which states, "[the car on the left] having entered the intersection at such interval of time and distance as to safely cross ahead of the vehicle approaching from the east, had its driver been exercising due care, the statute secured to him the prior use of the intersection". *See Brizal v. Vigil*, 65 N.M. 267, 335 P.2d 1065 (1959).

One may be liable for negligent acts occurring after entering the intersection even though favored at the time of entry. *Miller v. Marsh*, 53 N.M. 5, 201 P.2d 341 (1948).

Right-of-way is a relative right which does not justify action likely to cause an accident. *See Schoen v. Schroeder*, 53 N.M. 1, 200 P.2d 1021 (1948).

13-1205. Right-of-way not absolute.

A person having the right-of-way must nevertheless use ordinary care in exercising the right-of-way so as to avoid injury to [himself] [herself] or to others.

USE NOTES

This instruction is to be used when UJI 13-1204 is given and there is an issue concerning the exercise of ordinary care by the party on the right.

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

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

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

[As amended, effective January 1, 1987.]

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

13-1207. Duty of passenger.

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

If you find that circumstances existed in this case which would cause a passenger, exercising ordinary care for [his] [her] own safety, to keep a lookout or warn the driver, and that the plaintiff failed to do so, then such failure is negligence.

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

Committee commentary. — This instruction was approved in *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966), and *Romero v. Melbourne*, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

13-1208. Joint enterprise; imputation of negligence.

A joint enterprise existed between passenger and driver if these two elements were present:

(1) a common purpose in the use of a vehicle; and

(2) the right in each to share in the control of the vehicle.

As to the second element, the question for you to decide is whether there was a right in each to share in the control of the car rather than the actual exercise of such right of control.

If you find that there was a joint enterprise, then any negligence of the driver is the negligence of the plaintiff, but, if you do not find a joint enterprise, the negligence of the driver is not the negligence of the passenger.

USE NOTES

This instruction should identify the passenger and driver in their respective positions as parties to the action.

[As amended, effective January 1, 1987.]

Committee commentary. — The basic case on this issue is *Silva v. Waldie*, 42 N.M. 514, 82 P.2d 282 (1938). *See also Pavlos v. Albuquerque Nat'l Bank*, 82 N.M. 759, 487 P.2d 187, 56 A.L.R.3d 558 (Ct. App. 1971).

13-1209. Negligence of driver not attributable to passenger.

Negligence on the part of the driver of the vehicle in which plaintiff was a passenger cannot be charged to plaintiff.

USE NOTES

This instruction is not to be used where an issue exists as to the plaintiff's right of control over the driver.

[As amended, effective January 1, 1987.]

Committee commentary. — This instruction is not intended to absolve the passenger of negligence but only to avoid imputation of the negligence of the driver to him. *See Ford v. Etheridge*, 71 N.M. 204, 377 P.2d 386 (1962); *Mills v. Southwest Bldrs., Inc.*, 70 N.M. 407, 374 P.2d 289 (1962); *Perini v. Perini*, 64 N.M. 79, 324 P.2d 779 (1958); *Silva v. Waldie*, 42 N.M. 514, 82 P.2d 282 (1938); and *Archuleta v. Johnston*, 83 N.M. 380, 492 P.2d 997 (Ct. App.), cert. denied, 83 N.M. 379, 492 P.2d 996 (1971).

13-1210. Family purpose doctrine.

If you find that the motor vehicle operated by _____ *(driver)* [was made available by _____ *(head of household)* to _____ *(driver)* for any purpose on this occasion] [or] [was furnished by _____ *(head of household)* to family members of the household, including _____ *(driver),* for general use] [and that _____ *(driver)* was a family member of _____ *(head of household)* household], then _____ *(head of household)* is liable for damages proximately caused by negligent operation of the vehicle by _____ *(driver).*

USE NOTES

The parties should fill in the blanks to personalize this instruction as much as possible. The appropriate brackets should be used where supported by the evidence. Either the first or second bracketed material, or both, may be used where appropriate. Each forms an independent basis for application of the family purpose doctrine and it may not be necessary to use both brackets in every case. The last bracket should be used in any case where the driver's status as a member of the household is a jury issue.

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

Committee commentary. — The New Mexico Supreme Court has considered the family purpose doctrine in several cases including the following: *State Farm Mut. Auto Ins. Co. v. Duran*, 93 N.M. 489, 601 P.2d 722 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); *Peters v. LeDoux*, 83 N.M. 307, 491 P.2d 524 (1971); *Pavlos v. Albuquerque Nat'l Bank*, 82 N.M. 759, 487 P.2d 187, 56 A.L.R.3d 558 (Ct. App. 1971); *Cortez v. Martinez*, 79 N.M. 506, 445 P.2d 383 (1968); *Lopez v. Barreras*, 77 N.M. 52, 419 P.2d 251 (1966).

The New Mexico Supreme Court decision in *Madrid v. Shryock*, 106 N.M. 467, 745 P.2d 375 (1987) set forth public policy considerations in the application of the Family Purpose Doctrine. While not overruling any of the previous cases on Family Purpose, *see State Farm Mut. Auto Ins. Co. v. Duran*, 93 N.M. 489, 601 P.2d 722 (Ct. App. 1979); *Burkhart v. Corn*, 59 N.M. 343, 284 P.2d 226 (1955); *Peters v. LeDoux*, 83 N.M. 307, 491 P.2d 524 (1971); the Court rejected the traditional agency theory of liability.

A head of household, however, is not necessarily liable for the negligence of a minor child when the vehicle is owned and maintained by the minor child.

13-1211. Pedestrians; crossing at other than crosswalks - *No instruction drafted*.

No instruction drafted.

Committee commentary. — Instructions found in Chapter 15 should be used where applicable.

13-1212. Emergency vehicles - *No instruction drafted*.

No instruction drafted.

Committee commentary. — Instructions found in Chapter 15 should be used where applicable.

13-1213. Motor vehicles; railroad crossings - *No instruction drafted*.

No instruction drafted.

Committee commentary. — Instructions found in Chapter 15 should be used where applicable.

CHAPTER 13
Owners and Occupiers of Land; Tort Liability

Introduction

This chapter contains instructions for use in cases involving tort liability for injury or damage occurring on lands under the ownership, occupancy or control of persons other than the claimant. Instructions applicable to slip and fall cases are included in this chapter, as well as jury instructions applicable to suits against a municipality arising out of damages due to a defect in a street or sidewalk.

General instructions on tort law applicable to such cases are found in other portions of this book and, when applicable, should be used in connection with the instructions contained in this chapter.

[As amended, effective January 1, 1987.]

13-1301. Trespasser; definition.

A trespasser is a person who enters or remains upon the premises of another without the [express] [or] [implied] permission of the [owner] [occupant] of the premises.

[A person who is on the premises of another with the permission of the [owner] [occupant] is a trespasser to the extent the person goes outside the area in which the [owner] [occupant] might reasonably expect the person to be.]

[A person who is on the premises of another with the permission of the [owner] [occupant] is a trespasser to the extent the person uses the premises in a manner different from that which the [owner] [occupant] might reasonably expect.]

USE NOTES

This instruction is to be used if there is an issue as to whether the plaintiff was a trespasser. The bracketed sections should be selected as applicable to the evidence presented at trial.

[As amended, effective January 1, 1987; March 1, 1996.]

Committee commentary. — For a discussion of New Mexico's analysis of premises liability claims depending on whether the plaintiff was a trespasser or a visitor, *see Ford v. Board of County Commissioners,* 118 N.M. 134, 879 P.2d 766 (1994).

13-1302. Visitor; definition.

A visitor is a person who enters or remains upon the premises with the [express] [or] [implied] permission of the [owner] [occupant] of the premises.

USE NOTES

This instruction is to be used if there is an issue as to whether the plaintiff was a visitor. The bracketed terms should be selected as applicable to the evidence presented at trial.

[As amended, effective January 1, 1987; March 1, 1996.]

Committee commentary. — In *Ford v. Board of County Commissioners,* 118 N.M. 134, 879 P.2d 766 (1994), the Supreme Court eliminated the distinction, for purposes of defining the landowner's duty of care, between licensees and business visitors or invitees while retaining a different standard for the duty owed to trespassers. The Court referred to both licensees and business visitors as "visitors" and held that a duty of ordinary care applied to them.

13-1303. Withdrawn.

13-1304. Status of party not an issue.

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

USE NOTES

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

[As amended, effective January 1, 1987; March 1, 1996.]

13-1305. Duty to trespasser; artificial condition on premises.

If the [owner] [occupant] creates or maintains an artificial condition on the land, then [he] [she] has a duty to a trespasser to use ordinary care to warn of the condition and of the risk involved if:

(1) The condition involves an unreasonable risk of death or bodily harm to persons coming onto the land;

(2) [He] [She] knows or reasonably should know [that there are constant intrusions by persons in the dangerous area] [that there are persons on the land in dangerous proximity to the condition]; and

(3) [He] [She] has reason to believe that the trespasser will not discover the condition or realize the risk involved.

The [owner] [occupant] owes no duty to make [his] [her] land safe for a trespasser, unless and until [he] [she] knows or reasonably should know that the trespasser is on [his] [her] land.

USE NOTES

The bracketed language should be used as appropriate.

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

Committee commentary. — In *Ford v. Board of County Commissioners,* 118 N.M. 134, 139 n.4, 879 P.2d 766, 771 n.4 (1994), the Supreme Court affirmed that the duty of care owed to a trespasser is as set forth in UJI 13-1305 to 13-1307.

[As revised, effective March 1, 1996.]

13-1306. Duty to trespasser; activity of owner.

If the owner is engaged in activities on [his] [her] land, [he] [she] has a duty to use ordinary care to avoid injury to a trespasser, if:

(1) The activity involves an unreasonable risk of death or great bodily harm to persons coming onto the land;

(2) [He] [She] knows or should reasonably know that [there are constant intrusions by trespassers onto the area in which the activity is permitted] [there are trespassers on the land in dangerous proximity to the activity]; and

(3) [He] [She] has reason to believe that the trespasser will not realize the risk of harm involved.

[If the activity involves a controllable force, the owner has a duty either to use reasonable care to control the force to avoid injury or to give adequate warning.] The [owner] [occupant] of the land has no duty to regulate [his] [her] activities so as to avoid injury to a trespasser, unless and until [he] [she] knows or should know that the trespasser is on [his] [her] land.

USE NOTES

The bracketed language should be included as appropriate.

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

13-1307. Duty to trespasser; natural conditions.

An [owner] [occupant] of land has no liability to a trespasser injured on [his] [her] land from a natural condition of that land.

USE NOTES

This instruction may be applicable when there is a question of fact as to whether the trespasser was injured by a natural or an artificial condition.

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

13-1308. Withdrawn.

13-1309. Duty to visitor.

An [owner] [occupant] owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor [, whether or not a dangerous condition is obvious].

USE NOTES

This instruction is to be used to define the duty of care owed to a visitor. It applies in all cases in which a visitor claims to have been injured as a result of an unreasonably dangerous condition of the premises, including those in which the condition was open and obvious. In cases involving open and obvious dangers, the bracketed portion of the instruction should be given; in other cases it should be omitted. If the court concludes that the plaintiff's negligence in encountering a known or obviously dangerous condition was unforeseeable as a matter of law, however, an instruction imposing a duty of care on the owner/occupier of the premises should not be given.

For an instruction specifically applicable to typical slip and fall cases, *see* UJI 13-1318. For a supplemental instruction applicable to cases in which a visitor has been injured by the conduct of a third person, *see* UJI 13-1320. UJI 13-1601 (negligence) and 13-1603 (ordinary care) should be given with this instruction.

Where the case involves an issue of the plaintiff's alleged comparative fault, an appropriate instruction regarding the plaintiff's duty should also be given, such as UJI 13-1604 (ordinary care for own safety) or a modified version of UJI 13-1202 and 13-1203 (proper lookout).

[As amended, effective January 1, 1987; March 1, 1996.]

Committee commentary. — A landowner owes visitors (formerly categorized as either licensees or business visitors) a uniform duty of ordinary care to protect the visitor against conditions that foreseeably pose an unreasonable risk of injury. *Ford v. Board of County Comm'rs,* 118 N.M. 134, 879 P.2d 766 (1994). This duty applies even where a

dangerous condition is known to the visitor or is open and obvious, because in the exercise of ordinary care a landowner must generally anticipate some degree of negligence on the part of others encountering even a known or obvious danger. *Klopp v. Wackenhut Corp.,* 113 N.M. 153, 157, 824 P.2d 293, 297 (1992). There may be circumstances, however, in which a visitor's own negligence, resulting in injury from an obviously dangerous condition, is unforeseeable. *See id.* at 158, 824 P.2d at 298. Because no duty exists if the landowner lacks reason to know that an obviously dangerous condition poses an unreasonable risk of injury to a visitor, this instruction should not be given if the trial court determines that the negligence of the visitor was unforeseeable as a matter of law. *Id.* at 158-59, 824 P.2d at 298-99. Generally in a case involving injury from an obviously dangerous condition where the plaintiff may have been contributorily negligent, it is for counsel in argument to address how legal concepts of unreasonable risk, foreseeability, and ordinary care apply to the evidence at hand. *See id.* at 159, 824 P.2d at 299.

13-1310. Withdrawn.

13-1311. Withdrawn.

13-1312. Trespassing children (attractive nuisance).

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

(1) The place where the condition is maintained is one upon which the [owner] [occupant] knows or has reason to know that children are likely to trespass;

(2) The condition is one which involves an unreasonable risk of injury to trespassing children and the [owner] [occupant] knows or has reason to know of such risk; and

(3) The child because of [his] [her] youth does not discover the condition or realize the risk involved by intermeddling with it or coming into the area made dangerous by it.

In such a case, the [owner] [occupant] has a duty to exercise ordinary care, considering the youth of the child, to prevent injury to the child.

USE NOTES

This instruction may be used when the injured trespasser is a child.

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

Committee commentary. — A line of New Mexico cases recognizes and applies the attractive nuisance doctrine. For a discussion of the elements of the doctrine and its relation to ordinary negligence principles, *see Latimer v. City of Clovis*, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972). *See also* Restatement (Second) of Torts § 339 (1965), from which the foregoing instruction is adapted.

13-1313. Leased premises; latent defect.

If a landlord knows about an existing defect on the premises which is not readily apparent or knows facts and circumstances which would indicate that there is such a defect, then the landlord must tell the tenant about the defect at the time of renting the premises or before the tenant moves in. However, a landlord need not warn the tenant against a defect which is obvious.

USE NOTES

This instruction is not appropriate when the accident occurs on that part of the premises reserved for use by all or other tenants, such as hallways or stairs. In such instance, use UJI 13-1315.

[As amended, effective January 1, 1987.]

Committee commentary. — New Mexico has special statutory provisions as to the duty of a landlord.

See Sections 47-8-1 to 47-8-51 NMSA 1978.

13-1314. Landlord's duty regarding repairs.

A landlord who undertakes to make improvements or repairs upon leased premises is under a duty to use ordinary care in carrying out the work [even if the landlord was not under an obligation to make the improvements or repairs].

USE NOTES

The bracketed material is to be used when appropriate under the evidence.

[As amended, effective January 1, 1987.]

Committee commentary. — An owner's duty to make repairs to leased premises is controlled by the New Mexico Uniform Owner-Resident Relations Act, NMSA 1978, Section 47-8-1 et seq. The instruction is applicable in all cases where the landlord performs repairs or undertakes improvements.

See Strong v. Shaw, 96 N.M. 281, 629 P.2d 784 (Ct. App. 1981).

13-1315. Place reserved for common use.

A landlord must use ordinary care to keep the _____ *(stairs, hallway or other common premises)* in a safe condition for the purposes for which the _____ *(stairs, hallway or other common premises)* were intended.

USE NOTES

This instruction should be used where the injury occurs in a portion of the building reserved for common use.

The blanks must be properly completed.

[As amended, effective January 1, 1987.]

Committee commentary. — *See* Judge Hernandez's special concurrence in *Mercer v. Flats*, 91 N.M. 677, 579 P.2d 803 (Ct. App. 1978), for a discussion of a landlord's duty to provide fire extinguishers in common areas. *See* NMSA 1978 § 47-8-20(A)(3) as to residential landlords.

13-1316. Duty where property abuts sidewalk.

The [owner] [occupant] of property abutting a public sidewalk is under a duty to exercise ordinary care not to create an unsafe condition which would interfere with the customary and regular use of the sidewalk.

[As amended, effective January 1, 1987.]

Committee commentary. — Concerning owner's duty, as well as obligation of pedestrian to be observant, *see Giese v. Mountain States Tel. & Tel. Co.*, 71 N.M. 70, 376 P.2d 24 (1962).

By implication, the rule expressed in the foregoing instruction received approval in *Lommori v. Milner Hotels, Inc.*, 63 N.M. 342, 319 P.2d 949 (1957).

Reference should also be made to provisions of statutes and ordinances which may be applicable. It would seem this instruction would be equally applicable to property not abutting a public sidewalk.

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

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

[As amended, effective January 1, 1987.]

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

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

13-1318. Slip and fall.

An [owner] [occupant] owes a visitor the duty to exercise ordinary care to keep the premises safe for the visitor's use. [This duty applies whether or not a dangerous condition is obvious.] [In performing this duty, the [owner] [occupant] is charged with knowledge of any condition on the premises [of which the [owner] [occupant] would have had knowledge had [he] [she] [it] made a reasonable inspection of the premises] [or] [which was caused by the [owner] [occupant] or [his] [her] [its] employees].]

USE NOTES

This instruction should be used in slip and fall cases involving visitors. The bracketed second sentence should be given where the case involves a dangerous condition that was open and obvious. The appropriate bracketed language in the third sentence should be given if there is evidence that the defendant failed to make a reasonable inspection of the premises that would have revealed the dangerous condition or if the condition was caused by the defendant or an employee of the defendant. UJI 13-1601 (negligence) and UJI 13-1603 (ordinary care) should be given with this instruction. *Ford v. Board of County Comm'rs,* 118 N.M. 134, 879 P.2d 766 (1994).

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

Committee commentary. — This instruction applies the general rule of ordinary care expressed in UJI 13-1309 to typical "slip and fall" cases involving a visitor (or, in former parlance, a licensee or business invitee).

The former version of this instruction, which suggested that the duty to exercise ordinary care could always be satisfied by warning the plaintiff of a dangerous condition and which invoked outmoded concepts of contributory negligence, has been revised in light of *Klopp v. Wackenhut Corp.,* 113 N.M. 153, 824 P.2d 293 (1992). This instruction, accompanied by basic instructions defining negligence and ordinary care, provides a basis for counsel to argue the application of the law to the facts of a particular case. *Cf. Klopp,* 113 N.M. at 159, 824 P.2d at 299.

13-1319. Withdrawn.

13-1320. Duty to visitor; acts of third persons.

If an [owner] [occupant] breaches the duty to use ordinary care to keep the premises safe for use by a visitor, resulting in injury to the visitor from the acts of a third person, the [owner's] [occupant's] breach of duty is to be compared with the conduct of the third person who actually caused the injury to the visitor [, as well as with the visitor's own fault,] in order to determine the [owner's] [occupant's] proportionate degree of fault. The [owner's] [occupant's] duty to protect visitors arises from a foreseeable risk that a third person will injure a visitor and, as the risk of danger increases, the amount of care to be exercised by the [owner] [occupant] also increases. Therefore, the proportionate fault of the [owner] [occupant] is not necessarily reduced by the increasingly wrongful conduct of the third person.

USE NOTES

This instruction is to be used in conjunction with UJI 13-1309 in cases in which a visitor is injured by the conduct of a third person which must be compared to the negligence of the defendant. The bracketed language referring to the visitor's own fault is to be given if the court determines that a jury question exits regarding the visitor's comparative fault.

[Adopted, effective March 1, 1996.]

Committee commentary. — A landowner has a duty to exercise ordinary care to protect a visitor against harm resulting from the foreseeable conduct of a third party, whether that conduct is innocent, negligent, intentionally tortious, or criminal. *Reichert v. Atler,* 117 N.M. 623, 875 P.2d 379 (1994). Under New Mexico's system of comparative fault, the landowner's negligent failure to protect visitors from foreseeable harm may be compared to the conduct of the third party. *Id.* This instruction allows the jury to consider the importance of the owner's duty to protect visitors and to weigh the failure to perform that duty against the conduct of the third party, while avoiding the possibility that the landowner could shift a disproportionate share of responsibility to a third party whose intentional wrongful conduct was the direct cause of the plaintiff's injury.

CHAPTER 14
Products Liability

Introduction

The principles of strict liability in tort as approved by the American Law Institute and particularly § 402A of the Restatement (Second) of Torts gained wide acceptance beginning with *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962). In New Mexico, the court of appeals considered, without adoption,

the elements of strict liability under § 402A in *Schrib v. Seidenberg*, 80 N.M. 573, 458 P.2d 825 (Ct. App. 1969) and then the tenth circuit approved a federal district court's prediction of New Mexico's adoption of § 402A. *Moomey v. Massey Ferguson, Inc.*, 429 F.2d 1184 (10th Cir. 1970). The Supreme Court of New Mexico, which already had begun the erosion of privity concepts in products cases in *Steinberg v. Coda Roberson Constr. Co.*, 79 N.M. 123, 440 P.2d 798 (1968), rejected a court of appeals holding that adoption of strict liability was up to the legislature and approved § 402A in *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972). Reliance upon the Restatement in *Stang v. Hertz Corp.*, *supra*, provides further guidance as to the scope and nature of strict liability in New Mexico, and the committee has relied heavily upon the comments to the Restatement in drafting instructions for this chapter.

The instructions of this chapter are worded solely in terms of personal injury; however, under either a negligence or strict liability theory, recovery may be had for damage to property. *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 494 P.2d 178 (Ct. App. 1971) (strict liability) and *Steinberg v. Coda Roberson Constr. Co.*, *supra*, (negligence). Where property loss is economic loss as a result of injury to the product itself (repair or replacement costs, business interruption, loss of use) courts have disagreed whether tort theories state a cause of action. The federal courts have predicted that such economic loss is not recoverable in strict liability. *Colonial Park Country Club v. Joan of Arc*, 746 P.2d 1425 (10th Cir. 1984). The Court of Appeals has held that between parties in a commercial setting when there is no large disparity in bargaining power, damages for economic losses may only be recovered in contract. *Utah International Inc., v. Caterpillar Tractor Co.*, 108 N.M. 539, 775 P.2d 741 (Ct. App. 1989), *cert. denied*, 108 N.M. 354, 772 P.2d 884 (1989). The New Mexico Supreme Court has not passed on this issue.

No definition of a "supplier" is provided under UJI 13-1402. The omission is intentional. *Stang v. Hertz Corp.*, *supra*, suggests a wide scope of application for strict liability in tort and the law, with respect to persons liable under this theory, is in a state of development. See discussion in 2 Frumer and Friedman, Products Liability § 16A(4)(b) (1976). It was felt that any definition of this term might restrict future application of the doctrine where this was not warranted by the principles of *Stang v. Hertz Corp.*, *supra*.

For the reasons that it included no definition of "supplier," the committee has attempted no definition of "product." "Product" seems naturally to equate with "goods" as defined by 55-2-105(1) NMSA 1978; however, courts have applied the principles of products liability to nonmovable structures under both negligence and strict liability theories. *Steinberg v. Coda Roberson Constr. Co.*, *supra*. Use of the word "product" is not intended to prevent the application of these instructions to injuries caused by defects in nonmovable structures. The difficulty of application of strict liability in some cases is illustrated by the two appellate opinions in *Begay v. Livingston*, 99 N.M. 359, 658 P.2d 434 (Ct. App. 1981), *rev'd*, 98 N.M. 712, 652 P.2d 734 (1982), the Supreme Court holding that motel operators are not strictly liable for defects in fixtures and furnishings of motel rooms. While the holdings differ, the two opinions illustrate that

application of the doctrine in any particular case turns upon an analysis of the principles which underlie the creation of strict liability in tort, as expressed in *Stang v. Hertz Corp.*, *supra*. See also *Lay v. Vip's Big Boy Restaurant, Inc.*, 89 N.M. 155, 548 P.2d 117 (Ct. App. 1976), and *Ruiz v. Southern Pac. Co.*, 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

Strict liability applies to the theory of "crashworthiness" or "second collision" alleging that a faulty design or manufacture of an automobile or aircraft enhanced the injury a person otherwise received. *See Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 902 P.2d 54 (1995) (overruling *Duran v. GMC*, 101 N.M. 742, 688 P.2d 779 (Ct. App. 1983), *cert. quashed*, 101 N.M. 555, 685 P.2d 963 (1984)).

Stang v. Hertz Corp., *supra*, and the Uniform Commercial Code, as enacted in New Mexico, create parallel but independent bodies of product liability law. One is an action in tort; the other, implied warranty, is an action in contract. See discussion in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). Plaintiffs may proceed under both theories. No election is required. *Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983). The products liability action created by the Uniform Commercial Code will most frequently be used in commercial cases, and most claimants with personal injury actions will elect to proceed in negligence and strict liability in tort. Because this chapter is designed for cases of personal injury or physical property damage (even though the instructions are usable in a commercial damage case), instructions in negligence and strict liability predominate. However, for use in personal injury or commercial cases, the committee has included instructions on breach of warranties.

[Adopted, effective November 1, 1991; as amended, January 1, 1997.]

13-1401. Issues; complaint; answer; burden of proof - *No instruction drafted*.

No instruction drafted.

Committee commentary. — The statement of issues, burden of proof and formula for verdict in UJI 13-302 are designed to accommodate products liability cases. If sufficient evidence supports each theory, a claimant may alternatively state his products liability claim in negligence, strict liability and breach of warranty. 52 A.L.R.3d 101; *Kirkland v. GMC*, 521 P.2d 1353 (Okla. 1974); *Fabian v. E.W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978). Election of remedies is not a substantive principle available to defendant. *Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983); *Buhler v. Marrujo*, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

13-1402. Duty of the supplier.

The supplier of a product has a duty to use ordinary care to avoid a foreseeable risk of injury caused by a condition of the product or manner in which it is used. This duty is

owed [to persons who can reasonably be expected to use the product] [and] [to persons who can reasonably be expected to be in the vicinity during the use of the product.]

[The supplier's duty to use ordinary care continues after the product has left [his] [her] [its] possession. A supplier who later learns, or in the exercise of ordinary care should know, of a risk of injury caused by a condition of the product or manner in which it could be used must then use ordinary care to avoid the risk.]

USE NOTES

This instruction must be given in any products liability case in which the court submits negligence as a theory of liability. The instruction ordinarily will be followed by UJI 13-1403 and UJI 13-1404, defining the duty of all product suppliers. The bracketed second paragraph shall be given only where an issue is presented concerning a supplier's failure to act to prevent injury after selling the product and learning of a risk.

[As amended, effective November 1, 1991.]

Committee commentary. — All persons supplying a product owe the duty of ordinary care. The duty stated by this instruction and the supplier's duty under strict liability in tort are imposed upon the entity responsible for the act of supplying the product. If the supplier is a corporation, the corporation is regarded as the "supplier" within the meaning of this instruction. Corporate employees are not liable, absent negligent conduct on their part independent of a corporate failure to provide a product which satisfies the duty of ordinary care or is free from unreasonable risk of injury. *See* Restatement (Second) of Torts § 388, comment c (1966).

In contrast to strict products liability under UJI 13-1406, the duty of ordinary care does not depend upon the supplier's regular engagement in the business of supplying chattels and applies even to the gratuitous, isolated bailment. Restatement (Second) of Torts §§ 388-390, "Rules applicable to all suppliers". However, these instructions are drafted for the usual complaint against a defendant who is regularly engaged in the business of making, distributing, retailing, leasing or selling products. In an appropriate case, the negligence instructions of this chapter can be modified to cover the gratuitous bailor. UJI 13-1402 and 13-1403 would be given without modification and UJI 13-1404 would be modified so that the first sentence reads: "Ordinary care is that care which a reasonably prudent man would use in the circumstances". "Reasonably prudent man" would also be substituted for "reasonably prudent supplier" in the last sentence of UJI 13-1404. If a product is not supplied to satisfy a business purpose of the gratuitous bailor, the gratuitous bailor has no duty to inspect and the bailor's duty to warn extends only to risks of injury known to the bailor. *See* Restatement (Second) of Torts § 388, comment n and § 392, comment a.

UJI 13-1402 states the basic duty. Subsequent instructions in this chapter refine this duty under particular conditions and circumstances. Instructions defining obligations of warning, design and inspection are not all-inclusive. This chapter does not contain

instructions for all conceivable applications of the basic duty stated in UJI 13-1402. For example, instructions have not been drafted to fit the situation described in Restatement (Second) of Torts §§ 389 and 390. There are cases in which the plaintiff will have the argument that a particular product was so unsafe for the use for which it was likely to be put that the supplier could not reasonably assume that a warning would be adequate to protect the user. In such a case, UJI 13-1402 and 13-1419 can be used and plaintiff's specific theory of liability should be stated in UJI 13-1401. Cases falling within the circumstances of Restatement (Second) of Torts § 389, such as *Zamora v. J. Korber & Co.*, 59 N.M. 33, 278 P.2d 569 (1955), are also embraced by the general duty stated by this instruction but will require special instructions and a specification of the issue in UJI 13-1401.

The supplier's duty of ordinary care is not bounded by contractual concepts of privity. *Steinberg v. Coda Roberson Constr. Co.*, 79 N.M. 123, 440 P.2d 798, 799 (1968). The duty is owed to all who may be foreseeably endangered by a failure to exercise ordinary care, *Baker v. Fryar*, 77 N.M. 257, 259-61, 421 P.2d 784, 786-7 (1966), including a bystander who is not a user of the product. While § 402A of the Restatement (Second) of Torts originally took a neutral position towards application of strict liability to persons other than user, the decided trend of the cases adopting the doctrine has been toward inclusion of bystanders. *See Elmore v. American Motors Corp.*, 75 Cal. Rptr. 652, 451 P.2d 84 (1969) (cited without adoption or rejection in Stang v. Hertz Corp., 83 N.M. 730, 733, 497 P.2d 732, 735, 52 A.L.R.3d 112 (1972)).

The continuing duty of the supplier is merely one application of negligence law. When a product supplier learns of a defect after supplying the product, the supplier must use reasonable prudence to protect those exposed to the risk created by the defect. *See* 1 Frumer and Friedman, Products Liability § 8.02 (1976). Ordinary care is all that is required. Given that standard, the fact finder determines what should have been done under the circumstances - product recall, warning, etc.

[As revised, effective November 1, 1991.]

13-1403. Foreseeable risk of injury; misuse.

The supplier has the duty to consider foreseeable risks of injury. This duty is limited to use of the product for a purpose or in a manner which could reasonably be foreseen.

Where an injury is caused by a [risk] [or] [misuse of the product] which was not reasonably foreseeable to the supplier, [he] [she] [it] is not liable.

USE NOTES

This instruction will ordinarily be given in every products liability case. (There are cases where giving the instruction would create a false issue.) It is given immediately following UJI 13-1402 NMRA if a negligence theory is submitted and immediately following UJI 13-1406 NMRA if the only theory submitted is strict liability in tort.

The product misuse doctrine is a rule that the supplier is responsible for risks arising from foreseeable uses. A plaintiff must prove that the claimed injury results from a foreseeable use of the product. However, the bracketed phrase "misuse of the product" is only used in cases where product misuse has become an issue and is supported by sufficient evidence.

[As amended, effective November 1, 1991.]

Committee commentary. — As with any negligence action, in products liability cases founded upon negligence, foreseeability of the risk of injury is an essential element and restricts the scope of an actor's liability. *See* UJI 13-1402, committee commentary; *Kelly v. Montoya*, 81 N.M. 591, 593, 470 P.2d 563, 565 (Ct. App. 1970).

Because the supplier's duty is to consider foreseeable risks of injury, the jury may find the supplier liable for an injury which results from an unintended use of the product, if the use is one which, nonetheless, should have been anticipated. Restatement (Second) of Torts § 388; *First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 81-82, 537 P.2d 682, 689-690 (Ct. App. 1975); *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943 (Mo. App. 1970); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill App. 2d 315, 229 N.E.2d 684 (1967), aff'd, 42 Ill. 2d 339, 247 N.E.2d 401 (1969). There are cases where the use to which the product is put is so unintended and unforeseeable that the case should be taken from the jury. *Van de Valde v. Volvo of America Corp.*, 106 N.M. 457, 744 P.2d 930 (Ct. App. 1987) (use of a tire restraining strap to secure luggage on a roof luggage rack).

Thus, these instructions reject the contention that a manufacturer of an automobile has no duty to consider risks of injury associated with vehicle collision simply because the intended purpose of an automobile does not include its participation in collisions. In the "crashworthiness" cases, as in any other case, the manufacturer's liability is circumscribed by foreseeable use. Since involvement in accidents is reasonably foreseeable, a duty exists to consider this risk in design of the vehicle. *Compare Larsen v. GMC*, 391 F.2d 495, 502 (8th Cir. 1968) with *Evans v. GMC*, 359 F.2d 822, 825 (7th Cir.), cert. denied, 385 U.S. 836, 17 L. Ed. 2d 70, 87 S. Ct. 83 (1966), overruled *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977).

Treaties and cases in the products liability field contain lengthy discussions of "misuse." Some cases treat misuse as an affirmative defense. The misuse doctrine is simply one application of the established principle than an actor is liable for the foreseeable results of the actor's conduct. If a product is handled in a way which cannot be reasonably anticipated by the supplier and such handling is a cause of the plaintiff's injury, the supplier is relieved of liability because the nature and character of the injury is unforeseeable. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (S. Ct. Miss. 1966), cert. denied, 386 U.S. 912, 87 S. Ct. 860, 17 L. Ed. 2d 784 (1967); *Van de Valde v. Volvo of America Corp.*, 101 N.M. 457, 744 P.2d 930 (Ct. App. 1987). Where product mishandling is supportable by the evidence, the bracketed phrase "misuse of the

product" may be used in place of the broader "risk," as being more descriptive of defendant's argument. In an appropriate case both bracketed phrases may be used.

Because foreseeability of the risk should be the jury's focus in "misuse" cases, rather than a user's culpability, these instructions do not treat mishandling as an affirmative defense to be proved by the defendant under UJI 13-1427.

As the language of this instruction provides, the foresight required for liability is foresight of the use of the product which gives rise to an unreasonable risk of injury. If the use and risk are foreseeable, plaintiff need not prove that the particular harm was foreseen. *Newman v. Utility Trailer & Equip. Co.*, 278 Ore. 395, 564 P.2d 676-77 (1977).

13-1404. Ordinary care.

Ordinary care is that care which a reasonably prudent supplier would use in the conduct of [his] [her] [its] business. What constitutes ordinary care varies with the likelihood of an injury occurring and the seriousness of the harm which could reasonably be expected. As the danger that should be foreseen increases, so the amount of care required also increases.

The question in this case is whether, considering all of the circumstances, the risk of injury was foreseeable to, and would have been avoided by, a reasonably prudent supplier.

USE NOTES

This instruction must be given in every products liability case in which the court submits negligence as a theory of liability and is to immediately follow UJI 13-1402 and 13-1403 NMRA.

[As amended, effective November 1, 1991.]

Committee commentary. — In a negligence action, liability is approached from the standpoint of the standard of care which would be used by the reasonably prudent person in the shoes of the defendant supplier. *Steinberg v. Coda Roberson Constr. Co.*, 79 N.M. 123, 124, 440 P.2d 798, 799 (1968).

13-1405. Ordinary care; evidence.

What is customarily done by those engaged in the supplier's business is evidence of ordinary care. However, what ought to be done is fixed by a standard of ordinary care, whether it is usually complied with or not.

Compliance with [industry [customs] [standards] [codes] [rules__ [or] [governmental [rules] [standards] [codes__ is evidence of ordinary care, but it is not conclusive.

USE NOTES

In a negligence action, this instruction should be given when the court has admitted evidence of compliance with industry practices or customs or with governmental rules or standards. UJI 13-1408, a comparable instruction applicable to an action in strict liability, should also be given where the plaintiff is proceeding on both theories of liability. This instruction is to be given following UJI 13-1404.

Where the plaintiff is proceeding on a negligence per se theory based on violation of a governmental requirement, UJI 13-1421 should be given. If that is the plaintiff's sole theory, this instruction should not be given because compliance with a custom or practice does not excuse violation of a governmental requirement. Where the plaintiff's claims are based both on violation of a governmental standard and on other grounds, UJIs 13-1405, 13-1408, and 13-1421 may all be given. In such a case the court may conclude that it would be beneficial to give a special instruction limiting the applicability of evidence that the defendant complied with industry practice to the claims not based on violation of the governmental standard.

[As amended, effective January 1, 1997.]

Committee commentary. — Evidence of custom and usage has long been recognized as relevant to a jury determination of ordinary care. The leading case is *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 23 S. Ct. 622, 47 L. Ed. 905 (1903). In *Lopez v. Heesen*, 69 N.M. 206, 365 P.2d 448 (1961), the supreme court recognized the admissibility of such evidence in a products liability action. 69 N.M. at 214, 365 P.2d at 453. *See also Fabian v. E.W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978). Before evidence of a particular practice or usage is permitted, a proper foundation must be laid, demonstrating that the practice or usage is generally accepted and followed by a significant portion of the supplier's industry. Likewise, voluntary standards, codes or rules may constitute relevant evidence. The leading case on the use of standards, codes or rules is *McComish v. Desoi*, 42 N.J. 274, 200 A.2d 116 (1964). *See also* annotations at 58 A.L.R.3d 148; 50 A.L.R.2d 16; 29 Am. Jur. 2d, Evidence §§ 884-893 [*see now* 31A Am. Jur. 2d Expert and Opinion Evidence].

The language "or governmental [rules] [standards] [codes]" was added to make clear that compliance with governmental standards such as those established by the National Highway Transportation Safety Administration or the Federal Aviation Administration is not dispositive on the issue of ordinary care. *See Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 902 P.2d 54 (1995). This instruction does not change existing New Mexico law which, in certain circumstances, allows a claim of negligence *per se* for violation of industry or governmental standards, codes or rules. *See Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985) (violation of a legislatively authorized or adopted regulation is negligence *per se*); *but see Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 734 P.2d 1258 (1987) (violations of federal Occupational Safety and Health Acts do not constitute negligence *per se*). Custom will not excuse violation of a mandatory governmental standard set, *e.g.*, by statute or regulation, and evidence of

custom is not admissible to show an industry practice in conflict with the mandatory standard. *Apodaca v. Miller*, 79 N.M. 160, 441 P.2d 200 (1968); *Sanchez v. J. Barron Rice, Inc.*, 77 N.M. 717, 427 P.2d 240 (1967).

13-1406. Strict products liability; care not an issue.

Under the "products liability" claim, a supplier in the business of putting a product on the market is liable for harm caused by an unreasonable risk of injury resulting from a condition of the product or from a manner of its use. Such a risk makes the product defective. This rule applies even though all possible care has been used by the supplier in putting the product on the market.

The liability of the supplier is [to persons whom the supplier can reasonably expect to use the product] [and] [to persons whom the supplier can reasonably expect to be in the vicinity during the use of the product].

USE NOTES

This is the basic instruction defining strict products liability and, together with UJI 13-1407, must be used in every strict products liability case based upon Restatement (Second) of Torts § 402A. For bystander injury, use the second bracketed phrase.

[Adopted by Supreme Court Order No. 09-8300-011, effective May 15, 2009.]

Committee commentary. — The New Mexico Supreme Court's rationale for adopting strict products liability in tort for any supplier in the business of putting the product on the market is the risk distribution approach taken in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) and *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972).

The language of strict products liability, taken from Restatement (Second) of Torts § 402A, has less than the universal application which these instructions are intended to have for strict products liability relating to production flaw defects, unsafe design or formulation, warning inadequacies, safety options and products which are unavoidably unsafe, with a risk of harm not justified by usefulness or desirability of the product.

Since certain commercial promotions or other transactions do not involve "the business of selling" a product, the committee chose "business of putting the product on the market." *Cf. Stang*, 83 N.M. at 733-34, 497 P.2d 735-36 (holding that, so long as a bailor is in the business of leasing, he will be held to the same standard as a retailer). Likewise, "supplier" was preferred over "seller."

"Defective condition" is a phrase most applicable to the production flaw. "Risk of injury" was introduced by the committee as a complementary phrase, giving the instructions clearer universal application. For the reasons commented upon under UJI 13-1407, the

committee chose a reasonably prudent person standard of “unreasonable risk of injury,” rather than the Restatement user-oriented standard of danger “to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” *See* Restatement (Second) of Torts § 402A, comment i.

[Adopted by Supreme Court Order No. 09-8300-011, effective May 15, 2009.]

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

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

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

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

USE NOTES

This is the basic instruction defining "unreasonable risk of injury" and, except where misrepresentation is the only theory of recovery, must be used in every set of strict products liability instructions in lieu of "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics".

The bracketed paragraph two shall be given only if plaintiff contends that the product's design presents an unreasonable risk of injury.

The bracketed sentence in paragraph three shall always be given if plaintiff contends that the product when supplied, contained a production flaw which was a cause of injury. As discussed under the last paragraph of the committee commentary below, the trial judge will determine, based upon developing law, whether the final sentence of this instruction is also applicable to products cases alleging inadequate design or warning.

[As amended, effective March 1, 2005.]

Committee commentary. — Criteria for determining whether a risk of injury is unreasonable have not been provided in the instruction because the committee feels this falls within the unique domain of advocacy under the circumstances of proof in each

case. Design, formulation, warning, safety device and unavoidably unsafe product cases present greater latitude for argument than does the production flaw which the reasonably prudent person would generally be expected to find unacceptable when known. In his article, "The Nature of Strict Tort Liability for Products", 44 Miss. L.J. 825, 837-38 (1973), Professor Wade suggests seven risk-benefit criteria: (1) the usefulness and desirability of the product (*see* UJI 13-1419); (2) the availability of other and safer products to meet the same need (*see* UJI 13-1408); (3) the likelihood of injury and its probable seriousness, i.e., "risk" (*see* UJI 13-1407); (4) the obviousness of the danger (*see* UJI 13-1412 and 13-1415); (5) common knowledge and normal public expectation of the danger (particularly for established products) (*see* UJI 13-1403, 13-1406 and 13-1418); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings) (*see* UJI 13-1403, 13-1415 and 13-1418) and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive (*see* UJI 13-1407). *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1274 (5th Cir.), cert. denied, 419 U.S. 1096, 95 S. Ct. 687, 42 L. Ed. 2d 688 (1974).

The "unreasonably dangerous" test and other negligence vestiges of strict products liability have come under attack. In *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973), following *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972), the court held that the additional element of "unreasonable danger" is not a valid part of the concept of strict liability in tort. The Supreme Court of New Mexico has noted that a single definitional concept should be used and separate proof of defectiveness and unreasonable danger is not required. *Rudisaile v. Hawk Aviation, Inc.*, 92 N.M. 575, 577, 592 P.2d 175, 177 (1979). The New Jersey superior court would instruct that the supplier is liable if the product was unsafe and the plaintiff was a reasonably foreseeable user. California would instruct that the supplier is liable to a person injured while using a product in an intended way as a result of a "defect" in the product.

The committee, however, is in sympathy with the approach that "[a] product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of the trial outweighed the benefit of the way the product was so designed and marketed". P. Keeton, Product Liability and the Meaning of a Defect, 5 St. Mary's L.J. 30, 37-8 (1973) (original emphasis). Dean Keeton maintains there is no way to avoid a risk-benefit calculation in products liability cases. Id. at 39. The way to remedy the problem inherent in foreseeability is to supply knowledge as a matter of law, even if the defect was scientifically unknowable at the time of manufacture, and to allow the jury to decide if the ordinary person would have put the product on the market as designed. 48 Tex. L. Rev. 398, 403-4 (1970).

Keyed to the rationale of the Supreme Court of Oregon, the committee chose a prudent person standard of "unreasonable risk of injury" rather than the user-oriented language of Restatement (Second) of Torts § 402A, comment i (1966), discussed in *Rudisaile v. Hawk Aviation, Inc.*, supra.

"To elucidate this point further, we feel that the two standards are the same because a seller acting reasonably would be selling the same product which a reasonable consumer believes he is purchasing". That is to say, a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it. The foreseeable uses to which a product could be put would be the same in the minds of both the seller and the buyer unless one of the parties was not acting reasonably. The advantage of describing a dangerous defect in the manner of Wade and Keeton is that it preserves the use of familiar terms and thought processes with which courts, lawyers and jurors customarily deal.

"While apparently judging the seller's conduct, the test set out above would actually be a characterization of the product by a jury. If the manufacturer was not acting reasonably in selling the product, knowing of the risks involved, then the product would be dangerously defective when sold and the manufacturer would be subject to liability". *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033, 1037 (1974).

The supplier of a product which is defective by reason of a latent production flaw is universally held liable under strict products liability notwithstanding the fact that by inspection, testing, X-ray or any other means known to science at the time the product was placed on the market, it was not possible to know of the unreasonable risk of injury. *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972) (rented tire defective because of impact damage which was not discoverable by normal inspection procedures). While it may be an illogical inconsistency to hold that an unreasonably dangerous design or inadequate warning can give rise to strict products liability based only on what the supplier could reasonably know at the time the product was placed on the market, the New Mexico Supreme Court has not yet addressed this issue in a design or warning case. The last bracketed sentence of this instruction will always be applicable to the production flaw case. In design and warning cases the trial judge will have to decide this issue applying the principles of *Stang v. Hertz Corp.*, supra, until a decision is made by the supreme court.

[As revised, effective November 1, 1991.]

13-1408. Strict liability; evidence.

Under the "products liability" claim, what is customarily done by those engaged in the supplier's business is evidence of whether a risk of injury would be acceptable to a reasonably prudent person. However, the acceptability of a risk of injury is determined by the conduct of a reasonably prudent person having full knowledge of the risk, whether such conduct is usually followed or not.

Compliance with [industry [customs] [standards] [codes] [rules__ [or] [governmental [rules] [standards] [codes__ is evidence of the acceptability of the risk, but it is not conclusive.

USE NOTES

In a strict liability action, this instruction should be given when the court has admitted evidence of compliance with industry practices or customs or with governmental rules or standards. UJI 13-1405 NMRA is a comparable instruction applicable to an action in negligence. *See* UJI 13-1405 NMRA, Use Note. This instruction is to be given following UJI 13-1407.

[As amended, effective January 1, 1997.]

Committee commentary. — The trial judge and counsel are cautioned that UJI 13-1405 and 13-1408 do not establish rules of admissibility. The admissibility of voluntary codes, standards and practices is measured by the Rules of Evidence and the judge must consider objections of relevancy, authenticity, prejudice, confusion, waste of time, etc. Ordinarily, standards will be authenticated and introduced through expert witnesses. *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276, 287 (1978); *Grammer v. Kohlhaas Tank & Equip. Co.*, 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979). *See also* UJI 13-1405, committee commentary.

13-1409. Strict products liability; misrepresentation - *No instruction drafted*.

No instruction drafted.

Committee commentary. — The New Mexico Supreme Court has not ruled on § 402B of Restatement (Second) of Torts and the products liability theory there stated. Until such time as the supreme court does consider this issue, the trial judge must decide whichever doctrine will be applied.

In the event the trial judge decides to instruct on this theory, the following instruction may provide guidance:

Under the "products liability" claim, a supplier in the business of putting a product on the market may be liable for a misrepresentation of the product's _____ *([Condition] [character] [quality] or other proper description)*.

An unreasonable risk of injury is presented by an untrue misrepresentation by advertising, labels or otherwise, made to that class of persons who can reasonably be expected to use the product. The supplier is liable for harm proximately caused by a misrepresentation justifiably relied upon.

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

13-1410. Particular duties of the manufacturer.

The manufacturer of a product must use ordinary care in:

(1) [formulating] [designing] the product;

(2) making the product;

(3) [inspecting] [testing] the product; and

(4) packaging the product.

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

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

USE NOTES

This instruction is to be given in a negligence action where the defendant supplier is the manufacturer of the product or may be regarded by the jury as manufacturer under UJI 13-1411 NMRA. The proper brackets should be selected, depending upon the aspect of the manufacturing process which is in issue in the case. If a step in the manufacturing and distributing process is not involved in the lawsuit, it should be eliminated from the instruction. This instruction must not be given if plaintiff's case is based solely upon strict liability.

The bracketed sentences in the second paragraph shall be given only if plaintiff contends that the product was negligently designed.

Committee commentary. — In cases involving negligent design, the jury's focus should be upon features of the design which make a product allegedly dangerous for any reasonably foreseeable use. The manufacturer is permitted to consider factors other than safety, for example, feasibility, in designing the product. *Gates v. Ford Motor Co.*, 494 F.2d 458, 460 (10th Cir. 1974); *Blohm v. Cardwell Mfg. Co.*, 380 F.2d 341, 344 (10th Cir. 1967). Whether in negligence or strict liability, allegations involving product design do not always present jury issues. *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934 (1977); *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974); *Stubblefield v. Johnson-Fagg, Inc.*, 379 F.2d 270 (10th Cir. 1967).

Ordinary care requires that a supplier, engaged in the manufacture of a product, possess sufficient technical knowledge to make reasonably accurate judgments

concerning product design, manufacture, packaging and testing. At a minimum, the defendant should possess the technical knowledge known to other responsible manufacturers of the product, and he is constructively charged with such knowledge. Restatement (Second) of Torts § 395, comment g (1966).

In a negligence action, as distinguished from an action based upon strict liability in tort, the manufacturer's obligation to possess and apply available knowledge relates to that which is "knowable" at the time of manufacture and sale of the product. *See generally*, the discussion of "knowledge" as a condition of liability which appears in *Ross v. Phillip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964).

13-1411. Supplier regarded as manufacturer.

Under a claim of failure to use ordinary care, a supplier who permits a product to be sold as [his] [her] [its] own is subject to the duties of a manufacturer, even though the product was, in fact, made by someone else.

A supplier permits a product to be sold as [his] [her] [its] own if [he] [she] [it] labels or markets it in such a way that the purchaser is reasonably led to believe that the supplier made the product or had the product made to [his] [her] [its] specifications.

USE NOTES

This instruction shall be given where an issue exists concerning the status of a defendant who has distributed the product but did not make it. For the purpose of applying the particular duties of the manufacturer contained in UJI 13-1410, the plaintiff is contending that the defendant has held itself out as the manufacturer. This instruction must not be given if plaintiff's case is based solely upon strict liability.

[As amended, effective November 1, 1991.]

Committee commentary. — The duties of the manufacturer are applied to suppliers who either appear to be the maker of a product or appear to have had a product manufactured for them. Restatement (Second) of Torts § 400 (1966). The factors for consideration are analogous to those which determine an agent's apparent authority. *Chevron Oil Co. v. Sutton*, 85 N.M. 679, 515 P.2d 1283 (1973). Under strict liability in tort, all in the chain of distribution of the product share with the manufacturer liability for a product presenting an unreasonable risk of injury. Restatement (Second) of Torts § 402A, comment f. Thus, provided [he] [she] [it] is in the chain of distribution, the supplier's "status" with respect to manufacture of the product is irrelevant.

[As revised, effective November 1, 1991.]

13-1412. Obvious or known danger; design and safety device.

The supplier is not relieved of a duty to use ordinary care [to design the product to avoid a risk] [or] [to adopt a safety device] simply because the risk is obvious or may be known to the user. The supplier must use ordinary care [to design the product to avoid the risk] [or] [to adopt a safety device] if the supplier could reasonably expect that the user will fail to protect [himself] [herself] or others, despite awareness of the danger.

In connection with the claim under "products liability," a product may present an unreasonable risk of injury even though the risk is obvious or may be known to the user. An obvious risk of injury is unacceptable and must be avoided by [product design] [or] [the adoption of a suitable safety device] where a reasonably prudent supplier having full knowledge of the risk would expect that the user will fail to protect [himself] [herself] or others, despite awareness of the danger.

USE NOTES

This instruction shall be given where a submissible issue is the adequacy of product design and defendant contends that the risk of injury associated with the design is obvious. This instruction must not be given where the sole theory of liability in the case is failure to warn. In a warning case, obviousness of the risk eliminates a duty to warn against the danger.

The first paragraph shall be given in the negligence action; the second paragraph applies to strict liability in tort. Where both theories apply, the entire instruction shall be read, and court and counsel should determine whether the negligence and strict liability portions should be read together or separated to avoid close repetition of similar language. Appropriate bracketed language shall be selected, depending upon the nature of plaintiff's design allegation.

[As amended, effective November 1, 1991.]

Committee commentary. — While obviousness of a danger eliminates a duty to warn of that danger (UJI 13-1415, bracketed third paragraph), it does not eliminate the duty to use ordinary care in the design and manufacture of a product. In the design of a product, a supplier may be required by ordinary care to consider and guard against an obvious danger.

The same principle applies in strict liability cases, where the focus is the acceptability of a particular risk of injury. The issue is whether the overall plan or design makes the product unreasonably dangerous. *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934, 938 (1977); *Rindlisbaker v. Wilson*, 95 Idaho 752, 519 P.2d 421, 427 (1974). With increasing frequency, products liability cases are predicated upon the supplier's failure to adopt a plan or design which incorporates features to reduce or eliminate obvious hazards. An example is the cases dealing with products sold without safety devices. *E.g., Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970). The supreme court's adoption of the principle of this instruction is implicit in its decisions in *Proctor v. Waxler*, 84 N.M. 361, 503 P.2d 644 (1972) and *Villanueva v.*

Nowlin, 77 N.M. 174, 420 P.2d 764 (1966). In the first case, the court recognizes that no duty exists to warn of obvious dangers. 77 N.M. at 176, 420 P.2d at 766. In the second, the court holds that ordinary care may require some action, apart from warning, to protect against obvious hazards. 84 N.M. at 363-4, 503 P.2d at 646-7.

13-1413. Manufacturer and lessor; duty to inspect; imputed knowledge.

A [manufacturer of a product] [lessor regularly engaged in leasing a product] must use ordinary care to inspect the product for conditions which will expose users [bystanders] to risk of injury and is charged with knowledge of that which a reasonable inspection would disclose.

USE NOTES

This instruction shall be given only if an issue exists concerning the necessity for, and adequacy of, inspection of the product and competent evidence has been presented to support a contention that a failure to inspect proximately caused plaintiff's injury. The instruction shall not be given unless the defendant supplier is either the manufacturer or a lessor of the product. For other suppliers, the duty to inspect is stated in UJI 13-1414.

Use of the appropriate brackets depends upon the identity of the defendant as manufacturer or lessor; bracketed "bystander" should be used where plaintiff was injured, but not while using the product.

Committee commentary. — The lessor of a chattel for immediate use and the manufacturer of a chattel are regarded as having the duty of inspection of a product before turning it over to the consumer. Restatement (Second) of Torts § 395, comment h and § 408, comment a (1965). No precise statement can be made of the minuteness of the inspection required. This varies with the circumstances and the degree of danger involved. Thus, the only acceptable definition is the requirement of ordinary care.

13-1414. Supplier who is not the manufacturer; no duty to inspect.

A supplier who did not make a product and has not permitted it to be sold as the supplier's own is ordinarily under no obligation to inspect it for conditions which expose users [bystanders] to risk of injury. However, a supplier who has knowledge which would lead a reasonably prudent person to undertake an inspection of the product before selling it is charged with knowledge of that which a reasonable inspection would disclose.

USE NOTES

This instruction is to be given where a nonmanufacturer is the defendant (retailer, wholesaler), and the defendant's failure to discover and warn against a defect in the

product after information has come to light sufficient to alert the reasonably prudent person is a submissible issue. This instruction is not to be given if the defendant is the manufacturer or lessor of the product.

[As amended, effective November 1, 1991.]

Committee commentary. — There is a clear distinction between the liability of a manufacturer and that of a seller of goods made by another. Restatement (Second) of Torts §§ 401 and 402 (1965). Absent some knowledge or reason to know that a product presents an unreasonable risk of injury, the law imposes no obligation on the seller to inspect for hidden defects. Restatement (Second) of Torts § 402, comment d.

13-1415. Duty of the supplier; warning.

The supplier must use ordinary care to warn of a risk of injury. However, there is no duty to warn of a risk unknown to the supplier, unless, by the use of ordinary care, the supplier should have known of the risk.

Under plaintiff's claim of "products liability", a product presents an unreasonable risk of injury if put on the market without warning of a risk which could be avoided by the giving of an adequate warning.

[The supplier has no duty to warn of risks which [he] [she] [it] can reasonably expect to be obvious or known to foreseeable users of the product.]

USE NOTES

This instruction must be given where the supplier's failure to warn of a risk of injury is a submissible issue.

The first paragraph shall be given in a negligence case. The second paragraph shall be given in a strict liability case. Where both theories are submitted, both paragraphs shall be given.

The bracketed third paragraph is used only if there is sufficient evidence to support a jury's determination that the risk of injury involved was one which a supplier could reasonably expect to be obvious to foreseeable users.

[As amended, effective November 1, 1991.]

Committee commentary. — Product suppliers have a duty to warn of nonobvious dangers associated with a product's use. Restatement (Second) of Torts § 388 (1965); *Villanueva v. Nowlin*, 77 N.M. 174, 175-176, 420 P.2d 764, 765 (1966). *See also Fabian v. E.W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978); *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934 (1977) and *Garrett v. Nissen Corp.*, 84 N.M. 16, 498 P.2d 1359 (1972). No attempt has been made in this chapter to define an obvious danger. It is

believed that the concept of obviousness is one which is understandable to, and can be applied by, jurors without further definition and that any attempt to provide more specific guidelines would simply be confusing. Similarly, there is no duty to warn a product user of risks of which he has actual knowledge. *Jones v. Minnesota Mining & Mfg. Co.*, 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

The duty to warn is further restricted by the concept of foreseeability. UJI 13-1403. A remote, unforeseeable risk of injury does not give rise to a duty to warn. *First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975); *Standhart v. Flintkote Co*., 84 N.M. 796, 508 P.2d 1283 (1973); *Van de Valde v. Volvo of America Corp.*, 101 N.M. 457, 744 P.2d 930 (Ct. App. 1987). As stated in the committee comment to UJI 13-1403, because the focus is foreseeable risk of injury, the duty to warn is not limited to risk of injury arising from the use intended by the supplier. A risk of injury which arises from an anticipatable, but unintended, use of the product gives rise to a duty to warn. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83-4 (4th Cir. 1962).

Failure to warn is a theory under strict products liability. In the language of Restatement (Second) of Torts § 402A, a product sold without an adequate warning of danger from a particular condition or use of the product is "defective;" in the language of these instructions, the product presents an "unreasonable risk of injury." *Cf. First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 85, 537 P.2d 682, 693 (Ct. App. 1975); *Schrib v. Seidenberg*, 80 N.M. 573, 577-8, 458 P.2d 825, 829-30 (Ct. App. 1969).

[As revised, effective November 1, 1991.]

13-1416. Duty of the supplier; directions for use.

The supplier must use ordinary care to provide directions for use of the product to avoid a risk of injury caused by a foreseeable manner of use.

Under plaintiff's claim of "products liability", a product presents an unreasonable risk of injury if put on the market without directions for use to avoid a risk of injury caused by a foreseeable manner of use.

[The supplier has no duty to provide directions when [he] [she] [it] can reasonably expect that the safe and proper use will be obvious or known to foreseeable users of the product.]

USE NOTES

This instruction must be given where the supplier's failure to provide adequate directions for use of the product is a submissible issue.

The first paragraph shall be given in a negligence case. The second paragraph shall be given in a strict liability case. Where both theories are submitted, both paragraphs

shall be given. If only strict liability is submitted, drop from the second paragraph the introductory phrase "Under plaintiff's claim of 'products liability.' "

The bracketed third paragraph is used only if there is sufficient evidence to support a jury determination that proper use of the product is obvious without directions.

[As amended, effective November 1, 1991.]

Committee commentary. — The duty of ordinary care may require the supplier to provide information which is more aptly described as instructional. Dillard and Hart, "Product Liability: Directions for Use and Duty to Warn," 41 Va. L. Rev. 145 (1955); *McClanahan v. California Spray Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953); 1 Frumer and Friedman, Products Liability § 8.05(1) (1976). Absent necessary directions for use, a product presents an "unreasonable risk of injury" under strict products liability.

13-1417. Warning or directions; means of communication.

To satisfy the duty [to warn] [to give directions for use], [a warning] [directions for use] must be communicated by a means which can reasonably be expected to reach [persons using the product] [and] [persons in the vicinity during the use of the product].

USE NOTES

This instruction is to be given where the adequacy of the means chosen by a supplier to communicate a warning or directions for use is a submissible jury issue. Where inadequacy of the manner of communication of a warning is not a theory of plaintiff's case or is not supported by competent evidence, this instruction shall not be given. Specifically, this instruction shall not be given if the plaintiff was a bystander under circumstances which would have made it impossible for the supplier to communicate a warning by any reasonable means.

The appropriate bracketed language should be selected depending upon whether plaintiff claims failure to warn of a risk of injury or failure to give directions for use of a product. In a few cases both may apply, and the instruction will have to be modified to include both warnings and directions. The proper bracketed material should be selected depending upon whether the injured party was a user or a bystander.

Committee commentary. — More often than not, a product is used by someone other than its purchaser. An issue frequently litigated in products liability cases is the sufficiency of the means selected by the supplier for communicating a warning or directions for use. Restatement (Second) of Torts 388, comment n (1965). Adequacy of the means selected depends upon the circumstances of the case, and no definitive guidelines can be given. Many factors are to be considered: (1) the purpose for which the product is supplied; (2) the seriousness and likelihood of harm if the user of the product does not receive the warning; (3) the feasibility of communicating the warning directly to the user instead of relying upon a third person to pass the warning on; (4) the

nature and extent of the burden and expense imposed upon the supplier by requiring that a warning be communicated directly to the user and (5) the supplier's knowledge of the reliability of the person to whom the warning is in fact given. *Cf. First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975).

There are circumstances in which a supplier's communication of a warning to his immediate vendee is sufficient as a matter of law or, as a matter of law, direct warning to the plaintiff is not possible or feasible. In such cases, the issue framed by this instruction must be taken from the jury. *Hines v. St. Joseph's Hosp.*, 86 N.M. 763, 765, 527 P.2d 1075 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974); *Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983); *Jones v. Minnesota Mining & Mfg. Co.*, 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983). Where a supplier has neither the right nor the means of controlling the format of final distribution and packaging of the product, he is entitled to rely upon his immediate vendee to communicate the warning; and he satisfies his duty by warning the vendee. *See First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 85, 537 P.2d 682, 693 (Ct. App. 1975). The most frequently cited examples of this limitation upon the duty to warn are prescription drugs and products sold to others for further processing and packaging. *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 156 N.W.2d 898 (1968). However, there are circumstances involving the distribution of drugs, where evidence exists of sufficient retention of control by the supplier to justify submitting to the factfinder the adequacy of the means of communication which the supplier utilized. *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121 (9th Cir. 1968).

[Revised, effective November 1, 1991.]

13-1418. Warning or directions; adequacy.

To satisfy the duty [to warn] [to give directions for use], [a warning] [directions for use] must be adequate. To be adequate, [a warning] [directions for use] must have certain characteristics:

(1) It must be in a form that can reasonably be expected to catch the attention of the reasonably foreseeable user of the product;

(2) It must be understandable to the reasonably foreseeable user of the product; and

(3) It must disclose the nature and extent of the danger. In this regard, there must be specified any harmful consequence which a reasonably foreseeable user would not understand from a general warning of the product's danger [or] [from a simple directive to use or not to use the product for a certain purpose or in a certain way].

USE NOTES

This instruction is to be given only if there is a jury issue as to the adequacy of a warning or directions for use communicated by a supplier. If no warning has been given by the supplier and jury issues are limited to whether a foreseeable risk of injury necessitated a warning, this instruction shall not be given.

The appropriate bracketed words are to be selected in the introductory paragraph depending upon whether the adequacy of a warning or directions for use is involved. In some cases, the adequacy of both warnings and directions may be an issue and, then, the introductory paragraph will have to be slightly modified to accommodate both warnings and directions. The bracketed language in Paragraph (3) should be given where the factual controversy over adequacy of a warning revolves around simple, directive language.

Committee commentary. — Adequacy of warning is a frequently litigated issue. *Richards v. Upjohn Co.*, 95 N.M. 675, 625 P.2d 1192 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980). See discussion and cases, 53 A.L.R.3d 239. It is ordinarily, but not always, an issue of fact. *Michael v. Warner/Chilcott*, 91 N.M. 651, 579 P.2d 183 (Ct. App. 1978). New Mexico appellate courts have cited with approval the elements contained in Restatement (Second) of Torts § 388 (1965). *Garrett v. Nissen Corp.*, 84 N.M. 16, 21, 498 P.2d 1359, 1364 (1972); *Villanueva v. Nowlin*, 77 N.M. 174, 175-6, 420 P.2d 764, 765 (1966). Of particular value in the formulation of this instruction have been the principles and reasoning of *Spruill v. Boyle-Midway, Inc*., 308 F.2d 79, 85 (4th Cir. 1962) and *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 75 A.L.R.2d 765 (Fla. 1958). These are leading cases cited and discussed with approval by the court of appeals in *First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 84, 537 P.2d 682, 692 (Ct. App. 1975).

Directive language may not serve its purpose unless it includes some indication of the hazard involved with nonobservance. For example, a sign warning, "Keep Off the Grass", is not sufficient to alert a reasonable person that the grass is infested with deadly snakes. *See Post v. American Cleaning Equip. Co.*, 437 S.W.2d 516 (Ky. 1968).

13-1419. Unavoidably unsafe products.

There are some products which, even when properly prepared and labeled, cannot be made safe for their intended and ordinary use. Because of the nature of ingredients or natural characteristics of the products, use of these products involves substantial risk of injury, and some users will necessarily be harmed. Such products are said to be unavoidably unsafe.

Unless the product unreasonably exposes users to risk of injury, there is no liability for supplying an unavoidably unsafe product. Whether users are unreasonably exposed to risk of injury turns upon a balancing of the dangers and benefits resulting from the product's use.

Where exposure to risk of injury from use of an unavoidably unsafe product is unreasonable [and the supplier knows or in the use of ordinary care should know of the risk of injury involved], the supplier is liable for physical harm proximately caused by the product's use. The supplier's liability extends [to persons who can reasonably be expected to use the product] [and] [to persons who can reasonably be expected to be in the vicinity during the use of the product].

USE NOTES

This instruction must be given only in cases in which the generic condition of the product gives rise to the risk of injury, for example, certain chemicals and drugs. The risk arises from the nature of the product and not from inadequacies of design, manufacture or labeling. It shall be used *only* where the plaintiff presents sufficient evidence that the product's hazardous characteristics are of such magnitude that the product should not have been put in the channels of commerce. Applicability of the instruction is further limited by the requirement that the injury result from an intended use of the product. The bracketed phrase "and the supplier knows or in the use of ordinary care should know of the risk of injury involved" shall be used only if plaintiff's claim is in negligence.

Committee commentary. — Under both negligence and strict liability, the law recognizes a potential liability for the formulation of a product. As negligence, this appears in Restatement (Second) of Torts § 389, "Chattel Unlikely to be Made Safe for Use" (1965). A supplier is liable for distributing a product which is entirely unsafe for the primary use for which it is sold, irrespective of the warnings which may accompany it. See the specially concurring opinion of *Hernandez, J. Michael v. Warner/Chilcott*, 91 N.M. 651, 657-58, 579 P.2d 183, 189-90 (Ct. App. 1978). For example, an explosive mixture of kerosene and gasoline, sold for use in kerosene lamps, can never be safe for that purpose. A warning will not relieve the supplier of responsibility. Under strict liability, as expressed in Restatement (Second) of Torts § 402A, the concept of a supplier's liability for unavoidably unsafe products is explained in the negative. An unavoidably unsafe product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous if the product is useful and the risk is reasonable. Restatement (Second) of Torts § 402A, comment k. The committee has combined both the negligence and strict liability expressions of this principle in a single instruction. Whether a risk is reasonable is a question for the jury, balancing the benefits and hazards of the product.

As stated in the directions for use, this theory of liability is applicable only where the hazard arises from an intended use of the product. Where injury is the result of foreseeable misuse of the product, liability turns upon duties of warning, testing and design.

13-1420. Res ipsa loquitur.

Plaintiff relies in part upon the doctrine of "res ipsa loquitur" which is a Latin phrase and means "the thing speaks for itself." Plaintiff relies upon this doctrine to prove that the claimed defective condition of the product existed at the time the product was supplied by defendant [and that the defective condition was the result of a failure to use ordinary care]. In order for the jury to find that plaintiff has proved [this] [these] element[s] of [his] [her] claim by reliance upon "res ipsa loquitur", plaintiff has the burden of proving:

1. that a defective condition existed at the time [he] [she] used the product;

2. the reasonable probability that the condition of the product was not substantially changed after it left the defendant's possession[; and]

[3. that the defect is of a kind which usually does not exist unless the supplier of the product has failed to use ordinary care].

If you find that plaintiff has proved [this] [these] proposition[s], then the law permits you to infer that the defective condition of the product existed at the time the product was supplied by defendant [and that the defect arose because of the supplier's failure to use ordinary care].

If, on the other hand, you find that plaintiff has not proved [this] [these] proposition[s], or if you find, notwithstanding such proof, that the product was not supplied in a defective condition [or that defendant used ordinary care], then plaintiff cannot prove [this] [these] element[s] of [his] [her] claim by reliance upon "res ipsa loquitur".

USE NOTES

The bracketed material is applicable only to a negligence action and shall not be given if the sole theory of plaintiff's case is strict liability.

This instruction is to be used where plaintiff's claim of products liability, on either a negligence or strict liability theory, rests upon the existence of a flaw in, or contamination of, the product. It has no application where the product was made as intended by the manufacturer, and liability is based solely upon contentions of inadequate warning or design. The instruction must not be given unless the court first determines, as a matter of law, that circumstantial evidence or expert testimony is of sufficient probative value to permit the jury to find that the condition of the product was not substantially changed or altered after the product left the supplier's hands. This determination involves consideration of the nature of the product (i.e., sealed container), nature of the alleged defect, lapse of time between manufacture and sale of the product and the accident, nature of intermediate handling and use of the product, nature of the accident and any other pertinent factors.

[As amended, effective November 1, 1991.]

Committee commentary. — In a products liability case, the doctrine of "res ipsa loquitur" is not available to prove the defect itself. This must be established by direct or circumstantial evidence. *Grammer v. Kohlhaas Tank & Equip. Co.*, 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979); *Springer Corp. v. Dallas & Mavis Forwarding Co.*, 90 N.M. 58, 559 P.2d 846, 848 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); *Montoya v. GMC*, 88 N.M. 583, 585, 544 P.2d 723, 725 (Ct. App. 1975); *Goodman v. Brock*, 83 N.M. 789, 791-2, 498 P.2d 676, 678-9 (1972); *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 518, 494 P.2d 178, 180 (Ct. App. 1971), cert. quashed, 83 N.M. 740, 497 P.2d 742 (1972); *Carter Farms Co. v. Hoffman-La Roche, Inc.*, 83 N.M. 383, 385, 492 P.2d 1000, 1002 (Ct. App. 1971). While inference of a defect from circumstantial evidence seems, in practical effect, to produce the same result as "res ipsa loquitur", theoretically there is a difference. *Tafoya v. Las Cruces Coca-Cola Bottling Co.*, 59 N.M. 43, 46, 278 P.2d 575, 577 (1955). Both avenues of proof establish, prima facie, a required element of plaintiff's case; however, "res ipsa loquitur" is said to give rise to a rebuttable presumption. In *Tafoya v. Coca-Cola Bottling Co.*, supra, the supreme court approved use of "res ipsa loquitur", under defined circumstances, to create a presumption of certain elements of the plaintiff's case, namely, proof that contamination was introduced at the time of manufacture and was a result of failure to use ordinary care. These are the elements contained with the drafted instruction. The committee has avoided use of the word "presumption" because of the belief that it is confusing to the average juror.

13-1421. Liability per se; statute or ordinance.

There was in force, at the time the product was _____ (made, leased or sold), a [statute] [ordinance] which provided that: _____ _____ (*NOTE: Here quote or paraphrase the applicable statute or ordinance.*)

If defendant conducted [himself] [herself] in violation of this [statute] [ordinance], such conduct created an unreasonable risk of injury for which defendant is liable for damages caused to plaintiff by the violation [unless you further find that the violation was excusable or justifiable].

[To legally justify or excuse a violation, the violator has the burden of showing that [he] [she] did that which a reasonably prudent supplier would have done, acting under similar circumstances, in desiring to obey the law].

USE NOTES

This instruction must be given only where there is a submissible issue concerning plaintiff's contention that a product was made or supplied in violation of a statute or ordinance. The court must make a preliminary determination of the applicability of the statute or ordinance relied upon by the plaintiff. Applicability depends upon the purpose of the legislation. The court must find that the statute or ordinance was enacted for the benefit or protection of the plaintiff, or for the benefit or protection of a class of the public

to which the plaintiff belongs, and that it establishes a duty upon the defendant. If the statute or ordinance was enacted to give protection against a particular hazard or form of harm, it is applicable only if the plaintiff's injury could be found to have been caused by the hazard which the statute intended to prevent.

Where this instruction is given, the applicable part of the statute or ordinance in question must be quoted or paraphrased.

The bracketed language referring to excuse or justification of the violation and the bracketed third paragraph should not be given unless the court holds, as a matter of law, that there is sufficient evidence of excuse or justification for the issue to go to the jury. Absent such evidence, the "liability per se" rule applies, and the defendant supplier is liable for damages caused by the violation.

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

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

Committee commentary. — Committee comments to Chapter 15, Statutes and Ordinances, are applicable. The conditions for application of this instruction, stated under Directions for Use, are generally accepted prerequisites to submission of liability per se. Restatement (Second) of Torts § 286 (1965); *Burran v. Dambold*, 422 F.2d 133 (10th Cir. 1970); *Nunneley v. Edgar Hotel*, 36 Cal. 2d 493, 225 P.2d 497 (1950).

13-1422. Changed or altered product.

In order for a supplier [a particular supplier who was in the chain of marketing the product] to be liable, the injury must have been caused by a condition of the product which was not substantially changed from the condition in which the [particular] supplier placed the product on the market or in which the supplier could have reasonably expected it to be used.

For substantial change in the product to relieve a supplier of liability, the change itself must be a cause of the harm done.

USE NOTES

This instruction must be given only where an issue has been raised concerning subsequent change or alteration of the product and sufficient evidence has been introduced to permit a finding that the change or alteration was a cause of the plaintiff's injury. The bracketed language should be selected where more than one supplier is involved.

Where substantial change or alteration of the product is a submissible issue, UJI 13-1401 NMRA should be expanded to reflect that the plaintiff has the burden of proving

that the defect relied upon was present when the product was originally sold or leased. For example, by changing the first sentence of Paragraph C of UJI 13-1401 NMRA to read:

> Plaintiff claims that defendant is subject to products liability for an unreasonable risk of harm arising when the product was [sold] [leased]. Plaintiff claims that the risk was caused by the product's condition at that time or a reasonably anticipatable manner of use and that this risk was a cause of plaintiff's injury and resulting damages.

[As amended, effective March 1, 2005.]

Committee commentary. — Under either negligence or strict liability theory, the plaintiff must prove that the product has reached him without substantial change in the condition in which it was supplied. *Springer Corp. v. Dallas & Mavis Forwarding Co.*, 90 N.M. 58, 559 P.2d 846, 847 (Ct. App. 1976), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 518, 494 P.2d 178, 180 (Ct. App. 1971); *Tafoya v. Las Cruces Coca-Cola Bottling Co.*, 59 N.M. 43, 47-8, 278 P.2d 575, 578 (1955); Restatement (Second) of Torts § 402A(1)(b) (1965). This element is ordinarily presented to the jury in the posture of an alleged alteration or change in the condition of the product and this is the format of the instruction.

13-1423. Strict products liability; component part.

"Products liability" applies to the supplier of [a component part] [material intended for further processing] which causes injury if, when added to or incorporated into the finished product, the [component part] [material] is substantially unchanged or is in a condition in which it could have been reasonably expected to be used.

For substantial change in the [component part] [material] to relieve a supplier of liability, the change itself must be a cause of the harm done.

USE NOTES

This instruction must be used only where a defendant is a supplier of a component of the final product or a product which undergoes further processing and sufficient evidence has been introduced to permit a finding that substantial change in the component is a cause of the plaintiff's injury. The appropriate bracketed language should be selected.

As with the issue covered by UJI 13-1422, the issue submitted by this instruction may require expansion of UJI 13-1401. *See* UJI 13-1422, Use Note.

[As amended, effective March 1, 2005.]

Committee commentary. — Restatement (Second) of Torts § 402A took no position on the application of strict liability in tort to suppliers of component parts and products sold for further processing. Restatement (Second) of Torts § 402A, comments p and q. The Restatement predicts that where no change occurs in the component itself, but it is merely incorporated into something larger, strict liability will carry through to the ultimate consumer. This prediction was proved accurate. *First Nat'l Bank v. Nor-Am Agrl. Prods., Inc.*, 88 N.M. 74, 86, 537 P.2d 682, 694 (Ct. App. 1975). The comments under UJI 13-1422 are applicable here; proof that the component has reached the consumer in substantially the same condition as that in which it was supplied is an element of plaintiff's case. *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276, 282-3 (1978). Here again, however, the element comes to the jury's attention in the context of a claim of change or further processing, as a cause of plaintiff's injury.

[Revised, effective March 1, 2005.]

13-1424. Causation; products liability.

A defective product[1] is "a cause" of [injury] [harm] [_____ (other)] if[, unbroken by an independent intervening cause,[2]] it contributes to bringing about the [injury] [harm] [_____ (*other*)] [, and if the [injury] [harm] [_____ (*other*)] would not have occurred without it]. It need not be the only explanation for the [injury] [harm] [_____ (*other*)], nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause," the defective product[1] must be reasonably connected as a significant link to the [injury] [harm] [_____ (*other*)].

USE NOTES

1. *See* UJIs 13-1406 and 13-1407 NMRA for a definition of "defective product."

2. The bracketed phrase referring to independent intervening cause and UJI 13-1424A NMRA will be used only if there is sufficient evidence of an independent intervening cause. *Torres v. El Paso Electric Co.*, 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386, dramatically limits the application of independent intervening cause under New Mexico law. The phrase is to be used when there is an unforeseeable force, not in operation at the time the defendant acted, that is not a concurrent cause of the plaintiff's injury. *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, 130 N.M. 532, 27 P.3d 1019. Independent intervening cause is not appropriate when a defendant is merely arguing lack of causation.

The applicable portions of this instruction must be used in all products liability cases. In an appropriate case, this instruction will be followed by UJI 13-1424A, 13-1425 or 13-1426 NMRA.

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. 11-8300-003, effective March 21, 2011.]

Committee commentary. — "Independent intervening cause, in contrast to comparative negligence, constitutes a complete defense." *Torres v. El Paso Electric Co.*, 1999-NMSC-029, ¶ 17, 127 N.M. 729, 987 P.2d 386. "[I]n New Mexico, the doctrine of independent intervening cause does not apply to a plaintiff's negligence." *Id.* ¶ 18. It can be applicable, however, when "the unforeseeable negligence of a third party can reasonably be said to break the chain of causation" so that the injury to the plaintiff was not proximately caused by the defendant. *Id.* ¶ 20. If a defendant alleges that a plaintiff's negligence was a cause of that plaintiff's injuries, principles of comparative causation apply. *See Scott v. Rizzo*, 96 N.M. 682, 688, 634 P.2d 1234, 1240 (1981) (recognizing the application of comparative fault to strict liability cases).

[As amended by Supreme Court Order No. 11-8300-003, effective March 21, 2011.]

13-1424A. Independent intervening cause; products liability.

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

USE NOTES

This instruction is to be used when the evidence presents an issue with regard to an independent intervening cause. This instruction is a companion instruction to UJI 13-1424 NMRA. *Torres v. El Paso Electric Co.*, 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386, dramatically limits the application of independent intervening cause under New Mexico law. The clause is to be used when there is an unforeseeable force, not in operation at the time the defendant acted, that is not a concurrent cause of the plaintiff's injury. *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, 130 N.M. 532, 27 P.3d 1019. Independent intervening cause is not appropriate when a defendant is merely arguing lack of causation.

[Adopted by Supreme Court Order No. 11-8300-003, effective March 21, 2011.]

Committee commentary. — This instruction was formerly a part of UJI 13-1424 NMRA, but was redrafted as a separate instruction to be consistent with UJIs 13-305 and 13-306 NMRA, which address causation and independent intervening cause in the context of negligence. "Independent intervening cause, in contrast to comparative negligence, constitutes a complete defense." *Torres v. El Paso Electric Co.*, 1999-NMSC-029, ¶ 17, 127 N.M. 729, 987 P.2d 386. "[I]n New Mexico, the doctrine of independent intervening cause does not apply to a plaintiff's negligence." *Id.* ¶ 18. It can be applicable, however, when "the unforeseeable negligence of a third party can reasonably be said to break the chain of causation" so that the injury to the plaintiff was not proximately caused by the defendant. *Id.* ¶ 20. If a defendant alleges that a plaintiff's negligence was a cause of that plaintiff's injuries, principles of comparative causation apply. *See Scott v. Rizzo*, 96 N.M. 682, 688, 634 P.2d 1234, 1240 (1981) (recognizing the application of comparative fault to strict liability cases). A criminal act does not necessarily constitute an independent intervening cause if that act was foreseeable and

resulted from the defendant's negligence. *See Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 32, 134 N.M. 43, 73 P.3d 181.

[Adopted by Supreme Court Order No. 11-8300-003, effective March 21, 2011.]

13-1425. Warning or directions; causation.

If, in light of all the circumstances of this case, [an adequate warning] [adequate directions for use] would have been noticed and acted upon to guard against the danger, a failure to give [an adequate warning] [adequate directions for use] is a cause of injury.

USE NOTES

This instruction must be given in all products liability cases, whether founded upon negligence or strict liability, where failure to warn is a submissible jury issue. The instruction is to be given immediately following UJI 13-1424 NMRA. Where failure to warn or product misrepresentation are not submissible jury issues, UJI 13-1424 NMRA is the only instruction to be given on causation.

[As amended, effective March 1, 2005.]

Committee commentary. — Whether presented in negligence or strict liability, products liability based upon failure to provide an adequate warning presents special problems of causation. The jury is required to evaluate the contribution, if any, which an inadequate warning made to the plaintiff's injury. The traditional causation definition does not adequately focus this issue and, therefore, the committee has drafted this separate instruction on causation in warning cases.

Other courts have dealt with the causation issue in a variety of ways. In *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972), causation in warning cases is resolved by reference to the principle that where warning is given, the seller may reasonably assume that it will be read and heeded. A corollary of that presumption is the presumption that the plaintiff would have read and heeded a warning which the jury determines should have been provided. The presumption of causation, used in *Technical Chemical Co. v. Jacobs*, *supra*, does not conclude argument on this element of plaintiff's case. Because the presumption may be invalid, the supplier is permitted to defeat proximate cause by producing evidence that, because of some circumstance, improper use of the product would have occurred regardless of a warning. Without limiting the possibilities, this could include evidence that the user was blind, illiterate, intoxicated at the time of the use or irresponsible or lax in judgment. *Cunningham v. Charles Pfizer & Co., Inc.*, 532 P.2d 1377, 1381-82, 94 A.L.R.3d 739 (Okla. 1974); *Technical Chem. Co. v. Jacobs*, *supra*.

A related but separate issue is whether the product's purchaser or user should be permitted to testify as to what would have been done had a warning been provided.

Such testimony can be regarded as objectionable on the grounds that it is both speculative and self-serving. *Drackett Prods. Co. v. Blue*, 152 So.2d 463 (Fla. 1963). Dicta in several New Mexico appellate decisions suggest that the question is proper. *Demers v. Gerety*, 85 N.M. 641, 651, 515 P.2d 645, 655 (Ct. App. 1973), *rev'd on other grounds*, 86 N.M. 141, 520 P.2d 869, *on remand,* 87 N.M. 52, 529 P.2d 278 (Ct. App.), *cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974); *Woods v. Brumlop*, 71 N.M. 221, 229, 377 P.2d 520, 525 (1962). Advocates of a presumption of causation in warning cases argue that if such a presumption is used then plaintiffs will not be faced with the necessity of offering self-serving testimony as to what would have been done had an adequate warning been provided.

Recognizing that this position leaves unresolved difficult evidentiary issues, the committee has determined that a presumption of causation should not be included in UJI 13-1425 NMRA until the Supreme Court of New Mexico has passed on the question raised by *Technical Chemical Co. v. Jacobs*, *supra*, and other comparable cases. The committee has simply stated a rule of proximate cause, without reference to the burden of proof, which focuses the jury's attention on that evidence which will assist the jury in determining whether an adequate warning would have been heeded. [Revised, effective March 1, 2005.]

13-1426. Strict products liability; misrepresentation; causation.

No instruction drafted.

Committee commentary. — The New Mexico Supreme Court has not ruled on § 402B of Restatement (Second) of Torts and the products liability theory there stated. Until such time as the Supreme Court does consider this issue, the trial judge must decide whatever doctrine will be applied.

In the event the trial judge decides to instruct on this theory, the following instruction may provide guidance:

A misrepresentation is a cause of an injury if it substantially influenced the decision to purchase or use a product, and the harm results from the fact which is misrepresented. Reliance upon a misrepresentation need not necessarily be that of the person injured. The necessary reliance exists if a purchaser is substantially influenced to buy the product because of the misrepresentation and passes the product on to a person who is in fact injured, but is ignorant of the misrepresentation. There is no cause between an injury and a misrepresentation if the fact which is misrepresented is unknown to the product's purchaser and users or there is indifference to the representation.

Causation is taken to be proved in the absence of evidence that a misrepresentation was unknown to or ignored by the product's purchaser and users or that the harm resulted from a condition or character of the product which was not misrepresented. The supplier has the burden of proving that, in light of all the circumstances of this case, a misrepresentation did not substantially influence the purchase or use of the product.

A misrepresentation is not a cause without which the plaintiff's injury would not have occurred unless the plaintiff, or someone who gave the plaintiff the product to use, was induced by the representation to purchase or use the product. There is a second element to causation in a misrepresentation case. The injury must result from the quality, condition or character, which was misrepresented.

[Revised, effective March 1, 2005.]

13-1427. Comparative negligence defense.

[A user of a product] [a person in the vicinity during the use of a product] has a duty to use ordinary care to avoid a foreseeable risk of injury caused by the condition of the product or a manner in which it is used. Ordinary care is that care exercised by a reasonably prudent person and varies with the nature of what is being done. As the danger that should reasonably be foreseen increases, the amount of care required also increases.

USE NOTES

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

[As amended, effective March 1, 2005.]

Committee commentary. — Prior to the adoption of comparative negligence in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981), only a limited form of contributory negligence constituted a defense to an action in strict liability in tort. A plaintiff's recovery was barred by the intentional and unreasonable exposure to a known risk, the contributory negligence which lawyers have traditionally known as "assumption of risk." Other forms of contributory negligence, including the plaintiff's negligent failure to discover a product defect, were not a defense. *Rudisaile v. Hawk Aviation, Inc.*, 92 N.M. 575, 592 P.2d 175 (1979).

Since the adoption of comparative negligence and the principle that each person is responsible for his or her conduct contributing to an injury, New Mexico courts have seen no reason to exclude products liability cases from the operation of comparative fault. *Scott v. Rizzo*, supra, expressly reserved the question of whether comparative negligence would apply in cases of strict liability in tort and, if so, the scope of the contributory negligence defense; in *Marchese v. Warner Communications, Inc.*, 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983), cert. denied, 100 N.M. 259, 669 P.2d 735 (1983), the New Mexico Court of Appeals decided the issue holding that a plaintiff's conventional contributory negligence is a defense in strict liability actions and reduces the plaintiff's damages in proportion to the plaintiff's fault. *See also*, *Jaramillo v. Fisher Controls Co., Inc.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985), cert. denied, 102 N.M. 613, 698 P.2d 886 (1985). The use of the broad term "products liability claims" in both

Marchese v. Warner Communications, Inc., supra, and *Jaramillo v. Fisher Controls Co., Inc.*, supra, supports the conclusion that comparative fault principles apply with equal force to any theory of liability for a product related injury, whether negligence, strict liability in tort or breach of warranty. [Revised, effective November 1, 1991.]

13-1428. Creation and breach of express warranty.

A supplier's [description] [statement of fact] about [goods] [a product] which [he] [she] [it] sells, creates a warranty that the [goods] [product] will conform to the [description] [statement of fact], if,

(1) the supplier communicated the [description] [statement of fact] under circumstances which make it fair to regard it as part of the contract, and

(2) the [description] [statement of fact] is of a kind which would influence the buyer's decision to buy the [goods] [product].

[A warranty is not created by sales talk which a reasonably prudent buyer would interpret as merely a salesperson's recommendation or opinion.]

[A sample or model of the [goods] [product] may be used to create a warranty that the [goods] [product] will conform to the sample or model.]

A supplier breaches an express warranty if the [goods] [product] do not conform to the supplier's [description] [statement of fact] of their condition or promised performance.

USE NOTES

The proof in a case will dictate the choice between "goods" and "product." Ordinarily "goods" will be used in a case involving only economic loss.

Only the bracketed second paragraph of this instruction shall be used where sufficient evidence has been introduced at trial to justify a jury's conclusion that the statements relied upon in creating an express warranty were merely "puffing". The third paragraph will be used where the warranty was allegedly created by exhibiting a sample or model of the product.

[As amended, effective November 1, 1991.]

Committee commentary. — Beginning with this instruction, Chapter 14 states the elements of, and defenses to, actions for breach of express and implied warranties as codified in 55-2-313 to 55-2-318 NMSA 1978. The language of the statute, and consequently the language of the instructions, is the language of sales law. While breach of warranty instructions seem best suited for cases involving commercial loss, personal injury cases may involve breach of express warranties and actions for breach

of the implied warranties contained in this chapter are clearly available to a plaintiff as additional theories of liability. *Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983).

Nonetheless, products which are sold in a defective condition and give rise to strict liability are products which, almost invariably, give rise to an action for breach of implied warranty. Most courts and commentators have been unable to state a rational distinction between the merchantability standard of 55-2-314 NMSA 1978 and the comparable standard in strict liability of § 402A of Restatement (Second) of Torts. See discussion in White and Summers, Uniform Commercial Code, § 9-7 (1972 ed.). While it is clear that the code remedies are available in the personal injury case, it is not clear that strict liability in tort is available to the plaintiff who has sustained purely economic loss, consisting of loss of bargain and consequential damage such as loss of profits. See the introduction to this chapter. Thus, it is contemplated that the breach of warranty instructions in this chapter will be the instructions ordinarily given in a case involving purely economic loss.

Section 55-2-313 NMSA 1978 uses the language "part of the basis of the bargain" to state the requirement that the statement or promise which creates a warranty must have been communicated at a time and under circumstances which justify a conclusion that the seller and buyer regarded the statement as contractual. As stated in the excellent discussion of express warranties in *Vitro Corp. of Am. v. Texas Vitrified Supply Co.*, 71 N.M. 95, 376 P.2d 41 (1962), it is not necessary that the giving of a warranty be simultaneous with the sale. 71 N.M. at 104. This is similarly recognized by the code. Uniform Commercial Code, 1962 Official Text, § 2-313, comment 7 (1962). However, the statement relied upon must have been made under circumstances which justifiably infer reliance by the buyer. *Stang v. Hertz Corp.*, 83 N.M. 217, 219, 490 P.2d 475 (Ct. App. 1971), *rev'd on other grounds*, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972) (holding that insufficient evidence existed that a statement by lessor concerning "good tires" on a leased vehicle became part of the basis of the bargain).

The committee believes that the phrase "basis of the bargain" is awkward and has used instead the equivalent statement from *Vitro Corp. of Am. v. Texas Vitrified Supply Co.*, supra. "It is enough if it is made under such circumstances as to warrant the inference that it enters into the contract as finally made." 71 N.M. at 104.

The language of the Uniform Commercial Code is poor language for jury consideration and, therefore, other words have been selected to express the matter. The phrase "statement of facts" was used in preference to "representation," as that phrase finds more acceptance in contract law than in tort law. However, the "statement of facts" is more than merely an opinion. It is intended that the phrase "statement of facts" is more of a "promise or affirmation of facts".

Section 55-2-313 NMSA 1978 carries forward the common-law recognition that not all statements made during negotiation of a contract can be fairly regarded as warranties. This is implicit in the definition of express warranty. In an appropriate case, the second

paragraph of this instruction explicitly states that mere sales talk or puffing does not constitute contractual language. Uniform Commercial Code, 1962 Official Text, § 2-313, comment 8.

13-1429. Creation of implied warranty of merchantability.

[Unless excluded], a supplier who regularly deals in [goods] [products] of the kind that [he] [she] is selling or holds [himself] [herself] out as having special knowledge or skill concerning the [goods] [products], warrants that the [goods] [products] shall be merchantable. The warranty of merchantability is implied by law and exists independent of any statement made by the seller to the buyer.

[The warranty of merchantability is included in any sale or service of food or drink.]

USE NOTES

Unless the warranty has been excluded as a matter of law, applying the rules of Section 55-2-316 NMSA 1978, the first paragraph of this instruction shall be used in every case where plaintiff states a cause of action for breach of the implied warranty of merchantability. The bracketed second paragraph is to be given in a case involving the sale or service of food products or beverages.

[As amended, effective November 1, 1991.]

Committee commentary. — The implied warranty of merchantability is given by sellers who are merchants. "Merchant" is defined in 55-2-104 NMSA 1978. UJI 13-1429 incorporates the definition of merchant in a statement of the creation of the implied warranty of merchantability. In contrast with the implied warranty of fitness for particular purpose, the implied warranty of merchantability does not require proof by the buyer of reliance on the particular skills or judgment of the seller. It arises from the nature of the holding out by the seller that he is a person who deals in goods of the kind being sold. *Vitro Corp. of Am. v. Texas Vitrified Supply Co.*, 71 N.M. 95, 106, 376 P.2d 41 (1962).

13-1430. Breach of implied warranty of merchantability.

A supplier breaches the implied warranty of merchantability:

[1. If the goods sold would be rejected by someone knowledgeable in the trade for failure to meet the contract description]; [or]

[2. If goods sold in bulk are not of fair average quality for the type of goods described by the contract. The goods need not be the best quality but they must pass without objection in the trade]; [or]

[3. If the [goods] [products] are not fit for the ordinary purposes for which such [goods] [products] are used]; [or]

[4. If the goods do not run within variations permitted by the contract for the reason that there are wide differences in type, quality and quantity within delivered units and among all units involved]; [or]

[5. If the [goods] [products] are not adequately contained, packaged and labeled as required by the contract]; [or]

[6. If the [goods] [products] do not conform to the promises or statements made by the seller on the container or label]; [or]

[7. If the food or drink is unwholesome or unfit for human consumption].

USE NOTES

Select the bracketed material which fits the actual issues and evidence involved in the case. With this instruction, UJI 13-1429 must also be used. This list of items is not exclusive. Reference should be made to the Uniform Commercial Code 55-2-314 NMSA 1978 for further specifications.

[As amended by Supreme Court Order No. 08-8300-061, effective February 2, 2009.]

Committee commentary. — The elements of merchantability used in this instruction are those set out in the statute, 55-2-314 NMSA 1978. It is unlikely that all elements will be involved in any single case, and the court and counsel must use great care in choosing those elements which are suitable under the evidence. Giving an element of breach of merchantability which is not applicable on the evidence presented by the plaintiff may interject a false issue in the case. Elements (1), (2) and (4) will ordinarily have application only in cases of commercial loss. Where these instructions are used in a case involving personal injury, the elements of merchantability set out in (3), (5) and (6) may be applicable and "products" should be used for "goods".

The question which has received considerable discussion is whether, in a personal injury case, strict liability in tort and breach of the implied warranty of merchantability are comparable standards. It is felt by some that the standard of § 402A is narrower in that it pegs liability to an unreasonable risk of injury. White and Summers, Uniform Commercial Code, § 9-8 (1972 ed.). The committee does not share this view. While § 402A may be narrower in scope and eventually held to be inapplicable to cases involving solely economic loss, in the context of a personal injury action, there would seem to be little difference between the two standards as applied in the courts. It is precisely for this reason that the committee suggests use of the tort standard in personal injury cases and use of the merchantability standard in commercial cases. While both causes of action are available to the plaintiff, the use of two instructions and terminologies to define the same thing may well be confusing to the jury.

A review of New Mexico cases indicates that theories of implied warranty are predominantly used by lawyers in cases of commercial loss. *Jesko v. Stauffer Chem.*

Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976); *Standhardt v. Flintkote Co.*, 84 N.M. 796, 508 P.2d 1283 (1973); *Vitro Corp. of Am. v. Texas Vitrified Supply Co.*, 71 N.M. 95, 376 P.2d 41 (1962).

Prior to the adoption of strict liability in tort, attorneys quite naturally turned to implied warranties at common law and as expressed in the code to express a cause of action which did not require proof of negligence. *E.g. Phares v. Sandia Lumber Co.*, 62 N.M. 90, 305 P.2d 367 (1956). With the adoption of strict liability in tort by *Stang v. Hertz Corp*, 83 N.M. 730, 497 P.2d 732, 52 A.L.R.3d 112 (1972), resort to the code was no longer necessary and, in fact, generally undesirable because of the availability of defenses. It is expected that the trend will continue with personal injury actions developing under the doctrine of strict liability in tort and commercial cases finding application through the warranties of the code.

13-1431. Creation of implied warranty of fitness for particular purpose.

If the seller has reason to know at the time the contract is made that the [goods] [products] are purchased for any particular purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable [goods] [products], there is an implied warranty that the [goods] [products] are fit for the purpose [unless the warranty is excluded]. The warranty is implied by law in the seller's and buyer's contract and may exist independent of anything said by the seller.

USE NOTES

This instruction shall be given where applicable on the evidence and plaintiff has proved a submissible case under 55-2-315 NMSA 1978. The bracketed material should be used where a submissible issue exists concerning exclusion of the implied warranty.

Committee commentary. — Prior to the enactment of 55-2-315 NMSA 1978, the elements of the implied warranty of fitness for particular purpose were outlined in New Mexico cases. *Vitro Corp. of Am. v. Texas Vitrified Supply Co.*, 71 N.M. 95, 376 P.2d 41 (1962); *J.B. Colt Co. v. Gavin*, 33 N.M. 169, 262 P. 529 (1927). As stated in comment 1 of the official comments to the Uniform Commercial Code, whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. The seller must have reason to realize the purpose intended for the goods or that the buyer is relying on the seller's skill or judgment but actual knowledge of the particular purpose is not required. In contrast to the action for breach of implied warranty of merchantability, actual reliance upon the seller is required to establish breach of the implied warranty of fitness for a particular purpose. See discussion of both implied warranties in *Vitro Corp. of Am. v. Texas Vitrified Supply Co.*, 71 N.M. 95, 105-11, 376 P.2d 41 (1962).

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

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

USE NOTES

This instruction shall be given in every case where the court submits an issue of breach of implied warranty of fitness for particular purpose. The instruction is to be given immediately following the instruction on creation of implied warranty of fitness for particular purpose, UJI 13-1431 NMRA.

Committee commentary. — The committee believes that it is important to point out to the jury that the product may have no defects and yet be unsuitable for a particular purpose; hence, the inclusion of the element that a defect-free product may breach the implied warranty of fitness for particular purpose. *J.B. Colt Co. v. Gavin*, 33 N.M. 169, 170, 262 P. 529 (1927).

13-1433. Exclusion of implied warranties.

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

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

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

[If a buyer of [goods] [products] is given an opportunity to examine the [goods] [products] before agreeing to buy and refuses to examine the [goods] [products], or if [he] [she] [it] conducts an examination, there is no implied warranty with respect to defects which a reasonable examination should have revealed.]

USE NOTES

The appropriate bracketed paragraph will be selected depending upon the nature of the warranty claimed by the plaintiff and the type of exclusion relied upon by the defendant. The bracketed first paragraph is applicable to either the implied warranty of merchantability or implied warranty of fitness for a particular purpose. The bracketed second paragraph is applicable only to the exclusion of the implied warranty of merchantability. The bracketed third paragraph is applicable only to the exclusion of the

implied warranty of fitness for a particular purpose. The bracketed fourth paragraph is applicable to either the implied warranty of merchantability or implied warranty of fitness for a particular purpose.

[As amended, effective November 1, 1991.]

Committee commentary. — This instruction does not cover all circumstances of exclusion of warranties as set forth in 55-2-316 NMSA 1978. Thus, disclaimers of express warranties are possible under the Uniform Commercial Code, 55-2-316(1) NMSA 1978, but the committee has not drafted an instruction in accordance with that section. Court and counsel will have to draft an instruction where exclusion of an express warranty is a submissible issue. Similarly, the committee has not provided for an issue regarding exclusion of implied warranties by course of dealing or course of performance or usage of trade. Section 55-2-316(3)(c) NMSA 1978.

CHAPTER 15
Statutes and Ordinances

Introduction

The instructions of this chapter are drafted to embody the statutes of the state and the ordinances of the various municipalities. The use of the instructions of this chapter will encompass hundreds of statutes and ordinances and avoid burdening this pamphlet with individual instructions on the particular statutes and ordinances. The instructions of this chapter will be used extensively in the large volume of motor vehicle lawsuits which flood the courts.

These instructions are applicable with reference to any party to a lawsuit and, in the proper case, also to minors, decedents or others on behalf of whom a lawsuit is brought by another.

Instructions on violations of a statute or ordinance should not be given unless the evidence is sufficient to raise a jury question and to support a finding that the violation actually occurred.

The first four instructions in this chapter require the trial lawyer to add, as a second paragraph of the instruction, the particular statute or ordinance which it is alleged was violated. Certainly there can be no error in quoting the statute or ordinance verbatim. However, it may be better practice, particularly when the statute or ordinance is complicated, technical or drafted in language not readily understood by the jury, to paraphrase the particular statute or ordinance in question, in order to aid the jury in understanding the matters in issue.

In many jurisdictions adopting uniform or pattern jury instructions, there are included separate instructions in motor vehicle cases on all of the various rules of the road,

equipment requirements and matters of like nature. The New Mexico committee has determined that there is no justification in drafting individual instructions on the various statutes and ordinances that may be applicable and is confident that the trial attorneys, under the guidance of the trial court can and will effectively present the issues to the jury using the framework here provided.

Since the publication of the first edition of New Mexico Uniform Jury Instructions - Civil, instructions involving this chapter have been before the New Mexico appellate courts in the following cases: *Garner v. Valley Sav. & Loan Ass'n*, 91 N.M. 725, 580 P.2d 493 (Ct. App. 1978); *Kight v. Butscher*, 90 N.M. 386, 564 P.2d 189 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977); *Archibeque v. Homrich*, 87 N.M. 265, 531 P.2d 1238 (Ct. App.), rev'd on other grounds, 88 N.M. 527, 543 P.2d 820 (1975); *May v. Baklini*, 85 N.M. 150, 509 P.2d 1345 (Ct. App.), cert. denied, 85 N.M. 144, 509 P.2d 1339 (1973); *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973); *LaBarge v. Stewart*, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972); *Tafoya v. Whitson*, 83 N.M. 23, 487 P.2d 1093 (Ct. App.), cert. denied, 83 N.M. 22, 487 P.2d 1092 (1971); *Paddock v. Schuelke*, 81 N.M. 759, 473 P.2d 373 (Ct. App. 1970); *Kelly v. Montoya*, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970); *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969); *Tenorio v. Nolen*, 80 N.M. 529, 458 P.2d 604 (Ct. App. 1969); *Butcher v. Safeway Stores*, 78 N.M. 593, 435 P.2d 212 (Ct. App. 1967).

13-1501. Violation of statute.

There [was a] [were] statute[s] in force in this state, at the time of the occurrence in question, which provided that:

(Quote or paraphrase the applicable part of the statute in question. If more than one statute is in question, list each statute separately)

If you find from the evidence that _____ *(party)* violated [this] [any one of these] statute[s], then _____'s conduct constitutes negligence as a matter of law, [unless you further find that such violation was excusable or justified].

[To legally justify or excuse a violation of a statute, the violator must sustain the burden of showing that [s]he did that which might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.]

USE NOTES

In order to facilitate the use of the instruction by the trial court instruction (13-1501) is to be used only when a statute is involved, whereas the companion instruction (13-1502) is to be used when an ordinance is involved.

The statute in question must have been enacted for the benefit or protection of the party or of a class of the public to which he belongs before the instruction is applicable. The last bracketed phrase of the third paragraph and the last paragraph are to be used when there is evidence of excuse or justification in the violation of the statute.

If the court finds that a regulation may be the basis for a claim of negligence per se, this instruction may be modified accordingly.

UJI 13-1503 should be used in addition to this instruction when there is an issue of proximate cause.

This instruction is applicable in all cases involving a statute.

The blank lines in the third paragraph of the instruction are to be completed by referring either to plaintiff, defendant or other pleading designation of the party or to the name of the party as may be applicable under the circumstances.

[As amended, effective November 1, 1991.]

Committee commentary. — The violation of a statute which is enacted for the benefit or protection of the party claiming injury from the violator or enacted for the benefit or protection of a class of the public to which such person is a member is negligence per se. *Hayes v. Hagemeier*, 75 N.M. 70, 400 P.2d 945 (1963); *Bouldin v. Sategna*, 71 N.M. 329, 378 P.2d 370 (1963); *Zamora v. J. Korber & Co.*, 59 N.M. 33, 278 P.2d 569 (1954). The same principle of law is applicable to the violation of a municipal ordinance. *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 349 P.2d 1029 (1960). This instruction will find its greatest utility in motor vehicle cases. A minor driver is held to the same standard of an adult driver in motor vehicle cases. *Adams v. Lopez*, 75 N.M. 503, 407 P.2d 50 (1965).

Instructions are drafted for the benefit of the jury and not for the court or lawyer, and, therefore, terms such as "negligence per se" should be omitted, as such terms, rather than having any special meaning to the jury, are only confusing. However, the New Mexico law is specific that the violation of the statute which is enacted for the benefit or protection of the party claiming injury from the violator or for the benefit or protection of a class of the public to which such person is a member is negligence per se.

The test for negligence per se is the following: (1) there must be a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly; (2) the defendant must violate the statute; (3) the plaintiff must be in the class of persons sought to be protected by the statute and (4) the harm or injury to the plaintiff must generally be of the type of harm or injury the legislature, through the statute, sought to prevent. *Archibeque v. Homrich*, 88 N.M. 527, 543 P.2d 820 (1975).

The legislature did not explicitly state whom it sought to protect in 64-18-8 and 64-18-16 NMSA, 1953 Comp. (similar provisions at 66-7-308 and 66-7-317 NMSA 1978);

nevertheless, it is reasonable to assume that it was the motoring public in general, including passengers, and that the harm sought to be prevented was head-on collisions or sideswiping the opposite-moving traffic, since it is doubtful that the statute could have been intended by the legislature to apply to a one-car accident of unknown cause in which driver and passenger were killed (regardless of the fact that evidence showed the car crossed into the left-hand lane before its final plunge), and the district court properly refused to submit a negligence per se instruction based on these statutes to the jury. *Archibeque v. Homrich*, 88 N.M. 527, 543 P.2d 820 (1975) (statutes repealed but legal theory still applicable).

It was not error for the trial court to instruct the jury in the language of 64-18-24 NMSA, 1953 Comp. (similar provision at 66-7-325 NMSA 1978), which requires the giving of a signal before stopping, decreasing speed or turning right or left from a public highway, where plaintiff motorist who had stopped his vehicle in time to avoid striking a nonsignaling vehicle was struck from rear by defendant; the court did not interject a false issue into the case in that the lead car's failure to signal went to the issue of proximate cause with respect to this lawsuit, and another instruction informed the jury that a statutory violation must have been the proximate cause. *Sandoval v. Cortez*, 88 N.M. 170, 538 P.2d 1192 (Ct. App. 1975) (specific statute repealed but not the legal principle).

The application of the doctrine of excuse or justification for violation of the statute is well recognized in New Mexico under proper circumstances. *See Whitfield Tank Lines v. Navajo Freight Lines*, 90 N.M. 454, 564 P.2d 1336 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977); *Kight v. Butscher*, 90 N.M. 386, 564 P.2d 189 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977); *Tenorio v. Nolen*, 80 N.M. 529, 458 P.2d 604 (Ct. App. 1969); *Hayes v. Hagemeier*, 75 N.M. 70, 400 P.2d 945 (1963).

13-1502. Violation of ordinance.

There [was an] [were] ordinance[s] in force in the city of _____, at the time of the occurrence in question, which provided as follows:

(Quote or paraphrase the applicable part of the ordinance in question. If more than one ordinance is in question, list each ordinance separately.)

If you find from the evidence that defendant violated [any of these] [this] ordinance[s], then you are instructed that such conduct constituted negligence as a matter of law, [unless you further find that such violation was excusable or justified.]

[To legally justify or excuse a violation of the ordinance, the violator must sustain the burden of showing that [s]he did that which might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.]

USE NOTES

In the blank space in the first paragraph of the instruction, the name of the city in question needs to be added.

The second paragraph of this instruction will be a quotation or a paraphrase of the ordinance involved.

The last bracketed phrase of the third paragraph and the last paragraph are to be used when there is evidence of excuse or justification in the violation of the ordinance.

Identify the party, in the third paragraph, who may have violated the ordinance under the evidence presented by name or by pleading designation such as plaintiff, defendant, third party, etc.

In the first edition, UJI 13-1101 was drafted to cover both statute and ordinance violations. The second edition has created a separate instruction for ordinances and a separate instruction for statutes, simply to facilitate the use by the trial court in getting the instructions printed in advance.

The use note to UJI 13-1501 apply with equal force here.

[As amended, effective November 1, 1991.]

Committee commentary. — It has been held in New Mexico that the violation of an ordinance may be justified or excused under certain circumstances. *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 349 P.2d 1029 (1960). *See also* committee commentary to UJI 13-1503.

See the committee commentary to UJI 13-1501.

13-1503. Violation of statute; causation.

Negligence resulting from a violation of a[n] [statute] [or] [ordinance] is no different in effect from that resulting from other acts or omissions constituting negligence. In each case the negligence is of no consequence unless it was a cause of or contributed to, an injury found by you to have been suffered by the plaintiff.

USE NOTES

Where there are various claims of negligence arising from the same act or acts of a party, it may be proper to give this instruction immediately following one of the other instructions in this chapter.

The instruction will need to be modified and amended if it is the defendant contending that the plaintiff's damages were due to the plaintiff's violation of the statute or ordinance.

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

Committee commentary. — To be actionable, the negligence resulting from the violation of a statute or ordinance must be a cause of the injury complained of and be so found by the jury. *Baca v. Board of County Comm'rs*, 76 N.M. 88, 412 P.2d 389 (1966); *Horrocks v. Rounds*, 70 N.M. 73, 370 P.2d 799 (1962); *Hartford Fire Ins. Co. v. Horne*, 65 N.M. 440, 338 P.2d 1067 (1959).

[Revised, effective November 1, 1991; March 1, 2005.]

13-1504. Presentation of statute or ordinance; no negligence per se.

There [was] [were] [a] [an] [statute][s] [ordinance][s] in force in this state at the time of the occurrence in question which provided as follows:

> (Quote or paraphrase the applicable part of the statute in question. If more than one statute is in question, list each statute separately.)

USE NOTES

This instruction is to be used where a statute or ordinance is relevant to an issue in the case other than negligence per se, and the trial court determines that the language of the statute or ordinance should be brought to the attention of the jury.

[As amended, effective November 1, 1991.]

Committee commentary. — It has been held in New Mexico that the violation of an ordinance may be justified or excused under certain circumstances. *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 349 P.2d 1029 (1960). *See also* committee commentary to UJI 13-1503.

13-1505. Withdrawn.

CHAPTER 16
Tort Law — Negligence

Introduction

It is the intent of this chapter to provide the court and bar with jury instructions typical of a tort case. It is not intended, however, to preclude the use of other instructions as may be necessary in any particular case. See Rules of Civil Procedure Paragraph F of Rule 1-051. It is important to note, however, that the instructions identified in Chapter 21 are not to be given to the jury. The instructions in Chapter 16 should be personalized in order to make them more meaningful to the jury, particularly by inserting the names of the parties and the locale.

General and special verdict forms for comparative negligence cases appear with other verdicts and special interrogatories in Chapter 22.

13-1601. Negligence (of all persons); definition.

The term "negligence" may relate either to an act or a failure to act.

An act, to be "negligence", must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.

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

USE NOTES

This is a basic instruction defining negligence and is to be used when negligence is an issue unless the term is specifically defined in a separate chapter, e.g., medical malpractice.

No separate definition is given of contributory negligence. The negligence of all parties whose negligence is to be compared - plaintiff, defendant, other parties or absent persons - is defined by this single instruction.

[As amended, effective November 1, 1991.]

Committee commentary. — The definition of negligence as found in the Restatement, Torts § 284, from which this instruction was adopted, was approved, inter alia, in *Cotter v. Novak*, 57 N.M. 639, 261 P.2d 827 (1953); *Krametbauer v. McDonald*, 44 N.M. 473, 104 P.2d 900 (1940). It includes the indispensable element of foreseeability which is discussed in *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Valdez v. Gonzalez*, 50 N.M. 281, 176 P.2d 173 (1946); and *Reif v. Morrison*, 44 N.M. 201, 100 P.2d 229 (1940).

13-1602. Withdrawn.

13-1603. Ordinary care.

"Ordinary care" is that care which a reasonably prudent person would use in the conduct of the person's own affairs. What constitutes "ordinary care" varies with the nature of what is being done.

As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the

conduct in question must be considered in the light of all the surrounding circumstances.

USE NOTES

This instruction should be used whenever the term "ordinary care" is used. A duty instruction, e.g., UJI 13-1604 or a duty instruction specifically covering the subject matter, must be used in conjunction with this instruction.

[As amended, effective November 1, 1991.]

Committee commentary. — Ordinary care, due care and reasonable care are interchangeable terms. *Archuleta v. Jacobs*, 43 N.M. 425, 94 P.2d 706 (1939). Ordinary care is a relative term and depends upon the circumstances involved. *Latimer v. City of Clovis*, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972); *Ferreira v. Sanchez*, 79 N.M. 768, 449 P.2d 784 (1969); *White v. City of Lovington*, 78 N.M. 628, 435 P.2d 1010 (Ct. App. 1967); *Archuleta v. Jacobs*, 43 N.M. 425, 94 P.2d 706 (1939).

There are no "degrees" of care. The degree of care does not vary with the increase or diminution of danger. It continues to be "ordinary" in degree but the quantum of diligence to be used differs under different conditions. *Ferreira v. Sanchez*, 79 N.M. 768, 449 P.2d 784 (1969); *Archuleta v. Jacobs*, 43 N.M. 425, 94 P.2d 706 (1939).

The N.M. appellate courts have cited this definition in a number of cases. *See, e.g.*, *De La O v. Bimbo's Restaurant, Inc.*, 89 N.M. 800, 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976); *Hughes v. Walker*, 78 N.M. 63, 428 P.2d 37 (1967).

13-1604. Duty to use ordinary care.

Every person has a duty to exercise ordinary care for the safety of the person and the property of others.

[Every person also has a duty to exercise ordinary care for the person's own safety and the safety of [his] [her] property.]

USE NOTES

The bracketed material is to be used only when the party seeking recovery has been charged with lack of ordinary care.

This instruction must be used in those cases where the duty or duties in issue are not set forth in instructions specifically covering the subject matter.

[As amended, effective November 1, 1991.]

Committee commentary. — This instruction is a consolidation of UJI Civ. 12.3 and 12.4 of the first edition. It was held reversible error to refuse to give UJI Civ. 12.3 in *De La O v. Bimbo's Restaurant*, 89 N.M. 800, 558 P.2d 69, cert. denied, 90 N.M. 7, 558 P.2d 619 (Ct. App. 1976). The court held that the definition of ordinary care (UJI 13-1603) does not exclusively "cover" the subject and must be accompanied by this instruction applying the definition.

13-1605. Ordinary care of minor.

A person under 18 years of age is not necessarily held to the same standard of conduct as an adult. By the term "ordinary care" with respect to a minor, I mean that degree of care which a reasonably careful minor of the age, mental capacity and experience of _____ *(plaintiff - defendant - decedent)* would use under circumstances similar to those shown by the evidence in this case.

USE NOTES

This instruction should be given when there is an issue as to the negligence of a minor seven (7) years of age or older unless the court finds that the minor has assumed the responsibility of an adult by engaging in certain activities such as driving a motor vehicle.

Committee commentary. — See committee commentary at UJI 13-1606 NMR.

When a minor assumes responsibilities of an adult for certain activities, such as operating a motor vehicle, the minor is required to act in accordance with the adult standard of conduct. *Adams v. Lopez*, 75 N.M. 503, 407 P.2d 50 (1965); *cf. LaBarge v. Stewart*, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

In general, however, until a minor is mature enough to be capable of using the judgment of a reasonably prudent adult, the minor's conduct is not to be measured by the same standard, but by such judgment and experience as children of similar age, intelligence, experience and judgment under similar circumstances. *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955); *Martinez v. C.R. Davis Contracting Co.*, 73 N.M. 474, 389 P.2d 597 (1964).

[As revised, effective November 1, 1991.]

13-1606. No negligence for child under seven.

You must not consider whether _____ *(plaintiff - defendant - decedent)* was negligent. A child under the age of seven (7) is incapable of negligence under the laws of New Mexico.

USE NOTES

This instruction may be given even though there is no claim specifically raised.

Committee commentary. — In 1952, the state supreme court held as a matter of law that a five-year-old child could not be held contributorily negligent. *Frei v. Brownlee*, 56 N.M. 677, 248 P.2d 671 (1952). New Mexico courts have since declared that a seven-year-old could be contributorily negligent. *Marrujo v. Martinez*, 65 N.M. 166, 334 P.2d 548 (1959); *Latimer v. City of Clovis*, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972); and that a seven-year-old child could be sued directly for negligence. *Phillips v. Smith*, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

13-1607. Withdrawn.

13-1608. Withdrawn.

13-1609. Withdrawn.

13-1610. Negligence of parent not imputed to child.

If you find that the parent was negligent, any such negligence shall not be attributed to the child.

USE NOTES

This instruction is appropriate where the jury may erroneously charge the child with negligence of the parent.

Committee commentary. — In case of injury only to a child, the parent's negligence is not imputed to the child who can recover in the child's own right. *Frei v. Brownle*e, 56 N.M. 677, 248 P.2d 671 (1952); *Montoya v. Winchell*, 69 N.M. 177, 364 P.2d 1041 (1961). [As revised, effective November 1, 1991.]

13-1611. Withdrawn.

13-1612. Withdrawn.

13-1613. Withdrawn.

13-1614. Withdrawn.

13-1615. Withdrawn.

13-1616. Accident alone not negligence.

The mere happening of an accident is not evidence that any person was negligent. Neither the fact that damages are claimed due to the accident nor the fact that this lawsuit was filed is evidence of any negligence on the part of any person.

USE NOTES

This is a proper instruction in a tort case and covers the three factors that frequently influence a jury. The basic instruction can be modified and used in other cases.

Committee commentary. — The New Mexico Supreme Court has recognized this basic rule in many cases. *See, e.g.*, *Anaya v. Tarradie*, 70 N.M. 8, 369 P.2d 41 (1962); *Zanolini v. Ferguson-Steere Motor Co.*, 58 N.M. 96, 265 P.2d 983 (1954).

13-1617. Withdrawn.

13-1618. Act of God.

The defendant contends that the accident and the claimed damages resulted from an act of God. An act of God is an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature for which no human is responsible.

The defendant is not liable if you find that an act of God was the sole cause, and would have caused the accident and claimed damages regardless of whether the defendant was negligent. Defendant is liable, on the other hand, if you find that the accident and damages could have been avoided by defendant in the exercise of ordinary care under the circumstances of the act of nature.

USE NOTES

This instruction will be used only when the act of God may be found to be the sole cause. An act of God is not compared under the special verdict, as it is either a complete defense or not an issue in the case.

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

Committee commentary. — In the case of *Shephard v. Graham Bell Aviation Serv., Inc.*, 56 N.M. 293, 243 P.2d 603 (1952), the court pointed out the distinction between negligence concurring with an act of God and sole causation by an act of God.

13-1619. Withdrawn.

13-1620. Withdrawn.

13-1621. Withdrawn.

13-1622. Withdrawn.

13-1623. Circumstantial evidence of negligence ("Res ipsa loquitur").

The plaintiff, in order to prove _____ *(insert name of person or entity)* was negligent, is not required to prove specifically what _____ *(insert name of person or entity)* did or failed to do that was negligent. In order for the jury to find _____ *(insert name of person or entity)* negligent, the plaintiff has the burden of proving each of the following propositions:

1. that the injury or damage to _____ was proximately caused by _____ *(insert name of instrumentality or occurrence)* which was _____'s *(insert name of person or entity)* responsibility to manage and control;

and

2. that the event causing the injury or damage to _____ *(insert name of person)* was of a kind which does not ordinarily occur in the absence of negligence on the part of _____ *(insert name of person or entity)* in control of _____ *(insert name of instrumentality or occurrence).*

If you find that _____ *(insert name of person)* proved each of these propositions, then you may, but are not required to, infer that _____ *(insert name of person or entity)* was negligent and that the injury or damage proximately resulted from such negligence.

If, on the other hand, you find that either one of these propositions has not been proved or, if you find, notwithstanding the proof of these propositions, that _____ *(insert name of person or entity)* used ordinary care for the safety of others in [his] [her] [its] control and management of the _____ *(insert name of instrumentality or occurrence)* then the evidence would not support a finding of negligence.

USE NOTES

The names of the various individuals and the name or description of the instrumentality or occurrence should be inserted in the appropriate blanks. Care should be used that the correct names are placed in the various blanks.

What was previously labeled *res ipsa loquitur* has been retitled "circumstantial evidence of negligence". The fact that there is other evidence of the specific cause of the injury does not preclude the use of this instruction. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). Exclusive control by the defendant, of the instrumentality or

circumstance at issue is not a prerequisite for its use. *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994); *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). As a factual matter, two or more persons may conceivably share responsibility of the management of the object, activity, or circumstances at issue.

[As amended, effective November 1, 1991; August 1, 1999.]

Committee commentary. — The circumstantial evidence of negligence instruction has been drafted in response and is phrased in lay terms. All arcane, magic and "sacred" language, including even "res ipsa," have been eliminated. *Res ipsa* is a rule of circumstantial negligence and therefore has been characterized as such.

Trujeque v. Service Merchandise Company, 117 N.M. 388, 872 P.2d 361 (1994) and *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994) indicate that exclusive control of the instrumentality or circumstances giving rise to the injury is not a prerequisite for utilizing this instruction. Consequently the exclusivity requirement has been eliminated and the requirement of management and control is substituted in its place.

The occurrence of an accident or event is not enough in itself. It must be of the kind which does not ordinarily occur in the absence of negligence on the part of the person in control of the instrumentality. *Martinez v. Teague*, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981); *Hisey v. Cashway Supermarkets, Inc.*, 77 N.M. 638, 426 P.2d 784 (1967).

The circumstantial evidence of negligence doctrine does not impose liability as a matter of law. It only avoids a directed verdict against the person proving the application of the doctrine. The jury may weigh the conflicting inferences and return a verdict in favor of the person against whom the doctrine has been proven even though there is no evidence offered by or on behalf of the person to rebut the inference of negligence. *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956); *McFall v. Shelley*, 70 N.M. 390, 374 P.2d 141 (1962); *Pack v. Read*, 77 N.M. 76, 419 P.2d 453 (1966); *Archibeque v. Horwich*, 88 N.M. 527, 543 P.2d 820 (1975); *Strong v. Shaw*, 96 N.M. 281, 629 P.2d 784 (Ct. App. 1980).

In New Mexico, a party using the circumstantial evidence of negligence doctrine is not required to establish compliance with ordinary care. *Chapin v. Rogers*, 80 N.M. 684, 459 P.2d 846 (Ct. App. 1969).

13-1624. Intentional torts; assault and battery - *No instruction submitted*.

No instruction submitted.

Committee commentary. — The committee spent much time over a period of several months studying the matter of intentional torts.

Instructions were drafted on assault and battery with the thought of developing a separate chapter or at least a subchapter in this area.

It was finally concluded that there was insufficient New Mexico law on assault and battery to guide the committee on this subject and that too much reliance had been placed upon the law of other jurisdictions on assault and battery to include such instructions in this work.

13-1625. Fraud - *No instruction submitted*.

No instruction submitted.

Committee commentary. — The Institute of Public Law drafted a proposed, complete set of instructions in this area but, after careful consideration, the committee determined that the matter of negligent misrepresentation was already covered in the chapter on contracts, as was the matter of fraudulent misrepresentation, and it was concluded that this would give the bench and bar adequate guidance in this area when the need for specialized instructions on fraud were needed. Therefore, the eighteen instructions drafted on this subject matter will not be published as there is insufficient litigation to justify such publication.

13-1626. Invasion of privacy - *No instruction submitted*.

No instruction submitted.

Committee commentary. — The committee carefully studied and thoughtfully considered the drafts of jury instructions drafted by the Institute of Public Law on the law of invasion of privacy and thereafter concluded that there was neither enough New Mexico law nor sufficient cases in this area to merit the space needed for publication; and, therefore, the bench and bar will need to draft any particularized instructions needed on this subject matter when, and if, the occasion arises.

13-1627. Explosives; ultrahazardous activities; absolute liability.

When a person is engaged in the use of explosives, [he] [she] is liable for any damages proximately caused by that activity, including those damages resulting from concussion or vibration. This is true regardless of the amount of care used.

USE NOTES

1. This instruction applies to activities involving the actual use of explosives, including dynamite, nitroglycerine and like substances.

2. This instruction would not apply to the manufacture, storage or transportation of explosives, since liability based on those activities is predicated either on negligence or nuisance.

3. This instruction would not apply to firearms cases.

4. The theory may not apply where an independent contractor is performing a governmental function.

[As amended, effective November 1, 1991.]

Committee commentary. — The rule of absolute liability stated in the foregoing instruction is proper under the facts of *Thigpen v. Skousen & Hise*, 64 N.M. 290, 327 P.2d 802 (1958). There are no New Mexico cases on ultrahazardous activities, other than blasting, and, therefore, the instruction is limited to blasting situations. Liability for damages resulting from the manufacture, storage or transportation of explosives requires proof of negligence of nuisance. 35 C.J.S. Explosives § 5.

See also the Restatement of Torts §§ 519 to 524 and 35 A.L.R.3d 1177.

In most jurisdictions, the defense of assumption of risk prevents recovery, even on the absolute liability theory, but assumption of risk as such generally is no longer a defense in New Mexico.

13-1628. Intentional infliction of emotional distress.

To recover for intentional infliction of emotional distress, _____ (*name of plaintiff*) must prove that:

(1) the conduct of _____ (*name of defendant*) was extreme and outrageous under the circumstances; and

(2) _____ (*defendant*) acted intentionally or recklessly; and

(3) as a result of the conduct of _____ (*defendant*), _____ (*plaintiff*) experienced severe emotional distress.

Extreme and outrageous conduct is that which goes beyond bounds of common decency and is atrocious and intolerable to the ordinary person. Emotional distress is "severe" if it is of such an intensity and duration that no ordinary person would be expected to tolerate it.

USE NOTES

This instruction is used where the plaintiff has pled as a separate cause of action and presented sufficient evidence of the defendant's intentional invasion of the plaintiff's right to freedom from severe emotional distress. The instruction does not apply where emotional distress is merely an additional element of damages recoverable under the measure of damages for a compensable personal injury.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 08-8300-021, effective September 10, 2008.]

Committee commentary. — An independent cause of action for intentional infliction of emotional distress was first discussed in *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972) and recognized in *Dominguez v. Stone*, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981). The elements of the cause of action and its scope are defined in the New Mexico cases in reliance upon § 46 of Restatement of Torts (2d). *See also Baldonado v. El Paso Natural Gas Co.*, 2008-NMSC-005, ¶ 28, 143 N.M. 288, 176 P.3d 277.

Liability is limited to extreme and outrageous conduct and does not extend to mere insults, threats or annoyances. Conduct that occurs in the context of a special relationship between the parties is more likely to be extreme and outrageous. Examples of such special relationships include employer-employee relationships, contractual relationships, and relationships created by state regulations imposing an obligation on one party or the other. Sometimes the extreme and outrageous nature of the conduct arises less from the conduct standing alone than from the abuse by the defendant of a special relationship with the plaintiff. *See Baldonado v. El Paso Natural Gas Co.*, 2008-NMSC-005, 143 N.M. 288, 176 P.3d 277. The emotional distress must be severe, not exaggerated. As with any cause of action, the trial judge, in the first instance, must determine whether plaintiff's evidence permits a jury to reasonably determine that defendant's conduct was extreme and reckless or intentional in nature. When reasonable persons may differ on that question, it is for the jury to decide, subject to the oversight of the court. *Trujillo v. Northern Rio Arriba Elec. Coop., Inc.*, 2002-NMSC-004, ¶ 26, 131 N.M. 607, 41 P.3d 333.

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

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

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

[(2) as a result of seeing or perceiving the occurrence _____ *(plaintiff)* suffered severe emotional distress;] and

[(3) the occurrence resulted in physical injury or death to _____ *(victim)*].

Emotional distress is "severe" if it is of such an intensity and duration that no ordinary person would be expected to tolerate it. [_____ *(plaintiff)* cannot recover for grief or sorrow normally attending the [death] [injury] of a family member.]

[Adopted, effective November 1, 1991.]

Committee commentary. — In *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983), the Supreme Court recognized a cause of action for bystander recovery where proof is presented of four elements:

(1) existence of marital or intimate familial relationship between the victim and the plaintiff; (2) proof of severe shock to the plaintiff resulting from direct emotional impact caused by the contemporaneous sensory perception of the accident; (3) some physical manifestation of, or physical injury to the plaintiff resulting from, the emotional injury; and (4) proof that the accident resulted in physical injury or death to the victim.

In *Folz v. State of New Mexico*, 110 N.M. 457, 797 P.2d 246, (1990), the Supreme Court dispensed with the requirement of a physical manifestation of an emotional injury.

It is for the trial judge to determine, in the first instance, whether plaintiff's evidence is sufficient to bring the factual pattern of the case within the cause of action recognized by the Supreme Court in *Ramirez v. Armstrong*, supra. *Folz v. State of New Mexico*, supra. The Committee recognizes that cases will arise where the meaning and purpose of the Supreme Court's requirement of a "contemporaneous sensory perception" will require interpretation by the trial judge applying the public policy underlying the cause of action. [Approved, effective November 1, 1991.]

13-1630. Negligent infliction of emotional distress, generally.

No instruction drafted.

[Adopted, effective November 1, 1991.]

Committee commentary. — In *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983), the New Mexico supreme court described the elements of a claim for emotional distress suffered by a bystander as a result of negligent injury to another. *See* UJI 13-1629. There may be other instances in which a purely emotional injury resulting from negligent conduct gives rise to a cause of action. *See* Restatement (Second) of Torts §§ 436 & 436A. New Mexico law is not sufficiently developed in this area to permit the drafting of a uniform jury instruction. The committee has reserved this instruction number and catch line in the event that developments in New Mexico law warrant the drafting of such an instruction in the future.

[Approved, effective November 1, 1991.]

13-1631. Definition and elements of prima facie tort.

Plaintiff claims damages on the basis that defendant intended to cause plaintiff harm and succeeded in doing so. In order to recover damages from defendant on this claim, plaintiff must show:

1. That defendant intentionally [did some act] [failed to act];

2. That defendant intended that the [act] [failure to act] would cause harm to the plaintiff or that defendant knew with certainty that the [act] [failure to act] would cause harm to the plaintiff;

3. That the defendant's [act] [failure to act] was a cause of plaintiff's harm; and

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

USE NOTES

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

[As amended, effective March 1, 2005.]

Committee commentary. — The Supreme Court recognized the "prima facie tort" as part of New Mexico's common law in *Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1990). In that decision, the Court viewed more favorably the "flexible" approach of the Restatement (Second) of Torts, Section 870 and the Missouri courts, *see Porter v. Crawford & Co.*, 611 S.W.2d 265 (Mo. Ct. App. 1980) than the more restrictive approach characterized by the New York precedents. *See* Note, Prima Facie Tort, 11 Cumb. L. Rev. 113, 116-18 (1980). Thus, the Smentowski Court rejected such restrictions on the prima facie tort (1) as proof of "special damages", (2) "disinterested malevolence", or (3) that the conduct complained of not fit into any other tort category.

A count in prima facie tort may be pled in the alternative with other tort counts. At the close of the evidence, however, if plaintiff's proof is susceptible to submission under one of the traditional categories of tort, the action must be submitted to the jury on that cause and not under prima facie tort. Smentowski, 109 N.M. at 396.

It is not necessary in order to establish the prima facie tort that the defendant's motivation be solely to harm the plaintiff. Smentowski, 109 N.M. at 395. The plaintiff must show that the defendant acted with an intent to harm the plaintiff or with knowledge that its act would be certain to cause harm to the plaintiff. Smentowski, 109 N.M. at 395.

See Restatement (Second) of Torts Sections 871 and 871A for examples of particular types of harm which may result in liability under the prima facie tort.

[Approved, effective November 1, 1991.]

13-1631A. Justification offered; balance of factors.

Defendant states that [he] [she] was justified in [acting] [failing to act] on the basis that _____ *(insert statement of justification).*

Defendant's justification must be balanced to determine if it outweighs any motive of defendant to injure plaintiff. In determining whether defendant's [act] [failure to act] was justifiable or not under the circumstances, you must weigh the following factors:

1. The nature and seriousness of the harm to the plaintiff;

2. The fairness or unfairness of the means used by the defendant;

3. Defendant's motive or motives; and

4. The value to defendant or to society in general of the interests advanced by the defendant's conduct.

USE NOTES

This instruction should be given with UJI 13-1631.

[Adopted, effective November 1, 1991.]

Committee commentary. — The balancing factors set forth in this instruction are adopted from *Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1990). *See also* Restatement (Second) of Torts Section 870, Comments f, g, h and i, discussing the various balancing factors.

13-1632. Negligent misrepresentations.

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

A material misrepresentation is an untrue statement which a party intends the other party to rely on and upon which the other party did in fact rely.

A negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true.

USE NOTES

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

[As amended, effective March 1, 2005.]

Committee commentary. — New Mexico has adopted the tort of negligent misrepresentation as defined in Section 552 of the *Restatement (Second) of Torts* (1977), which involves a number of elements that must be proved to establish the claim.

Stotlar v. Hester, 92 N.M. 26, 582 P.2d 403 (Ct. App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978).

This instruction is designed to inform the jury of the basic elements of a negligent misrepresentation claim and to identify which of those elements are disputed in the case being tried. To avoid overburdening the jury, other elements are not included in the instruction unless they are actually at issue in the case.

Other potential elements are not even contained in the standard instruction. Negligent misrepresentation applies to situations in which the defendant "in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest," supplies incorrect information "for the guidance of others in their business transactions." *Id.* at 29, 582 P.2d at 406 (quoting *Restatement (Second) of Torts* § 552 (1977)). In addition, liability for negligent misrepresentation is limited to losses that were suffered "by the person or one of a limited group of persons for whose benefit and guidance [the defendant] intends to supply the information or knows that the recipient intends to supply it" and that resulted from reliance on the information "in a transaction that [the defendant] intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." *Id.* at 29, 582 P.2d at 406 (quoting *Restatement (Second) of Torts* § 552 (1977)). The instruction is drafted under the assumption that, in the ordinary case, the trial court will be able to determine as a matter of law whether the defendant supplied the information "in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest," whether the information was supplied for use in the kind of "business transactions" to which negligent misrepresentation would be pertinent, and whether the plaintiff, if a member of a group that received the information, was a member of a "limited" group within the meaning of the Restatement. In some instances, however, making these determinations may require the resolution of questions of fact by the jury. In such cases, the instruction should be supplemented or modified. *See generally* Restatement § 552 and comments thereto.

Additionally, cases may arise where it would be appropriate for the trial court to determine as a matter of law whether the transaction out of which the claimed injury arose was "substantially similar" to the transaction for which the information at issue was actually provided. *See, e.g.*, Restatement § 552 cmt. j, illus. 13-14. In such cases either the instruction would not be given at all (no substantial similarity) or the optional language in the instruction relating to substantially similar transactions would be omitted as not involving a jury issue.

With respect to the element of intent on the part of the defendant that the information at issue be received by the plaintiff individually or as a member of a group, it may be appropriate in some cases to supplement this instruction with a standard legal definition of "intent," *i.e.*, substantial certainty that a particular consequence will occur. *See, e.g., California First Bank v. State*, 111 N.M. 64, 73 n.6, 802 P.2d 646, 655 n.6 (1990).

This instruction deals with misrepresentations resulting from negligence in the furnishing of false information or information which, while true as far as it goes, is incomplete in a material respect and therefore misleading. It is possible that a negligent misrepresentation claim may also arise from a failure to disclose any information. Until a standard instruction is adopted, it will be the responsibility of the trial court, with the assistance of counsel, to determine whether and how the jury should be instructed with respect to such a claim.

13-1633. Fraud.

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

First, a representation of fact was made which was not true;

Second, either the falsity of the representation was known to the party making it or the representation was recklessly made;

Third, the representation was made with the intent to deceive and to induce _____ *(party claiming fraud)* to rely on the representation; and

Fourth, _____ *(party claiming fraud)* did in fact rely on the representation.

Each of these elements must be proved by clear and convincing evidence.

USE NOTES

This instruction is to be used only in cases where the claim is for fraudulent misrepresentation. *See* UJI 13-1632 for cases where negligent misrepresentation claims are made.

[Adopted, effective November 1, 1991.]

13-1634. Strict liability for nondelegable duty.

In this case _____ (*defendant*) employed _____ (*independent contractor*) to do work that was likely to create a substantial risk of physical harm to others. Therefore, _____ (*defendant*) is liable for any harm caused by the absence of reasonable precautions necessary to avoid the harm.

In determining whether reasonable precautions necessary to avoid the harm were absent, you should decide what precautions would have been taken by a reasonably prudent person having full knowledge of the risk.

USE NOTES

This instruction should be given whenever the court determines that there is a nondelegable duty arising from employing an independent contractor to do work that is specially, peculiarly or inherently dangerous. Before the court gives this instruction, it must decide as a matter of law that the work that the employer engaged the independent contractor to perform was likely to create a peculiar risk of harm to others unless reasonable precautions were taken. If the court determines that the conduct is abnormally dangerous (ultrahazardous), UJI 13-1627 NMRA should be given and not this instruction.

[As amended, effective March 1, 2005.]

Committee commentary. — The liability of one who employs an independent contractor for harm resulting from work which creates a peculiar risk of harm to others is direct liability for the absence of reasonable precautions and not vicarious liability for the negligence of the independent contractor. *Saiz v. Belen School District*, 113 N.M. 387, 827 P.2d 102 (1992). Under the strict liability theory recognized in *Saiz*, the questions for the jury are solely "(1) what precautions would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed, and (2) whether the absence of a necessary precaution was a cause of injury." Id. at 396, 827 P.2d at 111. If reasonable precautions necessary to avoid the harm are not present, liability of the employer for harm caused is established, irrespective of the presence or absence of fault of the independent contractor.

The inquiry whether the absence of reasonable precautions created a peculiar risk of harm is to be made by the trial judge as a matter of law and creates a duty of the employer, akin to the liability of a supplier of a product under strict liability, to take reasonably necessary precautions. *Saiz*, 113 N.M. at 399, 827 P.2d at 114 ("The doctrine with the proper fit is that of strict liability as developed in products liability cases."). As the *Saiz* Court stated: "The test of liability is the presence or absence of precautions that would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed; and liability is dependent on neither the lack of care taken by the contractor nor the lack of care taken by the employer to ensure that the contractor takes necessary precautions." *Id.* at 395, 827 P.2d at 110. Liability under this theory of nondelegable duty should be distinguished from the liability of a landowner for abnormally dangerous activities (ultrahazardous), which is absolute as opposed to the strict liability here. *Id.* at 397, 827 P.2d at 112; *see* UJI 13-1627 NMRA.

Under the strict liability claim, what is customarily done to protect against a peculiar risk of harm is evidence of the presence or absence of reasonable precaution; however, what should have been done by a person with full knowledge of the fact is a determination for the jury. The jury may be told the evidentiary value of customary precaution, similar to the instruction on the evidentiary value of custom in products liability actions. *See* UJI 13-408 NMRA.

Where there is liability, the employer is jointly and severally liable with any other parties who "fail[ed] to take precautions reasonably necessary to prevent injury to third persons arising from the peculiar risk." *Saiz*, 113 N.M. at 400, 827 P.2d at 115.

[Revised, effective March 1, 2005.]

13-1635. Loss-of-a-chance injury; definition; burden of proof.

A party is liable for negligence resulting in another's lost chance for [a better outcome to] [survival from] a preexisting condition. This lost opportunity is an injury in itself. For _____ to recover on this claim a medical expert must have established that, as a result of _____'s negligence, _____ lost a measurable opportunity to avoid [loss of limb], [loss of life] [_____ *(other)*].

USE NOTES

This instruction should be given when plaintiff alleges that the defendant's negligence resulted in the lost opportunity to obtain a better outcome from a preexisting condition. The instruction must be given with UJI 13-1802A NMRA which sets out the appropriate measure of damages for loss of a chance.

[Approved, effective March 20, 2000.]

Committee commentary. — New Mexico recognizes the loss of a chance as a theory of recovery. *See Baer v. Regents of University of California*, 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9; *Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279. The loss of a chance is the lost or diminished opportunity for a better outcome from a preexisting condition. The loss of a chance is not a new theory of recovery and may be established by proof of the customary elements required in any action for negligence: duty, breach, loss or damages, and causation. *See Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955). Both *Alberts v. Schultz* and *Baer v. Regents of University of California* arose in the context of medical negligence, but neither the Supreme Court nor the Court of Appeals specifically limited the loss of a chance to that context. The plaintiff bears the burden of proof on each element which, the Supreme Court noted in *Alberts v. Schultz*, "will almost always" require expert testimony. *Alberts v. Schultz*, 1999-NMSC-015, ¶ 18, 126 N.M. at 812, 975 P.2d at 1284.

The evidence will determine whether the loss of a chance is plaintiff's only theory of recovery or should be submitted as an alternative where there is also proof that defendant's negligence caused the entire loss. Two exemplar sets of instructions are set out as appendices at the end of Chapter 16. These sample instructions illustrate two alternative methods for instructing the jury depending on the evidence.

13-1636. Malicious abuse of process defined; general statement of elements.[1]

To establish a claim of malicious abuse of process, _____ (*name of the plaintiff*) has the burden of proving each of the following contentions:

(1) In a judicial proceeding, _____ (*name of the defendant*) [misused the legal process] [actively participated in misusing the legal process];

(2) _____ (*name of the defendant*)'s primary motive in [misusing the legal process] [actively participating in misusing the legal process] was to accomplish an illegitimate end; and

(3) The conduct of _____ (*name of the defendant*) caused damages to _____ (*name of the plaintiff*).

USE NOTES

These are the basic elements of the tort of malicious abuse of process. Definitions for specific elements and for the terms used in this instruction follow and should be used, as appropriate, depending on the specific claim made.

Either UJI 13-1639 NMRA (probable cause) or UJI 13-1640 NMRA (procedural impropriety) should be used together with this instruction, depending on the claim.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — In *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 17, 124 N.M. 512, 953 P.2d 277, the New Mexico Supreme Court reformulated the torts of abuse of process and malicious prosecution into a single tort of malicious abuse of process. In *Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 204 P.3d 19, the Court refined the requisite elements of malicious abuse of process, removing the requirement that the defendant have initiated judicial proceedings against the plaintiff. In *Durham*, the Court also extended the definition of "judicial proceedings" for purposes of this tort to include arbitration proceedings as well as civil and criminal proceedings. *Id.* ¶ 30.

The plaintiff bears the burden of establishing the elements of the tort by a preponderance of the evidence. Clear and convincing proof is no longer required to establish a malicious abuse of process case. *Fleetwood Retail Corp. of New Mexico v. LeDoux*, 2007-NMSC-047, ¶ 30, 142 N.M. 150, 164 P.3d 31.

A malicious abuse of process claim may be raised in an independent action or as a claim or counterclaim in the action where the abuse of process occurred. *DeVaney*, 1998-NMSC-001, ¶ 24. Our Supreme Court distinguishes the procedures for instructing the jury on a counterclaim for malicious abuse of process based on the filing of a complaint without probable cause from those used when a claim or counterclaim for malicious abuse of process is based on a procedural impropriety in the use of legal

process. *Fleetwood*, 2007-NMSC-047, ¶¶ 19-31. Different procedures are required because recovery by the original plaintiff on any claim in the original lawsuit is an absolute defense to a malicious abuse of process claim based on the filing of the complaint without probable cause. *Id*. ¶ 22. Any such counterclaim must be resolved against the original defendant (the plaintiff in the malicious abuse of process claim) as a matter of law. *Id*. ¶ 28. The same rule does not apply when the malicious abuse of process claim is based on a procedural irregularity or impropriety in the use of the legal process. *Id*. ¶ 31. These claims are properly resolved by the jury, regardless of which party prevails on the claims in the original complaint. *Id*.

The tort of malicious abuse of process is construed narrowly, in order to protect the right of access to the courts. *DeVaney*, 1998-NMSC-001, ¶ 19; *Valles v. Silverman*, 2004-NMCA-019, ¶ 16, 135 N.M. 91, 84 P.3d 1056.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1637. Malicious abuse of process; "judicial proceeding" defined.

A "judicial proceeding" can be a criminal prosecution, a civil lawsuit, or an arbitration proceeding. The [criminal prosecution] [civil lawsuit] [arbitration proceeding] [describe that proceeding naming the parties] at issue in this case is a "judicial proceeding."

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — *See Durham v. Guest*, 2009-NMSC-007, ¶¶ 30-35, 145 N.M. 694, 204 P.3d 19.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1638. Malicious abuse of process; "active participation" defined.

In this case, _____ (*name of the plaintiff*) has claimed that _____ (*name of the defendant*) actively participated in [bringing the judicial proceeding] [_____ (*describe the other legal process that the plaintiff claims was misused*)] against _____ (*name of the plaintiff*). A [person] [corporation] actively participates in [bringing a judicial proceeding] [_____ (*describe the legal process that the plaintiff claims was misused*)] if [his] [her] [its] conduct is the determining factor in the decision to [file the lawsuit] [_____ (*describe the other legal process the plaintiff claims was misused*)]. Merely providing encouragement, advice, or information is not enough.

USE NOTES

This instruction defining active participation should be used any time one or more of the defendants is not a party to the underlying criminal, civil, or arbitration proceeding in which the plaintiff's claim of malicious abuse of process arose.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — A non-litigant may be liable for malicious abuse of process if the non-litigant actively participated in the underlying lawsuit. *Valles v. Silverman*, 2004-NMCA-019, ¶¶ 15-17, 135 N.M. 91, 84 P.3d 1056. "Active participation" requires that the conduct of the defendant be the determining factor in the decision to file the lawsuit or in the decision to otherwise misuse the legal process. *Id*. ¶ 17. The non-litigant must have induced another to bring the proceeding or to otherwise misuse the legal process by, for example, urging or insisting that the proceeding be brought, urging or insisting that a particular procedure be used, providing information to a party or a prosecutor, knowing it to be false, or funding a judicial proceeding or a legal procedure that otherwise would not have been pursued. *Id*. ¶¶ 16-17.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1639. Misuse of process; lack of probable cause.[1]

A misuse of the legal process occurs when a defendant [begins a judicial proceeding] [actively participates in beginning a judicial proceeding] without probable cause.

Probable cause is a reasonable belief, founded on known facts established after a reasonable pre-filing investigation, that the claims made could be established to the satisfaction of [a court or a jury] [an arbitrator].

Alternative 1 (*the court determines lack of probable cause*)

[This court has determined that the judicial proceeding _____ (*name the proceeding and the parties*) was brought without probable cause.][2]

Alternative 2 (*dispute of fact about the existence of probable cause*)

[It is your role to resolve the disputes of fact between the parties.[3] In this case, _____ (*name of the plaintiff*) says _____ (*describe the plaintiff's factual allegations*). _____ (*Name of the defendant*) denies what _____ (*name of the plaintiff*) says, and _____ (*name of the defendant*) says _____ (*describe the defendant's position*).

If you find that _____ (*name of the plaintiff*) has proved [his] [her] [its] version of the facts, then the judicial proceeding was brought without probable cause.]

USE NOTES

1. This instruction should be used when the misuse of process claimed is the filing of a complaint, thereby initiating a judicial proceeding, without probable cause. The term

"judicial proceeding" includes civil lawsuits, criminal prosecutions, and arbitration proceedings.

2. If there is no genuine issue of material fact, the court should instruct the jury that the court has determined, as a matter of law, that the judicial proceeding was initiated without probable cause.

3. If there is a genuine issue of material fact, a special verdict form should be used. The special verdict form should ask the jury to make findings of fact, leaving the decision to the court on whether the facts found by the jury constitute probable cause. The verdict form should also guide the jury on whether and when it should go on to consider the defendant's motive.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — When malicious abuse of process is based on the filing of a complaint without probable cause, the jury's role is to resolve any dispute of fact. The court decides, as a matter of law, based either upon undisputed facts or based upon the findings of the jury, whether the defendant had probable cause to file the complaint. *Fleetwood Retail Corp. of New Mexico v. LeDoux*, 2007-NMSC-047, ¶ 27, 142 N.M. 150, 164 P.3d 31. The definition of probable cause included in this instruction is taken from *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 22, 124 N.M. 512, 953 P.2d 277.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1639A. Misuse of process; procedural impropriety, defined.

Misuse of the legal process occurs when a defendant engages in some impropriety in the use of the legal process that suggests extortion, delay, harassment, or some other illegitimate end. The legal process may be misused either by the irregular use of a procedure, or by some other act by the defendant that indicates the wrongful use of judicial proceedings. In this case, _____ (*name of the plaintiff*) says _____ (*describe the irregularity or impropriety*). _____ (*Name of the defendant*) denies what _____ (*name of the plaintiff*) says, and _____ (*name of the defendant*) says _____ (*describe the defendant's position*).

USE NOTES

This instruction should be used when the misuse of process claimed is a procedural impropriety or irregularity, other than the filing of a complaint without probable cause.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — Whether a defendant engaged in some impropriety or irregularity in the use of the legal process, suggesting extortion, delay, harassment or some other illegitimate end, is generally to be determined by the jury. "A use of process is deemed to be irregular or improper if it (1) involves a procedural irregularity or a misuse of a procedural device, such as discovery, subpoenas or attachment, or (2) indicates the wrongful use of proceedings such as an extortion attempt." *Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 204 P.3d 19. A misuse of process based on a procedural impropriety or irregularity can precede the filing of a complaint so long as an action is subsequently filed, or it can come at any stage of a proceeding. *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 20, 124 N.M. 512, 953 P.2d 277. Examples of culpable acts include the following: a demand for a collateral advantage prior to filing a complaint; a request for excessive damages contained in the complaint; attachment on property other than that involved in the litigation or in an excessive amount; oppressive conduct in connection with the arrest of a person or the seizure of property; excessive execution on a judgment; using the process to put pressure on the other to pay a different debt; taking or refraining from taking some other action; oppressive conduct in discovery; and the misuse of the subpoena power. *DeVaney*, 1998-NMSC-001, ¶¶ 20, 28.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1640. Malicious abuse of process; illegitimate motive.

[If the judicial proceeding was brought without probable cause] [If you find that _____ (*name of the defendant*) misused the legal process], you must consider whether _____ (*name of the defendant*)'s primary motive or purpose in [bringing the proceeding without probable cause] [actively participating in bringing the proceeding without probable cause] [_____ (*describe the other misuse or active participation in the misuse of the legal process*)] was to accomplish an illegitimate end. Acting with ill-will or spite toward the plaintiff is not enough to meet this requirement. _____ (*Name of the defendant*) must have [brought] [actively participated in bringing] [_____ (*describe the other misuse or active participation in the misuse of the legal process*)] the judicial proceeding primarily to accomplish a purpose for which the judicial proceeding was not designed.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

Committee commentary. — If a misuse of the legal process is established, either based on filing a complaint without probable cause or based on other impropriety or irregularity in the use of the legal process, then the jury must also decide whether the defendant's primary motive for misusing the legal process was to accomplish an illegitimate end. Proof that the defendant acted with ill-will or spite is not sufficient to meet this requirement. *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 29, 124 N.M. 512, 953 P.2d 277.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1640A. Malicious abuse of process; bifurcated trial; instructions prior to bifurcated claim of malicious abuse of process.

You have heard the evidence and returned a verdict for _____ (*name of the defendant/counter claimant*). You will now hear evidence regarding the claim of _____ (*name of the defendant/counter claimant*) that _____ (*name of the plaintiff/counter defendant*) maliciously abused the legal process by _____ (*describe conduct alleged to be malicious abuse of process*).

USE NOTES

This instruction should be used when the court bifurcates the claim of malicious abuse of process and the jury returns a verdict on all counts for the defendant/counter claimant in the underlying suit. It is designed to be used before the presentation of evidence on the malicious abuse of process claim.

[Adopted by Supreme Court Order No. 09-8300-033, effective October 19, 2009.]

13-1641. Withdrawn.

13-1642. Withdrawn.

13-1643. Withdrawn.

13-1644. Recompiled.

13-1645. Recompiled.

13-1646. Negligent entrustment of a motor vehicle.

To establish the claim of negligence in allowing _____ to [use] [drive] _____'s motor vehicle, _____ has the burden of proving the following contentions:

1. _____ was the owner or person in control of the vehicle that caused _____'s injuries;

2. _____ permitted _____ to operate the vehicle;

3. _____ knew or should have known that _____ was likely to use the vehicle in such a manner as to create an unreasonable risk of harm to others;

4. _____ was negligent in the operation of the motor vehicle; and

5. _____'s negligence was a cause of the injury to _____.

USE NOTES

This instruction should be used if the negligent entrustment doctrine is the basis of the plaintiff's claim against the defendant. The instruction is not applicable to a claim of negligent entrustment of real property. However, the instruction may apply to chattels other than automobiles. For example, it may apply to a claim for negligent entrustment of a firearm. The names identifying the owner or person in control of the vehicle, the negligent operator of the vehicle, and the person injured should be inserted as appropriate in the instruction.

[Approved, effective July 15, 2002; as amended, effective March 1, 2005; as amended by Supreme Court Order No. 10-8300-026, effective October 18, 2010.]

Committee commentary. — This instruction addresses what is often commonly called "negligent entrustment". "General principles of negligence are relevant to the determination of negligent entrustment". *McCarson v. Foreman*, 102 N.M. 151, 155, 692 P.2d 537, 541 (Ct. App. 1984). The theory of negligent entrustment is generally described by the Restatement (Second) of Torts: "It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others". Restatement (Second) of Torts § 308 at 100 (1965); *see also Douglas v. Hartford Ins. Co.*, 602 F.2d 934, 936 (10th Cir. 1989). The term "control" for purposes of this instruction means a person has the ability to prevent the unsafe driver from driving the car.

New Mexico courts have explicitly recognized negligent entrustment claims in the context of automobiles. *Hermosillo v. Leadingham*, 129 N.M. 721, 13 P.3d 79 (Ct. App. 2000); *McCarson v. Foreman*, 102 N.M. at 155-56, 692 P.2d at 541-42; *DeMatteo v. Simmon*, 112 N.M. 112, 114, 812 P.2d 361, 363 (Ct. App. 1991); *Spencer v. Gamboa*, 102 N.M. 692, 693, 699 P.2d 623, 624 (Ct. App. 1985). Thus, New Mexico law recognizes that one who negligently entrusts a motor vehicle to an incompetent driver may be liable for injury to a third person caused by the driver's incompetence.

The New Mexico Supreme Court has rejected the application of negligent entrustment to real property leased by a non-possessory landlord. *See Gabaldon v. ERISA Mortgage Co.*, 128 N.M. 84, 990 P.2d 197 (1999). The extent to which the theory of negligent entrustment may apply to other chattels carrying a potential for risk, such as a firearm or other dangerous instrumentality, is unresolved in New Mexico. This instruction may be modified for use with chattels other than motor vehicles.

[Adopted by Supreme Court Order No. 10-8300-026, effective October 18, 2010.]

13-1647. Negligence in [hiring] [supervising] [retaining] an employee.[1]

To establish the claim of negligence in [hiring] [supervising] [retaining] an employee, _____ (*name of the plaintiff*) has the burden of proving the following:

1. _____ (*Name of the defendant*) was the employer of _____ (*name of the employee*);

2. _____ (*Name of the defendant*) knew or should have known that [hiring] [retaining] [supervising] [_____ (*insert other employer conduct*)[2]] _____ (*name of the employee*) would create an unreasonable risk of injury to [a group or class that includes the plaintiff] [_____ (*insert name of the plaintiff*)];

3. _____ (*Name of the defendant*) failed to use ordinary care in [hiring] [retaining] [supervising][_____ (*insert other employer conduct*)[2]] _____ (*name of employee*);

4. _____ (*Name of the defendant*)'s negligence in [hiring] [retaining] [supervising] [_____ (*insert other employer conduct*)[2]] was a cause of _____ (*name of the plaintiff*)'s injury.

USE NOTES

1. In addition to this instruction, the jury should be instructed on negligence, UJI 13-1601 NMRA, ordinary care, UJI 13-1603 NMRA, and causation, UJI 13-305 NMRA.

2. *See Lessard v. Coronado Paint and Decorating Center, Inc.*, 2007-NMCA-122, ¶¶ 28, 37, 142 N.M. 583, 168 P.3d 155 (quoting the Restatement (Third) of Agency § 7.05(1) (2006) for the proposition that "[a] principal who conducts activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent").

[Adopted by Supreme Court Order No. 10-8300-029, effective December 3, 2010.]

Committee commentary. — While the question of whether a duty exists to a plaintiff is a legal question for the judge, the questions of whether the duty was breached and whether the breach caused the plaintiff's injuries are for the jury to decide. *See Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶¶ 22, 23, 137 N.M. 64, 107 P.3d 504. Under the common law, liability for negligence in hiring, retaining, or supervising "flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a

result of the hiring." *Id.* ¶ 10 (internal quotation marks and citation omitted). Any limitations on the duty are imposed as a matter of policy. *See Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 9, 134 N.M. 43, 73 P.3d 181 (explaining that duty comprises foreseeability of the plaintiff and a determination that the defendant's obligation is one to which the law will give recognition and effect).

A plaintiff injured by an employee sometimes may also sue the employer under a theory of respondeat superior. *See Lessard*, 2007-NMCA-122, ¶ 10. In order to recover under a theory of respondeat superior, the plaintiff must demonstrate that the employee was acting within the scope of his employment. *Id.* ¶ 11 (citing *Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 475, 827 P.2d 859, 863 (Ct. App. 1992)). In contrast, recovery under the theory of negligent hiring, retention and supervision does not require that the employee be acting within the scope of his employment at the time of the occurrence which injures the plaintiff. *Id.* ¶ 40; *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 729, 688 P.2d 333, 339 (Ct. App. 1984).

[Adopted by Supreme Court Order No. 10-8300-029, effective December 3, 2010.]

13-1650. Spoliation of evidence.

_____ (*name of plaintiff*) says in this case that _____ (*name of defendant*) intentionally [disposed of, destroyed, mutilated or significantly altered] evidence relevant to a [potential lawsuit] [lawsuit]. In order to prove intentional spoliation of evidence, _____ (*plaintiff*) must prove each of the following:

1. There was [a lawsuit] [the potential for a lawsuit];

2. _____ (*defendant*) knew there was [a lawsuit] [the potential for a lawsuit];

3. _____ (*defendant*) disposed of, destroyed, mutilated or significantly altered potential evidence;

4. By its conduct _____'s (*defendant's*) sole intent was to disrupt or defeat a potential lawsuit;

5. The destruction or alteration of the evidence resulted in _____'s (*plaintiff's*) inability to prove [his] [her] case;

6. _____ (*plaintiff*) suffered damages as a result of the destruction or alteration.

USE NOTES

This instruction is to be used when the plaintiff brings a claim for intentional spoliation of evidence.

[Approved, effective March 21, 2005.]

Committee commentary. — The elements of the tort of spoliation of evidence were discussed in *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 905 P.2d 185 (1995).

In *Torres v. El Paso Electric Co.,* 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386, the court discussed wrongful activity occurring prior to the filing of a complaint, and suggested that spoliation, "at least spoliation discovered prior to trial, should be tried in conjunction with the underlying claim, rather than in a bifurcated or separate trial". The court in *Torres* indicated that the tort seeks to remedy acts taken with the sole intent to maliciously defeat or disrupt a lawsuit. Practitioners should note that the trial court may independently impose sanctions for destruction of evidence ranging from dismissal, or imposition of liability to instructing the jury regarding an inference arising from spoliation. *See Segura v. K-Mart Corporation*, 2003-NMCA-013, 133 N.M. 192, 62 P.3d 283.

13-1651. Inference where evidence is lost, destroyed or altered.

_____ (*plaintiff or defendant*) says that evidence within the control of _____ (*other party*) was lost, destroyed or altered. If you find that this happened, without a reasonable explanation, you may, but are not required to, conclude that the lost, destroyed or altered evidence would be unfavorable to _____ (*other party*).

USE NOTES

This instruction may be given by the court when evidence in the control of one of the parties has been lost, destroyed or altered.

[Approved, effective March 21, 2005.]

Committee commentary. — In determining whether to give this instruction or to provide a different remedy, trial courts should consider whether the loss, destruction or alteration was intentional, whether there was a reasonable possibility of a lawsuit involving this evidence, whether the party requesting the instruction acted with due diligence in preserving the evidence and whether the evidence would have been relevant to a material issue in the case. *Torres v. El Paso Electric Co.*, 1999-NMSC-029, 127 N.M. 729, 987 P.2d 386.

The court may also choose to impose other sanctions it considers appropriate under the circumstances. For the standards to be used for an appropriate sanction, *see Restaurant Management Company v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, 127 N.M. 708, 986 P.2d 504 and *Segura v. K-Mart Corporation*, 2003-NMCA-013, 133 N.M. 192, 62 P.3d 283.

13-1660. Definitions for liquor liability.

As used in these instructions:

1. "Licensee" means a person licensed under the provisions of the Liquor Control Act and the agents or employees of the licensee.

2. "Intoxicated" means a person's mental and physical impairment as a result of using alcohol. As used in these instructions, such impairment must substantially reduce that person's ability to think and act as an ordinarily prudent person, in full possession of his or her faculties, would think and act under like circumstances.

3. "Minor" means a person under twenty-one years of age.

4. "Reckless" conduct is the intentional doing of an act with utter indifference to or conscious disregard for a person's [rights] [safety].

5. "Gross negligence" is an act or omission done without the exercise of even slight care under the circumstances.

USE NOTES

These definitions should be used in conjunction with the instructions governing liability under the common law and NMSA 1978, Section 41-11-1 for the sale, service, or provision of alcohol, UJI 13-1661 through UJI 13-1668 NMRA.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1661. Liquor licensee liability to a patron.

To establish the claim against _____ (*name of defendant licensee*) for violation of the New Mexico liquor control laws, _____ (*name of plaintiff*) has the burden of proving the following elements:

1. [_____ (*name of defendant)*] [or] [_____ (*name of defendant's agents(s) or employee(s)*)] sold, served, or provided alcoholic beverages to _____ (*name of patron*) while [he] [she] was intoxicated;

2. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] knew or should have known from the circumstances that _____ (*name of patron*) was intoxicated; and

3. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] acted with gross negligence and reckless disregard for the safety of _____ (*name of plaintiff*).

In addition, _____ (*name of plaintiff*) has the burden of proving that [_____ (*name of defendant*)'s] [or] [_____ (*name of defendant's agent(s) or employee(s)*)'s] sale, service, or provision of alcoholic beverages was a cause of _____ (*name of plaintiff*)'s [injuries and] damages.

USE NOTES

This is the basic instruction for a licensee's violation of NMSA 1978, Section 41-11-1, when the claim is brought by the person who was sold, served, or provided alcoholic beverages by the licensee. The instruction should be given in conjunction with the appropriate definitions contained in UJI 13-1660 NMRA.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — The statute creating tort liability for the sale of alcoholic beverages, NMSA 1978, Section 41-11-1, limits liability for violation of the Liquor Control Act to the licensee. Section 41-11-1(D)(1) defines "licensee" as "a person licensed under the provisions of the Liquor Control Act and the agents or servants of the licensee." The legislature's definition of "licensee" evidences an intent to impose vicarious liability on an absent licensee for the acts and omissions of the licensee's agents and employees. The New Mexico Supreme Court has confirmed that a licensee's liability extends to the acts of agents and employees. *See Buffet v. Vargas*, 1996-NMSC-012, 121 N.M. 507, 914 P.2d 1004.

The New Mexico Supreme Court held in *Estate of Gutierrez v. Meteor Monument, L.L.C.*, 2012-NMSC-004, 274 P.3d 97, that actual knowledge of the patron's intoxication is not required. The issue is whether the licensee or its agents or employees knew or should have known from the circumstances that the person was intoxicated. *Id*. ¶¶ 9-10. Section 41-11-1 specifically provides that a licensee may not be charged with "knowledge of previous acts by which a person becomes intoxicated at other locations unknown to the licensee."

Comparative fault principles apply to an action brought pursuant to Section 41-11-1. *Baxter v. Noce*, 1998-NMSC-024, ¶ 12, 107 N.M. 48, 752 P.2d 240; *Reichart v. Atler*, 1994-NMSC-056, ¶ 11, 117 N.M. 623, 875 P.2d 379.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1662. Liquor licensee liability to a third party.

To establish the claim against _____ (*name of defendant licensee*) for violation of the New Mexico liquor control laws, _____ (*name of plaintiff*) has the burden of proving the following elements:

1. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agents(s) or employee(s)*)] sold, served, or provided alcoholic beverages to _____ (*name of patron*) while [he] [she] was intoxicated; and

2. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] knew or should have known from the circumstances that _____ (*name of patron*) was intoxicated.

In addition, _____ (*name of plaintiff*) has the burden of proving that [_____ (*name of defendant*)'s] [or] [_____ (*name of defendant's agent(s) or employee(s)*)'s] sale, service, or provision of alcoholic beverages to _____ (*name of patron*) was a cause of _____ (*name of plaintiff*)'s [injuries and] damages.

USE NOTES

This is the basic instruction for a licensee's violation of NMSA 1978, Section 41-11-1, when the claim is brought by a third party allegedly injured by an intoxicated patron of the licensee. The instruction should be given in conjunction with the appropriate definitions contained in UJI 13-1660 NMRA.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — The statute creating tort liability for the sale of alcoholic beverages, NMSA 1978, Section 41-11-1, limits liability for violation of the Liquor Control Act to the licensee. Section 41-11-1(D)(1) defines "licensee" as "a person licensed under the provisions of the Liquor Control Act and the agents or servants of the licensee." The legislature's definition of "licensee" evidences an intent to impose vicarious liability on an absent licensee for the acts and omissions of the licensee's agents and employees. The New Mexico Supreme Court has confirmed that a licensee's liability extends to the acts of agents and employees. *See Buffet v. Vargas*, 1996-NMSC-012, 121 N.M. 507, 914 P.2d 1004.

The New Mexico Supreme Court held in *Estate of Gutierrez v. Meteor Monument, L.L.C.*, 2012-NMSC-004, 274 P.3d 97, that actual knowledge of the patron's intoxication is not required. The issue is whether the licensee or its agents or employees knew or should have known from the circumstances that the person was intoxicated. *Id*. ¶¶ 9-10. Section 41-11-1 specifically provides that a licensee may not be charged with

"knowledge of previous acts by which a person becomes intoxicated at other locations unknown to the licensee."

Comparative fault principles apply to an action brought pursuant to Section 41-11-1. *Baxter v. Noce*, 1998-NMSC-024, ¶ 12, 107 N.M. 48, 752 P.2d 240; *Reichart v. Atler*, 1994-NMSC-056, ¶ 11, 117 N.M. 623, 875 P.2d 379.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1663. Common law liquor liability to a patron.

To establish the claim against _____ (*name of defendant seller or server*) for wrongfully providing alcohol, _____ (*name of plaintiff*) has the burden of proving the following elements:

1. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] sold, served or provided alcoholic beverages to _____ (*name of patron*) while [he] [she] was intoxicated;

2. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] knew or should have known from the circumstances that _____ (*name of patron*) was intoxicated;

3. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] acted with gross negligence and reckless disregard for the safety of _____ (*name of plaintiff*).

In addition, _____ (*name of plaintiff*) has the burden of proving that [_____ (*name of defendant*)'s] [or] [_____ (*name of defendant's agent(s) or employee(s)*)'s] sale, service, or provision of alcoholic beverages was a cause of _____ (*name of plaintiff*)'s [injuries and] damages.

USE NOTES

This is the basic instruction for a common law claim for wrongfully providing alcohol when the claim is brought by the person who is provided with the alcohol. The instruction should be given in conjunction with the appropriate definitions contained in UJI 13-1660 NMRA.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — In *Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-30, ¶ 43, 150 N.M. 258, 258 P.3d 1050, the New Mexico Supreme Court held that the

enactment of NMSA 1978, Section 41-11-1 did not displace all common law dram shop claims, and thus the common law recognizes dram shop claims against non-licensee tavernkeepers. The Court also held that the standard of proof for common law claims is the same as the standard for claims under Section 41-11-1; *i.e.*, a claim by an injured third party requires proof of simple negligence, and a claim by an injured patron requires proof that the tavernkeeper acted with gross negligence and reckless disregard for the safety of the patron. *Id*. ¶¶ 37-38. For more discussion of common law liquor liability *see Lopez v. Maez*, 1982-NMSC-103, 98 N.M. 625, 651 P.2d 1269.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1664. Common law liquor liability to a third party.

To establish the claim against _____ (*name of defendant seller or server*) for wrongfully providing alcohol, _____ (*name of plaintiff*) has the burden of proving the following elements:

1. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] sold, served or provided alcoholic beverages to _____ (*name of patron*) while [he] [she] was intoxicated;

2. [_____ (*name of defendant*)] [or] [_____ (*name of defendant's agent(s) or employee(s)*)] knew or should have known from the circumstances that _____ (*name of patron*) was intoxicated;

In addition, _____ (*name of plaintiff*) has the burden of proving that [_____ (*name of defendant*)'s] [or] [_____ (*name of defendant's agent(s) or employee(s)*)'s] sale, service, or provision of alcoholic beverages was a cause of _____ (*name of plaintiff*)'s [injuries and] damages.

USE NOTES

This is the basic instruction for a common law claim for wrongfully providing alcohol, when the claim is brought by a third party and not the person who was provided with the alcohol. The instruction should be given in conjunction with the appropriate definitions contained in UJI 13-1660 NMRA.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — In *Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-30, ¶ 43, 150 N.M. 258, 258 P.3d 1050, the New Mexico Supreme Court held that the enactment of NMSA 1978, Section 41-11-1 did not displace all common law dram shop claims, and thus the common law recognizes dram shop claims against non-licensee

tavernkeepers. The Court also held that the standard of proof for common law claims is the same as the standard for claims under Section 41-11-1; *i.e.*, a claim by an injured third party requires proof of simple negligence, and a claim by an injured patron requires proof that the tavernkeeper acted with gross negligence and reckless disregard for the safety of the patron. *Id*. ¶¶ 37-38. For more discussion of common law liquor liability *see Lopez v. Maez*, 1982-NMSC-103, 98 N.M. 625, 651 P.2d 1269.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1665. Liability for social hosts outside of a licensed establishment.

To establish the claim against _____ (*name of defendant*), _____ (*name of plaintiff*) has the burden of proving the following elements:

1. _____ (*name of defendant*) provided alcoholic beverages to _____ (*name of guest or plaintiff*);

2. At the time _____ (*name of defendant*) provided the alcoholic beverages to _____ (*name of guest or plaintiff*), _____ (*name of guest or plaintiff*) was intoxicated;

3. _____ (*name of defendant*) provided the alcoholic beverages recklessly; and

4. _____ (*name of guest or plaintiff*)'s intoxication was a cause of _____ (*name of guest or plaintiff*)'s [injuries and] damages.

USE NOTES

This instruction is based on NMSA 1978, Section 41-11-1(E). It should be given when the plaintiff claims injury resulting from the provision of alcohol in a social setting outside of a licensed establishment. This instruction is to be used either when the claim is brought by a third party or by the person who was provided with the alcohol. The instruction should be given with the appropriate definitions from UJI 13-1660 NMRA. If the provision of the alcoholic beverages takes place in a licensed establishment, UJI 13-1666 NMRA should be used instead of this instruction.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — NMSA 1978, Section 41-11-1(E) defines the liability of a person who provides alcoholic beverages to guests in a social setting. The case law and Section 41-11-1(H) refer to such person as a "social host." *See, e.g., Delfino v.*

Griffo, 2011-NMSC-015, ¶ 13, 150 N.M. 77, 257 P.3d 917. The statute allows the guest or a third party to recover damages caused by the guest's intoxication when the elements set forth in the statute are satisfied. Most cases that include claims under Section 41-11-1(E) arise from service of alcohol at a private home or other private settings that are not licensed establishments. This instruction is for use in such a situation.

For the defendant to be entitled to the higher standard of care set forth in Section 41-11-1(E), the defendant must prove that the service of alcoholic beverages was gratuitous and in a social setting. In most cases, these issues will not be a matter of factual dispute. If such a dispute exists, further instruction may be necessary.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1666. Liability for social hosts in a licensed establishment.

To establish the claim against _____ (*name of defendant*), _____ (*name of plaintiff*) has the burden of proving the following elements:

1. _____ (*name of defendant*) provided alcoholic beverages to _____ (*name of guest or plaintiff*);

2. At the time _____ (*name of defendant*) provided the alcoholic beverages to _____ (*name of guest or plaintiff*), _____ (*name of guest or plaintiff*) was intoxicated;

3. _____ (*name of defendant*) provided the alcoholic beverages recklessly; and

4. _____ (*name of guest or plaintiff*)'s intoxication was a cause of _____ (*name of guest or plaintiff*)'s [injuries and] damages.

[To prove that _____ (*name of defendant*) provided alcoholic beverages to _____ (*name of guest or plaintiff*), _____ (*name of plaintiff*) must prove that _____ (*name of defendant*) had some responsibility for or control over the service of alcohol to _____ (*name of guest or plaintiff*). You must consider all of the circumstances. For example, you may consider whether _____ (*name of defendant*) set up a gathering for a specific purpose or benefit to _____ (*name of defendant*), such as to celebrate an event, or to promote business goodwill; whether _____ (*name of defendant*) arranged in advance for the provision of food and beverages or; whether _____ (*name of defendant*) invited _____ (*name of guest or plaintiff*) to attend as [his] [her] [its] guest. The presence or absence of a particular circumstance does not necessarily resolve whether _____ (*name*

of defendant) had some responsibility for or control over the provision of alcohol to _____ (*name of guest of plaintiff*).]

USE NOTES

This instruction is based on NMSA 1978, Section 41-11-1(E). It should be given when the plaintiff claims injury resulting from the provision of alcohol in a social setting inside a licensed establishment. This instruction is to be used either when the claim is brought by a third party or by the person who was provided with the alcohol. If the provision of the alcoholic beverages takes place outside a licensed establishment, UJI 13-1665 NMRA should be used instead of this instruction. The instruction should be given with the appropriate definitions from UJI 13-1660 NMRA. The bracketed paragraph should only be used when there is a factual dispute regarding whether the defendant provided alcohol to the person whose intoxication is at issue and may be modified based on the facts of the case.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — NMSA 1978, Section 41-11-1(E) defines the liability of a person who provides alcoholic beverages to guests in a social setting. The case law and Section 41-11-1(H) refer to such person as a "social host." *See, e.g., Delfino v. Griffo*, 2011-NMSC-015, ¶ 13, 150 N.M. 77, 257 P.3d 917. The statute allows the guest or a third party to recover damages caused by the guest's intoxication when the elements set forth in the statute are satisfied.

Most cases that include claims under Section 41-11-1(E) arise from service of alcohol at a private home or other private settings that are not licensed establishments. However, in *Delfino*, the New Mexico Supreme Court stated that "social hosting need not occur in a home." *Id*. ¶ 24 "[T]he Liquor Liability Act 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" and delivered by a licensed server. *Id*. ¶ 30. The Supreme Court made clear in *Delfino* that not all situations involving one person providing alcohol to another in a licensed establishment give rise to liability under the statute. "Social host liability . . . requires some degree of control over the service or consumption of alcohol." *Id*. ¶ 32 (citing *Chavez v. Desert Eagle Distributing Co. of New Mexico*, 2007-NMCA-018, ¶ 31, 141 N.M. 116, 151 P.3d 77).

For the defendant to be entitled to the higher standard of care set forth in Section 41-11-1(E), the defendant must prove that the service of alcoholic beverages was gratuitous and in a social setting. In most cases, these matters will not be a matter of factual dispute. If such a dispute exists, further instruction may be necessary.

[Adopted by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1667. Liquor licensee liability for sale or service to a minor.

To establish a claim against defendant _____ (*name of licensee*) for the [sale or service of alcoholic beverages to a minor] [or] [a minor's consumption of alcoholic beverages on the defendant's premises], plaintiff has the burden of proving the following elements:

[1. Defendant was a licensee;]

2. [Defendant or defendant's [agent(s)] or [employee(s)] sold or served alcoholic beverages to a minor] [or] [the minor consumed alcoholic beverages on the defendant's premises];

3. Defendant or defendant's agents or employees knew or, as a reasonably prudent person, would have known, the person was a minor.

In addition, plaintiff has the burden of proving that plaintiff's damages were proximately caused by [defendant's sale or service of alcoholic beverages to the minor] [or] [the minor's consumption of alcoholic beverages on defendant's premises].

USE NOTES

This instruction should be given in those cases where a liquor licensee sold or served alcohol to a minor or the minor consumed alcoholic beverages on the licensee's premises. The bracketed element number one should be given only if the court determines there is a factual issue regarding the status of defendant as a licensee. The other bracketed portions of the instruction should be used as appropriate to the circumstances of the case. The committee recommends that the name of defendant or defendant's agent or employee be inserted into the instruction at the appropriate points.

[Approved, effective July 16, 2001; UJI 13-1644 NMRA recompiled as UJI 13-1667 NMRA by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — Section 41-11-1(F) and (G) NMSA 1978 create and define civil liability for the violation of Section 60-7B-1 NMSA 1978, sale or service of alcoholic beverages to a minor. Section 60-7B-1(D) NMSA 1978 provides a defense to the licensee or the licensee's agents or employees where a person other than a minor procures the sale or service of the alcoholic beverages given to the minor and where the sale or service was procured as the result of actual or constructive misrepresentation leading to conceal the fact that the person is a minor and not legally entitled to be sold or served an alcoholic beverage.

[UJI 13-1644 NMRA recompiled as UJI 13-1667 NMRA by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

13-1668. Third party liability for procuring alcoholic beverages for a minor.

To establish a claim against defendant _____ (*name of defendant*) for procuring alcoholic beverages for a minor, plaintiff has the burden of proving the following elements:

1. Defendant [procured] [or] [assisted a minor in procuring] the alcoholic beverages;

2. Defendant knew or, as a reasonably prudent person, would have known, the person was a minor.

In addition, plaintiff has the burden of proving that plaintiff's damages were proximately caused by defendant's acts in [procuring] [or] [assisting the minor in procuring] the alcoholic beverages.

USE NOTES

This instruction should be given in those cases where a third party procures for a minor or assists a minor in procuring alcoholic beverages. The bracketed portions of the instruction should be used as appropriate to the circumstances of the case.

[Approved, effective July 6, 2001; UJI 13-1645 NMRA recompiled as UJI 13-1668 NMRA by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — Section 41-11-1(F) and (G) NMSA 1978 create and define civil liability for the violation of Section 60-7B-1 NMSA 1978, selling or serving alcoholic beverages to a minor. It is also a violation of Section 60-7B-1(A) NMSA 1978 to procure for or to assist in the procuring of alcoholic beverages for a minor.

[UJI 13-1645 NMRA recompiled as UJI 13-1668 NMRA by Supreme Court Order No. 15-8300-005, effective for all cases pending or filed on or after December 31, 2015.]

APPENDICES

Appendix 1. Sample loss-of-chance; loss of consortium instruction.

Statement of facts

In *Baer v. Regents of University of California*, 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9, Helmut Baer was required to undergo periodic physical examinations as part of a regular employment practice. During his 1985 exam, chest x-rays revealed a lesion in the right lung. A little over one year later, the lesion was interpreted as benign, but the doctor recommended periodic exams and x-rays for the future. In July 1989, Baer was

reexamined at his employer's facility by James Pederson, a physician's assistant. For the first time no chest x-rays were taken, and the physician's assistant offered Baer no medical advice concerning the lesion. A year later, Baer was independently diagnosed as having large cell carcinoma, and despite subsequent medical treatment, Baer died in October 1991. Assume, for the purposes of this exemplar, that Baer's widow filed a loss-of-consortium and a survival action against the employer, alleging the physician's assistant negligently failed to diagnose the cancerous nodule in her husband's lungs. Assuming, further, that plaintiff presented evidence that Baer more likely than not had cancer at the time of the exam by the physician's assistant and that the cancer would have been reasonably detectable by the omitted x-ray, the instructions to the jury may have been given as follows:

UJI 13-302A. Statement of theory for recovery and

UJI 13-302B. Statement of factual contentions of plaintiff, causation and burden of proof.

This lawsuit has been brought by plaintiff Jo Baer, individually and as the personal representative of the estate of Helmut Baer who is now deceased. Plaintiff seeks compensation from the defendant for damages that plaintiff claims were caused by negligence. To establish negligence on the part of defendant, the plaintiff has the burden of proving each of the following:

1. James Pederson omitted to take an x-ray of Helmut Baer in July 1989 during a regular physical examination conducted by Pederson as a physician's assistant in the employ of the Los Alamos National Laboratory.

2. By omitting the x-ray, Pederson failed to use the skill and care ordinarily used by reasonably well-qualified physicians' assistants practicing under similar circumstances, giving due consideration to the locality involved.

3. Helmut Baer more likely than not had cancer at the time of the exam by Pederson in July 1989.

4. Helmut Baer's cancer would have been reasonably detectable by the omitted x-ray.

5. Helmut Baer had a chance for a better outcome to his cancer had it been detected and treated in July 1989.

The plaintiff has the burden of proving, that the negligence of James Pederson was a cause of Helmut Baer's lost opportunity for a better outcome to his medical problem.

UJI 13-304. Burden of proof; greater weight of the evidence.

A party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence.

To prove by the greater weight of the evidence means to establish that something is more likely true than not true. When I say, in these instructions, that the plaintiff has the burden of proof on negligence or cause, I mean that you must be persuaded that what is sought to be proved is more probably true than not true.

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

James Pederson was the employee of Los Alamos National Laboratory at the time of the occurrence. Therefore, Los Alamos National Laboratory is liable for any wrongful act or omission of Pederson.

UJI 13-1101. Duty of health care provider.

In performing a regular physical examination of an employee James Pederson was under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified physicians' assistants practicing under similar circumstances, giving due consideration to the locality involved. A physician's assistant who fails to do so is negligent.

The only way in which you may decide whether the physician's assistant in this case possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by health care providers testifying as expert witnesses. In deciding this question you must not use any personal knowledge of any of the jurors.

UJI 13-1635. Loss-of-a-chance injury; definition; burden of proof.

A party is liable for negligence resulting in another's lost chance for survival from a preexisting condition. This lost opportunity is an injury in itself. For plaintiff to recover on this claim a medical expert must establish that, as a result of James Pederson's negligence, Helmut Baer lost a measurable opportunity to survive his cancer.

UJI 13-1802. Measure of damages; general.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Jo Baer individually for her emotional distress due to Helmut Baer's lost chance for survival, and you must fix the amount of money which will reasonably and fairly compensate the estate of Helmut Baer for his lost chance for survival. You must consider each of the following elements of damages proved by the plaintiff to have resulted from the negligence as claimed:

A. For Jo Baer, individually, her emotional distress as spouse caused by the loss of the society, guidance, companionship and sexual relations enjoyed with the deceased. [*UJI 13-1810A. Loss of consortium*.]

B. For Jo Baer, as personal representative of the estate of Helmut Baer, deceased:

1. The pain and suffering experienced by the deceased between the time of injury and death [*UJI 13-1807. Pain and suffering. See also, UJI 13-1830. Wrongful death.*];

2. The reasonable expenses of necessary medical care and treatment and funeral and burial [*UJI 13-1804. Medical expense. See also, UJI 13-1830. Wrongful death*.];

3. The lost earnings, the lost earning capacity and the value of the lost household services of the deceased considering the deceased's age, earning capacity, health, habits, and life expectancy had he survived his cancer. In considering loss of earnings or earning capacity, deductions must be made for income taxes, social security taxes, other taxes, and personal living expenses of the deceased. The damages set forth in this paragraph are damages for the future loss of money and are paid in a lump sum. Therefore, a reasonable discount must be made for the future earning power of the damages awarded [*UJI 13-1803. Earnings. See also, UJI 13-1830. Wrongful death.*]; and

4. The value of the deceased's life apart from his earning capacity. [*See UJI 13-1830. Wrongful death.*]

Provided, however, for the loss of a chance under both claim A and claim B, while you must (1) first determine total damages for the loss under the elements listed above for each of the two claims, you then must (2) base your award on a percentage representing the lost opportunity to avoid each loss. The valuation of lost chances is necessarily imprecise; the value of the loss may be established by fair approximations, by numbers or verbal descriptions, from which you may arrive at a percentage to apply to the total damages.

UJI 13-1802A. Measure of the loss of a chance.

Whether any of the elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

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

[As amended, effective March 1, 2005.]

Appendix 2. Sample loss of limb; loss-of-a-chance alternative.

Statement of facts

In *Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279, Alberts, who had a history of peripheral vascular disease, went to his primary care physician, Dr. Schultz, with symptoms including severe "rest pain" in his right foot, a sign of impending gangrene that could lead to amputation of the affected limb. At this visit of July 15, 1992, Dr. Schultz did not conduct a motor sensory examination and did not order an arteriogram, a diagnostic test that assists in evaluating the condition of blood vessels. Thirteen days later Alberts saw a vascular surgeon who, upon seeing the condition of the leg, sent Alberts to the hospital for an arteriogram followed by several procedures performed unsuccessfully. The leg was amputated below the knee. Alberts sued Dr. Schultz claiming he neglected to perform the appropriate examinations on his leg and failed to make a timely referral to a specialist, and that the thirteen-day delay resulted in the loss of the leg or, in the alternative, it decreased the probability that the leg could be saved. Assuming testimony to a reasonable degree of medical probability that the leg would have been saved or that, at the very least, the chances of saving the leg would have increased significantly with the timely grafting of other arteries that were suitable candidates for bypass surgery, the instructions to the jury may have been given as follows:

UJI 13-302A. Statement of theory for recovery; and

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

In this civil action plaintiff Dee Alberts seeks compensation from the defendant Dr. Schultz for damages which plaintiff claims were proximately caused by negligence.

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

1. When Dee Alberts visited Dr. Schultz as his primary care physician on July 14, 1992, Dr. Schultz failed to perform appropriate motor and sensory exams of the leg and immediately refer Mr. Alberts to a specialist for an arteriogram that would have resulted in timely grafting of arteries available for bypass surgery.

2. By failing to perform the motor and sensory exams and to refer Dee Alberts to a specialist for an arteriogram, Dr. Schultz failed to use the skill and care ordinarily used by reasonably well-qualified doctors practicing under similar circumstances, giving due consideration to the locality involved.

3. Dee Alberts lost his leg by amputation below the knee because he did not have timely bypass surgery;

or, in the alternative:

The chances of saving the leg at the very least would have increased significantly with timely grafting.

Dee Alberts also contends, and has the burden of proving, that negligence of Dr. Schultz was a proximate cause either of 1) the loss of his leg or 2) the loss of a chance to save the leg.

UJI 13-304. Burden of proof; greater weight of the evidence.

It is a general rule in civil cases that a party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence.

To prove by the greater weight of the evidence means to establish that something is more likely true than not true. When I say, in these instructions, that the plaintiff has the burden of proof on negligence or proximate cause, I mean that you must be persuaded that what is sought to be proved is more probably true than not true.

UJI 13-1101. Duty of a doctor.

In caring for Dee Alberts as his primary care physician, Dr. Schultz was under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors practicing under similar circumstances, giving due consideration to the locality involved. A doctor who fails to do so is negligent.

The only was [way] in which you may decide whether Dr. Schultz in this case possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by doctors testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

UJI 13-1635. Loss-of-a-chance injury; definition; burden of proof.

A party is liable for negligence resulting in another's lost chance for a better outcome to a preexisting condition. This lost opportunity is an injury in itself. For Dee Alberts to recover on this claim a medical expert must have established that, as a result of Dr. Schultz's negligence, Dee Alberts lost a measurable opportunity to avoid loss of his leg.

UJI 13-1802. Measure of damages; general.

If you should decide in favor of the plaintiff on the question of liability (1) for the loss of his leg, or, if not for the loss of the leg, then (2) for the loss of a chance to save the leg, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence as claimed:

1. The value of lost earnings and the present cash value of earning capacity reasonably certain to be lost in the future. *[UJI 13-1803. Earnings.]*

2. The reasonable expense of necessary medical care, treatment and services received, including prosthetic devices, and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future. *[UJI 13-1804. Medical expenses.]*

3. The reasonable value of necessary nonmedical expenses which have been required as a result of loss of limb, and the present cash value of such nonmedical expenses reasonably certain to be required in the future. *[UJI 13-1805. Nonmedical expenses.]*

4. The nature, extent and duration of the injury, including disfigurement. *[UJI 13-1806. Nature, extent, duration.]*

5. The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the loss of limb.

   The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiff with fairness to all parties to this action. *[UJI 13-1807. Pain and suffering.]*

Provided, however, for the loss of a chance for a better outcome to a medical problem, while you must (1) first determine total damages for the loss of limb under the above-listed elements, you then must (2) base your award on a percentage representing the lost opportunity to avoid loss of limb. The valuation of lost chances is necessarily imprecise; the value of the loss may be established by fair approximations, by numbers or verbal descriptions, from which you may arrive at a percentage to apply to the total damages. *[UJI 13-1802A. Measure of the loss of a chance.]*

Whether any of the elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess or conjecture.

Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages. *[UJI 13-1802. Measure of damages; general.]*

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

After considering the evidence and these instructions as a whole, the preliminary questions presented for you to answer on the special verdict form are as follows:

1. Was defendant negligent?

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

3. Was any negligence of defendant a proximate cause of plaintiff's lost chance to avoid the loss of his limb, and resulting damages?

If you answer "No" to question 1 on the special verdict form you shall return the special verdict for the defendant and against the plaintiff. If, on the other hand, you answer "Yes" to question 1 you shall answer question 2.

If you answer "Yes" to question 2, you shall determine the amount of money that will compensate plaintiff for his loss of limb and damages. If you answer "No" to question 2, you shall answer question 3. If you answer "No" to both questions 2 and 3, you shall return the special verdict for the defendant. If you answer "Yes" to question 3, you shall determine the amount of money that will compensate plaintiff for his lost chance to avoid the loss of his limb.

After you determine the damages for loss of limb or, in the alternative, for loss of a chance, you will otherwise answer the questions required of you on the special verdict form which I will hand to you at the conclusion of these instructions.

[Approved, effective March 20, 2000.]

CHAPTER 17
Bad Faith

Introduction.

Chapter 17 of the Uniform Jury Instructions–Civil has been revised to reflect developments in the law since the chapter originated in 1991. The chapter is devoted to common-law and statutory claims of bad faith against an insurer. The Committee recognizes that the obligation of good faith may create causes of action for bad faith in contexts other than the relationship between an insurer, the insured, and anyone to whom an insurer may have a duty of good faith. This chapter, however, is limited to the insurance context.

Chapter 17 includes instructions for common-law causes of action, UJIs 13-1701 to 13-1704 NMRA, as well as private actions under the Insurance Code, UJI 13-1706 NMRA. *See* NMSA 1978, § 59A-16-30 (1990). The chapter is self-contained with instructions or commentary on causation, affirmative defenses, and damages. With the addition of instructions for the statement of issues, burden of proof, duties of jurors, and verdict forms, jury instructions for the bad faith claim in the typical case should be complete.

A lawsuit against an insurer may also include causes of action for breach of contract or violation of the Unfair Practices Act. *See* NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019). Chapter 17 provides instructions only for common-law and statutory claims for insurance bad faith. Instructions for any claims for breach of contract or violation of the Unfair Practices Act are to be drawn from Chapter 8, Contracts and UCC Sales, or Chapter 25, Unfair Practices Act, respectively. The absence of an instruction in this chapter does not imply the unavailability of a claim or defense, it merely indicates that New Mexico case law is not sufficiently developed to justify a uniform instruction.

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1701. Duty of the insurance company.

An insurance policy is a contract that creates a special relationship between an insurer and insured which requires an insurer to deal fairly, reasonably, honestly, and in good faith with its insureds in all aspects of the insurance contract. The duty to act fairly, reasonably, honestly, and in good faith requires that an insurer must not place its own interests above those of an insured. [This duty applies to the insurer and also to anyone acting on its behalf. The insurer cannot avoid its duty of good faith by delegating its responsibilities.]

USE NOTES

This instruction must be given in an action for bad faith. The two bracketed sentences at the end of the instruction should be given if the facts involve an agent or delegee of the insurer and the trial court determines that the agent's or delegee's function subjects it to the same duty of good faith as the insurer.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — The cause of action for bad faith arises from a breach of the obligation of good faith. The duty to use good faith is founded in an implied covenant in an insurance policy to deal honestly and fairly. *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co*., 1984-NMSC-107, ¶ 11, 102 N.M. 28, 690 P.2d 1022. "[A]n insurer cannot avoid or dissolve this duty by delegating to third parties its essential function of making sure that claims for policy benefits are handled and determined fairly, promptly, and honestly." *Dellaira v. Farmers Ins. Exch*., 2004-NMCA-132, ¶ 11, 136 N.M. 552, 102 P.3d 111.

Breach of the implied obligation of good faith creates a cause of action. *State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, ¶ 8, 86 N.M. 757, 527 P.2d 798. Because the

duty to use good faith derives from the contract of insurance, no common-law cause of action exists in favor of a third party. *Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 36, 89 N.M. 423, 553 P.2d 703. However, third parties may bring statutory claims of unfair claims practices under NMSA 1978, §§ 59A-16-1 to -30 (1984, as amended through 2023) in certain circumstances. *Hovet v. Allstate Ins. Co*., 2004-NMSC-010, ¶ 18, 135 N.M. 397, 89 P.3d 69.

In *Ambassador*, 1984-NMSC-107, ¶¶ 15-16, and *Jessen v. National Excess Insurance Co*., 1989-NMSC-040, ¶ 14, 108 N.M. 625, 776 P.2d 1244, the Supreme Court stated that consideration of the interests of the insured is an element of the insurer's obligation. The Use Notes for this instruction previously provided that the insurer's obligation to consider the interests of the insured is applicable in an action for bad faith failure to settle. The obligation applies in other contexts. For example, in *Jessen*, the insured brought a first-party claim against the insurer for failure to either pay or deny the claim within a reasonable period of time. 1989-NMSC-040, ¶ 1. In affirming a jury's verdict for the insured, the Supreme Court stated: "the evidence shows the insurer utterly failed to exercise care for the interests of the insured in denying or delaying payment on an insurance policy." *Id*. ¶ 14.

An insurer's duty rises to the level of a fiduciary obligation when the insurer exercises "exclusive control . . . in matters pertaining to the performance of the insurance contract." *Azar v. Prudential Ins. Co. of Am*., 2003-NMCA-062, ¶ 54, 133 N.M. 669, 68 P.3d 909. *See* UJI 13-1708 NMRA comm. cmt.

[As amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1702. Bad faith conduct in first-party claims.

When deciding whether to pay a claim, an insurer must act fairly, reasonably, honestly, and in good faith under the circumstances. An insurer acts in bad faith when it does [one or more of] the following:

[fails to deal fairly with its insured, giving the interests of its insured at least the same weight as its own interests;]

[fails to act promptly to [evaluate] [investigate] [pay] the claim;]

[unreasonably delays notification of whether the claim will be paid or denied;]

[refuses to pay the claim for reasons that are frivolous or unfounded and are not reasonable under the terms of the policy. An insurer does not act in bad faith by denying a claim for reasons that are reasonable under the terms of the policy.]

(*The court may include other grounds for the claim if supported by the law and the evidence*.)

[An insurer may act in bad faith in its handling of a claim even if the policy provides no coverage for that claim.]

USE NOTES

This instruction must be given in a first-party claim. The bracketed paragraphs are to be given to reflect the nature of the plaintiff's claims when supported by the law and the evidence. Other grounds may be inserted as stated in the instruction should the court determine they are warranted by law and the evidence. The bracketed final sentence of the instruction should be given if the law and the evidence support a claim for bad faith in the handling of the insured's claim independent of whether policy coverage exists for the claim.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — A first-party claim for insurance bad faith may proceed on several different theories, some of which are outlined in *O'Neel v. USAA Insurance Co*., 2002-NMCA-028, ¶ 11, 131 N.M. 630, 41 P.3d 356: refusing to pay for reasons that were unfounded or frivolous, failing to act reasonably to conduct a fair investigation, or failing to act reasonably to conduct a fair evaluation of the claim. *See also Haygood v. United Services Auto. Ass'n*, 2019-NMCA-074, ¶ 19, 453 P.3d 1235. "Where an insurer fails to make an adequate investigation, its coverage position is unfounded, and it thus may be liable for bad faith denial of a claim." *Id*. (citations omitted).

The Supreme Court acknowledged additional bases in *Progressive Casualty Insurance Co. v. Vigil*, 2018-NMSC-014, ¶ 24, 413 P.3d 850, including an insurer's failure to "deal fairly with" its insured or "to act honestly and in good faith in the performance of the insurance contract." Delay in payment is also a basis for finding bad faith. *See Jessen v. Nat'l Excess Ins. Co*., 1989-NMSC-040, ¶ 7 n.2, 108 N.M. 625, 776 P.2d 1244; *Travelers Ins. Co. v. Montoya*, 1977-NMCA-062, ¶ 5, 90 N.M. 556, 566 P.2d 105.

"An insurer 'does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.'" *Progressive Ins. Co. v. Vigil*, 2015-NMCA-031, ¶ 14, 345 P.3d 1096 (quoting prior version of UJI 13-1702 NMRA), *rev'd and remanded on other grounds*, 2018-NMSC-014, 413 P.3d 850. "[A]n insurer has a right to refuse a claim without exposure to a bad faith claim if it has reasonable grounds to deny coverage." *Am. Nat'l Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 13, 293 P.3d 954. New Mexico precedent has not addressed how this rule would apply when the insurer relies on a policy provision that by its terms excludes or limits coverage but is unenforceable as contrary to New Mexico law or public policy. In the absence of authority, the trial court, aided by the arguments of counsel, will have to resolve this issue.

The instruction reflects that “a bad faith claim need not depend on the existence of coverage” and may exist, independent of coverage, if the insurer “failed to deal fairly in handling the claim, failed to conduct a fair investigation, or failed to fairly evaluate coverage, among other possibilities.” *Haygood*, 2019-NMCA-074, ¶¶ 22-23. A court may not foreclose bad faith claims entirely based on the absence of coverage. *Id*. ¶ 24.

[As amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1703. Recompiled.

13-1703A. Existence of duty to defend.

An insurer is under a duty to defend a claim [against its insured] if the facts alleged in the claim [and any other facts known to the insurer about the claim] [and any additional facts that the insurer could have discovered if it conducted a reasonable investigation of the claim] [bring the claim within the coverage terms of the insurance policy] [or] [give rise to a legitimate question about whether coverage exists under the policy terms]. In determining whether the claim potentially falls within the policy coverage, the facts and policy terms are to be considered from the viewpoint of a reasonable insured.

[For an insurer that is under a duty to defend a claim against its insured, the duty arises [when the insured makes a demand for a defense of the claim] [or] [when the insurer obtains actual notice of the claim] [, whichever occurs first]. The duty continues to exist unless or until the insurer receives a determination by a court that the claim against the insured is outside the scope of coverage of the insurance policy.]

[An insurer has no duty to defend if the claim against the insured clearly falls outside the coverage provided by the policy.] [An insurer is under no duty to defend if the insured affirmatively declines a defense.]

USE NOTES

This instruction is to be used in cases involving alleged bad faith conduct by an insurer in refusing to defend against a third-party claim, when the existence of a duty to defend on the insurer’s part is disputed and presents questions for resolution by the jury. It should be given in conjunction with UJI 13-1703B NMRA, which describes when a breach of the duty to defend constitutes bad faith.

The bracketed language in the instruction should be used as appropriate, depending on the basis of the claim against the insurer and the issues raised by the evidence. The bracketed second paragraph should be used, in whole or in part, if factual issues are raised by the plaintiff’s claim or the insurer’s defense and sufficient evidence is offered at trial to give rise to a jury question about when the insurer’s duty to defend arose and/or when that duty ceased to exist. The bracketed third paragraph should be used,

in whole or in part, if the insurer's defense and the evidence raise a jury issue about whether the claim against the insured clearly falls outside policy coverage or whether the insured "affirmatively declined" a defense by the insurer.

The brackets around the phrase "against its insured" in the first paragraph of the instruction indicate that the phrase ordinarily should be given, but the phrase is intended to refer to the plaintiff claiming benefits under the insurance policy and should be modified, along with other references in the instruction to the "insured," if the use of "insured" would not be appropriate in the circumstances of the case. If the case presents a question whether the plaintiff is an "insured" or is otherwise eligible to claim a defense under the policy, this instruction may require supplementation with instructions framing that issue.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — New Mexico law has taken an expansive approach in determining when an insurer has a duty to defend a third-party claim against an insured. Early cases focused on the allegations of the third-party's complaint in comparison with the coverage terms of the policy and held that a duty to defend exists "[i]f the allegations of the . . . complaint show that an accident or occurrence comes within the coverage of the policy" or, if the facts are not stated with sufficient clarity to determine the question of coverage, if "the alleged facts tend to show an occurrence within the coverage." *Am. Emps.' Ins. Co. v. Continental Cas. Co*., 1973-NMSC-073, ¶ 4, 85 N.M. 346, 512 P.2d 674 (internal quotation marks and citation omitted). Subsequent cases took a broader view, holding that a duty to defend "arises from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage." *Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co*., 1990-NMSC-094, ¶ 11, 110 N.M. 741, 799 P.2d 1113.

More recently, New Mexico courts have held that an insurer, in determining whether it has a duty to defend, may be charged with knowledge beyond the allegations of the complaint and facts otherwise known to it. "[A]n insurance company is required to conduct such an investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured or provided by the circumstances surrounding the claim in order to determine whether it has a duty to defend." *G & G Servs., Inc. v. Agora Syndicate, Inc*., 2000-NMCA-003, ¶ 23, 128 N.M. 434, 993 P.2d 751. The insurance company's duty "is based on the facts which it knew or would have known if it had conducted a reasonable investigation." *Id*. ¶ 32. Thus, "[i]f the duty to defend does not arise from the complaint on its face, the duty may arise if the insurer is notified of factual contentions or if the insurer could have discovered facts, through reasonable investigation, implicating a duty to defend." *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co*., 2006-NMCA-151, ¶ 14, 140 N.M. 720, 148 P.3d 806.

New Mexico courts have variously described the standard by which to determine whether pleaded, known, or reasonably discoverable facts create a duty to defend in light of the language of the policy. A duty to defend has been said to arise if the facts "tend to show" policy coverage, *Am. Emps.' Ins. Co*., 1973-NMSC-073, ¶ 4, or if they bring the claim against the insured "arguably," *Am. Gen*., 1990-NMSC-094, ¶ 11, or "potentially," *State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, ¶ 18, 101 N.M. 438, 684 P.2d 524, *disapproved of on other grounds by Ellingwood v. N.N. Invs. Life Ins. Co*., 1991-NMSC-006, ¶ 17, 111 N.M. 301, 805 P.2d 70, within the coverage of the policy, or if they give rise to a "legitimate question regarding . . . coverage," *Dove v. State Farm Fire & Cas. Co*., 2017-NMCA-051, ¶ 22, 399 P.3d 400. *See id*. ¶¶ 20-21 (concluding that allegations of complaint "should have initially alerted [the insurer] to the possibility" of coverage or "at the very least, have reasonably prompted [it] to investigate," and that facts revealed during discovery or that reasonable investigation would have revealed "further establish . . . potential coverage under the policy"). Only "[w]here there is no potential for coverage under a contract of insurance" is the insurer free of any duty to defend. *Marshall v. Providence Wash. Ins. Co*., 1997-NMCA-121, ¶ 13, 124 N.M. 381, 951 P.2d 76; *see also Guar. Nat'l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806, 907 P.2d 210 ("[T]he insurer has no duty to defend if the allegations in the complaint clearly fall outside the policy's provisions.").

In determining the existence of a duty to defend, whether the facts potentially or arguably fall within the policy coverage is to be considered from the viewpoint and reasonable expectations "of a hypothetical reasonable insured." *See Dove*, 2017-NMCA-051, ¶¶ 19, 24 (internal quotation marks and citation omitted); *see also Hinkle v. State Farm Fire & Cas. Co*., 2013-NMCA-084, 308 P.3d 1009 (holding that, even considering insured's reasonable expectations based on policy language, claims asserted in third-party's complaint against insured did not give rise to duty to defend). Any doubt about whether the claim is covered should be resolved in favor of the insured, *Price*, 1984-NMCA-036, ¶ 18, and any ambiguity in the policy language should be construed against the insurer, *Dove*, 2017-NMCA-051, ¶ 17.

An insurer faced with uncertainty about whether it is under a duty to defend has the option to seek a judicial determination of the question and may, at the same time, undertake to defend under a reservation of rights. *See id*. ¶ 12. The fact-based determination of whether a claim falls within policy coverage generally is reserved for the court in the primary action by the third party against the insured. *See Found. Rsrv. Ins. Co. v. Mullenix*, 1982-NMSC-038, ¶¶ 11-12, 97 N.M. 618, 642 P.2d 604; *Dove*, 2017-NMCA-051, ¶ 12. An insurer that unilaterally determines that there is no policy coverage "does so at its peril." *Dove*, 2017-NMCA-051, ¶ 14.

An insurer's duty to defend is triggered by the insured's demand for a defense or by the insurer's actual notice of a claim against the insured, unless the insured knowingly and affirmatively declines a defense. *Garcia v. Underwriters at Lloyd's, London*, 2008-NMSC-018, ¶ 1, 143 N.M. 732, 182 P.3d 113. New Mexico courts appear to take a broad view of what may constitute a demand. *See Price*, 1984-NMCA-036, ¶¶ 26-27. The duty continues "unless and until [the insurer] receives a judicial ruling in its favor

relieving it of any further obligations." *Dove*, 2017-NMCA-051, ¶ 12 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1703B. Bad faith failure to defend.

An insurer must act fairly, reasonably, honestly, and in good faith in determining whether it has a duty to defend a claim [against its insured]. An insurer acts in bad faith in refusing to defend a claim if it

[fails to conduct an investigation of the claim that is timely and reasonable under the circumstances;]

[fails to conduct a fair and honest evaluation of its duty to defend, giving the interests of its insured at least the same weight as its own interests;] [or]

[unreasonably delays notifying the insured of its decision about whether or not it will defend the claim.]

USE NOTES

This instruction is to be used in cases involving alleged bad faith conduct by an insurer in refusing to defend against a third-party claim. If the insurer's duty to defend is disputed and involves questions for resolution by the jury, UJI 13-1703A NMRA should be given together with this instruction.

The bracketed language in the instruction describing bad faith conduct should be used as appropriate, depending on the basis of the claim against the insurer and the issues presented by the case. The brackets around the phrase "against its insured" indicate that the phrase ordinarily should be given, but the phrase is intended to refer to the plaintiff claiming benefits under the insurance policy and should be modified (along with other references in the instruction to the "insured") if the use of "insured" would not be appropriate in the circumstances of the case. If the case presents a question whether the plaintiff is an "insured" or is otherwise eligible to claim a defense under the policy, this instruction may require supplementation with instructions framing that issue.

[Adopted, effective November 1, 1991; UJI 13-1703 NMRA recompiled and amended as UJI 13-1703B NMRA by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — An insurer may hold a subjective good faith belief that there is no coverage and still breach its duty to defend under the policy. *See Lujan v. Gonzales*, 1972-NMCA-098, ¶ 22, 84 N.M. 229, 501 P.2d 673. The insurer "is liable for its breach regardless of whether the breach was in good faith." *Id*. ¶ 42. To establish

that an insurer acted in bad faith in failing to defend, more must be shown than the breach itself. "[B]ad faith . . . mean[s] an absence of good faith by an insurer in its relations with its insured." *Id*. ¶ 38. Without attempting to define the term completely, the court in *Lujan* "use[d] the term 'good faith' . . . to mean an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured equal consideration" – *i.e*., "there must be a fair balancing of these interests." *Id*. ¶¶ 39, 41.

In *Lujan*, the Court held that substantial evidence supported the trial court's determination that the insurer acted in bad faith in refusing to defend or settle a claim when the court could find from the evidence that in evaluating its duty, the insurer exhibited "almost total disregard for the interest of its insured" and failed to notify the insured of its decision not to defend until after a settlement offer had expired. *Id*. ¶¶ 46-51. *See also State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, ¶ 41, 101 N.M. 438, 684 P.2d 524 (holding that insurer's bad faith failure to defend presented triable issue, when "there is evidence in this case which could support a finding that [insurer] closed its eyes to the facts" supporting duty to defend), *disapproved of on other grounds by Ellingwood v. N.N. Invs. Life Ins. Co*., 1991-NMSC-006, ¶ 17, 111 N.M. 301, 805 P.2d 70.

Lujan rejected on the facts the insurer's argument that in determining its duty to the insured it justifiably relied on certain information available to it. 1972-NMCA-098, ¶¶ 46-47. In drafting this instruction, the Committee has assumed that an insurer that reasonably evaluates factual information or reasonably interprets policy language in conformity with the general good-faith standard of equal consideration of interests has acted in good faith. In cases involving an insurer's alleged bad faith failure to pay a first-party claim, New Mexico courts have defined bad faith as a refusal to pay that is "frivolous or unfounded." *E.g*., *Jackson Nat'l Life Ins. Co. v. Receconi*, 1992-NMSC-019, ¶¶ 55-56, 113 N.M. 403, 827 P.2d 118 (emphasis, internal quotation marks, and citations omitted). Similarly, a prior version of this instruction stated that an insurer that refuses to defend acts in bad faith "if the terms of the insurance policy do not provide a reasonable basis for the refusal." UJI 13-1703 NMRA (1991). The Committee has not found these standards used in a published failure-to-defend case and therefore believes any defense of reasonableness advanced by an insurer in such a case should be considered by the jury in terms of whether the insurer conducted "a fair and honest evaluation of its duty to defend" and gave the insured's interest "at least the same weight as its own interests," as set forth in the instruction.

[UJI 13-1703 NMRA recompiled and amended as UJI 13-1703B NMRA by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1704. Bad faith failure to settle.

An insurer [or agent] must act in good faith in determining whether to settle a claim against its insured. It must settle a claim against its insured when practicable. In deciding whether to settle a claim, an insurer must exercise honest, informed judgment

and fairly balance its own interests and the interests of the insured. An insurer that fails to do so acts in bad faith. An insurer that acts honestly and fairly in not settling a claim, after conducting a diligent, competent, and reasonable investigation of the claim, is not liable for bad faith.

[When there is a substantial likelihood that a claim will result in a recovery that exceeds policy limits, the insurer has a good-faith duty to minimize, if not eliminate, its insured's liability.] [The insurer has a duty to accept reasonable settlement offers within policy limits.]

USE NOTES

This instruction must be given in any cause of action based on a bad faith failure to negotiate or settle a liability claim against the insured. The bracketed language about agents may be used in cases involving an adjuster, broker, or other person or entity acting as or on behalf of an insurer; the general term "agent" may be modified as appropriate to fit the facts of the case. The bracketed language about claims that pose a substantial likelihood of a recovery exceeding policy limits shall be used in cases involving claims that meet that description. The bracketed language about reasonable settlement offers shall be used in cases where the claimant made an offer to settle within policy limits.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — "[G]ood faith . . . impose[s] upon the insurer the duty to settle whenever practicable." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 13, 124 N.M. 624, 954 P.2d 56. In particular, "when damages are likely to exceed policy limits, the insurer risks exposing its insured to even greater liability by going to trial rather than settling. Should an insurer, in violation of its duty of good faith, refuse to accept a reasonable settlement offer within policy limits, it will be liable for the entire judgment against the insured, including the amount in excess of policy limits." *Id*. ¶ 15.

"If the insurer, based on its honest judgment and acting on adequate information after competent investigation of the claim, does not settle and instead proceeds to trial, then it has acted in good faith and cannot be found liable for any excess caused by its failure to settle." *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co*., 1984-NMSC-107, ¶ 18, 102 N.M. 28, 690 P.2d 1022. An insurer's negligent failure to properly investigate a claim, to become familiar with the applicable law, or to meet other "basic standards of competency" may serve as evidence "tending to prove bad faith, but [is] not a cause of action in and of itself." *Id*. ¶ 12.

An insurer's "honest judgment" is necessarily based on "its diligent, competent investigation of the claim." *Sloan v. State Farm Mut. Auto. Ins. Co*., 2004-NMSC-004, ¶ 22, 135 N.M. 106, 85 P.3d 230. It is also based on its honesty in balancing its interests

with its insured's. *See id*. ¶ 20 ("By 'dishonest judgment,' we mean that an insurer has failed to honestly and fairly balance its own interests and the interests of the insured. An insurer cannot be partial to its own interests, but rather must give the interests of its insured at least the same consideration or greater.").

There is no cause of action in New Mexico for the negligent failure to settle a claim of liability against the insured. *Ambassador*, 1984-NMSC-107, ¶ 7.

[As amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1705. Industry customs and standards.

Under the bad faith claim, what is customarily done by those engaged in the insurance industry is evidence of whether the insurer acted in good faith. Industry [customs] [and] [standards] are evidence of good or bad faith, but they are not conclusive.

USE NOTES

This instruction should be given when the trial court allows evidence of the insurer's compliance with or deviation from industry customs or standards as bearing on the insurer's good or bad faith. The appropriate parenthetical is used depending on the nature of the evidence.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — Evidence of industry custom and practice may be helpful to a determination of whether the insurer acted in good or bad faith, but it is not controlling. *See Brooks v. Beech Aircraft Corp*., 1995-NMSC-043, ¶ 40, 120 N.M. 372, 902 P.2d 54 (citing *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932)); *see generally Sloan v. State Farm Mut. Auto. Ins. Co*., 2004-NMSC-004, ¶¶ 14-16, 135 N.M. 106, 85 P.3d 230; *Allsup's Convenience Stores, Inc. v. N. River Ins. Co*., 1999-NMSC-006, ¶¶ 44-45, 127 N.M. 1, 976 P.2d 1; *Jessen v. Nat'l Excess Ins. Co*., 1989-NMSC-040, ¶¶ 7-14, 108 N.M. 625, 776 P.2d 1244; *State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, ¶¶ 1-9, 86 N.M. 757, 527 P.2d 798.

[As amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1706. Violation of the Insurance Code.

There was in force in this state, at the time of the [claim handling] [transaction] in this case, a law prohibiting certain practices by insurers. _____ (*plaintiff*) contends that _____ (*defendant*) engaged in the following prohibited practice[s]:

(*Insert the applicable part[s] of Article 16 of the Insurance Code*.)

If _____ (*defendant*) engaged in [any one of these] [this] practice[s], it is liable to _____ (*plaintiff*) for damages caused by its conduct if it acted knowingly or engaged in the practice[s] with such frequency as to indicate that such conduct was its general business practice.

USE NOTES

Unfair insurance practices supported by substantial evidence are to be numbered and listed using the statutory language.

The trial court has discretion to modify the term "insurer" as appropriate depending on the nature of the defendant.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — Article 16 of the Insurance Code, NMSA 1978, §§ 59A-16-1 to -30 (1984, as amended through 2023), the Trade Practices and Frauds Article (TPFA), creates a private cause of action for violations of the Code. Section 59A-16-30 ("Any person covered by Chapter 59A, Article 16 NMSA 1978 who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages."). Article 16 applies to insurers, agents, brokers, adjusters and "all other persons engaged in any business which is now or hereafter subject to the superintendent's supervision under the Insurance Code." Section 59A-16-1; *see also Martinez v. Cornejo*, 2009-NMCA-011, ¶ 18, 146 N.M. 223, 208 P.3d 443 ("[F]or purposes of the TPFA, the term 'insurer' includes 'agents, brokers, solicitors, adjusters, providers of services contracts pursuant to the Service Contract Regulation Act and all other persons engaged in any business which is now or hereafter subject to the superintendent's supervision under the Insurance Code.'" (footnote omitted) (quoting Section 59A-16-1)).

"The private right of action under the TPFA is not founded on or related to any common law liability or contractual obligation." *Martinez*, 2009-NMCA-011, ¶ 40. "In creating a separate statutory action, the Legislature had a remedial purpose in mind: to encourage ethical claims practices within the insurance industry." *Hovet v. Allstate Ins. Co*., 2004-NMSC-010, ¶ 14, 135 N.M. 397, 89 P.3d 69.

"[A] third party, who can demonstrate a special beneficiary status, may sue for unfair claims practices under [Section 59A-16-30]." *Hovet*, 2004-NMSC-010, ¶ 17 ("A private

right of action for third parties who are victims of automobile accidents is consistent with a statutory scheme that was intended to benefit both insureds and third-party claimants. . . [and] enforces the policy of the Insurance Code, which is to promote ethical settlement practices within the insurance industry."); *see also Russell v. Protective Ins. Co*., 1988-NMSC-025, ¶ 15, 107 N.M. 9, 751 P.2d 693 ("[N]on-contractual liability of a promisor to a third party is valid when it 'is consistent with the terms of the contract and with *the policy of the law authorizing the contract* and prescribing remedies for its breach.'") (quoting Restatement (Second) of Contracts § 313(2)(b) (1981)), *superseded by statute*, NMSA 1978, § 52-1-28.1(A) (1990), *and* § 59A-16-30. The New Mexico Supreme Court "has recognized that a third-party plaintiff who is an intended beneficiary of statutorily mandated insurance has a private right of action under Section 59A–16–30 to remedy an insurer's breach of the duty of fair settlement practices established by Article 16." *Jolley v. Associated Elec. & Gas Ins. Servs. Ltd*. (AEGIS), 2010-NMSC-029, ¶ 10, 148 N.M. 436, 237 P.3d 738.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1707. Violation of Unfair Practices Act.

Instruction withdrawn.

[Adopted, effective November 1, 1991; as withdrawn by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — In 2022, the Supreme Court adopted UJIs 13-2501 to -2506 NMRA for use in claims brought under the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019). These instructions should be used as appropriate in claims brought under the UPA.

When applicable, a plaintiff may pursue both the remedies under the Insurance Code and the UPA. *See* UJI 13-1706 NMRA. The Insurance Code does not provide an exclusive statutory remedy for unfair insurance practices. *State ex rel. Stratton v. Gurley Motor Co*., 1987-NMCA-063, ¶ 17, 105 N.M. 803, 737 P.2d 1180.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1708. Breach of fiduciary duty - *No instruction drafted*.

No instruction drafted.

Committee commentary. — Normally, the Court should decide whether the issues in the case involve fiduciary duties. *GCM, Inc. v. Ky. Cent. Life Ins. Co*., 1997-NMSC-052, ¶ 23, 124 N.M. 186, 947 P.2d 143 ("[T]he scope of a tort duty is a matter of law."). A fiduciary is obliged "to act primarily for another's benefit in matters connected with such undertaking." *Black's Law Dictionary*, 563 (5th ed. 1979). "In the insurance context, New Mexico courts have recognized a fiduciary duty because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer." *Azar v. Prudential Ins. Co. of Am*., 2003-NMCA-062, ¶ 54, 133 N.M. 669, 68 P.3d 909 (internal quotation marks and citation omitted). New Mexico has not expressly recognized a separate cause of action for breach of a fiduciary duty in the insurance bad faith context. Primarily, that is because a fiduciary duty has significant overlap with the duty of good faith and fair dealing. *See Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 44, 89 N.M. 423, 553 P.2d 703.

Though there is overlap between these two duties, the duty of good faith and fair dealing requires an insurer to give the insured's interests as much consideration as its own interests. *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56 (explaining that under the duty of good faith and fair dealing, "an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured *equal* consideration" (emphasis added) (internal quotation marks and citation omitted)). In contrast, a fiduciary relationship requires the insurer to place the insured's interests *above* that of its own.

The insurance contract alone "is not enough to give rise to a fiduciary relationship." *Azar*, 2003-NMCA-062, ¶ 54. New Mexico case law identifies three situations in which courts have recognized a fiduciary relationship in the insurance context: "(1) where the insurer, by the terms of the policy, had the power to decide whether to accept or reject offers of compromise; (2) where the insurer acted on behalf of the insured in settlement or litigation of claims; and (3) where the insurer gave advice to insured not to hire counsel and to instead communicate with insurer." *Id*. (parenthetically summarizing *Chavez*, 1976-NMCA-076, ¶ 43). "Thus, the fiduciary duty of an insurer is based on its exclusive control and obligations in matters pertaining to the performance of the insurance contract." *Id*. The fiduciary obligation allows the award of punitive damages in insurance cases under a more relaxed standard. *See* UJI 13-1718 NMRA; *Romero v. Mervyn's*, 1989-NMSC-081, ¶ 23 n.3, 109 N.M. 249, 784 P.2d 992.

[As amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1709. Causation.

A cause of a [loss] [injury] [harm] is a factor which contributes to the [loss] [injury] [harm] to the plaintiff and without which the [loss] [injury] [harm] would not have occurred. It need not be the only factor contributing to the [loss] [injury] [harm].

USE NOTES

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

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — At common law and under the statutory remedies of the Unfair Practices Act and the Insurance Code, compensation is for the injury caused by the prohibited conduct. For instance, "[s]hould an insurer, in violation of its duty of good faith, refuse to accept a reasonable settlement offer within policy limits, it will be liable for the entire judgment against the insured, including the amount in excess of policy limits." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 15, 124 N.M. 624, 954 P.2d 56. For reasons of public policy, the insured is viewed as having suffered injury from entry of the excess judgment even if the insured would be shielded from monetary liability on the judgment by, e.g., a covenant not to execute on the excess judgment or a discharge in bankruptcy. "Underlying this rule is the notion that it is the judgment against the insured, not the amount of his personal exposure to it, that damages the insured." *Dydek v. Dydek*, 2012-NMCA-088, ¶ 67, 288 P.3d 872. This instruction addresses the causal link that must be established between the insurer's bad faith conduct and the resulting injury.

An insurance bad faith claim may implicate the coverage provisions of the insurance policy. Policy coverage may be limited to losses caused by particular risks, or coverage may be excluded for losses caused by certain risks or by certain conduct of the insured. The determination of causation as it relates to policy coverage is not necessarily governed by this instruction. New Mexico law remains unsettled on this question.

The Court of Appeals in *HealthSouth Rehabilitation Hospital of New Mexico, Ltd. v. Brawley*, 2016-NMCA-037, 369 P.3d 27, addressed causation in the coverage context, but it ultimately determined the issue was not preserved for appellate review. Although the case discussed the issue in dicta, it explained a key difference between how causation operates in tort/negligence-based cases and how causation may apply in determining coverage. *HealthSouth* observes that

> causation principles in tort law are different from causation principles in insurance law because "the two systems examine the causation question for fundamentally different purposes. In tort, it is to assess fault for wrongdoing. In insurance, it is to determine when the operative terms of a contractual bargain come into play." Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 Ala. L. Rev. 957, 968 (2010); Knutsen, *supra*, at 969-70 (stating that "[i]nsurance causation therefore bears little resemblance to the policy-laden proximate cause analysis of tort law"); *see also Standard Oil Co. of N.J. v. United States*, 340 U.S. 54, 66, 71 S.Ct. 135, 95 L.Ed. 68 (1950) (1950) (Frankfurter, J., dissenting) ("[T]he subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of [an

> insurance] policy."); *Allstate Ins. Co. v. Smiley*, 276 Ill.App.3d 971, 213 Ill.Dec. 698, 659 N.E.2d 1345, 1354 (1995) (declining to follow a case because its holding "introduc[ed] . . . tort principles into the interpretation of an insurance policy"); Robert H. Jerry II, *Understanding Insurance Law*, 502 (2d ed. 1996) (stating that "many courts have explicitly stated that the proximate cause test is not the same in tort law and insurance law").

HealthSouth, 2016-NMCA-037, ¶ 19.

In bad faith cases that require consideration of both causation of the plaintiff's injury and causation as a factor affecting policy coverage, this instruction addressing the former may need to be supplemented with an instruction dealing with the latter, with the distinction being carefully drawn to assist the jury.

Legal scholars offer some thoughts to help attorneys understand the complexity of the task. Professor Peter Nash Swisher wrote *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation "Riddles*," 43 Tort Trial & Ins. Prac. L.J. 1 (2007), in which he advised on tort and insurance causation law:

> American courts and juries have struggled mightily to analyze and resolve various insurance causation issues from a number of different perspectives. Some courts determine coverage by applying an immediate cause rationale, while other courts employ an efficient proximate cause chain of events doctrine similar to tort law or utilize a hybrid approach combining both of these rules. The courts likewise have employed no less than three different insurance law approaches to address multiple concurrent causation issues, and they have disagreed on whether an efficient proximate cause approach requires a substantial causal nexus or only a sufficient causal nexus.

Swisher, *supra*, at 34.

Professor Swisher's article focused on the relationship between tort and insurance law causation principles; he did not specifically focus on bad faith insurance cases. In cases requiring a supplemental instruction on causation in insurance law, counsel will need to consider these alternative causation approaches as a starting point for that instruction.

Conduct of the policyholder which violates the policyholder's obligation of honesty becomes a cause of the loss if the insurer acted in reliance on that conduct.

[Revised, effective March 1, 2005; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1710. Affirmative defense; policyholder's dishonesty.

Instruction withdrawn.

[Adopted, effective November 1, 1991; as withdrawn by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — The common-law duty "to deal fairly and honestly rests equally upon the insurer and the insured." *Modisette v. Found. Rsrv. Ins. Co*., 1967-NMSC-094, ¶ 16, 77 N.M. 661, 427 P.2d 21. The Court of Appeals has since clarified that this duty is "related to but distinct from the implied covenant of good faith and fair dealing," which "protects against only bad faith or wrongful and intentional conduct that injures the other party's rights under the contract." *Azar v. Prudential Ins. Co. of Am*., 2003-NMCA-062, ¶ 58, 133 N.M. 669, 68 P.3d 909. Under either duty, merely negligent conduct by an insured "will be excused" in cases of bad faith by the insurer, because the insurer may not escape the consequences of its own agents' dishonesty based on its insured's negligence. *Griego v. N.Y. Life Ins. Co*., 1940-NMSC-029, ¶¶ 43-48, 44 N.M. 330, 102 P.2d 31. An affirmative defense based on an insured's dishonesty appears to be limited to representations made with intent to deceive, whether they occurred before or after the formation of the insurance contract.

An affirmative defense to bad faith claims is distinct from the contractual defense of fraud or deceit. *Cf. Eldin v. Farmers All. Mut. Ins. Co*., 1994-NMCA-172, ¶ 10, 119 N.M. 370, 890 P.2d 823 (describing the contractual defense). The 1991 version of this instruction arose from the New Mexico Supreme Court's opinion in *Jessen v. National Excess Insurance Co*., which noted that an insured's "misrepresentation or fraud" in his application, if proven, "would have vitiated the insurance policy." 1989-NMSC-040, ¶ 22, 108 N.M. 625, 776 P.2d 1244. The appellate courts have since confirmed that bad-faith claims do not necessarily depend on coverage under the policy, nor on the insurer's breach of contractual terms. *See, e.g., Haygood v. United Servs. Auto. Ass'n*, 2019-NMCA-074, ¶ 22, 453 P.3d 1235. In *O'Neel v. USAA Ins. Co*., 2002-NMCA-028, ¶ 9, 131 N.M. 630, 41 P.3d 356, the Court of Appeals allowed that bad faith claims "based on conduct separate from [the insurer's] refusal to pay" could survive despite the insured's misrepresentations. Specifically, where the insurer's "investigation was excessive and unnecessarily invasive," the jury "could have found that [the insurer] set up [its insured] in anticipation of a claim of fraud which it would then use, and did use, to attempt to totally void any obligation under the policy." *Id*. The Court rejected the insurer's argument that "a claim of bad faith must fail as a matter of law when the insured engages in material misrepresentations during the claims process." *Id*. ¶ 7. It noted both that "the jury could reasonably and properly conclude that [the plaintiff] did not engage in *intentional* misrepresentations," *id*. (emphasis added), and that "the record contains evidence to support a finding of bad faith against [the insurer] based on conduct separate from" its refusal to pay out fully on the original claim, *id*. ¶ 9.

The Committee is uncertain whether or how under current law the defense of policyholder dishonesty applies to claims of insurance bad faith. Consequently the 1991 instruction, which was written to apply to bad-faith cases without qualification, has been withdrawn. In the absence of further guidance from the appellate courts about the scope of applicability of this defense, the trial court must determine whether to instruct on the

defense based on the circumstances of the particular case and, if so, must determine the substantive content of the instruction.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1711. Affirmative defense; comparative fault - *No instruction drafted*.

No instruction drafted.

[Approved, effective November 1, 1991.]

Committee commentary. — The New Mexico courts have not decided whether to recognize an insured's comparative fault as a defense to insurance bad-faith claims, although the question has been presented to both the New Mexico Supreme Court and the Court of Appeals. In *Jessen v. National Excess Insurance Co*., 1989-NMSC-040, ¶ 22, 108 N.M. 625, 776 P.2d 1244, the Supreme Court held that there was no error in the district court's decision not to instruct on comparative fault, but declined to "decide whether such an instruction necessarily would be inappropriate in another case." The Supreme Court acknowledged that a California case cited by the defendant insurer, *California Casualty General Insurance Co. v. Superior Court*, 218 Cal. Rptr. 817, 818 (Ct. App. 1985), stood for the proposition that "comparative fault applies in bad faith claims," 1989-NMSC-040, ¶ 22; however, that case has since been overturned by the California Supreme Court, which held that "the *California Casualty* court's holding is grounded on the faulty premise that the obligations of insurer and insured—and thus their bad faith—are comparable. They are not." *Kransco v. Am. Empire Surplus Lines Ins. Co*., 2 P.3d 1, 11-12 (Cal. 2000). After that reversal, in *O'Neel v. USAA Ins. Co*., 2002-NMCA-028, ¶¶ 31-32, 131 N.M. 630, 41 P.3d 356, the Court of Appeals declined to recognize a proposed comparative-fault defense because the arguments had not been preserved.

Until the New Mexico appellate courts provide further guidance about whether the insured's comparative fault may serve as an affirmative defense to a claim of insurance bad faith, no instruction is submitted.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1712. Compensatory damages; general.

If you should decide in favor of _____ (*plaintiff*) on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate _____ (*plaintiff*) for any of the following elements of damages proved by

_____ (*plaintiff*) to have resulted from the wrongful conduct of _____ (*defendant*) as claimed:

(*NOTE: Here insert the proper elements of damages using the instructions which immediately follow and any other proper elements applicable under the evidence.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based on proof and not on speculation, guess, or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This instruction should be used in all causes of action for insurance bad faith. The instructions which follow must be inserted when applicable under the evidence.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1713. Policy proceeds.

The amount payable by the insurer under the terms of the policy.

USE NOTES

This element of damages must be included under UJI 13-1712 NMRA in a case where the plaintiff's claim is for bad faith failure to pay a first party claim, UJI 13-1702 NMRA.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1714. Cost of separate litigation.

The reasonable and necessary expenses of _____ (*plaintiff*), including attorney fees, for [defending against the lawsuit] [litigating _____ (*identify separate litigation*)].

USE NOTES

In the case of bad faith failure to defend in an underlying lawsuit, the parties should use the first bracketed language and, if necessary for clarity, should identify the lawsuit

against the insured for which expenses and fees for defense were incurred. Otherwise, any separate litigation in which expenses, costs, or fees were incurred as a result of the insurer's bad faith conduct should be briefly described using the second brackets.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — A plaintiff may recover "attorney's fees as damages from separate litigation that would remedy the injury giving rise to the action," which are actual damages distinguished from the attorneys' fees incurred in the instant action. *Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 10, 116 N.M. 412, 863 P.2d 447. As a pertinent example, when an insurance company has acted in bad faith in refusing to defend a claim against its insured, the insured is entitled to recover all reasonable and necessary costs of defense. *See Lujan v. Gonzales*, 1972-NMCA-098, ¶ 55, 84 N.M. 229, 501 P.2d 673.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1715. Underlying judgment.

The amount of any judgment obtained by _____ (*plaintiff in the underlying action*) against _____ (*defendant in the underlying action*) in _____ (*identify the underlying action*).

USE NOTES

This element of damages must be included under UJI 13-1712 NMRA in a case where an insurer's bad faith conduct resulted in the entry of a judgment in an underlying action against its insured. The names of the parties in the underlying action should be inserted in the blanks to assist the jury's recognition of this damage element. As used here, an "underlying action" may include events in the same lawsuit if they resulted in a judgment.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — "Our cases have made it clear that the measure of damages in a bad faith action is the amount of the excess judgment [against the insured]." *Dydek v. Dydek*, 2012-NMCA-088, ¶ 64, 288 P.3d 872. The amount of the judgment is recoverable even if the plaintiff in the underlying action has agreed not to enforce the judgment against the insured personally, or if the insured is "otherwise judgment proof." *Id*. ¶¶ 65-73.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1716. Incidental and consequential loss.

The amount of any incidental or consequential loss to the plaintiff, including _____ (*list losses claimed*). An "incidental loss" is a cost incurred in a reasonable effort to avoid losses caused by the insurer's conduct. A "consequential loss" is a loss that arises from the results of an insurer's conduct rather from the conduct itself.

Any losses you find were caused by the insurer's breach of the terms of the insurance policy are limited to losses that the insurer and the insured could reasonably have expected to be a consequence of the insurer's failure to perform its obligations under the policy.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — "New Mexico normally allows recovery of consequential or incidental damages which can be reasonably related to the defendant's breach." *Hubbard v. Albuquerque Truck Ctr. Ltd*., 1998-NMCA-058, ¶ 28, 125 N.M. 153, 958 P.2d 111; *see also, e.g., Primetime Hosp., Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 25, 146 N.M. 1, 206 P.3d 112 (quoting *Consequential Loss, Black's Law Dictionary* (8th ed. 2004)); *R.A. Mackie & Co., L.P. v. Petrocorp Inc*., 329 F. Supp. 2d 477, 510 (S.D.N.Y. 2004) (defining "incidental" losses); *Damages, Black's Law Dictionary* (11th ed. 2019) (defining "incidental damages" as "[l]osses reasonably associated with or related to actual damages").

To the extent a claim arises from the breach of the insurance contract, recoverable damages are limited to those "contemplated by the parties at the time of making the contract." *State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, ¶ 5, 86 N.M. 757, 527 P.2d 798.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

13-1717. Withdrawn.

13-1718. Punitive damages.

If you find that _____ (*plaintiff*) should recover compensatory damages for the bad faith actions of the insurer, and you find that the conduct of the insurer was [in

reckless disregard for the interests of _____ (*plaintiff*)], [based on a dishonest judgment], [or] [malicious, willful or wanton], then you may award punitive damages.

["Reckless disregard" is an insurer's [frivolous or unfounded refusal to pay] [or] [dishonest or unfair balancing of its own interests and the interests of the insured].]

["Dishonest judgment" is a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured.]

["Malicious conduct" is the intentional doing of a wrongful act with knowledge that the act was wrongful.]

["Willful conduct" is the intentional doing of a wrongful act with knowledge that harm may result.]

["Wanton conduct" is the doing of an act with utter indifference to or conscious disregard for a person's rights.]

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice, taking into account all the circumstances, including the nature of the wrong and any aggravating and mitigating circumstances as may be shown. The property or wealth of the defendant is a legitimate factor for your consideration. The amount awarded must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.

[_____ (*plaintiff*) has introduced evidence of [harm to others] [risk of harm to others] as a result of _____ (*defendant*)'s conduct. You may consider this evidence in determining the nature and enormity of _____ (*defendant*)'s wrongful conduct toward _____ (*plaintiff*). You may not, however, include in your award of punitive damages any award that punishes _____ (*defendant*) for harm to others not before this court.]

USE NOTES

This instruction must ordinarily be given in an action for insurance bad faith in which punitive damages are available under the law. The trial court may omit this instruction only in those circumstances in which the plaintiff fails to make a *prima facie* showing that the insurer's conduct exhibited a culpable mental state. Because this instruction is complete on the availability of punitive damages in insurance bad faith actions, UJI 13-1827 NMRA is unnecessary and should not be given in these cases.

The final bracketed paragraph of this instruction must be given when evidence of harm or injury to non-parties to the litigation has been admitted into evidence during the

trial. It is not intended to limit the jury's consideration of evidence of harm to the first-party insured in third party cases.

[As amended, effective March 21, 2005; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — The substance of this instruction derives, in part, directly from *Sloan v. State Farm Mutual Automobile Insurance Co*., 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230. *Sloan* establishes the standard for an award of punitive damages: "when the insurer's conduct was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful, or wanton." *Id*. ¶ 2. *Sloan* also provides a basis for defining these terms. *See id*. ("An insurer's frivolous or unfounded refusal to pay is the equivalent of a reckless disregard for the interests of the insured, and a dishonest or unfair balancing of interests is no less reprehensible than reckless disregard, which has historically justified an award of punitive damages."); *id*. ¶ 23 ("The trial court should include also the definition[] of 'dishonest judgment'—'a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured.'").

Sloan overruled prior case law that required a plaintiff to establish bad faith plus "an additional culpable mental state" before the jury could be instructed on punitive damages. *Id*. ¶ 6 (overruling *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co*., 1999-NMCA-109, ¶ 72, 127 N.M. 603, 985 P.2d 1183). "[U]nder New Mexico law, bad-faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve." *Id*. "[B]ad faith supports punitive damages upon a finding of entitlement to compensatory damages." *Id*. (internal quotation marks and citation omitted). But the trial court still has the discretion "to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages." *Id*.

The New Mexico Supreme Court has "allowed the award of punitive damages in insurance cases under a more relaxed standard [than that for contracts not involving insurance] in part because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer." *Romero v. Mervyn's*, 1989-NMSC-081, ¶ 23 n.3, 109 N.M. 249, 784 P.2d 992 (citing *Chavez v. Chenoweth*, 1976-NMCA-076, ¶¶ 43-44, 89 N.M. 423, 553 P.2d 703).

In the event the insured also brings a cause of action for violation of the Unfair Practices Act (UPA) and the fact finder finds the insurer willfully engaged in the trade practice based on the same conduct supporting the punitive damage award for bad faith, the insured must elect a remedy between treble damages under the UPA and punitive damages for the bad faith claim. *See* NMSA 1978, § 57-12-10(B) (2005); *Hale v. Basin Motor Co*., 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 ("[R]ecovery of both

statutory treble damages and punitive damages based upon the same conduct would be improper.”).

[Revised, effective March 21, 2005; as amended by Supreme Court Order No. S-1-RCR-2023-00028, effective for all cases pending or filed on or after December 31, 2023.]

CHAPTER 18
Damages

Introduction

Instructions on damages follow as a matter of course in all cases wherein an issue is submitted to a jury on the recovery of damages.

These instructions are arranged so that there are several groups of instructions. UJI 13-1801 should be used in all cases when the jury is instructed on damages. UJI 13-1802 is the general instruction on damages which will be used in all cases where the measure of damages, as to both person and property, is for the determination of the jury. A separate instruction for wrongful death, UJI 13-1830, is complete in itself.

Trial counsel is charged with the duty of submitting to the court the damages instructions which are applicable under the circumstances of each case. The instructions are grouped by subject matter with the first group involving instructions on damages applicable in personal injury cases. The second grouping of damages instructions pertains to damage to property - both personal and real. The third group of instructions is assembled under the heading of miscellaneous matters. In this group are also included the instructions on punitive damages, contribution among joint tortfeasors and judgment over in case of vicarious liability. The last grouping is for wrongful death.

[As amended, effective November 1, 1991.]

13-1801. Liability must be determined before damages.

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

USE NOTES

This instruction should be given in every case where the jury is permitted to assess damages.

This instruction should precede all damages instructions.

Committee commentary. — Experience has proven that the deliberations of a jury will be expedited if they clearly understand this rule of law.

In personal injury litigation, it is generally recognized that the jury favors the plaintiff from the outset of the case due to various reasons, the least of which is not sympathy. It is further recognized that the rule of law which states that the defendant is presumed innocent and that the burden of proof is upon the plaintiff, in actual practice before a jury is a myth. Therefore, it is the duty of the trial court to give clear admonitions to the jury in an attempt to give meaning to the rule of law.

This instruction has been cited in the following cases reported by the New Mexico appellate courts, to wit: *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); *Webb v. Webb*, 87 N.M. 353, 533 P.2d 586 (1975); *Demers v. Gerety*, 87 N.M. 52, 529 P.2d 278 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974); *Herrera v. Springer Corp.*, 85 N.M. 6, 508 P.2d 1303 (Ct. App.), *rev'd on other grounds*, 85 N.M. 201, 510 P.2d 1072 (1973); *Tafoya v. Whitson*, 83 N.M. 23, 487 P.2d 1093 (Ct. App.), cert. denied, 83 N.M. 22, 487 P.2d 1092 (1971); *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970); *Naumburg v. Wagner*, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

This instruction, if properly understood, should speed the jury in their job and facilitate the administration of justice.

Part A
Personal Injury Damages; Elements

13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: _____.

(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, plaintiff was already impaired by a physical or emotional condition, plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without

regard to the fact plaintiff may have been unusually susceptible to injury or likely to be harmed. The defendant is said to "take the plaintiff as he finds [him] [her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

Your verdict must be based upon proof and not upon speculation, guess or conjecture. Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This instruction is not complete in and of itself but this is the basic form of instruction to be utilized in all cases involving damages.

The pronoun will need to be changed in some instances. Likewise, the plural will need to be added in other instances when multiple parties are involved.

This instruction is not applicable in wrongful death cases. *See* UJI 13-1830.

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

Committee commentary. — The attorney for the plaintiff, in submitting instructions to the court, is charged with the duty of supplying the necessary elements of damages to be placed in the blank.

A damages issue predicated on conjecture, guess, surmise or speculation should not be given to the jury. *Hebenstreit v. Atchison*, T. & S.F. Ry., 65 N.M. 301, 336 P.2d 1057 (1959). This instruction has been before the New Mexico appellate courts in the following cases: *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976); *Boulden v. Britton*, 86 N.M. 775, 527 P.2d 1087 (Ct. App. 1974), *rev'd on other grounds*, 87 N.M. 474, 535 P.2d 1325 (1975); *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 141, 520 P.2d 869 (1974); *Francis v. Johnson*, 81 N.M. 648, 471 P.2d 682 (Ct. App. 1970).

The bracketed language addresses what was formerly considered under UJI Civil 13-1808 which has been withdrawn. Former UJI Civil 13-1808 addressed the aggravation of preexisting condition and the situation in which a plaintiff has a completely asymptomatic condition or disease, the "egg shell plaintiff". When the evidence shows that the plaintiff was experiencing symptoms from a preexisting condition and the same has been aggravated as a result of the injury and the extent of the aggravation is proved, the bracketed portion of the instruction is proper. The New Mexico case of *Hebenstreit v. Atchison*, T. & S.F. Ry., 65 N.M. 301, 336 P.2d 1057 (1959), cites cases from other jurisdictions and holds that in tort cases the plaintiff must prove the extent of aggravation of a preexisting condition with reasonable certainty, otherwise the issue

should not go to the jury. *See also Britton v. Boulden*, 87 N.M. 474, 535 P.2d 1325 (1975); *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct.App. 1974); *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), *rev'd on other grounds*, 86 N.M. 141, 520 P.2d 869 (1974). In order to get the issue to the jury, plaintiff must prove the aggravation by medical evidence.

New Mexico also recognizes "the eggshell Plaintiff" where the victim has an underlying condition, which increases the victim's susceptibility or pre-disposition to injury. *See Thomas v. Henson*, 102 N.M. 417, 424, 696 P.2d 1010, 1017 (Ct. App. 1984) *rev'd on other grounds* 102 N.M. 326, 695 P.2d 476 (1985); *City of Roswell v. Davenport*, 14 N.M. 91 (1907); *Boulden v. Britton*, 86 N.M. 775, 527 P.2d 1087 (Ct. App. 1974). It is important to instruct the jury on the rule which deems the injury and not the dormant condition, as the cause of Plaintiff's damages. *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962).

[Revised, effective March 1, 2005.]

13-1802A. Measure of the loss of a chance.

Provided, however, for the loss of a chance for [a better outcome to a medical problem], [survival], [_____ *(other)*], while you must (1) first determine total damages for the [loss of limb], [loss of life], [_____ *(other)*] under the above-listed elements, you then must (2) base your award on a percentage representing the lost opportunity to avoid [loss of limb], [loss of life], [_____ *(other)*]. The valuation of lost chances is necessarily imprecise; the value of the loss may be established by fair approximations, by numbers or verbal descriptions, from which you will arrive at a percentage to apply to the total damages.

USE NOTES

This instruction provides the measure of damages where plaintiff alleges defendant's negligence resulted in a lost opportunity to obtain a better outcome from a preexisting condition. When loss of a chance is an issue to be determined by the jury, this instruction must be included in the general measure of damages instruction, UJI 13-1802, following the listing of the elements of damages plaintiff is entitled to recover.

[Approved, effective March 20, 2000.]

Committee commentary. — New Mexico recognizes the loss of a chance as a theory of recovery. *See Baer v. Regents of University of California*, 1999-NMCA-005, 126 N.M. 508, 972 P.2d 9; *Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279. Damages for loss of a chance are a percentage of plaintiff's total loss. Both *Baer v. Regents of University of California* and *Alberts v. Schultz* make clear that the valuation of loss of a chance is not a mathematical certainty. Rather, the value of the lost chance may be established by fair approximations based on the evidence. The form of the testimony on the value of the lost chance may be either numerically or verbally

descriptive. What is important is not the verbal or numeric nature of the fair approximation by the testifying witnesses, but rather the underlying testimony and evidence supporting the fair approximations.

Two exemplar sets of instructions are set out as appendices at the end of Chapter 16. These sample instructions illustrate two alternative methods for instructing the jury depending on the evidence and provide examples of how the jury should be instructed on the measure of damages for the loss of a chance.

13-1802B. Suit against original tortfeasor; divisibility of injuries not in dispute; medical treatment.

In this case, if you find that _____ (*one or more original tortfeasors*) [was] [were] negligent and caused injury to the plaintiff, [he] [she] [it] [they] [is] [are] also responsible for any harm caused by medical care that the plaintiff's injury reasonably required, even if the medical care was negligently performed.

USE NOTES

This instruction, intended to be a part of UJI 13-1802 NMRA, is to be given in a successive tortfeasor case where the successive tortfeasor is not a party and the court determines that the tortfeasor responsible for the original injury is also liable for the additional harm caused by subsequent medical treatment for the original injury. If, however, an enhanced injury is so remote in time or likelihood that its foreseeability may not be presumed as a matter of law, the jury would be required to determine the forseeability of the injury before attributing the total damages to the original tortfeasor. *See Lewis v. Samson*, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972.

[Approved by Supreme Court Order No. 07-8300-036, effective February 1, 2008.]

13-1802C. Successive tortfeasor only defendant; no question for jury on divisibility of injuries.

In this case, the plaintiff says and has the burden of proving by the greater weight of the evidence that _____ (*one or more successive tortfeasors*) caused injuries that were separate and distinct from, or that caused a measurable worsening of, injuries the plaintiff received from _____ (*the original injury*).

In determining what damages, if any, were caused by _____ (*the successive tortfeasor or tortfeasors*), you should award the plaintiff compensation only for [the separate injury caused by _____ (*the successive tortfeasor or tortfeasors*)] [the measurable worsening of the plaintiff's condition caused by _____ (*the successive tortfeasor or tortfeasors*)] [harm that would have been avoided had _____ (*the successive tortfeasor or*

tortfeasors) [not been negligent][acted within the standard of care]], but not for damages from _____ (*the first or original injury*).

USE NOTES

This instruction, intended to be a part of UJI 13-1802 NMRA, should be used when there is no disagreement, or the court determines as a matter of law, that the successive tortfeasor, if liable, caused a separate or causally distinct injury and where the suit is brought only against alleged successive tortfeasors. When there is no jury question regarding divisibility of injuries and there are potential original and successive tortfeasors present, the trial court should use UJI 13-1802D NMRA in place of this instruction. This instruction should not be used in those cases presenting only an issue of preexisting injury but not involving successive torts. In those cases, the general language of UJI 13-1802 and the separate instruction on preexisting condition, UJI 13-1808 NMRA, provide guidance to the jury.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as "successive tortfeasor" and "original injury," which likely have little meaning to the jury.

[Approved by Supreme Court Order No. 07-8300-036, effective February 1, 2008.]

Committee commentary. — The need to instruct the jury on successive tortfeasor principles arises when, as a result of a course of events set in motion by one tortfeasor, an intervening act or omission of another causes injury "which can be causally apportioned on the basis [of] distinct harms." Paragraph D of Section 41-3A-1 NMSA 1978. "Because successive-tortfeasor liability is an exception to the general rule of several liability among concurrent tortfeasors, the doctrine is limited to a `narrow class of cases', in which a plaintiff can show more than one distinct injury successively caused by more than one tortfeasor." *Payne v. Hall*, 2006-NMSC-029, ¶ 36, 139 N.M. 659, 137 P.3d 599. In those cases where the parties stipulate, or the court determines as a matter of law that any injury caused by the defendant is either separate or causally distinct from injuries caused by the original tortfeasor or rendered the original injuries measurably worse, then there is no need to instruct the jury on the divisibility of injuries or the placement of the burden of proving distinct or enhanced injuries. In such cases, the damages instructions should focus the jury's attention on the distinct or enhanced injuries caused by the defendant's act or omission.

Throughout the successive tortfeasor instructions, the committee elected to use the terms "successive tortfeasor" and "original tortfeasor" to distinguish between types of defendants, even though the terms are being applied to defendants before any determination that any of them are liable for causing any injury. While it may not be technically correct to employ such terms prior to a determination of liability, the terms are employed for convenience and should be replaced with the names of the parties in the final instructions given to the jury.

13-1802D. Successive tortfeasors; divisibility of injury not in dispute or decided as a matter of law.

In this case, if you find that _____ (*one or more original tortfeasors*) [was] [were] negligent and caused injury to the plaintiff, and _____ (one or more successive tortfeasors) [was] [were] negligent and caused injury to the plaintiff, you will first decide the amount of damages from _____ (*the original injury*) and you will then decide the amount of damages from _____ (*the successive injury*).

You will next compare the negligence of each person whose [negligence] [fault] contributed to the first injury. You will then compare the negligence of each person whose [negligence] [fault] contributed to the second injury.

USE NOTES

This instruction is to be given in a successive tortfeasor case where the court determines or the parties agree that the case involves separate and distinct injuries and the case includes defendants who are potential original and successive tortfeasors.

These instructions should be customized to refer to injuries and parties. The last paragraph of this instruction should be modified or deleted when there is only one original or only one successive tortfeasor and it is not necessary to compare negligence. The instructions should avoid the use of legal terms such as "successive tortfeasor" and "original injury," which likely have little meaning to the jury.

In drafting the verdict form, attorneys should take care that (1) the jury does not compare the negligence of tortfeasors who caused the original injury with the negligence of the tortfeasors who caused the second injury and (2) damages are separately determined. These principles are reflected in the exemplar verdict forms appearing in the Appendix.

[Approved by Supreme Court Order No. 07-8300-036, effective February 1, 2008.]

13-1802E. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that _____ (*one or more original tortfeasors*) negligently caused injury to the plaintiff and _____ (*one or more successive tortfeasors*) negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff's injuries are divisible; or, in other words, whether the negligence of _____:

Alternative A: the _____ (*successive tortfeasors*) caused a separate injury or made the original injury measurably worse.

Alternative B: the _____ (*original tortfeasor(s)*) caused an injury that is separate, in nature or extent, from the injury(ies) caused by _____ (*the successive tortfeasors*).

If you find that the plaintiff's injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the injuries and each defendant will be responsible for its proportionate share of the plaintiff's damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose [negligence/fault] contributed to _____ (*the first injury*) and then compare the negligence of each person whose [negligence/fault] contributed to _____ (*the second injury*).

_____ says that the plaintiff received injuries caused by [_____ (*the original tortfeasor or tortfeasors*)] [_____ (*the successive tortfeasor or tortfeasors*)] that are distinct from injuries caused by [_____ (*the original tortfeasor or tortfeasors*)] _____ therefore bears the burden of proving, by the greater weight of the evidence, both that the plaintiff received [an original injury] [a second injury] that is separate and distinct from [a second injury or from enhanced injuries] [the original injury] and the amount of damages and injuries from the separate injuries.

USE NOTES

This instruction should be given when successive torts are at issue and the jury is to decide whether the plaintiff has suffered divisible injuries.

When suit is brought only against the original tortfeasor, this instruction should be drafted using "Alternative B" to ask the jury to determine whether the original tortfeasor caused injury that is separate and causally-distinct from any injury caused by the successive tortfeasor. *See Payne v. Hall*, 2006-NMSC-028, 139 N.M. 659, 137 P.3d 599. However, in other cases, the issue will be framed using "Alternative A" as whether the successive tortfeasor caused an injury that is separate and distinct from an injury caused by the original tortfeasor. This issue is for the trial court. Accordingly, the terms "original" and "successive," describing the tortfeasors, are bracketed so that the order may be changed, depending on the trial court's determination of how to frame the question of divisibility.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as "successive tortfeasor" and "original injury," which likely have little meaning to the jury.

In drafting the verdict form, attorneys should take care that (1) the jury does not compare the negligence of tortfeasors who caused the original injury with the negligence of the tortfeasors who caused the second injury and (2) damages are separately determined. These principles are reflected in the exemplar verdict forms

appearing in the Appendix. The fourth paragraph of this instruction should be modified or deleted when there is only one successive tortfeasor and it is not necessary to compare negligence.

[Approved by Supreme Court Order No. 07-8300-036, effective February 1, 2008.]

Committee commentary. — When there is conflicting evidence whether the plaintiff suffered injuries that may be separate and distinct, the jury must be permitted to decide the issue. *Payne v. Hall*, 2006-NMSC-029, ¶ 43, 139 N.M. 659, 137 P.3d 599 ("[W]hen the existence of causally-distinct, divisible injuries is not clear, then the question should be given to the jury to decide."). If the injuries are divisible, the original tortfeasor is jointly and severally liable both for the original injury and for the subsequent injuries; the successive tortfeasor is liable only for the successive injury; and the original tortfeasor may be entitled to indemnification or comparative contribution from the successive tortfeasor. *Lujan v. Healthsouth Rehabilitation Corp.*, 120 N.M. 422, 427, 902 P.3d 1025,1030 (1995) ("In cases involving successive tortfeasors whose separate causal contributions to the plaintiff's harm can be measured, the doctrine of joint and several liability applies ... to the enhanced portion of the injury."); *Lewis v. Samson*, 2001-NMSC-035, ¶ 14, 131 N.M. 317, 35 P.3d 972 (determining medical provider would be liable for the entirety of an enhanced injury when the plaintiff successfully demonstrated an enhanced injury and the degree of enhancement). This instruction is written on the assumption that the trial court will place the burden of proving divisible injuries on the party asserting divisibility, but the law on this point is not perfectly clear. *See Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶ 34,132 N.M. 631, 53 P.3d 398 (assuming without deciding that the plaintiff asserting enhanced injury bore burden of proof on the issue); *Lewis v. Samson*, 1999-NMCA-145, ¶ 83, 128 N.M. 269, 992 P.2d 282 (Hartz, J., dissenting) (noting that who bears the burden of proving enhanced damages is not clear under New Mexico law), *rev'd on other grounds*, 2001-NMSC-035.

13-1803. Earnings.

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

USE NOTES

This instruction is to be used in conjunction with UJI 13-1802. Standing alone the instruction is not complete.

The first part of the instruction is to be used for lost earnings to date of trial and, when there is an issue supported by the evidence concerning lost earning capacity in the future, then the bracketed material is to be used.

When future damages are involved, the jury will need to be instructed with reference to discounting present dollars in order to arrive at the "present cash value".

Committee commentary. — Loss of earnings of a minor during minority belong to the parent or legal guardian and are not a proper element of damages for the minor. A minor plaintiff is entitled only to those lost earnings which accrue after majority. A separate instruction is included in this chapter on that matter.

13-1804. Medical expense.

The reasonable expense of necessary medical care, treatment and services received [including prosthetic devices and cosmetic aids] [and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future].

USE NOTES

This instruction is again a part of UJI 13-1802 and is to be inserted in the blank in UJI 13-1802 in the proper case. In addition, include the bracketed material which relates to future medical expenses where proper. There must be adequate evidence that such expenses are reasonably certain to be incurred.

As to "present cash value" use UJI 13-1822.

Committee commentary. — This instruction was cited in the case of *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974).

[As amended, effective November 1, 1991.]

13-1805. Nonmedical expense.

The reasonable value of necessary nonmedical expenses which have been required as a result of the injury [and the present cash value of such nonmedical expenses reasonably certain to be required in the future].

USE NOTES

Under proper circumstances, this instruction is to be included in the blank in UJI 13-1802 NMRA. It is not every case where the bracketed material will be used. If the bracketed material is used, then UJI 13-1822 NMRA on present cash value must also be used.

Committee commentary. — If the plaintiff has sustained injuries which require caretaking expenses, then such expense is a proper element of damages when plaintiff has proved that the expense has been incurred and the reasonable value thereof. Mere inconvenience is not a proper element of damages.

[As amended, effective November 1, 1991.]

13-1806. Nature, extent, duration.

The nature, extent and duration of the injury [including disfigurement].

USE NOTES

This instruction is to be used as part of UJI 13-1802 and, when applicable, is to be inserted following the first paragraph of the instruction. Of course, the bracketed material will only be given to the jury when the evidence warrants.

Committee commentary. — There seems to be no question in the adjudicated cases that, in the proper circumstances, an instruction referring to the nature, extent and duration of the injury is a proper element for the jury to consider.

This instruction was cited by the New Mexico Court of Appeals in the case of *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974), and *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), rev'd, 86 N.M. 141, 520 P.2d 869 (1974).

13-1807. Pain and suffering.

The pain and suffering experienced [and reasonably certain to be experienced in the future] as a result of the injury.

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount to compensate the plaintiff for the pain and suffering.

USE NOTES

This is another portion of the general damages instruction that is to be inserted in the appropriate blank in UJI 13-1802 NMRA in the proper case.

[As amended by Supreme Court Order No. 13-8300-021, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Pain and suffering are proper elements of damages in a personal injury action. This matter was before the New Mexico Court of Appeals in 1974 in the case of *Vaca v. Whitaker*, 1974-NMCA-011, 86 N.M. 79, 519 P.2d 315.

13-1807A. Loss of enjoyment of life.

The loss of enjoyment of life experienced [and reasonably certain to be experienced in the future] as a result of the injury.

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount to compensate the plaintiff for the loss of enjoyment of life.

USE NOTES

This is another portion of the general damages instruction that is to be inserted in the appropriate blank in UJI 13-1802 NMRA in the proper case.

[Adopted by Supreme Court Order No. 13-8300-021, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — These damages are in addition to and separate from the nonpecuniary damages for pain and suffering that the plaintiff must newly endure as the result of his or her injury. *See Sena v. New Mexico State Police*, 1995-NMCA-003, 119 N.M. 471, 832 P.2d 604; *Couch v. Astec Industries, Inc.*, 2002-NMCA-084, ¶¶ 19-20, 132 N.M. 631, 53 P.3d 398. This instruction is not to be given in wrongful death cases, as UJI 13-1830 NMRA already enumerates the various elements of damage which may be recovered upon the wrongful death of an individual.

[Adopted by Supreme Court Order No. 13-8300-021, effective for all cases pending or filed on or after December 31, 2013.]

13-1808. Aggravation of preexisting condition.

The aggravation of any preexisting ailment or condition, but you may allow damages only for the aggravation itself and not for the preexisting ailment or condition.

USE NOTES

When the evidence shows that the plaintiff was suffering from a preexisting condition and the same has been aggravated as a result of the injury and the extent of the aggravation is proved, this instruction is proper. This is a portion of the general damages instruction to be inserted in the blank in UJI 13-1802 when appropriate.

Committee commentary. — The law recognizes "aggravation" as a separate element of compensable damages.

The New Mexico case of *Hebenstreit v. Atchison, T. & S.F. Ry.*, 65 N.M. 301, 336 P.2d 1057 (1959), cites cases from other jurisdictions and holds that in tort cases the plaintiff must prove the extent of aggravation of a preexisting condition with reasonable certainty, otherwise the issue should not go to the jury. *See also Britton v. Boulden*, 87 N.M. 474, 535 P.2d 1325 (1975); *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974); *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973), *rev'd on other grounds*, 86 N.M. 141, 520 P.2d 869 (1974).

In order to get the issue to the jury, plaintiff must prove the aggravation by medical evidence. *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962).

13-1809. Loss of earning capacity by minor.

The present cash value of earning capacity reasonably certain to be lost in the future after the plaintiff has reached the age of eighteen (18) years.

USE NOTES

In the proper case, where a minor has sustained personal injuries and the parent is suing for expenses incurred, such as medical expenses and money lost, such as earnings of the minor, and the minor is also suing for pain and suffering and impairment of earning capacity after he becomes of age, it will be proper to utilize UJI 13-1802 NMRA for the parent with the necessary elements of damage that pertain thereto and then another UJI 13-1802 NMRA for the minor with the necessary elements that pertain to that matter.

In like manner, such an instruction would apply when one other than the parent is the guardian of the estate of the minor.

When, and if, a case is presented involving a spouse situation where the community is liable for the expenses incurred in treatment and has a loss of earnings, a separate set of damages instructions may be necessary for the community and a further set for the injured spouse. In such situations, it will be necessary to custom tailor an instruction to include in the measure of damages each of the legal elements, including the reasonable value of the services of the spouse, but loss of consortium is not a legal measure of damages in a spouse situation in New Mexico. *Roseberry v. Starkovich*, 73 N.M. 211, 387 P.2d 321 (1963); *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149 (1961). Even before the Equal Rights Amendment [N.M. Const., art. II, § 18] to the New Mexico Constitution, the New Mexico Supreme Court had held that a wife alone may recover damages for her personal injury and for the resulting pain and suffering. S*oto v. Vandeventer*, 56 N.M. 483, 245 P.2d 826, 35 A.L.R.2d 1190 (1952).

[As amended, effective November 1, 1991.]

Committee commentary. — In the first edition a separate form of damages instruction was drawn for injury to a spouse, with subparts thereto (former UJI Civ. 14.18, UJI Civ. 14.19, UJI Civ. 14.20, UJI Civ. 14.21), but it is doubtful that such separate instructions are now needed in the book as the bench and bar have become accustomed to the form of damages presentation contained in UJI 13-1802. Therefore, with the foregoing explanation, additional instructions in this area will not be included in this work.

13-1810. Loss of services of spouse.

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

USE NOTES

This is another element of damages to be included in UJI 13-1802 NMRA when a spouse has been injured. When the bracketed portion of the instruction is used, the jury should also be instructed on future damages requiring discount to present cash value, *See* UJI 13-1822 NMRA.

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

13-1810A. Loss of consortium; definition.

Loss of consortium is a claim to recover compensation for damage to certain relationships. To recover for loss of consortium, _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) must show that _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) and [_____ (*name of injured party*)] [_____ (*name of decedent*)] had a mutually dependent relationship. Mutual dependence means that _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) and [_____ (*name of injured party*)] [_____ (*name of decedent*)] relied on the relationship and could not enjoy life in the same way once [the injury took place] [after the death].

In deciding whether a relationship is mutually dependent, factors to consider may include:

[The duration of the relationship;]

[The degree of mutual dependence;]

[The extent of common contributions to a life together;]

[The extent and quality of shared experience;]

[Whether _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) and [_____ (*name of injured party*)] [_____ (*name of decedent*)] were members of the same household;]

[Their emotional reliance on one another;]

[The particulars of their day-to-day relationship;]

[The manner in which _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) and [_____ (*name of injured party*)] [_____ (*name of deceased party*)] related to each other in addressing life's day-to-day requirements;]

[Other _____.]

USE NOTES

This instruction should be given when there is a jury question as to whether a claimant or claimants had a sufficiently close relationship with an injured or a deceased person to recover for loss of consortium. When this instruction is given, UJI 13-1810B NMRA should also be given.

[Adopted, effective October 1, 1996; as amended, effective March 20, 2000; as amended by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. —

Who may recover

New Mexico has rejected the notion that only those with "special legal status" in relation to the injured party, such as spouses or blood relatives, may recover consortium damages. *Wachocki v. Bernalillo Cty. Sheriff's Dep't*, 2011-NMSC-039, ¶ 7, 150 N.M. 650, 265 P.3d 701 (citing *Lozoya v. Sanchez*, 2003-NMSC-009, ¶ 19, 133 N.M. 579, 66 P.3d 948, *abrogated on other grounds by Heath v. La Mariana Apartments*, 2008-NMSC-17, ¶ 21, 143 N.M. 657, 180 P.3d 664). Loss of consortium damages are intended to compensate "for damage to a *relational* interest, not a legal interest[, because] . . . the use of legal status necessarily excludes many persons whose loss of a significant relational interest may be just as devastating as the loss of a legal spouse." *Lozoya*, 2003-NMSC-009, ¶ 20. For example, co-habitants, even though not legally married, may be entitled to recover, *id*. ¶ 27, as can a grandparent under certain circumstances, *Fernandez v. Walgreen Hastings Co*., 1998-NMSC-039, ¶¶ 23-32, 126 N.M. 263, 968 P.2d 774, a sibling, *Wachocki*, 2011-NMSC-039, ¶ 12, and *Silva v. Lovelace Health Sys*., 2014-NMCA-086, ¶¶ 43-44, or a parent, *id*. ¶¶ 41-42.

Nature of claim

"Loss of consortium damages are derivative in nature because they arise from a physical injury upon another person." *Thompson v. City of Albuquerque*, 2017-NMSC-021, ¶ 9, 397 P.3d 1279. "[A] plaintiff who sues for loss of consortium damages must prove that the alleged tortfeasor caused the wrongful injury or death of someone who was in a sufficiently close relationship to the plaintiff, resulting in harm to the relationship." *Id*. ¶ 14.

However, this does not mean that a loss of consortium claim must always be brought with the underlying tort claim, or that actual recovery for the underlying tort is a prerequisite for the recovery of loss of consortium damages. *Id*. ¶ 17; *see also State Farm Mut. Auto. Ins. Co. v. Luebbers*, 2005-NMCA-112, ¶ 37, 138 N.M. 289, 119 P.3d 169. "Although claims for loss of consortium damages derive from injury to another, the claimant has also suffered a direct injury for which he or she may seek recovery separately from the underlying tort." *Thompson*, 2017-NMSC-021, ¶ 16. "The direct injury alleged by a loss of consortium claimant is one to a relational interest with another who was physically injured." *Id*.

Elements

"A loss-of-consortium claimant must demonstrate two elements in order to recover damages." *Wachocki*, 2011-NMSC-039, ¶ 5. "The first element is that the claimant and the injured party shared a sufficiently close relationship. . . . The second element is a duty of care." *Id*.

Mutual dependence

"In *Lozoya*, [the Supreme Court] held that the degree of mutual dependence, as well as a host of other factors, such as duration of the relationship, emotional reliance, and a sharing of a common residence, bear upon whether the claimant and injured party shared a sufficiently close relationship." *Wachocki*, 2011-NMSC-039, ¶ 9; *see also Lozoya*, 2003-NMSC-009, ¶ 27 (noting that additional potential factors that may bear upon whether the claimant and injured party shared a sufficiently close relationship include "the extent of their common contributions to a life together, the extent and quality of their shared experience, . . . the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements" (internal quotation marks and citation omitted)); *Fitzjerrell v. City of Gallup*, 2003-NMCA-125, ¶ 13, 134 N.M. 492 ("[T]he qualities of the relationship that give rise to the claim are flexible in scope.").

In *Wachocki*, the Supreme Court recognized that "[the *Lozoya*] factors may be helpful in the context of some relationships, especially spousal-type relationships[,]" but, in seeking to provide "a uniform analysis applicable to all relationships," identified mutual dependence as "the key element." *See Wachocki* 2011-NMSC-039, ¶¶ 9-10. In providing illustrative examples, the Supreme Court discussed *Lozoya*, 2003-NMSC-009, in which an unmarried co-habitant brought a loss of consortium claim, and *Fernandez*, 1998-NMSC-039, in which a grandmother brought a loss of consortium claim. *Wachocki*, 2011-NMSC-039, ¶ 10. In both cases, circumstances were present indicating that the claimant and injured party "relied on the relationship and could not enjoy life in the same way once the relationship was severed." *Id*. Under such circumstances, the claimant and the injured party may be found to be mutually dependent. *See id*.

Duty

Although imposition of a duty is a legal question for the court, whether a duty exists often depends on a factual determination, which we entrust to the jury. *Lozoya*, 2003-NMSC-009, ¶ 21. "It is appropriate that the finder of fact be allowed to determine, with proper guidance from the court, whether a plaintiff had a sufficient enough relational interest with the victim of a tort to recover for loss of consortium." *Id*.

Judge or jury

As with any action, a defendant may contend that a claimant's loss of consortium claim is insufficient as a matter of law, at which time the judge will decide whether there is sufficient evidence supporting a loss of consortium claim to allow the claim to proceed to the factfinder. *See, e.g., Couch v. Astec Indus., Inc*., 2002-NMCA-084, ¶ 64, 132 N.M. 631, 53 P.3d 398 (holding that evidence as to loss of consortium was insufficient as a matter of law to permit the jury to consider a loss of consortium claim).

[As amended by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after December 31, 2019.].

13-1810B. Loss of consortium; damages.

If you decide _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) [has] [have] proven damage to a mutually dependent relationship as the result of [_____'s (*name of decedent*) death] [_____'s (*name of injured party*) injury], you also must decide the amount of money that will reasonably compensate _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) for the harm _____ (*name of loss of consortium claimant or names of loss of consortium claimants*) suffered from the [loss of][injury to] _____'s (*name of loss of consortium claimant or names of loss of consortium claimants*) relationship with [_____ (*name of decedent*)] [_____ (*name of injured party*)]. No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount of money to compensate _____ (*name of loss of consortium claimant or names of loss of consortium claimants*).

USE NOTES

This instruction should be given when a jury is asked to decide whether damages for loss of consortium should be awarded and, if so, the amount of damages the loss of consortium claimant or claimants should recover. Such damages may be recovered in cases involving injury or death.

When the instruction is given in an injury case, a special verdict form should be drafted which includes lines that provide for a separate award of damages to the injured party and a separate award of damages to any loss of consortium claimant or claimants. If there is more than one loss of consortium claimant, the verdict form should include a line for a separate award of loss of consortium damages to each loss of consortium

claimant. A sample special verdict form appears in UJI Chapter 22 at UJI 13-2223 NMRA.

When the instruction is given in a wrongful death case, it should immediately follow UJI 13-1830. In a wrongful death case, a special verdict form should be drafted which includes lines that provide for a separate award of damages to the personal representative of the estate and for a separate award of loss of consortium damages to any loss of consortium claimant or claimants. If the personal representative is also a loss of consortium claimant, the verdict form should include a line for a separate award of loss of consortium damages to the personal representative. If there are additional loss of consortium claimants, the verdict form should include a line for a separate award of loss of consortium damages to each loss of consortium claimant. A sample special verdict form can be found at UJI 13-2223 NMRA.

If loss of consortium is not contested by the defendant or defendants, and only the amount of damages is at issue, this instruction should be modified in keeping with the circumstances of the case.

[Adopted by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — "Loss of consortium is a type of personal injury damage because damages for consortium are damages for the plaintiff's emotional distress due to the harm to a sufficiently close relationship." *Thompson v. City of Albuquerque*, 2017-NMSC-021, ¶ 8, 397 P.3d 1279 (alteration, internal quotation marks, and citations omitted). In the setting of a child losing a parent, for example, this is the value of the loss of the parent's "love, care, society, companionship, and the like." *State Farm Mut. Auto. Ins. Co. v. Luebbers*, 2005-NMCA-112, ¶ 42, 138 N.M. 289, 119 P.3d 169.

[Adopted by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after December 31, 2019.]

13-1811. Mitigation.

In fixing the amount of money which will reasonably and fairly compensate plaintiff, you are to consider that an injured person must exercise ordinary care to minimize or lessen [his] [her] damages. Damages caused by [his] [her] failure to exercise such care cannot be recovered.

USE NOTES

This instruction is designed to be used when the evidence creates an issue as to whether plaintiff exercised ordinary care to mitigate damages which were incurred after the injury and not before.

UJI 13-1603 NMRA. Ordinary care, must be given when this instruction is used.

[As amended, effective November 1, 1991.]

Committee commentary. — New Mexico follows the general rule that an injured person must use ordinary care to mitigate his damages. *Mitchell v. Jones*, 47 N.M. 169, 138 P.2d 522 (1943), citing 15 Am. Jur., Damages §§ 27 and 36 (*see now* 22 Am. Jur. 2d Damages §§ 30, 32, 38, 39).

Under the doctrine of avoidable consequences, a person injured by the tort of another is not entitled to damages for loss which could have been avoided by ordinary care. *Rutledge v. Johnson*, 81 N.M. 217, 465 P.2d 274 (1970) (plaintiff injured in rear end car accident and thereafter was further injured in three household accidents).

The obligation to mitigate damages extends not only to obtaining medical attention, but also to curing of the injury and using reasonable measures to prevent aggravation and to effect a cure. Substantial authority requires an injured person to submit to surgery or medical treatment to minimize tort damages. 62 A.L.R.3d 9, 70. The award should not include any sums for physical or mental pain and suffering or loss of earnings caused by failure to reasonably care for injuries sustained and this would include negligence in failure to consult a doctor, to follow a doctor's advice, to promptly see a doctor or to otherwise care for the injuries. *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444 (Tex. 1967).

Part B
Property Damages; Elements

13-1812. Personal property; no salvage value.

In determining property damages, if any, you may award the fair market value of the property immediately before the occurrence.

USE NOTES

This instruction to be used in conjunction with UJI 13-1802.

If the property has any salvage value, then UJI 13-1813 will be used and not this instruction.

Committee commentary. — This instruction is intended to be used when the damaged property has no salvage value, and it may also be used where the salvage is of doubtful value, if any.

13-1813. Personal property; costs of repair.

In determining property damages, if any, you may award the reasonable expense of necessary repairs to the property which was damaged.

USE NOTES

Again, it is pointed out that this instruction is to be inserted in the blank space in UJI 13-1802 NMRA, when the evidence justifies the same.

Committee commentary. — In the case of *Snider v. Town of Silver City*, 56 N.M. 603, 247 P.2d 178 (1952), the supreme court approved as a measure of damages the cost of restoring the buildings to the condition they were in prior to the time of damage.

In the case of *Thigpen v. Skousen & Hise*, 64 N.M. 290, 327 P.2d 802 (1958), an instruction was given to the effect that the jury could award damages "to the extent of the actual damage done to [the] building . . .."

13-1814. Personal property; before and after rule.

In determining property damage, if any, you may award the difference between the fair market value of the damaged personal property immediately before the occurrence and its fair market value immediately after the occurrence.

USE NOTES

This instruction is to be used when the property is damaged beyond repair but the property does have a salvage value.

This instruction is to be used with UJI 13-1802 and is to be inserted following the first paragraph.

Committee commentary. — The ordinary and usual measure of damages to personal property is that contained in the foregoing instruction and, therefore, this is the instruction which will generally be used in cases involving damage to both personal and real property.

In *Robert E. McKee Gen. Contractor v. Insurance Co. of N. Am.*, 269 F.2d 195 (10th Cir. 1959), where a stock of merchandise was damaged, it was held that the measure of damages was the difference in the value of the merchandise before and after injury.

In *O'Meara v. Commercial Ins. Co.*, 71 N.M. 145, 376 P.2d 486 (1962), the actual cash value was the measure of damages under an insurance policy. The court determined the cash value and deducted the salvage price.

13-1815. Personal property depreciation and repairs depreciation vs. before and after rule; unrepaired.

In determining property damage, you may award only the smaller of two figures which are calculated as follows:

One figure is the reasonable expenses of necessary repair to the property damaged plus the decrease, if any, in the fair market value of the repaired property as compared to its fair market value before the occurrence; and

The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

USE NOTES

This instruction is to be inserted following the first paragraph of UJI 13-1802, when the evidence justifies its use.

If there is no claim that the repaired property has depreciated in value, use UJI 13-1816.

If the cost of repairs plus depreciation will be less than the difference in value between the damaged and undamaged property, use UJI 13-1817.

If only the reasonable expense of necessary repairs is claimed and that is less than the difference in value of the property before and after the damage, use UJI 13-1813.

If the difference in the value of property before and after it was damaged is less than the reasonable cost of repairs, use UJI 13-1814.

This instruction may not be appropriate for damages to real estate, or improvements thereon, or property of intrinsic value or of no market value.

Committee commentary. — The theory of damages is to make an injured party whole, not to enable him to make a profit as a result of the damages; therefore, it is proper that he recover the lesser figure in damages. *See Curtis v. Schwartzman Packing Co.*, 61 N.M. 305, 299 P.2d 776 (1956). *See also* California Jury Instructions (Civil) 1746; Colorado Jury Instructions, 6:9 et seq.; Illinois Pattern Jury Instruction, 30.10; Iowa Jury Instructions, Chapter 3; Pattern Instructions for Kansas, 2d ed., §§ 9.10-9.21; Missouri Approved Jury Instructions, 4.01 et seq.; Wisconsin Jury Instructions, p. 1800 et seq.

13-1816. Personal property; repairs vs. before and after rule.

In determining property damages, you may award only the smaller of two figures which are calculated as follows:

One figure is the reasonable expense of necessary repairs to the property; and

The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

USE NOTES

This phrase is to be inserted between the first two bold paragraphs of UJI 13-1802 NMRA, when the evidence justifies its use.

This instruction is to be used when there is an issue as to whether the cost of repairs or the difference in value of the property before and after it is damaged is the lesser amount. When the cost of repairs is admittedly the lesser amount, use UJI 13-1813 NMRA; when the converse is true, use UJI 13-1814 NMRA.

This instruction may not be appropriate for damages to real estate or improvements thereon. *See* UJI 13-1819 NMRA.

Committee commentary. — In the case of *O'Meara v. Commercial Ins. Co.*, 71 N.M. 145, 376 P.2d 486 (1962), it was held that the actual cash value was the measure of damages under an insurance policy. The court determined the cash value and deducted the salvage price in arriving at the measure of damages. In the case of *Robert E. McKee Gen. Contractor v. Insurance Co. of N. Am.*, 269 F.2d 195 (10th Cir. 1959), it was held that, where stock or merchandise was damaged, the measure of damages was the difference in the value of the merchandise before and after the injury.

The court of appeals in 1974 cited this instruction in the case of *Gawlick v. American Bldrs. Supply, Inc.*, 86 N.M. 77, 519 P.2d 315 (Ct. App. 1974).

13-1817. Personal property; repairs plus depreciation.

In determining damages to personal property, you may award the reasonable expense of necessary repairs to the property, plus the decrease, if any, in the fair market value of the repaired property as compared to its fair market value before the occurrence.

USE NOTES

This instruction is to be used when the damages to which plaintiff is entitled are both the cost of repairs and the depreciation in value.

When applicable this instruction is a part of UJI 13-1802 NMRA.

If only the reasonable expense of necessary repairs is supported by the evidence use UJI 13-1813 NMRA.

Committee commentary. — There are occasional cases when the difference in value before and after cannot be ascertained with reasonable certainty, but the cost of repairs plus the depreciation in value constitute a fair method of ascertaining the loss of damages to the plaintiff.

DePalma v. Weinman, 15 N.M. 68, 88, 103 P. 782, 787, 24 L.R.A. (n.s.) 423 (1909) states:

Certainly if appellants by their wrongful acts caused the destruction and injury of appellees' goods, they were holden for the value of those destroyed and the injury to those damaged, and if such wrongful acts caused appellees to have to move the remaining stock and fixtures to another place, to again resume their business, it seems equally clear that they should pay such expense.

The repairs are recoverable even if the repairs were more than the actual value, at least in situations where the personal property was unique or almost irreplaceable. *Curtis v. Schwartzman Packing Co.*, 61 N.M. 305, 299 P.2d 776 (1956).

13-1818. Personal property; loss of use.

The reasonable rental value of similar property during the period reasonably required for the repair of the damaged property.

USE NOTES

This instruction should be inserted into UJI 13-1802 to define the measure of damages when damages for loss of use of personal property are at issue.

[As amended, effective January 1, 1996.]

Committee commentary. — Damages for loss of use of damaged personal property are recoverable even if the plaintiff does not actually rent substitute property during the period required for repairs. *Cress v. Scott,* 117 N.M. 3, 868 P.2d 648 (1994).

13-1819. Real property.

You shall determine what was the value of the property immediately before the occurrence and immediately after the occurrence. The difference between these two figures is the legal measure of damages to real property.

USE NOTES

This instruction, when applicable, is to be used in conjunction with UJI 13-1802 and is to be inserted following the first paragraph of that instruction.

The general rule on the measure of damages to real property is stated in the foregoing instruction. However, in certain peculiar situations, the courts have determined that there are other damages and other measures thereof. In such instances, the attorney for the plaintiff will have to prepare the applicable instruction for submission to the court.

Committee commentary. — The Supreme Court of New Mexico has recognized that under certain circumstances the measure of damages to real property may vary. *See Thigpen v. Skousen & Hise*, 64 N.M. 290, 327 P.2d 802 (1958); *Snider v. Town of Silver City*, 56 N.M. 603, 247 P.2d 178 (1952). *See also Duke City Lumber Co. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975).

13-1820. Mitigation of damages to property.

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that a person who is damaged must exercise ordinary care to minimize existing damages and to prevent further damages. Plaintiff may not recover for losses which could have been prevented by reasonable efforts on [his] [her] part.

USE NOTES

This instruction is to be used with the applicable instruction on damage to property and is to be inserted following the first paragraph of UJI 13-1802 NMRA.

This mitigation of damages instruction can apply both to personal property and real property situations.

[As amended, effective November 1, 1991.]

Committee commentary. — It is doubtful that an affirmative defense is necessary in order to raise the issue of mitigation of damages. If the evidence justifies the submission, then the instruction should be given to the jury.

The duty to mitigate damages to property is set forth in 22 Am. Jur. 2d Damages § 43.

Reference is made to the case of *Mitchell v. Jones*, 47 N.M. 169, 138 P.2d 522 (1943), as to the manner of pleading mitigation.

Part C
Miscellaneous Damages

13-1821. Future damages; extent and amount.

If you have found that plaintiff is entitled to damages arising in the future, you must determine the amount of such damages.

If these damages are of a continuing nature, you may consider how long they will continue.

[As to loss of future earning ability, you may consider that some persons work all their lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.]

USE NOTES

This instruction may be applicable to various types of damages and should be given when there is proper evidence that damages will, in fact, exist in the future.

If the prospective damages involve earning capacity then the third paragraph will be given and the brackets will be removed. However, the third paragraph applies only to earning capacity and not to any other type of future damages. Use with UJI 13-1803 or 13-1830.

UJI 13-1805 will also be given when the evidence presents an issue of permanency of an injury to an individual.

Committee commentary. — The New Mexico Supreme Court in the case of *Baros v. Kazmierczwk*, 68 N.M. 421, 362 P.2d 798 (1961) discussed future "loss of earnings".

Certain future damages must be reduced to present cash value and, in that connection, reference is made to UJI 13-1822.

13-1822. Future damages; discount to present cash value.[1]

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages awarded today to their present cash value. This reduction is necessary because money received now will, through proper investment, grow to a larger amount in the future. To find present cash value, you should discount or reduce the total amount of future damages to account for the earning power of the money you award today.

[You may consider expert testimony in determining the present cash value of future damages.][2]

[You must use [the interest rate of _____ percent] [and _____ (*specify other stipulated information*)] agreed to by the parties in determining the present cash value of future damages.][3]

Damages for any future pain and suffering [and disfigurement][4] are not to be so reduced.

USE NOTES

1. Whenever the jury is given the option or is directed to award future damages, this instruction should be given. However, defendant may waive such instruction. Use this instruction with UJI 13-1802.

2. Give this bracketed sentence if there has been expert testimony on reduction to present value. Unless there is a stipulation, expert testimony may be used to accurately establish present values for future losses.

3. Give this bracketed sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

4. Use only if applicable.

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets and an instruction on how to use them are provided in the Interest Tables in the New Mexico Statutes Annotated.

[As amended by Supreme Court Order No. 15-8300-005, effective for all cases filed or pending on or after December 31, 2015.]

Committee commentary. — The rule is universal that future damages are to be reduced except for future pain and suffering and disfigurement. 154 A.L.R. 801.

[As amended by Supreme Court Order No. 15-8300-005, effective December 31, 2015.]

13-1823. Admitted liability.

The defendant has admitted liability for any damage which may have proximately resulted from the occurrence. You need only decide [what damages to plaintiff resulted from this occurrence and] what damages plaintiff should recover for these injuries.

USE NOTES

This instruction should precede UJI 13-1802 NMRA, or the prototype thereof, whenever it is used. UJI 13-1802 NMRA or an instruction of like import will need to be given on the measure of damages, even when the defendant has admitted liability.

In the second sentence a phrase is bracketed. If there is an issue in the particular case as to whether some or all of the damages of which the plaintiff complains were in fact caused by the occurrence, then you will use the bracketed material; otherwise, it will be omitted.

In all cases where the defendant admits liability, the plaintiff is entitled to at least nominal damages.

This instruction should be given in all cases where the defendant has admitted liability. No verdict form should be submitted to the jury permitting them to determine liability. The only verdict form should specify the amount of damages to be awarded to the plaintiff.

Committee commentary. — Experience shows that this instruction will be used infrequently. When the defendant does admit liability, it frequently causes concern as to the proper type of instructions to be given to the jury. This instruction should be of assistance both to the bench and bar in this connection.

13-1824. No allocation of damages among joint defendants.

If you find that plaintiff is entitled to recover damages against more than one defendant, you must return a verdict in one single sum against the defendants whom you find to be liable.

USE NOTES

This instruction is to be used when there are multiple parties defendant and the jury is permitted to find in favor of one or more defendants and against more than one defendant.

This instruction stands alone. It is not an element to be added to UJI 13-1802 NMRA.

Committee commentary. — Care should be exercised to submit proper verdict forms to the jury when a situation is presented which would justify the use of an instruction of this type.

13-1825. Uniform contribution; settlement with one defendant.

Evidence has been introduced that plaintiff voluntarily settled [his] [her] claim against _____ *(name of released defendant)* and has released _____ *(name of released defendant)* from further liability by reason of the occurrence giving rise to this lawsuit.

If you find in favor of plaintiff and against the defendant _____ *(name of remaining defendant)* then you should assess the full amount of damages which you find to be proper under the evidence and the damages instructions here given to you.

Any offset or reduction in the amount of damages will be made by the court and should not be of concern to you in determining the damages, if any, to be assessed against _____ *(name of remaining defendant).*

USE NOTES

This instruction is to be used only where a joint tortfeasor has been released in conformity with the Uniform Contribution Among Tortfeasors Act, Section 41-3-1 NMSA 1978 et seq. Some adaptation of the instruction will be needed when there are more than two joint tortfeasors involved.

The instruction is not appropriate for use with a "covenant not to sue," nor with a release which does not discharge the remaining parties pro rata in accordance with the act.

The adjustment of the judgment rendered by the jury, by reason of the release, should be made following verdict by the court on the basis of the terms and conditions of the release and the act.

This instruction stands alone and is not an element of UJI 13-1802 NMRA but is to be used when circumstances justify.

[As amended, effective November 1, 1991.]

Committee commentary. — Application of the Uniform Contribution Among Tortfeasors Act is discussed in *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969) and in *Garrison v. Navajo Freight Lines*, 74 N.M. 238, 392 P.2d 580 (1964).

See also Johnson v. City of Las Cruces, 86 N.M. 196, 521 P.2d 1037 (Ct. App. 1974). In *Alder v. Garcia*, 324 F.2d 483 (10th Cir. 1963), the joint tortfeasor who took both a release and a partial assignment of plaintiff's cause against the other tortfeasor was denied relief on either, on grounds of public policy.

13-1826. Withdrawn.

13-1827. Punitive damages.

(Introduction)

In this case, _____ (*name of party making claim for punitive damages*) seeks to recover punitive damages from _____ (*name of party against whom punitive damages are sought*). You may consider punitive damages only if you find that _____ (*party making claim*) should recover compensatory [or nominal] damages.

(Theories of Liability)

[[1.] If you find that the conduct of _____ (*name of party against whom direct liability for punitive damages is asserted*) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], then you may award punitive damages against [him] [her] [it].]

[[2.] [Also] [I]f you find that the conduct of _____ (*name of agent or employee who was a tortfeasor*) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], you may award punitive damages against _____ (*name of principal or employer party against whom liability for punitive damages is asserted*) if:

(a) _____ (*name of agent or employee*) was acting in the scope of [his] [her] employment with _____ (*name of principal or employer party against whom liability for punitive damages is asserted*) and had sufficient discretionary or policy-making authority to speak and act for [him] [her] [it] with regard to the conduct at issue, independently of higher authority; [or if]

(b) _____ (*name of principal or employer party against whom liability for punitive damages is asserted*) in some [other] way [authorized,] [participated in] [or] [ratified] the conduct of _____ (*name of agent or employee*).]

[[3.] If you find that the conduct of the _____ (*agents or employees*), taken as a whole, showed that _____ (*name of principal or employer against whom liability for punitive damages is asserted*) was [malicious] [willful] [reckless] [wanton] [or] [in bad faith] you may award punitive damages against _____ (*name of principal or employer party*).]

(Definitions)

Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

Reckless conduct is the intentional doing of an act with utter indifference to the consequences. When there is a high risk of danger, conduct that breaches the duty of care is more likely to demonstrate recklessness.

Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person’s [rights] [safety].

(Conclusion)

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature and enormity of the wrong and such aggravating and mitigating circumstances as may be shown. The property or wealth of the defendant is a legitimate factor for your

consideration. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.

USE NOTES

This instruction provides a general framework for a punitive damage instruction usable in any civil action involving claims for punitive damages. Some other chapters of UJI Civil contain punitive damage instructions specifically applicable to particular causes of action which should be used where appropriate. *See, e.g.*, UJI 13-861 (contracts) and 13-1718 NMRA (insurance bad faith).

This instruction is divided into sections by headers and numbers for ease of reference in these use notes. The headers should not be included in the instruction as given to the jury, although some form of numbering may be helpful if there are multiple claims for punitive damages. Within each section, bracketed language should be selected as appropriate.

The sections labeled Introduction and Conclusion should always be given. UJI 13-1832 NMRA must be given following this instruction if the bracketed reference to nominal damages is included in the "Introduction." Where the case includes a claim for punitive damages against an individual who directly injured the plaintiff, Paragraph 1 should be given. Paragraph (2)(a) applies when the person who directly injured the plaintiff had sufficient discretionary or policy-making authority to speak or act for the principal or employer with regard to the conduct at issue. Paragraph 2(b) applies when the person who directly injured the plaintiff did not have sufficient authority, but the principal or employer authorized, ratified or participated in the act. Paragraph 3 applies when the cumulative conduct of the agents or employees show that the principal or employer had a culpable mental state, irrespective of whether the party who directly harmed the plaintiff had a culpable mental state. *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, 150 N.M. 283, 258 P.3d 1075; *see also Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 881 P.2d 11 (1994). The description of agents or employees can include specific names, if available, categories of agents or employees, or generic references to agents or employees. Depending on the facts and pleadings, more than one claim for punitive damages may be included in the same case, against the same or different parties. Portions of Paragraphs 2 and 3 may not need to be given if the court determines that the elements addressed in these subparagraphs (scope of authority and managerial capacity, or authorization, participation, ratification) have been established as a matter of law. Appropriate entries from the "Definitions" section should be given depending on whether the offending conduct is alleged to be malicious, willful, etc.

Separate verdicts must be used for punitive damages when there is more than one party against whom punitive damages are sought.

In an unusual or complex case, it may be appropriate to modify this general form of instruction to instruct the jury clearly and correctly on the law. *See* Committee Commentary.

[Adopted, effective November 1, 1991; as amended, effective July 1, 1998; as amended by Supreme Court Order No. 08-8300-021, effective September 10, 2008; as amended by Supreme Court Order No. 13-8300-021, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Punitive damages cannot be awarded without the recovery of other compensatory damages or nominal damages (where the cause of action does not require proof of actual damages). In a negligence action, punitive damages cannot be awarded without recovery of compensatory damages. In other actions, an award of nominal damages may be sufficient to support a recovery of punitive damages. *See, e.g., Sanchez v. Clayton*, 117 N.M. 761, 767, 877 P.2d 567, 573 (1994); UJI 13-1832 NMRA.

Standards for an award of punitive damages against an principal or employer are addressed in *Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*, 118 N.M. 140, 879 P.2d 772 (1994); *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 881 P.2d 11 (1994); *Brashear v. Baker Packers*, 118 N.M. 581, 883 P.2d 1278 (1994); *Rhein v. ADT Automotive, Inc.*, 1996-NMSC-066, 122 N.M. 646, 930 P.2d 783; and *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, 150 N.M. 283, 258 P.3d 1075.

The definitions section of this instruction which describes the types of conduct giving rise to punitive damages is disjunctive; if, for example, a defendant acts recklessly, it is unnecessary to show intentional misconduct. *Greentree Acceptance, Inc. v. Layton*, 108 N.M. 171, 174, 769 P.2d 84, 87 (1989).

The New Mexico Supreme Court in *Paiz v. State Farm Fire & Casualty Co.*, 118 N.M. 203, 210-213, 880 P.2d 300, 307-310 (1994), eliminated gross negligence as a basis for an award of punitive damages for contract claims. Following the decision in *Paiz*, the committee recommended that gross negligence be removed as a basis for punitive damages in both contract and tort cases. This recommendation was adopted by the New Mexico Supreme Court in 1998.

In 1994, Supreme Court held that the risk of danger posed by the product or the tortfeasor's conduct is a valid consideration in determining whether the conduct rises to the level of recklessness necessary to show a culpable mental state. *See Clay*, 118 N.M. at 269, 881 P.2d at 14. Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to establish the requisite culpable mental state to support an award of punitive damages. Id.

When punitive damages are awarded by a jury against more than one party, the damages awarded against each must be separately stated by the jury. *Vickrey v. Dunivan*, 59 N.M. 90, 94, 279 P.2d 853, 856 (1955).

In some cases it may be appropriate to modify this general form of instruction to instruct the jury clearly and correctly on the law. For instance, it may be necessary to specify the kind of conduct allegedly giving rise to punitive damages liability against various parties

- e.g.: “If you find that the conduct of Truck Driver in his driving of the vehicle leading up to the accident was reckless or wanton, then you may award punitive damages against him. If you find that the conduct of Trucking Company in connection with its screening and hiring of Truck Driver was reckless or wanton, then you may award punitive damages against it. Additionally, if you find that the conduct of Truck Driver was reckless or wanton, you may award punitive damages against Trucking Company if . . . .”

[As amended by Supreme Court Order No. 13-8300-021, effective for all cases pending or filed on or after December 31, 2013.]

13-1827A. Punitive damages; evidence of harm or injury to non-parties to the litigation.

_____ (*Name of the plaintiff*) has introduced evidence of [harm to others] [risk of harm to others] as a result of _____ (*name of the defendant*)’s conduct. You may consider this evidence in determining the nature and enormity of _____ (*name of the defendant*)’s wrongful conduct toward _____ (*name of the plaintiff*). You may not, however, include in your award of punitive damages any amount that punishes _____ (*name of the defendant*) for harm to others not before this court.

USE NOTES

This instruction must be given where the jury is instructed on the issue of punitive damages, UJI 13-1827 NMRA, and evidence of harm or injury to non-parties to the litigation has been admitted into evidence during the trial.

[Approved by Supreme Court Order No. 08-8300-021, effective September 10, 2008.]

Committee commentary. — In *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), the Supreme Court held that "the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063, 166 L.Ed. at 948. At the same time, the Court acknowledged that conduct that poses a substantial risk of harm to others in addition to the plaintiff, that poses a risk to the public at large, or that is repeated may be more reprehensible than other conduct. Ultimately, the Court imposed an obligation on the State to establish procedures to prevent the risk that a jury "in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others[.]" *Id.* at 1065. The purpose of this instruction is to address the risk identified by the Supreme Court so that a jury is instructed that it can consider evidence of injury or harm to others in determining the reprehensibility of the conduct that injured the plaintiff, but that it may not punish the defendant for causing harm to others who are not parties to the litigation.

13-1828. Vicarious liability; indemnity between tortfeasors.

If there is no wrongdoing on the part of the principal, then the principal is entitled to indemnity from [his] [her] agent.

USE NOTES

This instruction should be modified if the relationship of the parties is other than principal and agent, such as employer and employee, etc.

This instruction is not designed for use in a case in which the basis of indemnity is contractual.

[As amended, effective November 1, 1991.]

Committee commentary. — *See Hancock v. Berger*, 77 N.M. 321, 422 P.2d 359 (1967), where it was held that a broker was entitled to indemnity against saleswoman although liability of broker rested solely on respondeat superior.

13-1829. Indemnity between active and passive tortfeasors - *No instruction drafted*.

No instruction drafted.

USE NOTES

The trial lawyers and judge will need to submit to the jury an instruction when the New Mexico law on this point is covered by the evidence.

Committee commentary. — No instruction has been prepared on this subject, but this does not mean that an instruction should not be given in a proper case.

A number of New Mexico cases have discussed the right to indemnity of one whose negligence is "passive" or "secondary" from the "active" or "primary" wrongdoer. Because of the widely varying factual situations in which this principle may be involved, and because no New Mexico case is directly in point on this question, an instruction in the usual format of the Uniform Jury Instructions and adapted to the particular factual situations should be prepared in a proper case.

The following cases, while discussing this rule, have refused to apply it on grounds that the negligence was concurring, or that the duties of the parties were the same, or that the negligence of the party seeking indemnity was more than merely "passive":

Standhardt v. Flintkote Co., 84 N.M. 796, 508 P.2d 1283 (1973); *Harmon v. Farmers Mkt. Food Store*, 84 N.M. 80, 499 P.2d 1002 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972); *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d

364 (1969); *Lommori v. Milner Hotels, Inc.*, 63 N.M. 342, 319 P.2d 949 (1957); *Krametbauer v. McDonald*, 44 N.M. 473, 104 P.2d 900 (1940).

For discussion of a variety of factual situations in which the right of indemnity between tortfeasors may exist, *see* Restatement of Restitution, § 87 et seq.

See also BAJI, "Implied Indemnity - Indemnification Active or Passive Negligence", § 12.69 for draft which appears to coincide with the present, but undeveloped, New Mexico case law on the subject matter.

Part D
Wrongful Death

13-1830. Measure of damages; wrongful death.

This lawsuit has been brought by _____ (*name of personal representative*) on behalf of the estate of _____ (*name of decedent*), who is now deceased.

New Mexico law allows damages to be awarded to the estate of a deceased person if the death or the related damages described in this instruction were caused by the wrongful act, neglect, or default of another. If you should find for the estate of _____ (*name of decedent*) on the question of liability, you must then fix the amount of money which you deem fair and just for the life of _____ (*name of decedent*), including in your award compensation for any of the following elements of damages proved by the evidence:

1. The reasonable expenses of necessary medical care and treatment and funeral and burial;

2. The pain and suffering experienced by _____ (*name of decedent*) between the time of injury and death;

3. The lost earnings, the lost earning capacity, and the value of the lost household services of _____ (*name of decedent*) considering _____'s (*name of decedent*) age, earning capacity, health, habits, and life expectancy. In considering loss of earnings or earning capacity, deductions must be made for income taxes, social security taxes, other taxes, and personal living expenses of _____ (*name of decedent*). The damages set forth in this paragraph are damages for future loss of money and are paid in a lump sum. Therefore, a reasonable discount must be made for the future earning power of the damages awarded;

4. The value of _____'s (*name of decedent*) life apart from _____'s (*name of decedent*) earning capacity;

5. The mitigating or aggravating circumstances attending the wrongful act, neglect, or default;

6. The loss of guidance and counselling to _____'s (*name of decedent*) minor children.

7. You may also consider the loss to the beneficiaries of other expected benefits that have a monetary value. While the presence or absence of a measurable monetary loss to beneficiaries is a factor for consideration, damages may be awarded even where monetary loss to the surviving beneficiaries cannot be shown.

The property or wealth of the beneficiaries or of the defendant is not a legitimate factor for your consideration.

No fixed standard exists for determining fair and just damages. You must use your judgment to decide a reasonable amount. Your verdict must be based on evidence, not on speculation, guess, or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family.

USE NOTES

The wrongful death instruction enumerates the various elements of damage that may be recovered upon the wrongful death of an individual. The personal representative may not always recover each of the elements of damages depending upon the evidence produced at trial. If there are no minor children, item 6 should be excluded. Similarly, if there are no lost earnings, earning capacity, or household services item 3 should be excluded, and so on. Only those elements supported by the evidence are to be included in the instruction given the jury.

If the personal representative is also a loss of consortium claimant, the verdict form should include a line for a separate award of loss of consortium damages to the personal representative. If there are additional loss of consortium claimants, the verdict form should include a line for a separate award of loss of consortium damages to each loss of consortium claimant. A sample special verdict form appears in UJI Chapter 22 at UJI 13-2223 NMRA.

[As amended, effective October 1, 1996; March 20, 2000; as amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008; as amended by Supreme Court Order No. 16-8300-018, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — The wrongful death instruction was drafted as a consequence of our Supreme Court's opinion in *Romero v. Byers*, 1994-NMSC-031, 117 N.M. 422, 872 P.2d 840. After our Supreme Court's opinion in *Estate of Saenz ex rel. Saenz v. Ranack Construction, Inc*., 2018-NMSC-032, 420 P.3d 576, the committee

recommended revisions to UJI 13-1830 and UJI 13-1810A NMRA, and the addition of UJI 13-1810B and UJI 13-2223 NMRA, in an attempt to further clarify the separate nature of wrongful death damages and loss of consortium damages in situations where the personal representative is also a loss of consortium claimant.

[As amended by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after December 31, 2019.]

13-1831. Mortality tables.

According to a table of mortality, the life expectancy of persons aged _____ years is _____ additional years. This figure is not conclusive. It is the average life expectancy of persons who have reached that age. This figure may be considered by you in connection with other evidence relating to the probable life expectancy of _____, including evidence of [his] [her] occupation, health, habits and other activities, bearing in mind that some persons live longer and some live shorter than the average.

USE NOTES

Care should be exercised in completing the blank spaces to conform to the evidence.

This instruction may be used in conjunction with UJI 13-1830 NMRA in wrongful death cases.

This instruction may also be used in conjunction with UJI 13-1802 and 13-1806 NMRA in permanent injury cases.

[As amended, effective November 1, 1991.]

Committee commentary. — Mortality tables need not be read into evidence or read to the jury during the course of the trial. It is sufficient that the court fill in the blanks above with the proper figures. The court can take judicial notice of the mortality tables which are included in the New Mexico Statutes.

For New Mexico law, *see Padilla v. Atchison*, T. & S.F. Ry., 61 N.M. 115, 295 P.2d 1023 (1956); *Dominguez v. Albuquerque Bus Co.*, 58 N.M. 562, 273 P.2d 756, 50 A.L.R.2d 414 (1954). This instruction was cited in *Higgins v. Hermes*, 89 N.M. 379, 384, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Part E
Nominal Damages

13-1832. Nominal damages.

If you find that _____ *(plaintiff)* has established a right to recover from _____ *(defendant)* but that _____ *(plaintiff)* has suffered [no harm], [insignificant harm], [or] [damages that cannot be ascertained], you may award [him] [her] [it] nominal damages. Nominal damages are a trivial sum of money, usually one cent or one dollar, awarded to a party who has established a right to recover but has not established that [he] [she] [it] is entitled to compensatory damages.

USE NOTES

This instruction should not be used when the cause of action requires proof of actual damages.

[Adopted effective, January 1, 1999.]

Committee commentary. — This instruction defines nominal damages and explains when such damages may be awarded. Nominal damages are referenced in UJI 13-1827 and will support an award of punitive damages. There may be other situations in which the jury should be instructed as to the availability of nominal damages as a remedy when the substantive elements of a cause of action have been established. *See Sanchez v. Clayton,* 117 N.M. 761, 877 P.2d 567 (1994).

APPENDIX TO CHAPTER 18

Appendix 1. Examples of instructions and special verdict forms for use in successive tortfeasor cases.

INTRODUCTION

This Appendix contains a set of sample instructions and exemplars drafted by the Committee on Uniform Jury Instructions for Civil Cases and is intended to cover many of the situations in which one party or another may argue either that one party is liable for the negligence or fault of another party based on successive tortfeasor principles or that a plaintiff received more than one divisible injury.

For those successive tortfeasor cases where the parties stipulate, or the court rules, that the plaintiff's injuries are divisible, the Committee considered three scenarios where different instructions would be useful. First, for those cases where suit is brought against the original tortfeasor only and no claim is made against the potential successive tortfeasor, the Committee determined that no special successive tortfeasor instruction on "divisibility" was necessary. In such cases, the Committee contemplated that the jury would determine the original tortfeasor's liability for enhanced injuries under the rules of proximate cause with the aid of UJI 13-1802A NMRA. Counsel can adapt the sample instructions and verdict form in the Appendix to Chapter 11 for use under this first scenario. Second, for those cases where divisibility is not a jury issue and suit is brought against the potential successive tortfeasor only, the Committee contemplated that the trial court would instruct the jury using 13-1802B NMRA. A sample set of

instructions and a verdict form for this first scenario appear as Example A in this Appendix. Third, in those cases where suit is brought against both the potential original and successive tortfeasors, the Committee contemplated the use of 13-1802C NMRA. The sample instructions and verdict form for this third scenario appears in Example B of this Appendix.

For all cases governed by successive tortfeasor principles in which the jury is asked to determine whether injuries are divisible, the Committee contemplated the use of UJI 13-1802D NMRA. Two sets of sample instructions and verdict forms, under Examples C and D, appear in this Appendix. Example C was drafted for use in a case where the plaintiff alleges that two defendants each caused a divisible injury. Example D is based loosely on the facts of *Payne v. Hall*, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599, with a minor variation consisting of the addition of a third-party claim, and demonstrates the use of 13-1802D NMRA in a more complex case.

Each of the exemplar instructions and verdict forms was drafted in contemplation that they would be used chiefly in negligence cases. The Committee recommends that particular attention be paid to revising the instructions and verdict forms before they are adapted for use with strict liability, crashworthiness, or so-called "second-injury" or "rollover" cases where successive tortfeasor principles may be at issue.

EXAMPLE A
Statement of facts

The plaintiff, injured in automobile accident, is transported to a hospital where he claims he received negligent care. The plaintiff brings suit against the health care provider only, and the parties agree, or the court decides as a matter of law, that any injuries received at the hospital are causally distinct from injuries the plaintiff received in the automobile accident.

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

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

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

In this case the plaintiff seeks compensation from the defendant medical provider for damages the plaintiff says were caused by negligent medical treatment of injuries first received by the plaintiff in an automobile accident. The plaintiff says the defendant caused an injury separate from the first injuries, or made them worse.

To establish negligent medical treatment on the part of the defendant, the plaintiff has the burden of proving that, in treating the plaintiff, the defendant failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances.

The plaintiff has the burden of proving such negligent medical treatment was a cause of a separate injury, or made the first injury measurably worse.

The defendant denies what the plaintiff says.

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: _____ _____.

(NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact the plaintiff may have been unusually susceptible to injury or likely to be harmed. The defendant is said to "take the plaintiff as he finds [him] [her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802B. Successive tortfeasor only defendant; no question for jury on divisibility of injuries.

In this case, the plaintiff says and has the burden of proving by the greater weight of the evidence that the defendant medical provider caused injuries that were separate and distinct from, or that amounted to a measurable worsening of, injuries the plaintiff received in the automobile accident.

In determining what damages, if any, were caused by the defendant medical provider, you should award the plaintiff compensation only for the separate injury caused by the medical provider and for any measurable worsening of the plaintiff's condition caused by the medical provider that would have been avoided had the medical provider acted within the standard of care, but not for damages from the automobile accident.

Special Verdict Form
Example A

An exemplar special verdict form suitable for this fact pattern appears in the appendix to Chapter 11 (Medical Negligence).

EXAMPLE B
Statement of facts

The plaintiff, injured in automobile accident with another driver, is transported to a hospital where he claims he received negligent care. The plaintiff brings suit against the other driver and the other driver brings a third-party complaint against the medical provider, and the parties stipulate, or the court decides as a matter of law, that the injuries received in the automobile accident are divisible from the injuries claimed to have been caused at the hospital.

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

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

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

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

In this case the plaintiff seeks compensation from the defendant driver for damages the plaintiff says were caused by negligence.

To establish negligence on the part of the defendant driver, the plaintiff has the burden of proving that the defendant driver failed to stop and yield the right-of-way to the plaintiff's vehicle.

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

The defendant denies what the plaintiff says, and the defendant says that the third-party defendant medical provider's negligent treatment [caused injury separate from the first injuries received in the automobile accident], [or] [made the first injury measurably worse] [or] [caused injury which would not have occurred with proper medical treatment].

To establish that negligent medical treatment [caused injury separate from the first injuries] [or] [made the first injuries measurably worse] [or] [caused injury which would not have occurred with proper medical treatment], the defendant has the burden of proving (1) in treating the plaintiff, the medical provider failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances, and (2) such negligent medical treatment [was a cause of separate injury] [or] [made the first injury measurably

worse] [or] [caused injury which would not have occurred with proper medical treatment].

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: _____ _____.

(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact the plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to "take the plaintiff as he finds [him][her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802C. Successive tortfeasors; divisibility of injury not in dispute or decided as a matter of law.

In this case, if you find that the defendant other driver or the defendant medical [provider was] [providers were] negligent and caused injury to the plaintiff, you will first decide the amount of damages from the automobile accident and you will then decide the amount of damages from the medical treatment.

You will next compare the negligence of each person whose negligence contributed to the injuries caused by the car accident. You will then compare the negligence of each person whose negligence contributed to the injuries caused at the hospital.

Special Verdict Form
Example B

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer: Yes No

Other Driver _____ _____

Medical Provider _____ _____

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

If the answer to Question No. 1 is "Yes" as to either the other driver or the medical provider, you are to answer Question 2.

Question No. 2: For each person or company you found negligent in response to Question No. 1, was the negligence of that person or company a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer: Yes No Not applicable

Other Driver _____ _____ _____

Medical Provider _____ _____ _____

If you answered "No" or "Not applicable" as to both defendants listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: _____ Yes _____ No

If you answered "No" then you should skip the next question and go to Question No. 5. If you answered "Yes," then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [him] [her]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS ONLY ONE DEFENDANT NEGLIGENT

Question No. 5: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff and caused by the [defendant driver] [defendant medical provider] to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

[Other Driver	_____%]
[Medical Provider	_____%]
[Plaintiff	_____%]
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. Then the court will enter judgment for the plaintiff and against each defendant in the proportion of damages for which each defendant is responsible.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY HAS FOUND BOTH DEFENDANT DRIVER AND MEDICAL PROVIDER NEGLIGENT

Question No. 5: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the separate injuries caused by the defendant auto accident driver and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:

Damages caused by auto accident defendant driver _____

Damages caused at the hospital _____

Total damages _____

(*must be the sum of the two numbers above*)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons who contributed to the separate damages caused by the automobile accident and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to himself in the automobile accident.

Other Driver	_____%
Plaintiff	_____%
_____	_____
Total	100%

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury.

Medical Provider	_____%
Plaintiff	_____%
_____	_____
Total	100%

_____

Foreperson

EXAMPLE C
Statement of facts

The plaintiff, injured at a medical clinic, is transported to hospital where he claims he received additional negligent care. The plaintiff brings suit against the defendant clinic doctors and defendant hospital doctors, contending that each caused distinct injuries, and the issue of divisibility of injuries is for the jury.

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

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

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

In this case the plaintiff seeks compensation from the defendant clinic doctors for damages from injuries the plaintiff says were caused by negligent medical treatment at the clinic and from the defendant hospital doctors for damages for enhanced and separate injuries the plaintiff says were caused by negligent medical treatment at the hospital.

To establish negligent treatment on the part of the defendant clinic doctors, the plaintiff has the burden of proving that, in treating the plaintiff, the clinic doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff either suffered an injury separate and distinct from any injury later received at the hospital or, in the alternative, that the plaintiff suffered a single injury caused at least in part by negligence on the part of the clinic doctors.

To establish negligent treatment on the part of the defendant hospital doctors, the plaintiff has the burden of proving that, in treating the plaintiff, the hospital doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff either suffered an injury separate and distinct from any injury the plaintiff received at the clinic, or that the hospital doctors made the plaintiff's original injuries measurably worse or, in the alternative, that the negligence of the hospital doctors, in combination with the negligence of the clinic doctors, contributed to bring about plaintiff's injuries and damages.

Both the clinic and the hospital deny what the plaintiff says.

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: _____
_____.

(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured

without regard to the fact plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to "take the plaintiff as he finds [him][her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802D. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that one or more of the clinic doctors and one or more of the hospital doctors negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff's injuries are divisible; or, in other words, whether the negligence of the clinic doctors caused an injury that is separate and causally distinct from any separate, enhanced or avoidable injury caused by the hospital doctors.

If you find that the plaintiff's injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the injuries and each defendant will be responsible for his or her proportionate share, if any, of the plaintiff's damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose negligence contributed to the injuries at the clinic and then compare the negligence of each person whose negligence contributed to the injuries at the hospital. The plaintiff would be entitled to recover from the clinic both the damages related to the distinct injuries caused by the clinic and any damages from additional or enhanced injuries from subsequent medical treatment at the hospital. The clinic, in turn, would be entitled to recover from the hospital the share of damages caused by the negligence on the part of the hospital.

The plaintiff says that the plaintiff received injuries caused by the clinic doctors that are divisible from the injuries caused by the hospital doctors. The plaintiff, therefore, bears the burden of proving, by the greater weight of the evidence, both that the plaintiff received an original injury at the clinic that is separate and causally distinct from a second injury received at the hospital, and the amount of damages and injuries from the separate injuries.

Special Verdict Form

Potential successive tortfeasor issue for the jury

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer:	Yes	No
Clinic doctor 1	_____	_____
Clinic doctor 2	_____	_____

Hospital doctor 1	_____	_____
Hospital doctor 2	_____	_____

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

If the answer to Question No. 1 is "Yes" as to at least one of the persons listed, you are to answer Question 2.

Question No. 2: For each person or persons you found negligent in response to Question No. 1, do you find that the negligence of that person or company was a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer:	Yes	No	Not applicable
Clinic doctor 1	_____	_____	_____
Clinic doctor 2	_____	_____	_____
Hospital doctor 1	_____	_____	_____
Hospital doctor 2	_____	_____	_____

If you answered "No" or "Not applicable" as to all the persons or companies listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: _____ Yes _____ No

If you answered "No" then you should skip the next question and go to Question No. 5. If you answered "Yes", then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [him] [her]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS AGAINST BOTH CLINIC DOCTORS BUT NOT AGAINST HOSPITAL DOCTORS, PLAINTIFF NOT NEGLIGENT

Question No. 5: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic doctor 1	_____%
Clinic doctor 2	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY HAS FOUND TWO CLINIC DOCTORS AND ONE HOSPITAL DOCTOR NEGLIGENT AND THE PLAINTIFF NEGLIGENT AND THERE IS A SUCCESSIVE TORTFEASOR ISSUE

Question No. 5: In accordance with the court's instruction No. ___ regarding separate and causally-distinct injuries, did the clinic doctors cause an injury that is separate and causally distinct from any second injury or enhancement of the original injury caused by hospital doctor 2?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is "Yes," then skip Question Nos. 6 and 7 and answer Question Nos. 8-11. If the answer to Question No. 5 is "No," then answer Question Nos. 6 and 7.

Question No. 6: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic doctor 1	_____%
Clinic doctor 2	_____%
Hospital doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. The court will then enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom and you will return to open court.

_____
Foreperson

Question No. 8: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence at the clinic and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:

Damages caused by negligence of clinic doctors	_____
Damages caused by hospital doctor 2	_____

Total damages _____
(*must be the sum of the two numbers above*)

Go to Question No. 9.

Question No. 9: Compare the negligence of the following persons who contributed to the separate damages caused by negligence at the clinic and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to himself at the clinic.

Clinic doctor 1	_____%
Clinic doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

Go to Question No. 10.

Question No. 10: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by negligence at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury at the hospital.

Hospital doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

_____
Foreperson

EXAMPLE D
Statement of facts

The plaintiff says she was injured as a result of medical treatment at a medical clinic. She also contends and the trial court has determined that, under the "positive rule of decisional law" announced in *Lewis v. Samson*, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972, 985 (2001), the clinic is liable for any injuries or enhanced injuries the plaintiff received subsequently at a hospital. The clinic denies that it was negligent and contends that if the plaintiff received negligent medical care, it was at the hospital to which the plaintiff was transferred from the clinic. The plaintiff brings suit only against the clinic. The clinic has filed a third party claim against the hospital, seeking indemnity against the plaintiff's claim that the clinic is liable for injuries caused by negligence at the

hospital. The trial court has determined that divisibility of injuries is a question for the jury. The physicians at the clinic and hospital are employees of the respective facilities.

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

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

UJI 13-302C. Statement of denial and affirmative defenses.

In this case the plaintiff seeks compensation from the defendant clinic for damages from injuries the plaintiff says were caused by negligent treatment at the clinic and for any additional injuries or measurable worsening of her damages she suffered as a result of subsequent treatment required at the hospital.

To establish negligent treatment on the part of the clinic, the plaintiff has the burden of proving that, in treating the plaintiff, the clinic doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff suffered an injury.

The plaintiff also says, and has the burden of proving, that the injuries the plaintiff received at the clinic were separate and causally-distinct from any injury or measurable enhancement of her injuries caused by treatment at the hospital.

The clinic denies that it was negligent and contends that, if the plaintiff was injured through negligence, it was the result of treatment she received from doctors at the hospital.

To establish negligent treatment on the part of the hospital, the clinic has the burden of proving that, in treating the plaintiff, the hospital doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers and that such failure either caused or contributed to plaintiff's injuries.

UJI 13-1802 Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate her for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: _____
_____.

(*NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.*)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to "take the plaintiff as he finds [him][her]," meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802D. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that one or more of the clinic doctors negligently caused injury to the plaintiff and one or more of the hospital doctors negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff's injuries are divisible; or, in other words, whether the negligence of the clinic doctors caused an injury that is separate and causally-distinct from any separate, enhanced or avoidable injury caused by the hospital doctors.

If you find that the plaintiff's injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the plaintiff's injuries and each defendant will be responsible for its proportionate share, if any, of the plaintiff's damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose negligence contributed to the injuries at the clinic and then compare the negligence of each person whose negligence contributed to the injuries at the hospital. The plaintiff would be entitled to recover from the clinic both the damages related to the distinct injuries received at the clinic and any damages arising from additional or enhanced injuries arising from the subsequent medical treatment necessitated by those injuries. The clinic, in turn, would be entitled to recover from the hospital the share of damages caused by negligence on the part of the hospital.

The plaintiff says that she received injuries caused by the clinic doctors that are separate and causally distinct from any separate injuries or measurable enhancement of the clinic injuries caused by the hospital doctors, she bears the burden of proving, by the greater weight of the evidence, that she received an injury at the clinic that is separate and causally distinct from any separate or enhanced injury received at the hospital, and the amount of damages and injuries attributable to the separate injuries.

Special Verdict Form

Potential successive tortfeasor issue for the jury

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer:	Yes	No
Clinic	_____	_____
Hospital	_____	_____

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

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

Question No. 2: For each health care provider you found negligent in response to Question No. 1, do you find that the negligence of that provider was a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer:	Yes	No	Not applicable
Clinic	_____	_____	_____
Hospital	_____	_____	_____

If you answered "No" as to the Clinic, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to the Clinic, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: ____ Yes _____ No

If you answered "No" then you should skip the next question and go to Question No. 5. If you answered "Yes," then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [him] [her]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS AGAINST CLINIC BUT NOT AGAINST HOSPITAL DOCTORS, PLAINTIFF IS NEGLIGENT

Question No. 5: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic	_____%
Plaintiff	_____%
	_____
Total	100%

The court will multiply the percentage of negligence for the Clinic by the plaintiff's total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which the defendant is responsible.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY HAS FOUND THE CLINIC AND THE HOSPITAL AND THE PLAINTIFF NEGLIGENT AND THERE IS A SUCCESSIVE TORTFEASOR ISSUE

Question No. 5: In accordance with the court's instruction No. ___ regarding separate and causally-distinct injuries, did the clinic cause an injury that is separate and causally distinct from any second injury or enhancement of the original injury caused by the hospital?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is "Yes," then skip Question Nos. 6 and 7 and answer Question Nos. 8-11. If the answer to Question No. 5 is "No," then answer Question Nos. 6 and 7.

Question No. 6: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. *(Here enter the total amount of damages without any reduction for comparative negligence.)*

Go to Question No. 7.

Question No. 7: Compare the negligence of the following parties and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Clinic	_____%
Plaintiff	_____%
Hospital	_____%
	_____
Total	100%

The court will multiply the percentage of negligence for the defendant by the plaintiff's total damages. The court will then enter judgment against the defendant and in favor of the plaintiff in the proportion of damages for which the defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom and you will return to open court.

_____
Foreperson

Question No. 8: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence at the clinic and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:

Damages caused by negligence of clinic	_____
Damages caused by negligence of hospital	_____
Total damages	_____
(*must be the sum of the two numbers above*)	

Go to Question No. 9.

Question No. 9: Compare the negligence of the following parties who contributed to the separate damages caused by negligence at the clinic and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to herself at the clinic.

Clinic	_____%
Plaintiff	_____%
	_____
Total	100%

Go to Question No. 11.

Question No. 11: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by negligence at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury at the hospital.

Hospital doctor 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

_____
Foreperson

[Approved by Supreme Court Order No. 07-8300-036, effective February 1, 2008.]

CHAPTER 19
Miscellaneous Matters

Part A
Miscellaneous Matters

13-1901. Recompiled.

13-1902. Recompiled.

13-1903. Recompiled.

13-1904. Jury deadlocked.

It is your duty, as jurors, to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgments. Each of you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favors such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinions of the other jurors.

I hope that, after further deliberation, you may be able to agree upon a verdict. That is why we try cases, to try to dispose of them and to reach a common conclusion, if you can do so, consistent with the consciences of the individual members of the jury. The court suggests that, in deliberating, you each recognize that you are not infallible, that you listen to the opinion of the other jurors and that you do so conscientiously with a view to reaching a common conclusion, if you can.

USE NOTES

1. This instruction should not be given as part of the original series of the instructions of the court to the jury, but only if, after reasonable deliberation, the jury reports to the court an inability to agree or fails to return a verdict.

2. At such time as the trial judge determines that a supplemental instruction is necessary, only this instruction should be given.

3. In giving the instruction the following procedure should be employed:

a. Before the trial judge attempts to ascertain whether the jury is deadlocked, counsel should be present along with the reporter. At that time, the court should, on the record, state the facts concerning any communication from the jury, or, if there has been no communication, the length of time the jury has been deliberating, and inform counsel that the court proposes to give this instruction, giving counsel an opportunity to make such objections as they desire.

b. In the presence of counsel and the reporter, the jury should be returned to the box, and the court, after cautioning the jury not to reveal the numerical division in the voting or which side has the preponderance, should ask the foreperson if they are able to reach a verdict. If they are not, the court should then give this instruction and return them to the jury room for further deliberations.

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

Committee commentary. — An instruction substantially as set forth above was approved by the New Mexico supreme court in *Garcia v. Sanchez*, 68 N.M. 394, 362

P.2d 779 (1961). In contrast, the trial court was held to have coerced the jury and thus committed reversible error where, after deadlock, the court inquired into how the jury was numerically divided, commented on the importance of the case and the time and expense of trial, and placed a time limit on further deliberations. *Pirch v. Firestone Tire & Rubber Co.*, 80 N.M. 323, 455 P.2d 189, 38 A.L.R.3d 1273 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

After submission of a cause to the jury, all communications between the judge and the jury must take place in open court and in the presence of, or after notice to, the parties or their counsel. *Amador v. Lara*, 93 N.M. 571, 603 P.2d 310 (Ct. App. 1979).

Instructions of this nature have generated a substantial body of case law in the criminal field. *See* comments to UJI 14-5030 NMRA.

Part B
No Instructions Drafted

13-1905. Dead man statute - *No instruction drafted*.

No instruction drafted.

Committee commentary. — The so-called "Dead Man Statute" caused considerable scholastic problems over the years and was previously covered by 20-2-5, 1953 Comp., but this statute has been repealed and the question presented is covered by the New Mexico Rules of Evidence.

13-1906. Entrustments - *No instruction drafted*.

No instruction drafted.

Committee commentary. — Numerically, the cases do not justify involvement by the committee in this field of law and, therefore, no recommendations were tendered.

CHAPTER 20
Duties of Jurors

Introduction

The duties of jurors need to be clearly specified, not only so that the jury has guidelines as to what they are to do but also to help them to avoid any fatal error. Here should be grouped the final instructions to the jury before they are to commence their deliberations.

All of the instructions in this chapter ordinarily will be given to the jury in every case, unless for some particular reason a particular instruction would not be applicable.

13-2001. Performance of your duties.

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

USE NOTES

This instruction shall be given to the jury in every case and shall replace all instructions of similar import which generally are much longer but, in essence, state the same principle.

Committee commentary. — The jury should be impressed with the seriousness of their part in the administration of justice. This instruction is a basic statement of law ordinarily applicable in all jury cases.

This particular instruction was the subject matter of the decisions of both the appellate court and the supreme court in the case of *Jewell v. Seidenberg*, 82 N.M. 88, 475 P.2d 785 (Ct. App.), *rev'd on other grounds*, 82 N.M. 120, 477 P.2d 296, 49 A.L.R.3d 121 (1970).

13-2002. Duty to follow instructions.

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

USE NOTES

This instruction will be given in all jury cases and will replace like instructions on the same subject matter heretofore given.

Committee commentary. — This is the basic stock instruction, given so that the jury will not be misled into thinking that any single instruction supersedes any other given or that any one instruction is decisive of the lawsuit.

This instruction was cited in the partially concurring and dissenting opinion in the case of *Williams v. Town of Silver City*, 84 N.M. 279, 502 P.2d 304 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

13-2003. Jury sole judges of witnesses.

You alone are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account the witness' ability and opportunity

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

USE NOTES

This is a basic instruction to be given in all cases.

[As amended, effective November 1, 1991.]

Committee commentary. — Regardless of the type of case involved, it is for the jury to determine the credibility of the witnesses and, further, to determine the weight to be given to the testimony of each witness. If there is no conflict in the testimony, there is nothing for the jury to determine, but if there is a conflict in the testimony, then it is for the jury to resolve the conflict and this instruction is a proper guide in this regard.

An instruction of this type was approved in *State v. Massey*, 32 N.M. 500, 258 P. 1009 (1927). *See also State v. Poich*, 34 N.M. 423, 282 P. 870 (1929). This instruction was cited in *Murphy v. Frinkman*, 92 N.M. 428, 589 P.2d 212 (Ct. App. 1978); *Anderson v. Welsh*, 86 N.M. 767, 527 P.2d 1079 (Ct. App. 1974); and *Greer v. Johnson*, 83 N.M. 334, 491 P.2d 1145 (1971).

13-2004. Witness impeached.

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct.

[or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.]

[or by evidence that the witness has been convicted of a crime.]

[or by evidence that the general reputation of the witness for truth, honesty or integrity is bad.]

[or by specific acts of wrongdoing of the witness.]

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

USE NOTES

The bracketed material will be used as required in each case.

The instruction is to be used whenever a witness (including a party) has been impeached in one or more of the manners provided by law.

Committee commentary. — The various methods by which a witness may be impeached or discredited, according to the general authorities as well as New Mexico cases, have been analyzed and studied and the various elements have been set forth in this instruction. However, it is doubtful that, at any time, all of the various elements will be present and, therefore, care should be exercised in selecting the proper elements to be presented to the jury.

This instruction was cited in the following New Mexico cases: *Anderson v. Welsh*, 86 N.M. 767, 527 P.2d 1079 (Ct. App. 1974); *Tobeck v. United Nuclear-Homestake Partners*, 85 N.M. 431, 512 P.2d 1267 (Ct. App. 1973); and *State v. Madrid*, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

13-2005. Jury sole judges of the facts.

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

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

USE NOTES

This instruction shall be given in all cases and is intended to preclude other instructions of similar import.

Committee commentary. — It is a basic precept of New Mexico law that, if requested, the jury must be informed that they are the sole judges of the facts. This provision, prior to the adoption of mandatory jury instructions in New Mexico, was long a part of the rules of procedure in New Mexico. The latter portion of the instruction purposely repeats cautions contained in other instructions.

This instruction was cited by the New Mexico Supreme Court in the case of *Jewell v. Seidenberg*, 82 N.M. 120, 477 P.2d 296, 49 A.L.R.3d 121 (1970) and by the court of appeals in the case of *Anderson v. Welsh*, 86 N.M. 767, 527 P.2d 1079 (Ct. App. 1974).

This instruction was cited and quoted in part in the specially concurring opinion of Judge Sutin in the case of *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

13-2006. All jurors to participate.

The jury acts as a body. Therefore, on every question on the verdict form which the jury must answer it is necessary that all jurors participate regardless of the vote on another question. Before a question can be answered, at least [five] [ten] of you must agree upon the answer; however, the same [five] [ten] need not agree upon each answer.

USE NOTES

This instruction shall be given in all civil jury cases in New Mexico, whenever there is more than one matter for the jury to settle.

[Amended by Supreme Court Order No. 12-8300-012, effective May 19, 2012.]

Committee commentary. — Active participation by the entire jury is the intent of the jury system. Simply because one or more jurors disagree on a particular issue does not justify their being excluded from further deliberations. Each individual juror's answers to the questions on the verdict form must be consistent. *Naumburg v. Wagner*, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

[Amended by Supreme Court Order No. 12-8300-012, effective May 19, 2012.]

13-2007. Closing arguments.

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

USE NOTES

This instruction will ordinarily be given in all jury trials and is to replace instructions of like nature previously given.

Committee commentary. — The foregoing instruction is to protect the parties from prejudicial statements and remarks of counsel made during the course of the trial. *See Beal v. Southern Union Gas Co.*, 66 N.M. 424, 349 P.2d 337, 84 A.L.R.2d 1269 (1960). In the case of *Miera v. Territory*, 13 N.M. 192, 81 P. 586 (1905), the supreme court, in approving such an instruction, pointed out that it left the jury at liberty to give such weight as they might think proper to the arguments of counsel, in explaining and interpreting the evidence, but not to regard them as actual evidence.

This instruction (U.J.I. Civ. 17.7 in the first edition) was cited in the following cases: *Proper v. Mowry*, 90 N.M. 710, 568 P.2d 236 (Ct. App. 1977); *Romero v. Melbourne*, 90

N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); *State v. Herrera*, 84 N.M. 46, 499 P.2d 364 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972), 409 U.S. 1110, 93 S. Ct. 918, 34 L. Ed. 2d 692 (1973) and *State v. Turner*, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

13-2008. Withdrawn.

13-2009. Verdict of jury.

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.

You will be given the Court's instructions and [a special] verdict form[s]. [In this case it will be necessary for you to answer the preliminary questions presented to you on the verdict form.]

When as many as [ten] [five] of you have agreed upon a verdict [and your answers to the questions presented on the special verdict form], your foreperson must sign the appropriate form[s] and you will all then return to open court.

USE NOTES

This instruction should be given in every case. The bracketed language in the second and third paragraphs is used when special interrogatories or preliminary questions are presented under verdict forms UJI 13-2217 or UJI 13-2220 NMRA. Where used instead of the special verdict form questions, "special interrogatories" should be substituted for "preliminary questions." The instruction is given without the bracketed language where a general verdict form is used.

[As amended, effective November 1, 1991.]

Committee commentary. — In civil cases in New Mexico, a majority of the jury renders the jury's verdict. Rule 1-038F and G, Rules of Civil Procedure for the District Courts. The verdict is announced by a jury foreperson. The verdict must be in writing and signed by the foreperson. Rule 1-308F and G. Chapter 22 of these instructions contain the appropriate jury verdict forms for general verdicts and special verdicts accompanied by special interrogatories or answers to preliminary questions necessary to rendering of a verdict in cases of comparative fault.

CHAPTER 21
No Instructions to Be Given

Introduction

Unnecessary instructions must be deleted.

Jury instructions differ among the various jurisdictions. Historical concepts and tradition have spawned and protected many instructions that are not needed for the proper enlightenment or guidance of the jury to a true verdict. One of the most important developments in mandatory jury instructions is the mandate that certain instructions will *not* be given. When standardized jury instructions were originally attempted, probably the biggest problem was in forcing the trial courts to give up certain stock instructions which had long been in use. Illinois, with its "Pattern Jury Instructions" in 1961, evolved specific directions that certain matters were not to be the subject matter of instructions in the future. The New Mexico Supreme Court adopted that theory and the first edition of UJI - Civil declared that certain subject matters should not be given in the future (Paragraph E of Rule 1-051, Rules of Civil Procedure for the District Courts; UJI Civ. - Chapter 19, first edition).

This same concept is carried forward in this second edition.

Not only are the matters specified herein not to be the subject matter of instructions in the future, unless coming within the exception specified in Rule 1-051, but the same are examples of instructions of like nature which shall not be hereafter used.

13-2101. Assumption of risk - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction is to be given on the doctrine of assumption of risk as a separate defense, per se.

However, the principle still applies in New Mexico under the "reasonable person" standard of contributory negligence. A voluntary exposure to a known danger will preclude recovery.

[As amended, effective November 1, 1991.]

Committee commentary. — In the case of *Williamson v. Smith*, 83 N.M. 336, 341, 491 P.2d 1147 (1971), after reviewing previous decisions and discussing the doctrine, it was stated:

For these reasons, assumption of risk will no longer be a defense in New Mexico, and UJI 13-1310 NMRA on that subject will no longer be given. If pleaded and warranted by the evidence, the ground formerly occupied by the doctrine of assumption of risk will be covered by the law pertaining to negligence and contributory negligence....

By what we have said, we do not mean to infer that a given state of facts which would heretofore have constituted a valid defense on the basis of assumption of risk will no longer prevail. To the contrary, such a set of facts, if properly pleaded and proven, will be as efficacious as formerly. It will however henceforth be regarded as contributory negligence and governed by the principles pertaining to that doctrine.

Contributory negligence is a broad and flexible doctrine keyed to reasonableness of conduct. This court has approved the Restatement (Second) of Torts

Section 466 states:

"§ 466. Types of Contributory Negligence

The plaintiff's contributory negligence may be either

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm."

13-2102. Child; care required for safety of - *No instruction to be given*.

No instruction to be given.

USE NOTES

Ordinary care is the standard of care to be exercised in the State of New Mexico. The circumstances may change but the standard of care remains constant.

Committee commentary. — Under the law of New Mexico and pursuant to UJI 13-1603 and 13-1604 NMRA, the defendant is required in all instances to use ordinary care commensurate with the circumstances, and no other care is required of any person under such circumstances.

To instruct that one must anticipate the ordinary behavior of children and, therefore, exercise greater care for their protection and safety is an argument about what constitutes ordinary care under the circumstances and is not a rule of law. *See Marrujo v. Martinez*, 65 N.M. 166, 334 P.2d 548 (1959).

13-2103. Decedent; presumption of due care - *No instruction to be given*.

No instruction to be given.

Committee commentary. — The presumption of due care had its origin in jurisdictions where the burden of proof was on the plaintiff to prove that the plaintiff used due care (Illinois Pattern Jury Instructions, Chapter 20). This is not the rule in New Mexico and, therefore, no such instruction is proper. The presumption involves only the contributory negligence of the decedent. The presumption is procedural and simply fixes the burden on the defendant of producing some evidence to rebut the presumption. A defendant, however, already has a greater burden. The defendant must not only offer some evidence to rebut the presumption, but also must prove that the decedent was guilty of contributory negligence by a preponderance of the evidence.

The authorities in the various jurisdictions are in a state of hopeless confusion on this issue. *Armstrong v. West Texas Rig Co.*, 339 S.W.2d 69 (Tex. Civ. App. 1960); *Graham v. Milsap*, 77 Idaho 179, 290 P.2d 744 (1955); *Arenson v. National Auto & Cas. Ins. Co.*, 45 Cal. 2d 81, 286 P.2d 816 (1955); *Vinson v. East Texas Motor Freight Lines*, 280 S.W.2d 124 (Mo. 1955); *Hutton v. Martin*, 41 Wash. 2d 780, 252 P.2d 581 (1953); *Mecham v. Allen*, 1 Utah 2d 79, 262 P.2d 285 (1953); *Ammundson v. Tinholt*, 228 Minn. 115, 36 N.W.2d 521, 7 A.L.R.2d 1318 (1949); *Silva v. Traver*, 63 Ariz. 364, 162 P.2d 615 (1945).

A New Mexico rule was stated in *Hartford Fire Ins. Co. v. Horne*, 65 N.M. 440, 338 P.2d 1067 (1959):

We believe the correct rule is that the presumption operates to protect or shield a person in whose favor it is invoked until credible and substantial evidence which would support a finding is introduced to the contrary, and that it then vanishes as though it never existed....

"Credible" and "substantial" evidence which would support a finding should be sufficient to establish contributory negligence, the burden already imposed on the defendant. UJI 12.16 from the first edition was cited in *Archibeque v. Homrich*, 87 N.M. 265, 531 P.2d 1238 (Ct. App.), rev'd, 88 N.M. 527, 543 P.2d 820 (1975); *Wilson v. Wylie*, 86 N.M. 9, 518 P.2d 1213 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974); *White v. Wayne A. Lowdermilk, Inc.*, 85 N.M. 100, 509 P.2d 575 (Ct. App. 1973). *See also* Rule 11-301, Rules of Evidence.

[As revised, effective November 1, 1991.]

13-2104. Failure of party to produce evidence or witness - *No instruction to be given.*

No instruction to be given.

USE NOTES

No instruction should be given on this subject matter.

Committee commentary. — Such an instruction is found in many works on jury instructions. Study reveals that these are usually founded upon a particular statute of the state involved. There is no such statute in the State of New Mexico. The matter can be covered in argument.

In the criminal case of *State v. Soliz*, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969), reference was made to this instruction.

13-2105. Failure of party to testify - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given on this subject matter.

Committee commentary. — Instructions such as the foregoing in some states are predicated upon a particular statute. There is no statute, applicable to civil cases, covering this point in the State of New Mexico.

Instructions of this nature are arguments which are better made by the trial lawyers than by the judge. The court should not comment on the evidence to the jury on a matter of this nature and, therefore, instructions on this subject matter should be deleted.

13-2106. Flight from accident not negligence - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given on this subject matter.

Committee commentary. — The mere fact that a person flees from an accident is not proof, nor even evidence, of negligence and the court should not enter into the argument by declaring either way.

This again is a subject which well might be argued by the attorney to the jury. It is not a proper subject of instruction. Instructing on the subject matter or along the lines of that indicated above would be an undue emphasis on certain evidence.

13-2107. Foreseeability as negligence - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given in a negligence case on foreseeability in any form other than the negligence instruction and ordinary care instruction which cover this matter properly. See UJI 13-1601 and 13-1604 NMRA.

Committee commentary. — Foreseeability is actually an element of negligence and is so stated in UJI 13-1601 NMRA, but there is no justification in giving a separate instruction on this point and the practice followed by some courts should not be followed here.

The New Mexico instructions on negligence and ordinary care properly cover the subject matter and no separate instruction on foreseeability is necessary or needed in the ordinary negligence case.

13-2108. Highest degree of care - *No instruction to be given*.

No instruction to be given.

USE NOTES

Ordinary care under the circumstances is the proper standard of care in New Mexico and in most jurisdictions.

Committee commentary. — It is the opinion of the committee that there should be no degrees of care in New Mexico, as our supreme court has stated on numerous occasions. Notwithstanding the case of *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955), the proper standard is one of ordinary care under the circumstances and UJI 13-1603 NMRA should be used in such instances.

In like manner, the duty of the carrier to protect passengers from injuries by third persons should be that of ordinary care under the circumstances. Any instruction requiring a higher or different degree of care should be refused. The same is true with reference to duty of care to protect passengers from other passengers.

Some states have special statutes giving to common carriers certain police powers. New Mexico has no such statutes and, therefore, instructions in this vein should be rejected.

No special instructions are required with reference to the duty of a common carrier to disabled, infirm or intoxicated persons or to children. The proper standard of care is that of due care under the circumstances.

Special instructions, sometimes tendered, recognizing a distinction between passenger and invitee and specifying when the invitation terminates are without practical distinction and the committee determined that no such instruction should be given in New Mexico.

See also: *LeDoux v. Martinez*, 57 N.M. 86, 254 P.2d 685 (1953); *Gray v. Esslinger*, 46 N.M. 421, 130 P.2d 24, rehearing denied, 46 N.M. 492, 131 P.2d 981 (1942); *Archuleta v. Jacobs*, 43 N.M. 425, 94 P.2d 706 (1939). This instruction was cited in *Smith v. Greyhound Lines*, 382 F.2d 190 (10th Cir. 1967).

13-2109. Hospital and business records - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction concerning hospital and business records should be given.

Hospital and business records, like any other documents, are matters of evidence and the admissibility thereof is determined by the Rules of Evidence. No special comment to the jury is necessary.

Committee commentary. — When the court gives an instruction such as the foregoing it singles out a portion of the evidence for improper emphasis. This matter well may be argued to the jury. There is no necessity for a special instruction on hospital and business records. In the first instance, before the matter is submitted into evidence it has been ruled on as a matter of law. Thereafter, the court should treat it as other evidence, leaving to counsel the matter of emphasis and argument.

13-2110. Inherently improbable testimony - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given on this subject matter.

Committee commentary. — The lawyers in their summation well might argue that a witness has testified to matters that are inherently improbable or that such testimony should not be believed, but an instruction on this specific point is argumentative. Furthermore, it is covered already by other instructions, particularly when the jury is advised that it is their duty to determine the facts.

13-2111. Jury to consider all the evidence - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given on this subject matter.

Committee commentary. — Instructions of this nature are pure legal jargon without substance; the jury does not understand the technicalities involved and does not need them in arriving at a true verdict. The uniform jury instructions on the burden of proof make an instruction of this nature unnecessary.

13-2112. Withdrawn.

13-2113. Negligence of outside agency.

No instruction to be given.

USE NOTES

Intervention of outside agency instructions is a confusion of causation and such instructions should not be given in New Mexico.

[As amended, effective March 1, 2005.]

Committee commentary. — Some courts heretofore have given an instruction to the jury advising them that if they should find that the action of a third person or an outside agency, not a party to the suit, was merely a contributing cause of injury to the plaintiff, then the acts of the third party or of the outside agency are not a defense to the defendant against the claim of the plaintiff. On the other hand, if the jury should find that the sole cause of the injury to the plaintiff was negligence of the third party or of an outside agency, the plaintiff is not entitled to recover from the defendant.

Such an instruction is clearly argumentative. The basic subject matter is covered by other instructions (*e.g.,* UJI 13-309 NMRA). If the attorneys for the parties desire to argue the point, they are free to do so, but the court should not give such an instruction to the jury.

[Revised, effective March 1, 2005.]

13-2114. Number of witnesses - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction need be given as to the effect or noneffect of the number of witnesses testifying on one side or the other.

Committee commentary. — It has been common procedure in New Mexico for the side producing the greater number of witnesses to submit an instruction on the foregoing. On the other hand the side that has the lesser number of witnesses submits a contrary instruction to the effect that the number of witnesses is of no consequence.

This might be a question for argument. Basically, the matter of witnesses is already covered by the instruction on the credibility of a witness. Furthermore, no lawsuit should be determined by the number of witnesses which a side produces.

Quantitative measurement of evidence is not a proper basis for determination of a lawsuit. Wigmore says this rule originated in the Roman Law. VII Wigmore on Evidence 239 (3d ed.).

An instruction of such a nature would be contrary to the New Mexico rule as expressed in *State v. Hunter*, 37 N.M. 382, 24 P.2d 251 (1933).

13-2115. One witness against many - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given on this subject matter.

Committee commentary. — The general trend of standardized statewide jury instructions is to omit an instruction on this issue. Although the number of witnesses testifying on one side or the other may be important, still the number is not conclusive. The matter is covered by the instruction on the credibility of a witness and, if given, an instruction on this issue tends to prejudice one side or the other of the lawsuit by emphasizing or minimizing the testimony of the witnesses on that side, or by singling out the testimony of a single witness in a particular lawsuit.

13-2116. Oral admissions - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given to the effect that oral admissions should be viewed with caution. This is a matter of evidence and the weight of such evidence is to be determined by the jury.

Committee commentary. — The matter of oral admissions is again a vehicle which properly belongs in the closing argument of the attorney. It is not a proper subject of instruction. It would unduly emphasize a single portion of the evidence. Therefore, any instruction along these lines is improper. *See Territory v. Douglas*, 17 N.M. 108, 124 P. 339 (1912).

13-2117. Party competent as a witness - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given on this subject matter.

Committee commentary. — There may have been a time in the growth of the law that such an instruction was proper, but today it is without merit. Furthermore, the matter can be covered in arguments of the attorneys, since other instructions inform the jury that they can consider the bias or interest of a witness.

The competency of witnesses is now governed by Article 6 of the New Mexico Rules of Evidence.

13-2118. Reliance on personal observations - *No instruction to be given*.

No instruction to be given.

USE NOTES

The jury should not be instructed that they are to rely on their ordinary experience as jurors in determining the case nor that they should consider the evidence presented in court in light of their personal observations, unless specifically instructed to the contrary.

Committee commentary. — An instruction of this nature invites the jury to go beyond the evidence that has been submitted in court and is contradictory to the law that the jury must determine the case on the evidence submitted in court. The common sense of a juror is not obliterated by the other instructions of the court. Regardless of instructions by the court, the jury will view the evidence through their personal observations and experiences in life.

13-2119. Remarks of judge - *No instruction to be given*.

No instruction to be given.

USE NOTES

There is no necessity to instruct the jury that any remarks or rulings of the court were not intended to express an opinion, therefore, no instruction should be given on this subject matter.

Committee commentary. — The reading of an instruction on the point indicated above is not necessary under the Uniform Jury Instructions in New Mexico because by other instructions the jury has already been advised that they are the sole judges of the facts. Furthermore, under New Mexico law the court has the right to comment on the evidence under former Rule 51(e), N.M.R. Civ. P. (superseded, *see* Rule 11-107 NMRA).

One of the purposes of the uniform jury instructions is to reduce the volume of verbiage and the quantity of instructions given to a jury. In the ordinary course of events, no useful purpose is served by an instruction such as this.

13-2120. Unavoidable accident - *No instruction to be given*.

No instruction to be given.

USE NOTES

UJI Civ. 13.9 of the first edition was abolished by the supreme court in 1973. Therefore, no instruction is to be given on this subject matter at this time.

Committee commentary. — Unavoidable accident was a theory of defense deeply imbedded in New Mexico jurisprudence over a period of many years until abolished in the case of *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973). (*See also* the court of appeals opinion of Chief Judge Wood, 84 N.M. 456, 504 P.2d 1089.) In abolishing this defense by name, it is apparent that the defense continues under a different name. The supreme court stated:

[T]hat the defense in question is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause. Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose.

It is merely another way of saying that the defendant is not negligent. The defendant is not entitled to have this defense over-emphasized. The instruction is not only unnecessary but is confusing. The instruction on unavoidable accident may mislead the jury as to the proper manner of determining liability, which is to be based on the concepts of negligence and proximate cause. Rules concerning those elements are sufficiently complicated without engrafting upon them the unnecessary concept of unavoidability.

Alexander v. Delgado, 84 N.M. at 719, 507 P.2d at 780-1.

13-2121. Witness; credibility of special - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction should be given as to the credibility of special categories of witnesses nor as to the weight to be given to their testimony.

Committee commentary. — No special instruction should be given in this connection. When a witness testifies as an expert the instruction on expert testimony will be given. No instruction will be given which tends to single out the testimony of a certain witness and give it special attention. This is a matter that well might be argued by the attorneys in the case.

Some jurisdictions commonly give special instructions with regard to the testimony of employees, lawyers and other groups. This has never been the practice in New Mexico and should not be added at this late date. If counsel has a basis for an argument as to these witnesses, the argument is permissible.

13-2122. Witness; need not be believed - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction is necessary to the effect that any witness need not be believed.

Committee commentary. — Courts throughout New Mexico have instructed juries that they are not bound to believe a fact simply because a witness has testified on the matter.

This subject matter is covered by other instructions, for example, UJI 13-213, 13-2003 and 13-2004 NMRA, and there is no longer a need for an instruction on this point.

The modern view is against instructions of this nature. 4 A.L.R.2d 1077. For New Mexico cases on this type of instruction, *see Alexander v. Cowart*, 58 N.M. 395, 271 P.2d 1005 (1954); *State v. Gurule*, 33 N.M. 377, 267 P. 63 (1928); *Territory v. Muniz*, 17 N.M. 131, 124 P. 340 (1912); *Pacific Gold Co. v. Skillicorn*, 8 N.M. 8, 41 P. 533 (1895); *Faulkner v. Territory*, 6 N.M. 464, 30 P. 905 (1892).

13-2123. Witness; willfully false - *No instruction to be given*.

No instruction to be given.

USE NOTES

No instruction on whether or not a witness has testified "willfully false" is necessary.

Committee commentary. — An instruction on this subject matter invades the province of the jury. It is a matter better left to the argument of advocates. The jury has already been advised by other instructions that they are the judges of the facts. If the testimony of the witness is inconsistent with other statements, then the matter will be covered by the instruction on impeachment.

The credibility of a witness is covered generally by UJI 13-2003 NMRA.

13-2124. Last clear chance - *No instruction to be given*.

No instruction to be given.

USE NOTES

It is not proper in New Mexico to give instructions on last clear chance. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

Committee commentary. — Last clear chance was a doctrine recognized in New Mexico prior to the adoption of comparative negligence. In prior editions last clear chance was broken down into two separate instructions. In the 1966 edition § 12.12 was entitled "Last clear chance; discoverable peril; escape impossible" and this same concept was carried forward in the Second Edition as UJI Civ. 16.21 (withdrawn effective October 1, 1983). In the earlier edition, the second concept of last clear chance was found in UJI Civ. 12.13 and entitled "Last clear chance; escape possible." As pointed out in the court of appeals decision adopting pure comparative negligence in New Mexico, last clear chance is no longer a viable doctrine in New Mexico law.

13-2125. Contributory malicious, willful or wanton misconduct - *No instruction to be given*.

No instruction to be given.

USE NOTES

See Ruiz v. Southern Pac. Transport Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1983) (cert. quashed).

CHAPTER 22
Verdicts

Introduction

All possible forms of verdicts have not been drafted but merely illustrations of the type of verdicts which are proper under varying circumstances.

In drafting these forms of verdicts, it was intended to illustrate to the bar and the bench how simple verdicts can be made.

In those cases where complexity arises from third-party actions, cross-claims and issues arising through a multiplicity of parties, then verdict forms will have to be drafted by the trial judge and care should be exercised so that every possible issue is submitted to the jury.

It is recommended that each form of verdict be submitted to the jury on an individual sheet and that the entire caption of the case appear on each individual sheet, where each form of verdict is submitted. Usually there is very little on such a sheet and, therefore, ample room should be left for completion of any necessary figures and for the signature of the foreman.

When multiple forms of verdicts are submitted to the jury, the trial court is cautioned to clearly and fully instruct the jury on the use of the various forms of verdicts submitted.

The form adopted should be adapted to New Mexico practice, as outlined in the following forms.

Special forms of verdict are set forth in Chapters 7, 8, 9 and 17.

13-2201. Verdict for plaintiff; single parties.

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

_____
Foreperson

USE NOTES

The caption of the case should be typed at the head of the verdict form which is submitted to the jury for their use. Following the caption of the case, there will then be a title such as - VERDICT FOR PLAINTIFF. The signature line should be sufficiently below the printed verdict so that the foreperson will have no problem in signing.

If the parties plaintiff are multiple and but one sum is to be awarded jointly, then all that is necessary is to add the letter "s" to the word plaintiff.

Like changes of a simple nature can be made for varying circumstances.

[As amended, effective November 1, 1991.]

Committee commentary. — This is an illustration of the proper form of a simple verdict to be submitted to the jury where the sole question, for final determination, is the amount of money, if any, which the plaintiff will recover.

13-2202. Verdict for defendant; single parties.

We find for the defendant.

_____
Foreperson

USE NOTES

The formal caption of the lawsuit should be added to the top of each verdict form submitted to the jury for their consideration. Following the caption, there should be a title given to each verdict such as, in the above - VERDICT FOR DEFENDANT.

This type of verdict form can be used without change even when there are multiple parties plaintiff, when one sum is to be awarded jointly to the multiple parties plaintiff. In such instances, a change will occur in UJI 13-2201 NMRA where the singular will be changed to the plural. However, in the verdict form for the defense, no change needs to be made when only one verdict can be rendered for plaintiff and the converse is one verdict for the defendant. On the other hand, where multiple verdicts can be rendered for individual parties plaintiff, individual verdict forms for the defendant will be necessary, and, when it is possible for the jury to return a verdict for the defendant against all of the plaintiffs, such a verdict form should be submitted.

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

Committee commentary. — There is no need to include the negative in a form of verdict. In a simple case of single parties, UJI 13-2201 and 13-2202 NMRA can be given to the jury with instructions that only one form of verdict need be reached by the jury and signed by its foreperson.

If there are multiple plaintiffs, and each is entitled to a separate verdict, then, of course, separate verdicts will need to be provided so that the jury can find in favor of any particular plaintiff or in favor of defendant as to that particular plaintiff.

[As revised, effective November 1, 1991.]

13-2203. Verdict for plaintiff; multiple defendants.

We find for the plaintiff in the sum of $_____ against all the defendants.

_____
Foreperson

USE NOTES

The formal caption of the particular case will need to be added to the verdict form before it is submitted to the jury. Ample room should be provided for entry of the sum which the jury may enter and also ample room should be provided for the signature of the foreperson. This form illustrates the type of verdict which can be used when the defendants are multiple and their liability is one and the same. This form of verdict can also be readily adapted for use with multiple plaintiffs such as cotenants against multiple defendants where the claims of the plaintiffs are joint and the liability of the defendants is the same. This form of verdict can also be used in a joint tortfeasor situation when UJI damage instruction 13-1825 NMRA is used.

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

Committee commentary. — When the permissible verdict is against multiple defendants and the jury is not permitted to allocate damages among the various defendants, then this is the proper form of verdict for plaintiff.

13-2204. Verdict for defendants; multiple parties.

We find for all the defendants.

_____
Foreperson

USE NOTES

See Use Note, UJI 13-2202 and 13-2203 NMRA.

[As amended, effective November 1, 1991.]

Committee commentary. — *See* committee commentary, UJI 13-2202 and 13-2203 NMRA.

13-2205. Verdict for plaintiff; separate liability.

We find for the plaintiff _____ and against the defendant _____.

_____
Foreperson

USE NOTES

See UJI 13-2201 NMRA.

[As amended, effective November 1, 1991.]

Committee commentary. — *See* UJI 13-2201 NMRA.

13-2206. Verdict for defendant; separate liability.

We find for the defendant _____ and against the plaintiff _____.

_____
Foreperson

USE NOTES

See UJI 13-2202 and 13-2203.

[As amended, effective November 1, 1991.]

Committee commentary. — *See* UJI 13-2202 and 13-2203 NMRA.

13-2207. Verdict for plaintiff; counterclaim.

We find for the plaintiff on the complaint in the sum of $_____ and against the defendant on the counterclaim.

_____
Foreperson

USE NOTES

This form of verdict can, and should, be used where there is a single party plaintiff and a single party defendant who has filed a counterclaim. The caption of the case will need to be added and the title can simply read - Verdict for Plaintiff; Counterclaim.

If the plaintiffs are plural and only one sum is to be awarded jointly, then the only change in the form will be adding the letter "s" after the word plaintiff.

If there are multiple parties defendant but the verdict, if any, is to be against all of the defendants in like amount, the counterclaim is for the defendants jointly and but one sum could be awarded to them jointly, then the only change needed would be to add, following the word defendant, the letter "s".

[As amended, effective November 1, 1991.]

Committee commentary. — Again, this is an illustration of a form of verdict which can be used in the simple lawsuit where there is one award; likewise, if there are multiple parties defendant and the award for plaintiff or plaintiffs can be only against them jointly, then this form can be used without change. If an award can be made against separate parties, the verdict forms should be separate.

[Revised, effective March 1, 2005.]

13-2208. Verdict for defendant; counterclaim.

We find for the defendant in the sum of $_____ on the counterclaim and against the plaintiff on the complaint.

_____
Foreperson

USE NOTES

The specific form above can be used when there is a single defendant who has filed a counterclaim and a single plaintiff who is the counterdefendant.

If the parties are multiple, then simple amendment can be made. If the parties are multiple with differing interests, then, separate forms of verdict should be submitted to the jury.

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

Committee commentary. — *See* UJI 13-2207 NMRA.

13-2209. Verdict for neither party; counterclaim.

We find neither party should recover.

_____
Foreperson

USE NOTES

In the ordinary case involving complaint and counterclaim, where the jury would be permitted to completely offset one matter against the other, verdict forms UJI 13-2207, 13-2208 and 13-2209 NMRA will all be needed. When multiple forms are given to the jury, they should be instructed as to the number of verdicts to be returned. In the simple case of a complaint and counterclaim of single parties only one verdict form should be signed.

[As amended, effective November 1, 1991.]

Committee commentary. — *See* UJI 13-2207 NMRA. Verdict forms UJI 13-2207, 13-2208 and 13-2209 NMRA are informing the jury of the three possible results in the ordinary counterclaim case. Only one verdict can be returned.

These forms of verdict would not be suitable in a case involving a counterclaim in the nature of a setoff. In such instance, verdict form UJI 13-2210 NMRA will be required.

[Revised, effective March 1, 2005.]

13-2210. Verdict for both parties; for plaintiff on complaint; for defendant on counterclaim.

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

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

_____
Foreperson

USE NOTES

This form of verdict should be used only when the counterclaim involves a possibility of a verdict arising out of a different transaction than the claim of the plaintiff and where there can be an award for both parties.

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

Committee commentary. — *See* committee comments to verdict forms, UJI 13-2207 through 13-2209 NMRA.

Three other forms of verdict are possible in the situation which justifies use of UJI 13-2210 NMRA. UJI 13-2209 NMRA would be used when it is possible to return a verdict for neither party, and this usually occurs when it is also possible to return a verdict for both parties. UJI 13-2201 NMRA would be used when a verdict could be rendered for the plaintiff alone and against the defendant. UJI 13-2208 NMRA would be used when there could be a verdict rendered in favor of the defendant on his counterclaim and against the plaintiff on the counterclaim and complaint.

13-2211. Verdict for cross-claimant.

We find for the defendant _____ on the cross-claim in the sum of $_____ and against the defendant _____.

_____
Foreperson

USE NOTES

Use this verdict form (in addition to others) on a straight, simple cross-claim case.

[As amended, effective November 1, 1991.]

13-2212. Verdict for cross-defendant.

We find for the defendant _____ on the cross-claim.

_____
Foreperson

USE NOTES

This type of form will be used when no dollar amount is involved.

[As amended, effective November 1, 1991.]

13-2213. Verdict for third-party plaintiff.

We find for the third-party plaintiff.

_____
Foreperson

USE NOTES

This form should be submitted to the jury when all issues between the parties require a jury determination.

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

Committee commentary. — When a third-party complaint is involved and the matter is submitted for jury determination, all of the necessary forms of verdict will need to be submitted to the jury.

Ordinarily, the jury does not determine the amount on a third-party complaint. When the third-party plaintiff is seeking indemnity, of course, the court will enter judgment proper under the law of indemnity. When the third-party complaint involves contribution, the court will enter the proper judgment, but it is not for the jury to determine a dollar

amount and there is no need to include in the form of verdict a blank for the jury to fill in an amount.

13-2214. Verdict for third-party defendant.

We find for the third-party defendant.

_____
Foreperson

USE NOTES

When UJI 13-2213 NMRA is used, then UJI 13-2214 NMRA will also be used.

[As amended, effective November 1, 1991.]

Committee commentary. — Reference is to committee commentary to UJI 13-2213 NMRA.

13-2215. Verdict against one of multiple defendants where liability was alleged as joint and several.

We find for the plaintiff against the defendant _____ in the sum of $_____.

We find the defendants _____ and _____ not liable.

_____
Foreperson

USE NOTES

This form of verdict will be used when plaintiff alleges joint liability.

This form of verdict should be used only where there are two or more defendants whose liability is alleged to be joint and several but where the jury finds for the plaintiff against only one of the defendants.

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

Committee commentary. — This form of verdict may also be adapted for use where there are multiple plaintiffs. The court should draft other proper possibilities in cases of multiple parties.

A verdict form must also be submitted to the jury permitting a verdict for all defendants because it is necessary that the jury have a form to cover all of the various contingencies.

[Revised, effective March 1, 2005.]

13-2216. Verdict under Uniform Contribution Among Tortfeasors Act.

We find for the plaintiff _____ and against the defendant _____ in the sum of $_____ after allowing for all sums paid by other defendant[s].

_____
Foreperson

USE NOTES

This form of verdict may be used where plaintiff has sued two alleged joint tortfeasors and one of them has settled with plaintiff under the Uniform Contribution Among Tortfeasors Act, Section 41-3-1 NMSA 1978 et seq.

This form of verdict may also be adapted for use in when there are multiple defendants still remaining in the case and they are found to be joint tortfeasors.

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

Committee commentary. — If before or during trial a defendant settles this instruction should be given.

This form of verdict was approved in the case of *Garrison v. Navajo Freight Lines*, 74 N.M. 238, 392 P.2d 580 (1964).

[Revised, effective March 1, 2005.]

13-2217. Special interrogatories.

In the answer to the special interrogatories propounded by the court, we make the following answers to which we have, by proper majority, agreed:

Interrogatory No. 1: _____

(NOTE: Here state clearly and briefly the specific question which is to be propounded to the jury, avoiding ambiguity and double-questions.)

Answer to Interrogatory No. 1: _____

Interrogatory No. 2: _____

(NOTE: Again set forth the appropriate question to the jury.)

Answer to Interrogatory No. 2: _____

Interrogatory No. 3: _____

(NOTE: Here set forth the appropriate question.)

Answer to Interrogatory No. 3: _____

_____
Foreperson

USE NOTES

The specific questions to be given to the jury will be set forth one after the other. Each question and answer need not be signed by the foreperson, but a signature of the foreperson is required at the end of all of the questions and answers.

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

Committee commentary. — This form is for purpose of illustration only. When special interrogatories are submitted to the jury, this form may be used along with a general verdict form. Special care should be exercised to avoid ambiguity in the questions propounded to the jury and under no circumstances should a multiple-form question be propounded under a single interrogatory.

The court may submit interrogatories in such form as the jury merely answers with a "yes" or "no" response. Sometimes the interrogatories are submitted to the jury in sequence so that a certain instruction obviates the need to answer other interrogatories.

13-2218. Comparative negligence; no comparison among defendants or non-parties; general verdict.

If you find that plaintiff's injury was caused by a combination of negligence of the defendant and negligence of the plaintiff, you must determine the amount of damages to be awarded as follows:

First: In accordance with the damage instructions I have given you, determine the total amount of damages suffered by the plaintiff.

Second: Compare the negligence of plaintiff and defendant and determine a percentage for each so that the total of the percentages equals 100%.

Third: Reduce the plaintiff's total damages by the percentage of plaintiff's negligence. This gives you the amount of damages to be awarded to plaintiff in your verdict.

USE NOTES

This instruction is to be used only when comparative negligence is an issue in the lawsuit and the court is submitting the case on a general verdict without special interrogatories. If there is no evidence of plaintiff's negligence then there is no need for this instruction. This instruction is to be used only in cases where there is no apportionment of negligence among defendants or non-parties. *See also* the Use Note under UJI 13-2220 NMRA regarding choice of verdict forms and modifications that may be necessary.

[As amended, effective March 1, 2005.]

Committee commentary. — Comparative negligence was adopted in New Mexico in the case of *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

13-2219. Comparative negligence; comparison among defendants or non-parties; general verdict.

If you find that plaintiff's injury was caused by a combination of negligence of more than one person, you must determine the amount of damages to be awarded as follows:

First: In accordance with the damage instructions I have given you, determine the total amount of damages suffered by the plaintiff.

Second: Compare the negligence, if any, of [plaintiff(s)] [beneficiary(ies)] [and] [defendant(s)] [and] [non-parties] and determine a percentage for each. The percentage for any one or more of the persons named may be zero if you find that such person was not negligent or that any negligence on the part of such person was not a cause of damage. The total of the percentages must equal 100% for the persons whose negligence did cause the damage.

Third: Multiply the percentage of each defendant times the plaintiff's total damages. This gives you the amount of damages to be awarded to plaintiff against each defendant on the line provided in the appropriate verdict form. If the percentage found for [any one] defendant is zero, then the verdict as to [that] defendant will be for [that] defendant and against the plaintiff(s).

USE NOTES

This instruction is to be used only when comparative negligence is an issue in the lawsuit and the court is submitting the case on a general verdict without special interrogatories. This instruction is to be used only in cases where there is an issue of apportionment of negligence among defendants or non-parties. The persons whose negligence is to be compared in the second paragraph should be stated by name. *See also* the Use Note under UJI 13-2220 NMRA regarding choice of verdict forms and modifications that may be necessary.

[As amended, effective March 1, 2005.]

Committee commentary. — Comparative negligence was adopted in New Mexico in the case of *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). Apportionment of damages among defendants was adopted in New Mexico by the court of appeals in *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

13-2220. Comparative negligence; special verdict.

On the questions submitted, the jury finds as follows:

Question No. 1: Was the [any] defendant negligent?

Answer: _____ (*Yes or No*)

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

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

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

Answer: _____ (*Yes or No*)

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

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

Question No. 3: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by plaintiff(s) _____ to be

$_____ (Here enter the total amount of damages without any reduction for comparative negligence).

[We find the total amount of damages suffered by plaintiff(s) _____ to be $_____ (Here enter the total amount of damages without any reduction for comparative negligence.)]

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

_____	_____ %	
(Name)		
_____	_____ %	
(Name)		
_____	_____ %	
(Name)		
_____	_____ %	100%
(Name)	TOTAL	

The court will multiply the percentage of [each] defendant times the plaintiff(s)' total damages as found by the jury under Question No. 3. The court will then enter judgment for plaintiff(s) against [each] defendant in the proportion of damages found as to [that] defendant. [If the percentage found by the jury for any one defendant is zero, then the court will enter judgment for that defendant and against the plaintiff(s) as to that defendant.]

_____
Foreperson

USE NOTES

Unless the trial court in its discretion decides it is best to submit the case under UJI 13-2201 and 13-2202 NMRA with comparative negligence instruction UJI 13-2218 NMRA, or under UJI 13-2221 NMRA with comparative negligence instruction UJI 13-2219 NMRA, then the trial court is to use UJI 13-2220 NMRA in all cases involving comparative negligence. The mandate within parentheses in Question No. 3 shall be used in every case. The bracketed paragraph in Question No. 3 is to be used when multiple plaintiffs may not necessarily have sustained the same total amount of damages. In appropriate cases, Question No. 4 may have to be modified, e.g., to state that the jury is to compare the negligence of plaintiff(s) and defendant(s) and/or the

negligence of plaintiff with the unreasonableness of the risk of injury presented by the product in a strict products liability action.

The persons to be individually listed in Question No. 4 are each of those persons whose acts and omissions may affect proportionate liability under the facts and the law. The bracketed last sentence of the explanation of the effect of the answer to Question No. 4 need be included only where there are multiple defendants.

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

Committee commentary. — Comparative negligence was adopted in New Mexico in the case of *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). Apportionment of damages among defendants was adopted in New Mexico by the court of appeals in *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

13-2221. Comparative negligence; verdict form.

I. We find for the defendant (A) _____ and against the plaintiff(s)
_____.

OR

We find for the plaintiff(s) (X) _____ and against the defendant (A) _____ in the sum of $_____.

[We find for the plaintiff(s) (Y) _____ and against the defendant (A) _____ in the sum of $_____].

II. We find for the defendant (B) _____ and against the plaintiff(s).

OR

We find for the plaintiff(s) (X) _____ and against the defendant (B) _____ in the sum of $_____.

_____
Foreperson

[As amended, effective November 1, 1991.]

13-2222. Successive tortfeasors; sample verdict form; divisible injuries.

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

Answer:	Yes	No
Defendant 1	_____	_____
Defendant 2	_____	_____
Defendant 3	_____	_____
Defendant 4	_____	_____

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

If the answer to Question No. 1 is "Yes" as to at least one of the persons [or companies] listed, you are to answer Question 2.

Question No. 2: For each [person] [company] you found negligent in response to Question No. 1, was the negligence of that [person] [company] a cause of any injury or damage to the plaintiff? For each [person] [company] you found not negligent in answer to Question No. 1, check answer "Not applicable."

Answer:	Yes	No	Not applicable
Defendant 1	_____	_____	_____
Defendant 2	_____	_____	_____
Defendant 3	_____	_____	_____
Defendant 4	_____	_____	_____

If you answered "No" or "Not applicable" as to each [person] [company] listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for all defendants and against the plaintiff, and you will all return to open court. If you answered "Yes" as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

Answer: _____ Yes _____ No

If you answered "No" then you should skip the next question, and your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

If you answered "Yes," then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [himself] [herself]?

Answer: _____ Yes _____ No

Your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THERE IS NO NEED TO SUBMIT QUESTION OF DIVISIBLE INJURIES TO THE JURY

Question No. 5: Using the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Defendant No. 1	_____%
Defendant No. 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

_____
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE

JURY MUST DETERMINE THE QUESTION OF

DIVISIBLE INJURIES

Question No. 5: Using the court's instruction No. ___ regarding distinct injuries, did _____ [(*the successive tortfeasor or tortfeasors*)] [_____ (*the original tortfeasor or tortfeasors*)] cause an injury that is distinct from any [separate] [enhanced] [or] [avoidable] injury caused by _____ [(*the original tortfeasor or tortfeasors*)] [(*the successive tortfeasor or tortfeasors*)]?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is "Yes," then skip Question Nos. 6 and 7 and answer Question Nos. 8 - 11. If the answer to Question No. 5 is "No," then answer Question Nos. 6 and 7.

Question No. 6: Using the instructions on damages given by the court, we find the total amount of damages suffered by the plaintiff to be $_____. (*Here enter the total amount of damages without any reduction for comparative negligence.*)

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:

Defendant No. 1	_____%
Defendant No. 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of negligence for each defendant by the plaintiff's total damages. The court will then enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom, and you will return to open court.

_____

Question No. 8: Using the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence of _____ (*original*

tortfeasor or tortfeasors) and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused by the negligence of _____ (*successive tortfeasor or tortfeasors*).

Answer:

Damages caused by [original tortfeasor or tortfeasors]	_____
Damages caused by [successive tortfeasor or tortfeasors]	_____
Total damages *(must be the sum of the two numbers above)*	_____

Go to Question No. 9.

Question No. 9: Compare the negligence of the following persons who contributed to the separate damages caused by _____ (original tortfeasor or tortfeasors) and find a percentage for each. The total of the percentages must equal 100%. [The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing the original injury to [himself] [herself].]

Defendant No. 1	_____%
Defendant No. 2	_____%
Plaintiff	_____%
_____	_____
Total	100%

Go to Question No. 10.

Question No. 10: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by _____ (*the successive tortfeasor or tortfeasors*) and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury.

Defendant No. 3	_____%
Defendant No. 4	_____%
Plaintiff	_____%
_____	_____
Total	100%

The court will multiply the percentage of each defendant contributing to _____ (*the original injury*) and _____ (*the*

successive injury) by the plaintiff's damages from each injury. The court will then enter judgment for the plaintiff and against each defendant in the proportion of damages for which that defendant is responsible.

_____

Foreperson

USE NOTES

This sample verdict form is to be used when the trial court will present a second set of questions to the jury, based on the jury's response to the initial set of questions. In simpler cases, the trial court may prefer to use a single set of questions covering all issues.

When a case presents the potential that the jury will find that successive tortfeasors caused separate and divisible injuries to the plaintiff, the jury should first be presented an initial set of questions designed to permit the court to determine whether there is any need for the jury to make the determination of divisibility. *Cf. Payne v. Hall*, 2006-NMSC-029, ¶ 44, 139 N.M. 659, 137 P.3d 599 (suggesting that the jury may need to be provided with alternative sets of instructions). Unless the jury finds at least one defendant involved in the original injury to be liable and at least one defendant involved in the subsequent injury to be liable, it is unnecessary to present the question of divisibility to the jury because the defendants liable will be concurrent tortfeasors as regards either the original or successive injuries. This sample special verdict form above asks the jury to identify which parties were negligent and whether they caused injuries to the plaintiff. Question No. 3 should only be included when there is evidence to support a finding of negligence on the part of the plaintiff.

Once the jury has determined which defendants are liable, the court can decide whether there is a need to allow the jury to determine whether injuries are divisible. If there is no such need, the first set of supplemental set of questions allows the jury, as in a routine case, to determine the plaintiff's total damages and then to compare the fault of each person who contributed to those damages. If there is a need to allow the jury to determine whether damages arising from two incidents are divisible, the second set of supplemental questions asks the jury to make that determination. In the second supplemental set of instructions, if the jury determines the plaintiff's injuries are not divisible, the jury then determines the plaintiff's total damages and compares the negligence of all defendants who are liable. If the jury determines the injuries are divisible, the jury determines the portion of damages attributable to each injury and then separately compares the negligence of the parties responsible for the separate injuries.

In drafting a set of questions based on this sample verdict form, the court may find it more convenient, depending on the context, to refer to the divisible injuries as either injuries caused by a particular party (e.g., "injuries caused by Fred Johnson and Mark Jackson" or "injuries caused by Dr. Smith or Dr. Wilger") or injuries related to a particular incident (e.g., "injuries received in the automobile accident" or "injuries

received at the hospital"). The method of shorthand that works best for the particular case should be used consistently throughout the instructions to avoid confusing the jury. The verdict form should be drafted to make clear that the damages and injuries for which an award may be made are those caused by some fault of a defendant.

Because the supplemental sets of questions are to be presented to the jury only after the jury determines which defendants are liable, the questions in the supplemental sets should be customized to eliminate the names of parties the jury has already determined not to be liable.

This sample verdict form contains no question regarding the foreseeability of the risk of a successive injury as a result of the original injury. It will usually be the case that the court will decide this issue as a matter of law. *See Lewis v. Samson*, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972 (imposing, "as a `positive rule of decisional law' the requirement of joint and several liability upon the original tortfeasor for the original and enhanced injuries"). When the trial court does not decide foreseeability as a matter of law, it may be necessary to draft an additional question on this issue for the jury.

[Approved by Supreme Court Order No. 07-8300-036, effective February 1, 2008.]

Committee commentary. — The trial court should be careful to use the sample verdict form as a guide only. The sample form and exemplars in the Appendix reflect the state of the law at a particular time and, as the Supreme Court acknowledged in *Payne v. Hall*, 2006-NMSC-029, ¶ 2, 139 N.M. 659, 137 P.3d 599, the legal issues surrounding successive tortfeasor liability continue to evolve. The court and counsel, therefore, will want to be sure, when drafting successive tortfeasor instructions, to be sensitive to the context of the particular case and any legal developments after the drafting of these guides.

The sample form makes no attempt to inform the jury that a finding of divisibility may cause the original tortfeasor to be jointly and severally liable with the successive tortfeasor for the distinct injuries caused by the latter. The sample form assumes that the trial court will take into account the consequences of the jury's finding on such issues as joint and several liability and indemnity when entering judgment.

13-2223. Wrongful death damages and loss of consortium damages; sample special verdict form.

On the questions submitted, the jury finds as follows:

Question No. 1: Did the Defendant act negligently toward John Doe?

Answer: _____ (*Yes or No*)

If the answer to Question No. 1 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict form, which will be your verdict for the Defendant and against the Plaintiffs, and the jury should return to open court.

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

Question No. 2: Did any negligence on the part of the Defendant cause or contribute to cause John Doe’s death?

Answer: _____ (*Yes or No*)

If the answer to Question No. 2 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict form, which will be your verdict for the Defendant and against the Plaintiffs, and the jury should return to open court.

If the answer to Question No. 2 is “Yes,” you are to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, we find the total amount of compensatory damages suffered by the Estate of John Doe to be as follows:

Type of Damages:	Amount of Damages
Medical Expenses	$_____
Funeral expenses	$_____
Lost earnings	$_____
Lost value of life	$_____
Loss of household services	$_____
Pain and suffering	$_____
Total compensatory damages for the Estate of John Doe	$_____

Question No. 4: Compare the negligence of the following parties and find a percentage of fault for each. The total of the percentages must equal 100%, but the percentage for any one or more of the persons named may be zero if you find that any party was not negligent or was not a cause of John Doe’s death.

The Defendant	_____%
John Doe	_____%
	_____
	Total 100%

Question No. 5: Did John Doe and Plaintiff Jane Doe have a mutually dependent relationship that was damaged by the death of John Doe?

Answer: _____ (*Yes or No*)

If the answer to Question No. 5 is “No,” go on to question 7.

If the answer to Question No. 5 is “Yes,” answer Question 6.

Question No. 6: In accordance with the loss of consortium instructions given by the court, we find the total amount of loss of consortium damages to Plaintiff Jane Doe to be as follows:

Loss of consortium damages for John Doe’s wife, Plaintiff Jane Doe $_____

Question No. 7: Did John Doe and Plaintiff Junior Doe have a mutually dependent relationship that was damaged by the death of John Doe?

Answer: _____ (*Yes or No*)

If the answer to Question No. 7 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict form and the jury should return to open court.

If the answer to Question No. 7 is “Yes,” answer Question 8.

Question No. 8: In accordance with the loss of consortium instructions given by the court, we find the total amount of loss of consortium damages to Plaintiff Junior Doe to be as follows:

Loss of consortium damages for John Doe’s daughter, Plaintiff Junior Doe $_____

_____
Foreperson

USE NOTES

This sample special verdict form is an example of a form that could be used in cases involving a wrongful death claim and a loss of consortium claim. The sample special verdict form also could be used in cases involving non-deadly injuries by incorporating the following suggested modifications: (1) replacing the word “death” with “injury” in questions 2, 4, 5, and 7; and (2) altering question 3 to remove references to an estate and to remove any forms of damages which do not apply in that case (e.g., funeral expenses).

[Adopted by Supreme Court Order No. 19-8300-014, effective for all cases pending or filed on or after December 31, 2019.]

CHAPTER 23
Employment

13-2300. Introduction.

The instructions in this chapter are to be used in cases involving claims of wrongful or retaliatory discharge, including cases brought under the Whistleblower Protection Act ("WPA"), NMSA 1978, §§ 10-16C-1 to -6 (2010), as well as in cases brought under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 through 28-1-14 (2007).

The first series of instructions (UJIs 13-2301 through 13-2303 NMRA) are to be used in cases in which a plaintiff claims that his or her employer violated an implied contract of employment. Although the term "wrongful discharge" is used in these instructions, they can be modified to refer to any other adverse employment action which the plaintiff contends violated an implied contract of employment.

The second series of instructions (UJIs 13-2307 through 13-2307L NMRA) are to be used in cases in which a plaintiff claims a violation of the New Mexico Human Rights Act. Section 28-1-7 of the Human Rights Act lists several different unlawful discriminatory practices. The instructions in this chapter are intended to be used primarily for claims under Section 28-1-7(A), which generally prohibits an employer from discriminating on the basis of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity.

In outlawing certain discriminatory employment practices, the Human Rights Act has the same general purposes as some federal statutes, including Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e - 2000e-4), the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101-81), and the Age Discrimination in Employment Act of 1967 (29 U.S.C § 633a(a)). Consequently, the New Mexico Supreme Court has stated that when considering claims under the New Mexico Human Rights Act, courts may look at federal civil rights adjudication for guidance. *See, e.g.*, *Ocana v. American Furniture Co.*, 2004-NMSC-018, ¶ 23, 135 N.M. 539, 91 P.3d 58 (citing *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 20, 129 N.M. 586, 11 P.3d 550). For this reason, practitioners and trial courts may consider relying on federal case law for the purpose of drafting jury instructions, especially on issues not expressly ruled on by New Mexico courts. However, the New Mexico Supreme Court has also stated that "our reliance on the methodology developed in the federal courts . . . should not be interpreted as an indication that we have adopted federal law as our own." *Ocana*, 2004-NMSC-018, ¶ 13 (citing *Smith v. FDC Corp.*, 109 N.M. 514, 517, 787 P.2d 433, 436 (1990)). The provisions in the New Mexico Human Rights Act are similar, but not identical, to the federal statutes. For that reason, practitioners and trial courts should exercise caution in relying on federal authority for the purpose of drafting instructions.

The third series of instructions (UJIs 13-2310 through 13-2313 NMRA) are damages instructions. These instructions are to be used in cases in which a plaintiff claims his or her employer violated an implied contract of employment and may be modified for use in cases involving claims for violations of the New Mexico Human Rights Act.

The fourth series of instructions (UJIs 13-2321 through 13-2327 NMRA) are to be used in every case alleging violation of the WPA, NMSA 1978, §§ 10-16C-1 to -6.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010; as amended by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

13-2301. Employment at will; general rule.

An employment relationship calling only for performance of work and payment of wages is an "employment at will". A person employed at will may be discharged at any time for any reason or for no reason at all, unless an exception to this rule applies. An exception to this rule exists if the discharge is in violation of [an implied agreement] [public policy] [or] [a statute].

USE NOTES

This instruction must be given in every case involving a claim of wrongful discharge based upon breach of an implied employment agreement. If an issue of employment at will exists, it should also be given in cases involving claims of wrongful discharge in violation of public policy or in violation of a statute. It should not be given where the sole issue to be submitted is whether, or where the court has determined as a matter of law that, there is an express employment contract for a definite term or one that permits discharge only for cause or only by following certain prescribed procedures. This instruction should be followed by UJI 13-2302 through 13-2305 NMRA and related instructions, as appropriate.

[Approved, effective January 1, 1999.]

Committee commentary. — The general rule on employment at will is found in *Garza v. United Child Care, Inc.,* 88 N.M. 30, 536 P.2d 1086 (Ct. App. 1975); *Gonzales v. United Southwest Nat'l Bank,* 93 N.M. 522, 602 P.2d 619 (1979); *Vigil v. Arzola,* 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *rev'd on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984), *overruled on other grounds*, *Chavez v. Manville Prods. Corp.,* 108 N.M. 643, 777 P.2d 371 (1989). This instruction follows closely the language of the instruction given by the trial court in *Kestenbaum v. Pennzoil Co.,* 108 N.M. 20, 766 P.2d 280 (1989), but adds language by which the trial court may introduce the applicable exceptions to the employment at will rule, *e.g.,* implied contract, violation of public policy, or statutory mandate. *Kestenbaum; Chavez; Shovelin v. Central New Mexico Elec. Coop., Inc.,* 115 N.M. 293, 850 P.2d 996 (1993).

[Approved effective January 1, 1999.]

13-2302. Wrongful discharge; implied contract to discharge only for cause.

In this case you must determine whether there was an implied agreement that _____ (*employee*) could be discharged only for cause. In order for there to be an implied agreement, there must be a promise, representation or conduct sufficiently specific to create a reasonable expectation in the mind of _____ (*employee*) that [he] [she] could be discharged only for cause. In determining whether there was an implied agreement, you may consider all the surrounding circumstances, including the parties' words and actions, [what they wanted to accomplish], [the way they dealt with each other], [how other employees in the same or similar circumstances were customarily dealt with by _____ (*employer*)] [and] [any writings, handbooks or procedures used by _____ (*employer*)].

[How other employees in the same or similar circumstances were customarily dealt with cannot by itself constitute sufficient evidence to establish an implied contract.] If such an agreement existed, and if _____'s (*employee's*) discharge violated that agreement, then the discharge was wrongful.

USE NOTES

The bracketed circumstances should be given when the evidence in the case permits. When this instruction is given, it should immediately follow UJI 13-2301 NMRA, and be given with UJI 13-2306 NMRA.

[Approved, effective January 1, 1999; as amended by Supreme Court Order No. 08-8300-012, effective June 13, 2008.]

Committee commentary. — "New Mexico recognizes an exception to at-will employment for an implied contract based on words and conduct of the parties..., including provisions in a personnel manual or handbook". *Newberry v. Allied Stores, Inc.,* 108 N.M. 424, 426, 773 P.2d 1231, 1233 (1989) (citing *Kestenbaum v. Pennzoil Co.,* 108 N.M. 20, 766 P.2d 280 (1988)). Normally, whether there is an implied agreement "is a question of fact to be discerned from the totality of the parties' statements and actions regarding the employment relationship". Newberry, 108 N.M. at 427, 773 P.2d at 1234; *see also Lukoski v. Sandia Indian Management Co.,* 106 N.M. 664, 666, 748 P.2d 507, 509 (1988). In determining whether the at-will employment is altered by an implied contract, all the circumstances surrounding the employment relationship will be considered. *Kestenbaum; Newberry.*

The ultimate question is whether the employer, by sufficiently specific words or conduct, has created in the employee a "reasonable expectation" of job security. *Hartbarger v.*

Frank Paxton Co., 115 N.M. 665, 672, 857 P.2d 776, 783 (1993); *Lukoski,* 106 N.M. at 667, 748 P.2d at 510.

The Supreme Court has indicated that the manner in which other employees were treated is not by itself a sufficient basis for finding an implied contract. *Hartbarger,* 115 N.M. at 674, 857 P.2d at 785.

Where an implied agreement requiring good cause for termination is found, discharge of the employee cannot be justified on the basis of the employer's good faith, but rather must be supported by "reasonable grounds [for the employer] to believe that sufficient cause existed to justify [the employee's] termination". *Kestenbaum,* 108 N.M. at 27, 766 P.2d at 287. This is "an objective standard of reasonable belief". *Id.* at 28, 766 P.2d at 288.

2008 Committee commentary. — *See also Mealand v. Eastern N.M. Med. Center*, 2001-NMCA-089, ¶ 9, 131 N.M. 65, 33 P.3d 285 (stating that New Mexico adheres to an objective theory of contracts and that regardless of an employer's subjective intent, the employer may be bound by words in an employee handbook that support reasonable expectations on the part of the employee of specified procedures, and noting a potential conflict with *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶ 12, 121 N.M. 710, 917 P.2d 1382 (holding that a manual could not create a reasonable expectation of an implied contract when it contained an express reservation of the right to terminate an employee for any reason); *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 20 (holding that the conservancy district's written personnel policy constituted an implied employment contract and a valid written contract for the purposes of governmental immunity); *Sanchez v. The New Mexican*, 106 N.M. 76, 78, 738 P.2d 1321, 1324 (1987) (holding that an employee handbook did not constitute an implied contract when the language lacked specific contractual terms, made no promises, but simply declared a general approach to employment).

13-2303. Wrongful discharge; implied contract to follow certain procedures.

In this case you must determine whether there was an implied agreement that _____ *(employer)* would follow a particular procedure in discharging _____ *(employee)* specifically or in discharging _____'s *(employer's)* employees generally. In order for there to be an implied agreement, there must be a promise, representation or conduct sufficiently specific to create a reasonable expectation in the mind of _____ *(employee)* that _____ *(employer)* would follow a particular procedure in discharging _____ *(employee)* or _____'s *(employer's)* employees generally. In determining whether there was an implied agreement, you may consider all the surrounding circumstances, including the parties' words and actions, [what they wanted to accomplish], [the way they dealt with each other], [how other employees in the same or similar circumstances were customarily dealt with by _____

(employer)] [and] [any writings, handbooks or procedures used by _____ *(employer)*].

[How other employees in the same or similar circumstances were customarily dealt with cannot by itself constitute sufficient evidence to establish an implied contract.] If such an agreement existed, and if _____'s *(employee's)* discharge violated that agreement, then the discharge was wrongful.

USE NOTES

The bracketed language should be given when the evidence in the case permits. When this instruction is given, it should immediately follow UJI 13-2301 NMRA or, if given, UJI 13-2302 NMRA.

[Approved, effective January 1, 1999.]

Committee commentary. — An implied agreement to follow only certain procedures in the termination of an employee's employment is a variation of the more general implied agreement which overcomes the presumption of at-will employment. *See* committee commentary to UJI 13-2302.

Where the implied agreement establishes a procedure whereby the employer must provide the employee with notice and specifics of the reason for termination, the employer can rely only on those reasons in justifying the termination and may not advance other justifiable reasons at trial. *Kestenbaum v. Pennzoil Co.,* 108 N.M. 20, 26-27, 766 P.2d 280, 286-87 (1989).

[Approved, effective January 1, 1999.]

13-2304. Retaliatory discharge.

In this case you must [also] determine whether _____ (*employee*) was discharged because [he][she] _____ (*insert conduct court has determined is protected by public policy*). If _____ (*employee*) was discharged because [he] [she] _____ (*insert conduct court has determined is protected by public policy*) [and if _____ (*employee's*) conduct which triggered the discharge was taken in furtherance primarily of a public interest rather than primarily a private interest], then the discharge was retaliatory and was wrongful.

In determining whether _____ (*employee*) was discharged because [he] [she] _____ (*insert conduct court has determined is protected by public policy*), you must determine whether that conduct was a motivating factor in the decision to discharge [him] [her]. A motivating factor is a factor that plays a role in the decision to discharge. It need not be the only reason, nor the last nor latest reason, for the discharge.

USE NOTES

This instruction should be given in all wrongful discharge cases involving a claim of discharge in violation of public policy. If the case involves issues of employment at will, this instruction should immediately follow UJI 13-2301, UJI 13-2302 or UJI 13-2303, if given.

Before this instruction is given, the court must determine as a matter of law that a public policy exists that was violated if plaintiff was discharged for the reason alleged.

A statement of the public policy relied on by the plaintiff and a description of the act or refusal to act which was allegedly the reason for the discharge should be inserted in the instruction as indicated.

The bracketed clause in the second sentence, which raises the issue of public versus private interest, is to be given only in the limited class of "whistleblower" cases in which the plaintiff made a report of wrongdoing to a private party rather than to public authorities. *See* Committee Commentary.

In some cases, it may be appropriate to give further instruction to the jury on the causation requirement associated with this claim. In those cases, the trial court must fashion a supplemental instruction based on the court's determination of the governing law.

[Approved, effective January 1, 1999; as amended by Supreme Court Order No. 08-8300-012, effective June 13, 2008.]

Committee commentary. — A cause of action in tort for retaliatory or abusive discharge in violation of public policy originated in *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *reversed on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), *overruled on other grounds*, *Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 777 P.2d 371 (1989), and has been recognized by the Supreme Court. *See, e.g., Paca v. K-Mart Corp.*, 108 N.M. 479, 775 P.2d 245 (1989); *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 857 P.2d 776 (1993).

Relevant public policy may be derived from statutory provisions, or the court itself may declare public policy. *See Vigil*, 102 N.M. at 688-89, 699 P.2d at 619-20; *see also Shovelin v. Central N.M. Elec. Coop., Inc.*, 115 N.M. 293, 850 P.2d 996 (1993). Public policy would be violated by discharging an employee for making statements criticizing the employer's misuse of public funds, *Vigil*, 102 N.M. at 690, 699 P.2d at 621, serving as a juror, *id.*, at 689, 699 P.2d at 620, joining a labor union, *id.*, refusing to commit perjury or engage in price fixing, *id.*, refusing to sign a false statement, *Zaccardi v. Zale Corp.*, 856 F.2d 1473 (10th Cir. 1988), exercising the right to vote or refrain from voting, *Shovelin*, 115 N.M. at 305, 850 P.2d at 1008 or seeking relief under the Human Rights Act, *Gandy v. Wal-Mart Stores, Inc.*, 117 N.M. 441, 872 P.2d 859 (1994). A discharge based on the employer's belief or suspicion that the plaintiff engaged in protected

activity is wrongful; the plaintiff need not establish the employer's actual knowledge. *See Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089.

A retaliatory discharge claim based on an employee's reporting of activities that are illegal or raise health or safety concerns ("whistleblowing") exists only if the employee's action was taken in furtherance of the public interest rather than primarily to further a private interest. *Garrity v. Overland Sheepskin Co.*, 121 N.M. 710, 917 P.2d 1382 (1996).

A retaliatory discharge claim includes a causation element. *See Sanchez v. The New Mexican*, 106 N.M. 76, 738 P.2d 1321 (1987). "A sufficient nexus must exist between the public policy asserted by the employee and the reasons for his or her discharge." *Vigil*, 102 N.M. at 689, 699 P.2d at 620. The instruction above adopts a "motivating factor" formulation for the causation element. *See Weidler*, 1998-NMCA-021, ¶ 15. The second-to-last sentence of the instruction previously stated as follows: "A motivating factor is a factor that plays a role in the decision to discharge and without which the discharge would not have happened." (Emphasis added.) The 2008 amendment deleted the italicized language. The New Mexico Supreme Court has rejected the "but for" test as inapplicable to employment claims brought under the New Mexico Human Rights Act. *See Nava v. City of Santa Fe*, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

In Chavez, the Supreme Court overruled the portions of *Vigil v. Arzola* that required proof of causation by clear and convincing evidence and that limited recovery to pecuniary losses. *Chavez*, 108 N.M. at 648, 777 P.2d at 376. Punitive damages are recoverable on a retaliatory discharge claim. *Vigil*, 102 N.M. at 689, 699 P.2d at 621. Mitigation of damages by the plaintiff is required. *Id.; see also Chavez*, 108 N.M. at 650, 777 P.2d 371 at 378.

[Approved, effective January 1, 1999; as amended by Supreme Court Order No. 12-8300-013, effective May 26, 2012.]

13-2305. Withdrawn.

13-2306. Cause justifying discharge.

If _____ *(employer)* agreed that _____ *(employee)* could be discharged only for cause, _____ *(employer)* could discharge _____ *(employee)* without violating the agreement if _____ *(employer)* in fact believed that [he] [she] had a sufficient cause to justify the discharge of _____ *(employee)* and that belief was reasonable.

USE NOTES

This instruction should be used if UJI 13-2302 is given.

[Approved, effective January 1, 1999.]

Committee commentary. — *See* committee commentary to UJI 13-2302.

[Approved, effective January 1, 1999.]

13-2307. Human Rights Act violation.

In this case you must [also] determine whether _____ (*name of employer*) violated a statute known as the New Mexico Human Rights Act.[1]

[1] [An employer violates the Human Rights Act if it _____ (*insert the adverse action, i.e., refuses to hire, fires, fails to promote, demotes, or discriminates in matters of compensation terms, conditions, or privileges of employment against*) [a] [an] [otherwise qualified] person based on _____ (*insert the illegal consideration, i.e., race, age, religion, color, national origin, ancestry, sex, serious medical condition or physical or mental handicap, sexual orientation, gender identity, or spousal affiliation*[2]).] [An employer may _____ (*insert in this blank the adverse action described above*) a person, however, if the action is based on a bona fide occupational qualification.]

[2] [An employer violates the Human Rights Act if it refuses or fails to accommodate a person's mental or physical handicap or serious medical condition [unless the accommodation is unreasonable or an undue hardship to the employer].]

[3] [An employer violates the Human Rights Act if it engages in any form of [threat] [retaliation] [or] [discrimination] against any person who has [opposed any unlawful discriminatory practice[3]] [filed a complaint] [testified or participated in any proceeding under the Human Rights Act.]

USE NOTES

1. This instruction is divided into three bracketed paragraphs that address the following areas of law covered by the Human Rights Act, Section 28-1-7(A) through (J) NMSA 1978: (1) basic discrimination; (2) reasonable accommodation; and (3) retaliation.

2. For claims involving discrimination based on sexual orientation, gender identification, or spousal affiliation, *see* Section 28-1-7(A) NMSA 1978, which sets forth limitations on these claims. *See also* Section 28-1-2(P) and (Q) NMSA 1978, which define "sexual orientation" and "gender identity."

3. For the purpose of a retaliation claim, the unlawful discriminatory practices are those listed in Section 28-1-7(A) through (J) NMSA 1978.

This instruction can serve as a basic instruction on the substantive law in cases involving violations of Section 28-1-7 of the Human Rights Act. It should be given, with the appropriate bracketed language included, when a violation of the Human Rights Act is alleged. If the case involves issues of employment at will, this instruction should immediately follow UJI 13-2301 NMRA or UJI 13-2302 NMRA, UJI 13-2303 NMRA or UJI 13-2304 NMRA, if given. The first bracketed paragraph is for claims of discrimination under Section 28-1-7(A). The second bracketed paragraph is for claims of failure to accommodate a physical or mental handicap under Section 28-1-7(J). The third bracketed paragraph is for statutory claims of retaliation under Section 28-1-7(I).

The bracketed portion relating to bona fide occupational qualification should only be included if the employer has submitted evidence supporting the affirmative defense of a bona fide occupational qualification justifying any discrimination. Similarly, the bracketed language relating to whether an accommodation would be unreasonable or would cause an undue hardship should be given only when appropriate in light of the contentions of the parties and the evidence presented. The words "otherwise qualified" may be omitted where the plaintiff's qualifications are not at issue.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — The New Mexico Human Rights Act, Sections 28-1-1 to 28-1-7 and Sections 28-1-9 to 28-1-14 NMSA 1978, addresses a variety of discriminatory practices in addition to wrongful discharge. There are few New Mexico cases which directly address violations of the Act. *See, e.g., Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d 433 (1990); *Keller v. City of Albuquerque*, 85 N.M. 134, 509 P.2d 1329 (1973). However, the court and counsel may find guidance in federal cases addressing similar allegations, *see Behrmann v. Phototron Corp.*, 110 N.M. 323, 795 P.2d 1015 (1990), although reliance is not required, *Martinez v. Yellow Freight Sys., Inc.*, 113 N.M. 366, 369, 826 P.2d 962, 965 (1992). Supplemental instructions may be given when the trial court deems it appropriate.

Section 28-1-7 NMSA 1978 identifies numerous unlawful discriminatory practices. This instruction includes only those unlawful practices that are most commonly presented to a jury. For any other alleged acts of discrimination, *see* Section 28-1-7 NMSA 1978.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307A. Race, gender, and other discrimination under the New Mexico Human Rights Act.

To establish that _____ (*the defendant*) discriminated against _____ (*the plaintiff*) based on [his] [her] [race] [age] [religion] [color] [national origin] [ancestry] [sex] [serious medical condition] [physical or mental handicap] [sexual orientation][gender identity] [spousal affiliation], _____ (*the plaintiff*) has the burden of proving the following:

(1) that _____ (*the plaintiff*) was "otherwise qualified" for _____ (*the position in question*);[1]

(2) that _____ (*the defendant*) _____ (*insert adverse action, i.e., refused to hire, fired, failed to promote, demoted, or discriminated in matters of compensation terms, conditions, or privileges of employment against*) _____ (*the plaintiff*);

(3) that _____ (*the plaintiff*)'s _____ [race] [age] [religion] [color] [national origin] [ancestry] [sex] [serious medical condition] [physical or mental handicap] [sexual orientation] [gender identity] [spousal affiliation] was a motivating factor in _____ (*the defendant*)'s _____ (*insert adverse action, i.e, refusing to hire, firing, failing to promote, demoting, or discriminating in matters of compensation terms, conditions, or privileges of employment against*) _____ (*the plaintiff*).

[If you disbelieve the reason(s) _____ (*the defendant*) has given for _____ (*insert adverse action*), you may infer that _____ (*the defendant*) took this action because of _____ (*the plaintiff*)'s [race] [age] [religion] [color] [national origin] [ancestry] [sex] [serious medical condition] [physical or mental handicap] [sexual orientation] [gender identification] [spousal affiliation].]

USE NOTES

1. The term "otherwise qualified" is defined in UJI 13-2307J NMRA.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — This is the basic instruction to be used in cases in which the plaintiff alleges discrimination based on race, gender, or any other trait enumerated in NMSA 1978, § 28-1-7(A) (2004), of the New Mexico Human Rights Act (other than physical or mental handicap or serious medical condition, which are addressed in other instructions in this chapter). New Mexico recognizes pregnancy as a protected status. *See Behrman v. Phototron*, 110 N.M. 373, 795 P.2d 1055 (1990). In *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 8, 136 N.M. 647, 103 P.3d 571, the New Mexico Supreme Court held that the test for causation in a sexual harassment claim brought under the Human Rights Act was whether the plaintiff's protected status was a motivating factor for the employment practice, and the Court rejected the argument that the plaintiff must prove that but for the protected status (the plaintiff's sex), the employment practice (sexual harassment) would not have occurred.

In the context of summary judgment, the New Mexico Supreme Court has considered helpful the federal burden-shifting methodology used under Title VII of the Civil Rights Act of 1964. *See, e.g., Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 9, 139 N.M. 12, 127 P.3d 548 (citing *Smith v. FDC Corp.*, 109 N.M. 514, 517, 787 P.2d 433, 436 (1990)).

Specifically, for a claim of unlawful discrimination, our Supreme Court has used the methodology from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *See Juneau*, 2006-NMSC-002, ¶ 9 (citing *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶¶ 20-22). Under the *McDonnell Douglas* framework, an employee bears the initial burden of demonstrating a prima facie case of discrimination, which then shifts the burden to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action. *Id.* The employee then has the opportunity to rebut the employer's proffered reason as pretextual or otherwise inadequate. *Id.*

However, the national trend is that this burden-shifting analysis is only for the purpose of summary judgment, and not to be used by the fact-finder at trial. *See, e.g., Bovee v. State Hwy. and Transp. Dep't*, 2003-NMCA-025, ¶ 14, 133 N.M. 519, 65 P.3d 254; *see also Sonntag v. Shaw*, 2001-NMSC-015, ¶¶ 48-50, 130 N.M. 238, 22 P.3d 1188 (Serna, J., concurring). In *Bovee*, the New Mexico Court of Appeals, in the context of discussing a bench trial, stated that

once a plaintiff has made a prima facie case creating a presumption of discrimination, and a defendant has provided a legitimate, non-discriminatory reason in response, the presumption raised by the prima facie case is rebutted and "drops from the case" . . . Thus, the question before a district court in a bench trial on the merits is "the ultimate question of discrimination," not the question of whether a plaintiff has made a prima facie case. Accordingly, although the parties discuss the application of the *McDonnell Douglas* test, because the case was tried on the merits, our focus is whether Plaintiff met her "ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Bovee*, 2003-NMCA-025, ¶ 14 (internal citations omitted). *See also U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

The instruction includes the defendant's assertion of its reasons for taking the adverse employment action against the plaintiff. The jury is permitted, but not required, to infer that the true reason for the defendant's action was the plaintiff's race, gender, or other protected status. *See Sonntag*, 2001-NMSC-015, ¶ 27 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). In instructing the jury on these issues, the trial court must keep in mind that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff and should not instruct the jury in a way that implies to the jury any other burden. *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 39, 130 N.M. 25, 16 P.3d 1084.

The last bracketed paragraph in this instruction relates to the concept of pretext. In cases in which the plaintiff is relying on circumstantial evidence to prove illegal discrimination, the plaintiff may present evidence that the reason asserted by defendant for the action taken against plaintiff is not credible. In these cases, the jury is permitted, but not required, to infer that the true reason for the defendant's action was the plaintiff's race, gender, or other protected status. *See, e.g., Sonntag v. Shaw*, 2001-NMSC-015, ¶ 27, 130 N.M. 238, 22 P.3d 1188 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). The last bracketed paragraph is to be used in these cases. In instructing

the jury on these issues, the trial court must keep in mind that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff, *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 39, 130 N.M. 25, 16 P.3d 1084, and should not instruct the jury in a way that implies to the jury any other burden. The last bracketed paragraph should not be used in cases in which a plaintiff is relying only on direct evidence of discrimination, and not circumstantial evidence.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307B. Bona fide occupational qualification. *No instruction drafted.*

No instruction drafted.

USE NOTES

The court may wish to instruct the jury on the definition of "bona fide occupational qualification" when the defendant raises it as a defense.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — NMSA 1978, § 28-1-7(A) (2004), states that it is an unlawful discriminatory practice for an employer, unless based on a bona fide occupational qualification, to take certain discriminatory actions. Therefore, if the defendant raises the defense of bona fide occupational qualification, and the trial court determines that bona fide occupational qualification is a factual issue to be resolved by the jury, the court should consider an instruction defining that term.

Neither the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to 28-1-15 (2007), nor any New Mexico case defines bona fide occupational qualification. In the federal context, Title VII states that it shall not be an unlawful employment practice for an employer to take certain actions on the basis of "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2. The Age Discrimination in Employment Act has a similar provision, 29 U.S.C. § 623. A discussion of various applications of bona fide occupational qualification may be found in *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991). Although under Title VII the bona fide occupational qualification defense is only available for claims of discrimination based on religion, sex, or national origin, the language of Section 28-1-7(A) applies the bona fide occupational qualification more broadly to claims made under the New Mexico Human Rights Act. In *Stock v. Grantham*, 1998-NMCA-081, ¶ 22, 125 N.M. 564, 964 P.2d 125, the New Mexico Court of Appeals stated that "[a]bility to attend work regularly is a bona fide occupational qualification."

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307C. Discrimination based on serious medical condition or physical or mental handicap.

To establish that _____ (*the defendant*) discriminated against _____ (*the plaintiff*) based on [a serious medical condition] [physical or mental handicap], _____ (*the plaintiff*) has the burden of proving each of the following elements:

(1) that _____ (*identify impairment*) qualifies as a [serious medical condition] [physical or mental handicap];[1]

(2) that [he] [she] suffers from _____ (*identify impairment*);

(3) _____ (*the plaintiff*) [is] [was] "otherwise qualified," meaning [he] [she] [is] [was] able to meet all of [his] [her] job's requirements in spite of [his] [her] _____ (*identify impairment*);[2]

(4) that _____ (*the defendant*) [knew] [regarded as] [or] [had a record of] _____ (*the plaintiff*)'s [impairment] [condition]; and

(5) that _____ (*the defendant*) intentionally discriminated against _____ (*the plaintiff*) because of his disability by _____ (*insert adverse action i.e. terminating his employment, refusing to accommodate*).

If you find that _____ (*the plaintiff*) has not established each of these elements, you must find for _____ (*the defendant*) on _____ (*the plaintiff*)'s discrimination claim based on [serious medical condition] [physical or mental handicap].

[If you find that _____ (*the plaintiff*) has established each of these elements, you must then determine whether _____ (*the defendant*) has stated a bona fide occupational qualification.[3]][4]

USE NOTES

1. *See* UJIs 13-2307F and 13-2307G NMRA regarding serious medical condition or physical or mental handicap.

2. *See* UJI 13-2307J NMRA for a definition of the term "otherwise qualified."

3. *See* UJI 13-2307B NMRA regarding "bona fide occupational qualification."

4. This paragraph should only be used when the defense of bona fide occupational qualification has been raised.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — The court must determine which of the elements stated in this instruction are to be submitted to the jury. No New Mexico case has decided whether the qualification of an impairment as a serious medical condition is a question of law or fact. The Tenth Circuit has decided that "[w]hether the plaintiff has an impairment within the meaning of the ADA and whether the conduct affected is a major life activity for purposes of the ADA are questions of law for [the] court to decide." *See Holt v. Grand Lack Mental Health Center*, 443 F.3d 762, 765 n.1 (10th Cir. 2006) (citing *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003). Because this instruction provides a broad overview of the elements of a New Mexico Human Rights Act claim, the parties should take care when drafting an instruction under UJI 13-302 NMRA not to repeat the information contained in this instruction.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307D. Failure to accommodate.[1]

_____ (*The plaintiff*) says _____ (*the defendant*) failed to reasonably accommodate _____ (*the plaintiff*)'s [serious medical condition] [physical or mental handicap]. To establish that _____ (*the defendant*) discriminated against _____ (*the plaintiff*), _____ (*the plaintiff*) must prove the following:

(1) _____ (*the defendant*) knew of _____ (*the plaintiff*)'s [serious medical condition] [physical or mental handicap];

(2) _____ (*the plaintiff*) requested an accommodation;[2]

(3) A reasonable accommodation existed that would have allowed _____ (*the plaintiff*) to perform the essential functions of the job;

(4) _____ (*the defendant*) failed to provide a reasonable accommodation.

USE NOTES

1. In addition to this instruction, the jury should also be given UJI 13-2307F or 13-2307G NMRA, under Section 28-1-7(J) NMSA 1978.

2. Unless a disability is "open, obvious, and apparent to the employer . . . the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest reasonable

accommodations." *Trujillo v. Northern Rio Arriba Electric Coop.*, 2002-NMSC-004, ¶ 16, 131 N.M. 607, 41 P.3d 333 (quoting with approval *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996)).

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307E. Undue hardship. *No instruction drafted.*

No instruction drafted.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307F. Determining whether impairment qualifies as a physical or mental handicap.

Physical or mental handicap means [_____ (*the plaintiff*) has a physical or mental impairment that substantially limits one or more of _____ (*the plaintiff*)'s major life activities] [_____ (*the plaintiff*) has a record of a physical or mental handicap] or [_____ (*the plaintiff*) is regarded as having a physical or mental handicap].

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — This definition is taken from NMSA 1978, § 28-1-2(M) (2007).

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307G. Determining whether impairment qualifies as a serious medical condition. *No instruction drafted.*

No instruction drafted.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — In *Trujillo v. Northern Rio Arriba Electric Cooperative*, 2002-NMSC-004, ¶ 12, 131 N.M. 607, 41 P.3d 333, the New Mexico Supreme Court stated: "We do not believe that the Legislature intended that the phrase 'medical condition' in Section 28-1-7(A) include temporary illnesses with minimal effects." No New Mexico case has decided whether the qualification of an impairment as a serious medical condition is a question of law or fact. The Tenth Circuit has decided that "[w]hether the plaintiff has an impairment within the meaning of the ADA and whether the conduct affected is a major life activity for purposes of the ADA are questions of law for [the] court to decide." *See Holt v. Grand Lack Mental Health Center*, 443 F.3d 762,

765 n.1 (10th Cir. 2006) (citing *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003)).

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307H. Establishing disability by showing an individual has a record of a physical or mental condition. *No instruction drafted.*

No instruction drafted.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307I. "Regarded as" defined. *No instruction drafted.*

No instruction drafted.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — *See Trujillo v. Northern Rio Arriba Electric Cooperative*, 2002-NMSC-004, ¶ 17, 131 N.M. 607, 41 P.3d 333 (stating that the fact that the employer was aware of employee's health problems is alone not sufficient to show that employer regarded employee as having a medical condition or that he was fired for that reason).

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307J. "Otherwise qualified" defined.

A person is "otherwise qualified" if [he] [she] is able to do the job in spite of [his] [her] _____ (*insert illegal consideration, i.e., race, age, religion, color, national origin, ancestry, sex, serious medical condition or physical or mental handicap, sexual orientation, gender identity, or spousal affiliation*).

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — *See Kitchell v. Public Service Co.*, 1998-NMSC-051, ¶ 6, 126 N.M. 525, 972 P.2d 344 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406-07 (1979), for the definition of an otherwise qualified person as "one who is able to meet all of the program's requirements in spite of his handicap").

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307K. "Reasonable accommodation" defined. *No instruction drafted.*

No instruction drafted.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2307L. Constructive discharge.

In order to establish that [he] [she] was constructively discharged, _____ (*the plaintiff*) must demonstrate that _____ (*the defendant*) made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

Committee commentary. — *See Ulibarri v. State Corr. Acad.*, 2006-NMSC-009, ¶ 16, 139 N.M. 193, 131 P.3d 43; *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 40, 143 N.M. 506, 177 P.3d 1080.

[Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010.]

13-2310. Damages for wrongful discharge.

If you should decide in favor of _____ (*plaintiff*) on [any of] [his] [her] claim[s] for discharge [because [he] [she] was discharged because _____ (*insert conduct court has determined to be a violation of public policy*)] [in violation of [an implied contract], [or] [a statute]], then you must fix the amount of money damages that will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by [him] [her] to have resulted from the wrongful conduct of the defendant[s]:

(*NOTE: Here include the proper elements of damages.*)

[In addition, if you should decide in favor of _____ (*plaintiff*) on [his] [her] claim [for discharge because [he] [she] _____ (*insert conduct court has determined to be a violation of public policy*)] [or] [for discharge in violation of a statute], _____ (*plaintiff*) is entitled to recover an amount of money that will reasonably and fairly compensate [him] [her] for any emotional distress caused by the violation.]

[Any damages for _____ (*list elements of special damages subject to this paragraph*) awarded on the claim for breach of an implied agreement must be damages which were reasonably foreseeable as a consequence of any breach.]

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

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This is the basic form of damages instruction for wrongful discharge claims. It must be completed by inserting appropriate elements of general and/or special damages as supported by the law and the evidence. *See* UJI 13-2311 NMRA et seq. The second paragraph should be included where a claim is based on retaliatory discharge or violation of the New Mexico Human Rights Act [28-1-1 NMSA 1978] and emotional distress damages are sought. The third paragraph should be included where a claim is based on breach of an implied employment agreement and special damages are sought. The trial court must determine what elements of damages are subject to the rule expressed in that paragraph, and those elements of damages should be inserted in the space indicated. *See* committee commentary.

In appropriate cases, additional instructions such as an instruction on mitigation of damages, *see* UJI 13-860 NMRA, UJI 13-1811 NMRA; *see also* UJI 13-851 NMRA, or instructions relating to damages arising in the future, *see* UJI 13-1821 NMRA and UJI 13-1822 NMRA, should be given with this instruction.

[Approved, effective January 1, 1999; as amended by Supreme Court Order No. 08-8300-012, effective June 13, 2008.]

Committee commentary. — The New Mexico Human Rights Act permits recovery of "actual damages." Section 28-1-13 NMSA 1978. The term "is synonymous with compensatory damages." *Behrmann v. Phototron Corp.,* 110 N.M. 323, 328, 795 P.2d 1015, 1020 (1990). Recovery may include past and future lost earnings. *Id.; see also Smith v. FDC Corp.,* 109 N.M. 514, 787 P.2d 433 (1990).

Damages for emotional distress are ordinarily not recoverable in actions based on breach of an implied employment contract. *See Silva,* 106 N.M. at 20, 738 P.2d at 514 (holding, in accord with general contract principles, that such damages "are not recoverable ... in the absence of a showing that the parties contemplated such damages at the time the contract was made"). Emotional distress damages are recoverable under a retaliatory discharge claim. *Chavez v. Manville Prods.* In *Silva,* the Supreme Court approved a jury instruction stating that the jury could find either breach of contract or retaliatory discharge but not both, because "if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge action is unnecessary and inapplicable." 106 N.M. at 21, 738 P.2d at 515. *See also Salazar v. Furr's, Inc.,* 629 F. Supp. at 1408 (retaliatory discharge claim "does not extend to cases for which another remedy is provided by law"). In *McGinnis v. Honeywell, Inc.,* 110 N.M. 1, 791 P.2d 452 (1990), however, the Court indicated that there would be reason to allow the jury to pass on both claims in an appropriate case because emotional distress damages are available for retaliatory discharge but not for breach of contract. In cases where both breach of contract and retaliatory discharge

claims are submitted and emotional distress damages are sought, the jury should be instructed in a way that avoids double recovery on those elements of damages common to both claims and that prevents the jury from awarding emotional distress damages under the contract claim. A special verdict form may be used to guide the jury's approach in such cases. *See* UJI 13-2320.

Mitigation of damages applies to wrongful discharge cases. *McGinnis.* The burden of proof is on the defendant, "to prove by substantial evidence that [plaintiff's] damages would be alleviated by future employment opportunities." *McGinnis,* 110 N.M. at 7, 791 P.2d at 458.

As in other contract and tort cases, punitive damages can be awarded for breach of an implied employment contract or retaliatory discharge where supported by the evidence. *See Vigil v. Arzola; McGinnis v. Honeywell, Inc. See* UJI 13-861 and UJI 13-1827. Punitive damages may be awarded only where there is bad faith during the course of employment or in the discharge. *Bourgeous v. Horizon Healthcare Corp.,* 117 N.M. 434, 872 P.2d 852 (1994). Punitive damages are available in all retaliatory discharge cases. *Rhein v. ADT Automotive,* 1996-NMSC-066, 122 N.M. 646, 930 P.2d 783. Violation of the Human Rights Act does not support an award of punitive damages. *Behrmann v. Phototron Corp., supra.*

[Approved, effective January 1, 1999.]

13-2311. Lost wages.

The wages _____ *(plaintiff)* would have earned during the period that [he] [she] would have remained employed by _____ *(defendant)* had there been no wrongful discharge.

USE NOTES

This instruction should be inserted into UJI 13-2310 NMRA, Damages for Wrongful Discharge, where loss of past or future wages is an element of the plaintiff's damages.

Where mitigation of damages is a jury question, it may be appropriate, in lieu of this instruction, to adapt the instruction applicable to damages for breach of an express contract of employment, if the instruction is suited to the facts. *See* UJI 13-851 NMRA.

[Approved, effective January 1, 1999.]

13-2312. Lost benefits.

The value of employment benefits, including _____ *(here insert specific benefits at issue).*

USE NOTES

This instruction should be inserted into UJI 13-2310 NMRA, Damages for Wrongful Discharge, where loss of employment benefits is an element of the plaintiff's damages. The benefits at issue should be specified by filling in the blank.

[Approved, effective January 1, 1999.]

13-2313. Expenses of securing new employment.

The reasonable expenses incurred by _____ *(plaintiff),* including _____ *(here insert claimed elements of expenses),* in securing new employment after the discharge.

USE NOTES

This is a typical element of special damages for wrongful discharge that could be inserted into UJI 13-2310 NMRA in appropriate cases. It is not intended to be exclusive. The expenses at issue should be specified by filling in the blank.

[Approved, effective January 1, 1999.]

13-2320. Special verdict form for wrongful discharge cases.

Question 1:

(A) Was there an implied contract of employment between _____ (*plaintiff*) and _____ (*defendant*) that _____ (*plaintiff*) would only be discharged [for cause] [and] [or] [through the use of certain procedures]?

Answer: _____ (Yes or No)

If the answer to Question 1(A) is "Yes," answer Question 1(B).

If the answer to Question 1(A) is "No," go to Question 2.

(B) Did _____ (*defendant*) breach the implied contract of employment with _____ (*plaintiff*)?

Answer: _____ (Yes or No)

If the answer to Question 1(A) is "Yes," and you have answered Question 1(B) (*regardless of the answer*), go to Question 3.

Question 2: Was _____ (*name of the plaintiff*)'s _____ (*alleged impermissible basis for termination*) a motivating factor in the decision to discharge _____ (*name of the plaintiff*)?

Answer: _____ (Yes or No)

Go to Question 3.

Question 3: Did _____ (*defendant*) discharge _____ (*plaintiff*) in violation of _____ (*identify the statute in question, e.g., the New Mexico Human Rights Act, Title VII, etc.*)?

Answer: _____ (Yes or No)

If you did not answer Question 1(B) or if you answered "No" to Question 1(B), and if the answers to Question 2 and Question 3 are "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendant and against the plaintiff, and you will all return to open court.

If your answer to any of Questions 1(B), 2, or 3 is "Yes," you are to answer Question 4.

Question 4: Did _____'s (*defendant's*) conduct cause damage to _____ (*plaintiff*)?

Answer: _____ (Yes or No)

If the answer to Question 4 is "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendant and against the plaintiff, and you will all return to open court.

If the answer to Question 4 is "Yes," also answer Question 5.

Question 5: In accordance with the damage instructions given by the court, we find the damages suffered by _____ (*plaintiff*) to be:

(Elements of damages)	(Amount)
_____	$_____
_____	$_____

If the answer to Question 2 is "Yes," also answer Question 6.

Question 6: Did _____ (*plaintiff)* suffer emotional distress as a result of _____'s (*defendant's*) violation of _____ (*a statute allowing for recovery of emotional distress damages, e.g., the New Mexico Human Rights Act or Title VII*)?

Answer: _____ (Yes or No)

If the answer to Question 6 is "Yes," also answer Question 7.

Question 7: In accordance with the damage instructions given by the court, we find the damages suffered by _____ (*plaintiff*) for emotional distress to be $_____.

_____
Foreperson

USE NOTES

This instruction provides a form of special verdict for a wrongful discharge case involving claims for breach of an implied employment contract, retaliatory discharge, and violation of the New Mexico Human Rights Act [28-1-1 NMSA 1978]. It should be modified as necessary to suit the case at hand. The Court may exercise its discretion to utilize a general verdict form if appropriate in a given case. The Court should determine the appropriate elements of damage to be included under Question 5.

[Approved, effective January 1, 1999; as amended by Supreme Court Order No. 08-8300-012, effective June 13, 2008; by Supreme Court Order No. 12-8300-012, effective May 19, 2012.]

13-2321. Whistleblower Protection Act claim; elements.

In this case, you must [also] determine whether _____ (*name of public employer defendant*) violated the Whistleblower Protection Act by taking a retaliatory action in response to _____'s (*name of public employee plaintiff*) engagement in protected activity.

To establish a violation of the Whistleblower Protection Act, _____ (*name of plaintiff*) has the burden of proving each of the following five elements:

1. _____ (*name of defendant*) was a public employer and _____ (*name of plaintiff*) was a public employee.

["Public employer" means [(1) any department, agency, office, institution, board, commission, committee, branch, or district of state government]; or [(2) any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived]; [(3) any entity or instrumentality of the state specifically provided for by law]; and/or [(4) every office or officer of any entity listed in items 1 through 3 of this subsection].]

["Public employee" means a person who works for or contracts with a public employer.]

2. _____ (*name of plaintiff*) engaged in an activity that is protected by the Whistleblower Protection Act.

3. _____ (*name of defendant*) took an adverse action against _____ (*name of plaintiff*).

4. The adverse action was retaliatory in that _____'s (*name of plaintiff*) engagement in the protected activity was a cause of the adverse action.

AND

5. _____ (*name of plaintiff*) suffered damages as a result of the retaliatory action.

[In this case, the parties agree that the following elements were met: _____ (*insert element(s) parties agree were met*). What is in dispute is whether the following elements were met: _____ (*insert element(s) parties do not agree were met*).]

USE NOTES

This instruction should be given in every case alleging violation of the Whistleblower Protection Act ("WPA"), NMSA 1978, §§ 10-16C-1 to -6 (2010), and includes the general elements of a WPA claim. The instruction sets out all the elements that must be established for a WPA claim. If there is no factual dispute as to the existence of any particular element, or if the court determines that the element has been established as a matter of law, the last paragraph of the instruction should be given to inform the jury which elements should be taken as established and which elements remain to be determined by the jury. If the public character of the employment is disputed, the drafter should incorporate the bracketed definitions from NMSA 1978, Section 10-16C-2, or equivalent language, to allow the jury to consider whether a party's status comes within the terms of "public employer" or "public employee," as might justify WPA protection.

Following this instruction, the jury should be given supplemental instructions, UJI 13-2322 through -2325 NMRA, as applicable, to further instruct on any disputed element.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

13-2322. Whistleblower Protection Act; protected activity.

To establish that _____ (*name of plaintiff*) engaged in an activity that is protected under the Whistleblower Protection Act, _____ (*name of plaintiff*) has the burden of proving that _____ (*name of plaintiff*):

[communicated information to the public employer or a third party about an action or failure to act that the public employee believed in good faith constituted an unlawful or improper act. Good faith means that a reasonable basis existed for the belief as evidenced by the facts available to the public employee;]

[or]

[provided information to, or testified before, a public body as part of an investigation, hearing, or inquiry into an unlawful or improper act;]

[or]

[objected to or refused to participate in an activity, policy, or practice that constitutes an unlawful or improper act.]

"Unlawful or improper act" means a practice, procedure, action, or failure to act on the part of a public employer that:

[violates a federal law, a federal regulation, a state law, a state administrative rule, or a law, ordinance, or rule of any political subdivision of the state;]

[or]

[constitutes malfeasance in public office;]

[or]

[constitutes gross mismanagement, a waste of funds, an abuse of authority, or a substantial and specific danger to the public.]

USE NOTES

This instruction should be given in a case alleging violation of the Whistleblower Protection Act ("WPA"), NMSA 1978, §§ 10-16C-1 to -6 (2010), if protected activity is in dispute. The instruction consists of two parts. The first part sets out three kinds of conduct—communicating information, providing information or testimony, or objecting to or refusing to participate in certain activities—that an employee might engage in and claim protection under the WPA. The drafter should choose one or more of these activities as applicable to the case. The second part defines the term "unlawful or improper act," which is a term appearing in the descriptions of protected activity. The definition includes three bracketed phrases. The drafter should choose one or more of these phrases as applicable to the case.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

13-2323. Whistleblower Protection Act; retaliatory action.

"Retaliatory action" means taking any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment.

USE NOTES

This instruction should be given in a case alleging violation of the Whistleblower Protection Act ("WPA"), NMSA 1978, §§ 10-16C-1 to -6 (2010), if there is a dispute about whether the employer's action of which the employee complains is "retaliatory action" as defined by the WPA.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — The Whistleblower Protection Act forbids public employers from taking "any retaliatory action" against a public employee because the public employee engaged in certain protected conduct. *See* NMSA 1978, § 10-16C-3; *see also Velasquez v. Regents of N. N.M. Coll.*, 2021-NMCA-007, ¶ 27, 484 P.3d 970. "Retaliatory action" is defined as "any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment." NMSA 1978, § 10-16C-2; *Velasquez*, 2021-NMCA-007, ¶ 40.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

13-2324. Whistleblower Protection Act; causation.

An employee's engagement in protected activity is a cause of an employer's retaliatory action if the employee's protected activity was a factor that motivated, at least in part, the employer's action against the employee. A motivating factor is a factor that plays a role in an employer's decision to act. To be considered a motivating factor, the employee's protected activity need not be the only reason, nor the last reason, nor latest reason, for the employer's action.

USE NOTES

This instruction should be given in a case alleging violation of the Whistleblower Protection Act, NMSA 1978, §§ 10-16C-1 to -6 (2010), if causation is in dispute.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See Dart v. Westall*, 2018-NMCA-061, ¶¶ 18-24, 428 P.3d 292 (concluding sufficient evidence was presented to establish plaintiff suffered retaliatory action after plaintiff engaged in protected activity, which was found to be a

cause of the retaliatory action). The definition of "motivating factor" used in this instruction is derived from UJI 13-2304 NMRA (discussing retaliatory discharge).

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

13-2325. Whistleblower Protection Act; affirmative defense.

To establish a defense to a claim under the Whistleblower Protection Act, _____ (*name of defendant*) has the burden of proving that the action taken against _____ (*name of plaintiff*) was due to:

[_____'s (*name of plaintiff*) misconduct]

[or]

[_____'s (*name of plaintiff*) poor job performance]

[or]

[a reduction in work force]

[or]

[_____ (*insert another legitimate business purpose claimed by the employer unrelated to the conduct prohibited by the Whistleblower Protection Act)*],

AND that

_____'s (*name of plaintiff*) engagement in the protected activity was not a motivating factor for _____'s (*name of defendant*) action against _____ (*name of plaintiff*).

USE NOTES

This instruction applies in every case alleging violation of the Whistleblower Protection Act, NMSA 1978, §§ 10-16C-1 to -6 (2010), in which the employer asserts an affirmative defense under NMSA 1978, Section 10-16C-4.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — This jury instruction is based on the Whistleblower Protection Act ("WPA"), NMSA 1978, § 10-16C-4 (2010). One element of the affirmative defense described in Paragraph B of that section is that "retaliatory action was not a motivating factor" in the action taken by the employer against the employee. The

Committee believes that the statutory language is potentially confusing and that the intent underlying the statutory phrasing is better expressed, in the context of these instructions, by stating that the employer must show that the employee's engagement in the protected conduct was not a motivating factor for the employer's action. The instruction has been phrased accordingly. *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶¶ 19-26, 117 N.M. 346, 871 P.2d 1352 (explaining that if the plain language of a statute would render its application absurd or unreasonable, the statute should be construed to accomplish legislative intent).

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

13-2326. Whistleblower Protection Act; damages.

If you decide in favor of _____ (*name of plaintiff*) on [any of] _____'s (*name of plaintiff*) claim[s] under the Whistleblower Protection Act, then you must fix the amount of money damages that will reasonably and fairly compensate _____ (*name of plaintiff*) for any of the following elements of damages proved to have resulted from the wrongful conduct of _____ (*name of defendant*):

[(1) The wages _____ (*name of plaintiff*) would have earned during the period that _____ (*name of plaintiff*) would have remained employed by _____ (*defendant*) had there been no retaliatory action.]

[(2) The value of employment benefits, including _____ (*insert specific benefits at issue*).]

[(3) Compensation for any _____ (*insert any special damage*) sustained as a result of the violation.]

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based on proof, and not on speculation, guess, or conjecture. Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This is the basic form of damages instructions for Whistleblower Protection Act claims. It must be completed by inserting appropriate elements of general and/or special damages as supported by the law and the evidence. The court should decide what, if any, special damages may be included.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — The Whistleblower Protection Act ("WPA"), NMSA 1978, §§ 10-16C-1 to -6 (2010), permits recovery of actual damages, special damages, and double back pay with interest, and an order of reinstatement. *See* NMSA 1978, § 10-16C-4(A); *Maestas v. Town of Taos*, 2020-NMCA-027, ¶ 17, 464 P.3d 1056. This combination of legal and equitable remedies implicates both the court and the jury. The term "actual damages" is "synonymous with compensatory damages." *Behrmann v. Phototron Corp.*, 1990-NMSC-073, ¶ 24, 110 N.M. 323, 795 P.2d 1015 (addressing the meaning of "actual damages" under the New Mexico Human Rights Act, NMSA 1978, § 28-1-13(D) (2005)). General and/or special damages may include lost wages (UJI 13-2311 NMRA), lost benefits (UJI 13-2312 NMRA), and reasonable expenses (UJI 13-2313 NMRA). Expenses of securing new employment (UJI 13-2313) is a typical element of special damage that could be inserted in appropriate cases. *See* § 10-16C-4(A); *see also Velasquez v. Regents of N. N.M. Coll.*, 2021-NMCA-007, ¶¶ 50-60, 484 P.3d 970 (addressing reinstatement remedy under the WPA). Subsections 10-16A-4(C) and (D) indicate that the remedies provided under the WPA are not exclusive.

In addition, an employer shall be required to pay the litigation costs and reasonable attorney fees of the employee. "The WPA provides that an employer that violates the WPA 'shall' be required to pay the employee's reasonable attorney fees." *Maestas*, 2020-NMCA-027, ¶ 19 (citing Section 10-16C-4(A)). "Attorney fees under the WPA, in contrast [to attorney fee statutes that contain the term "prevailing party"], depend on whether a public employer is found to have violated the provisions of the WPA, and are not conditioned on an employee's status as a prevailing party." *Maestas*, 2020-NMCA-027, ¶ 20.

"Section 10-16C-4(A) creates two kinds of remedies—*viz.*, monetary damages and the injunctive relief of reinstatement of a public employee to his or her former position of employment." *Flores v. Herrera*, 2016-NMSC-033, ¶ 13, 384 P.3d 1070. "Courts are in general agreement that front pay is only available if the court finds that reinstatement is inappropriate." *Maestas*, 2020-NMCA-027, ¶ 12 (internal quotation marks and citations omitted).

As a result of the potential mix of equitable and legal claims under the WPA, the court should consider the division of roles under Section 10-16C-4(A) between the jury and the judge. Where, for example, the Act's equitable remedy of reinstatement is implicated, "the district court must determine the mode and order of trial when legal and equitable claims have been joined." *Maestas*, 2020-NMCA-027, ¶ 11 (internal quotation marks, citations, and brackets omitted). "As a general matter, the district court determines when and if equitable relief is appropriate, not a jury." *Id.* Further,

> when equitable and legal claims present common issues of fact which are material to the disposition of both claims, the legal claims must be submitted to a jury before the equitable claims are decided. Otherwise, the judge while deciding the equitable claims will have invaded the province of the jury by deciding disputed facts that are material to the legal claim.

Blea v. Fields, 2005-NMSC-029, ¶ 1, 138 N.M. 348, 120 P.3d 430.

These instructions have been drafted on the assumption that the jury will be asked to determine the amount of back pay and the court will double that amount in entering judgment, as a ministerial act under the statutory directive. The instructions also have been drafted on the assumption—though the statute is not specific on this point—that the court will determine the rate of interest to be applied to the award of double back pay.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

13-2327. Whistleblower Protection Act; special verdict.

On the questions submitted, the jury finds as follows:

Question 1: Did _____ (*name of plaintiff*) engage in protected activity?

Answer: _____ (Yes or No)

If the answer to Question 1 is "Yes," answer Question 2.

Question 2: Did _____ (*name of defendant*) take retaliatory action against _____ (*name of plaintiff*)?

Answer: _____ (Yes or No)

If the answer to Question 2 is "Yes," answer Question 3.

Question 3: Was _____'s (*name of plaintiff*) engagement in protected activity a cause of the retaliatory action by _____ (*name of defendant*)?

Answer: _____ (Yes or No)

If the answer to Question 3 is "Yes," answer Question 4.

Question 4: Did _____'s (*name of defendant*) retaliation against _____ (*name of plaintiff*) cause damage to _____ (*name of plaintiff*)?

Answer: _____ (Yes or No)

If the answer to Question 4 is "Yes," answer Question 5.

Question 5: In accordance with the damage instructions given by the court, we find the damages suffered by _____ (*name of plaintiff*) to be:

Back pay	$_____
(Add other elements of damages)	$_____
_____	$_____

_____
Foreperson

USE NOTES

This instruction provides a form of special verdict for claims involving violation of the Whistleblower Protection Act ("WPA"), NMSA 1978, §§ 10-16C-1 to -6 (2010). The amount awarded as back pay, if any, should appear on a separate line so that the court may double the award and add interest under NMSA 1978, Section 10-16C-4(A). This special verdict form should be modified as necessary to suit the case at hand. Additionally, in appropriate cases it may be necessary to add questions relating to the employer's affirmative defense under UJI 13-2325 NMRA and NMSA 1978, Section 10-16C-4(B).

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

CHAPTER 24
Legal Malpractice

Introduction

This chapter provides basic jury instructions for the types of legal malpractice claims that most often are litigated; specifically, those sounding in negligence and breach of fiduciary duty. If a breach of contract claim is brought against an attorney, *see Leyba v. Whitley*, 1995-NMSC-066, ¶ 12, 120 N.M. 768, 907 P.2d 172, any instructions necessary to present the claim to the jury will need to be prepared. *See* Chapter 8 (Contracts).

As indicated, the law distinguishes between a legal malpractice claim based on an attorney's negligence and a legal malpractice claim based on an attorney's breach of fiduciary duty. "Legal malpractice based on negligence concerns violations of the standard of care; whereas legal malpractice based upon breach of [a fiduciary] duty concerns violations of a standard of conduct." *Richter v. Van Amberg*, 97 F. Supp. 2d 1255, 1261 (D.N.M. 2000) (quoting *Kirkpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996)); *accord Spencer v. Barber*, 2013-NMSC-010, ¶ 17, 299 P.3d 388. "It is possible to have professional negligence without a breach of fiduciary duty, and vice-versa." *Richter*, 97 F. Supp. 2d at 1261.

The chapter includes instructions setting forth the elements for legal malpractice claims sounding in negligence and breach of fiduciary duty as well as corresponding

duty and definitional instructions. The chapter does not include a causation instruction; in most cases UJI 13-305 NMRA should suffice to instruct the jury on that element. The chapter includes a general damages instruction, UJI 13-2414 NMRA, which provides the overall measures of damages that typically are recoverable in a legal malpractice case. As the instruction indicates, additional instructions should be given for any specific element(s) of damages that the jury is asked to consider. *See* Chapter 18 (Damages). The chapter does not include a special verdict form; forms of verdict in other UJI chapters may be used to prepare the verdict form. *See, e.g*., Chapter 22 (Verdicts).

As the preceding considerations indicate, the instructions that should be given in a legal malpractice case are not entirely contained in this chapter. Other UJIs and non-UJIs relating to the claims and defenses in a case may be used as appropriate. *See* Rule 1-051 NMRA; *see also Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (modified UJIs or non-UJIs may be given when no applicable instruction exists). Additionally, if a case involves the issue of whether an attorney breached a duty to a third-party beneficiary in a non-wrongful death context or the issue of collectability of damages, instructions regarding those issues will need to be prepared. The UJI-Civil Committee concluded that the law in New Mexico regarding the issues is insufficiently settled to draft UJIs that address the issues.

Sample sets of jury instructions in hypothetical legal malpractice cases appear in the appendix to the chapter. The examples are meant to serve as a guide for assembling a set of instructions in a legal malpractice case.

[Adopted by Supreme Court Amended Order No. 17-8300-013, effective December 31, 2017.]

13-2401. Legal malpractice; elements.

For _____ (*name of plaintiff*), to recover from _____ (*name of defendant*), on _____'s (*name of plaintiff*) claim of legal malpractice, you must find that all of the following have been proved by a preponderance of the evidence:

1. An attorney-client relationship existed between _____ (*name of plaintiff*) and _____ (*name of defendant*);

2. _____ (*name of defendant*) owed a duty to _____ (*name of plaintiff*);

3. _____ (*name of defendant*) breached that duty; and

4. That breach was a cause of a loss to _____ (*name of plaintiff*).

USE NOTES

This instruction should be given in every legal malpractice case. It sets forth the elements of a legal malpractice claim.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — The elements of legal malpractice are (1) the employment of the defendant attorney; (2) the defendant attorney's breach of a reasonable duty; and (3) the breach resulted in and was a cause of loss to the client. *See, e.g., Encinias v. Whitener Law Firm, P.A*., 2013-NMSC-045, ¶ 8, 310 P.3d 611 (negligence); *Spencer v. Barber*, 2013-NMSC-010, ¶ 17, 299 P.3d 388 (fiduciary duty).

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2402. Legal malpractice; attorney-client relationship.

An attorney-client relationship arises when there is an agreement that the lawyer will act as attorney for the client. No formal contract is necessary to create the attorney-client relationship. Nor is it necessary that the lawyer be paid a fee for the lawyer's services.

To prove the formation of an attorney-client relationship, _____ (*name of plaintiff*) must prove that _____ (*name of plaintiff*) expressed _____'s (*name of plaintiff*) intent that _____ (*name of defendant*) provide legal services to _____ (*name of plaintiff*), and _____ (*name of defendant*) [either]

[agreed or appeared to agree to provide such services to _____ (*name of plaintiff*)] [or]

[knew or reasonably should have known that _____ (*name of plaintiff*) was reasonably relying on _____ (*name of defendant*) to provide such services].

USE NOTES

This instruction should be given in cases in which the plaintiff alleges that the defendant is liable for legal malpractice and the existence of an attorney-client relationship is a disputed issue of fact. The bracketed portions of the instruction should be given as warranted by the facts of the case.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — To recover on a claim of legal malpractice, plaintiff must prove the defendant attorneys represented the plaintiff. *See Glenborough Corp. v. Sherman & Howard*, 1996-NMCA-005, ¶ 8, 121 N.M. 253, 910 P.2d 329.

"Save where appointed by court, the relationship of attorney and client is created by contract." *Holland v. Lawless*, 1981-NMCA-004, ¶ 5, 95 N.M. 490, 623 P.2d 1004, cert. denied, 95 N.M. 593, 624 P.2d 535 (1981). Because "[t]he existence of a contract is generally an issue and question of law[,]" the existence of an attorney-client relationship is generally not an issue presented to a jury unless there is a dispute over the facts necessary to form such a relationship. *See id*.

"The contract may be express or implied." *Id*. Thus, "[n]o formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client." *Id*. Instead, "[t]he contract may be implied from the conduct of the parties." *George v. Caton*, 1979-NMCA-028, ¶ 25, 93 N.M. 370, 600 P.2d 822. "Albeit the relationship of attorney and client may be implied, there must be some facts to raise the implication." *Holland*, 1981-NMCA-004, ¶ 10.

A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.

Restatement (Third) of Law Governing Lawyers § 14 (2000).

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2403. Legal malpractice; negligence and standard of care.

A lawyer has a duty to use the same degree of care, skill, and diligence ordinarily used by attorneys under similar circumstances. A lawyer who fails to do so is negligent.

USE NOTES

This instruction should be used in a legal malpractice case in which an attorney's negligence is alleged to have caused injury or harm.

If the case also involves a legal malpractice claim based on a breach of fiduciary duty by the defendant, the instruction for that claim should be given. *See* UJI 13-2404 NMRA.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — In a negligence case, "[a]n attorney's duty to a client is 'to exercise the degree of knowledge or skill ordinarily possessed by others in his or her profession similarly situated.'" *Bassett v. Sheehan*, 2008-NMCA-072, ¶ 8, 144 N.M. 178,

184 P.3d 1072, (quoting *Resolution Trust Corp. v. Barnhart*, 1993-NMCA-108, ¶ 13, 116 N.M. 384, 862 P.2d 1243). "[A]djudication of malpractice claims requires an assessment of whether Defendants' services were rendered 'with the skill, prudence, and diligence that an ordinary and reasonable lawyer would use under similar circumstances.'" *Potter v. Pierce*, 2014-NMCA-002, ¶ 17, 315 P.3d 303 (quoting *Black's Law Dictionary* 1044 (9th ed. 2009)); *First Nat'l Bank v. Diane, Inc.*, 1985-NMCA-025, ¶ 14, 102 N.M. 548, 698 P.2d 5 ("In determining whether an attorney exercised the requisite degree of competence, the crucial inquiry is whether his advice was so legally deficient when given that he could be found to have failed to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.").

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2404. Legal malpractice; breach of fiduciary duty.

A lawyer has [a] fiduciary [duty][duties] to:

[have undivided loyalty to _____ (*name of plaintiff*);]

[treat _____ (*description of matters communicated by client and/or information regarding the representation*) as confidential;]

[_____ (*insert breach of any other applicable fiduciary duty to the case*)].

A lawyer who fails to do so breaches the fiduciary [duty][duties].

USE NOTES

This instruction should be used in a case in which an attorney's breach of a fiduciary duty or duties is alleged to have caused injury or harm. The instruction should be given with additional instructions that explain the applicable fiduciary duty or duties. *See, e.g.*, UJI 13-2405 (Duty of confidentiality), UJI 13-2406 (Duty of loyalty); *see also* UJI 13-2411 (Rules of Professional Conduct).

If the case also involves a legal malpractice claim based on negligence, the instruction for that claim should be given. *See* UJI 13-2403 (Legal malpractice; negligence and standard of care).

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — In recognizing that a legal malpractice claim based on a breach of fiduciary duty claim may be brought, the New Mexico Supreme Court did not

limit an attorney's fiduciary duties to those of undivided loyalty and confidentiality. *See Spencer v. Barber*, 2013-NMSC-010, ¶ 17, 299 P.3d 388; *see also* 2 R. Mallen and J. Smith, *Legal Malpractice* § 15:1 (2014) (identifying the duties of undivided loyalty and confidentiality as the commonly-recognized ones). Correspondingly, the instruction includes a bracket which enables the instruction to be drafted to include an alleged breach of any other applicable fiduciary duty.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2405. Duty of confidentiality; definition.

A lawyer has a duty to preserve a client's confidential information. Confidential information is information relating to the lawyer's representation of the client that is not generally known. [This duty applies to former clients.]

[A lawyer may reveal confidential information if

1. the client gives consent after consulting with the lawyer[;] [or]

2. the New Mexico Rules of Professional Conduct permit the disclosure of the information.]

USE NOTES

This instruction should be given when the plaintiff claims that a lawyer breached a duty to the client by revealing confidential information. The bracketed paragraph should be omitted unless the lawyer claims that an exception applies regarding the disclosure of confidential information. If the bracketed paragraph regarding the New Mexico Rules of Professional Conduct is given, the jury should also be instructed on the Rules of Professional Conduct. *See* UJI 13-2411 NMRA.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — Attorneys have an ongoing obligation to maintain the confidentiality of information about their clients. *See Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 18, 292 P.3d 466 (lawyers have continuing duty to preserve confidentiality of client information); *In re Lichtenberg*, 1994-NMSC-034, ¶ 10, 117 N.M. 325, 871 P.2d 981 ("Members of the public who share their confidences and secrets with an attorney are entitled to have those confidences and secrets held inviolate except in certain unusual circumstances.").

"Confidential client information consists of information relating to representation of a client, other than information that is generally known." Restatement (Third) of the Law Governing Lawyers § 59; *see also* Rule 16-109 NMRA. The exceptions to when a

lawyer may disclose confidential information are set out in Rule 16-106 NMRA. *See* Rule 16-106 NMRA; *State v. Barnett*, 1998-NMCA-105, ¶ 16, 125 N.M. 739, 965 P.2d 323 ("Rule 16-106 generally prohibits a lawyer from revealing information relating to representation of a client unless the client consents after consultation."). This includes when the client consents after consultation, *see* Rule 16-106(A) NMRA, or when the lawyer is implicitly authorized to reveal confidential information in carrying out the representation. *See id*. ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by Paragraph B of this rule."); Committee commentary to Rule 16-106 NMRA at [7].

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2406. Duty of loyalty; definition.

A lawyer has a duty of loyalty to a client. A lawyer breaches the duty of loyalty by putting the lawyer's own interests, or the interests of another, before those of the client.

USE NOTES

This instruction should be given when the plaintiff claims that a lawyer has breached the duty of loyalty.

If at issue, the jury should be instructed on the Rules of Professional Conduct. *See* UJI 13-2411 NMRA.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — "In the practice of law, there is no higher duty than one's loyalty to a client." *Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 1, 292 P.3d 466. "This duty applies to current and former clients alike." *Id*. "The client is entitled to the undivided loyalty of the attorney." *State v. Almanza*, 1996-NMCA-013, ¶ 4, 121 N.M. 300, 910 P.2d 934. "Lawyers are required to avoid divided loyalties that would harm . . . their clients." Restatement (Third) of the Law Governing Lawyers: Conflicts of Interest Ch. 8 Intro. Note (2000). Influences that interfere with a lawyer's devotion to a client's welfare constitute conflicts with that client's interest. *Id*.

The duty of loyalty may arise in several contexts. For example, a lawyer may not represent a client in a matter in which the current client's interests are "materially adverse" to the interest of the former client. *Mercer*, 2013-NMSC-002, ¶ 18; Rule 16-109 NMRA. The duty of loyalty may also be implicated when counsel represents two clients in the same matter, or when the interests of the client and the attorney diverge. *State v. Martinez*, 2001-NMCA-059, ¶ 25, 130 N.M. 744, 31 P.3d 1018; Rule 16-107 NMRA;

Rule 16-108 NMRA. “If counsel’s duty of undivided loyalty is in any way compromised, such as by personal interests or by loyalties to another party, counsel must avoid representing the client.” *State v. Joanna V*., 2004-NMSC-024, ¶ 6, 136 N.M. 40, 94 P.3d 783.

The duty of loyalty continues when a lawyer leaves one firm for another. “When an attorney leaves one law firm and joins another, the attorney continues to owe a duty of . . . undivided loyalty to his or her clients.” *Mercer*, 2013-NMSC-002, ¶ 16. “[W]hen a law firm hires a new associate, any conflict the associate would have individually, is imputed to the entire firm.” *Id*. ¶ 17. “This is because ‘a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client.’” *Id*. (quoting Rule 16-110, cmt. 2). Thus, “each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.” *Id*.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2407. Legal malpractice; attorney duty to warn.

A lawyer has a duty to advise the client of negative consequences a reasonable lawyer would conclude may result from the course of action the lawyer recommends. This duty does not require a lawyer to discuss with the lawyer’s client every possibility, no matter how small or remote.

USE NOTES

This instruction should be given in cases where a plaintiff claims a lawyer breached the duty of care by failing to inform the client of negative consequences resulting from following the lawyer’s recommendation.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — If the lawyer is aware, or should have been aware, of potential exposure to the client from following the lawyer’s advice, the lawyer has the duty to warn the client of the potential adverse risks if the advice is incorrect. *First Nat’l Bank v. Diane, Inc*., 1985-NMCA-025, ¶¶ 18, 22, 102 N.M. 548, 698 P.2d 5. However, “if there is no reasonable ground for him to believe that his [advice] is questionable, he certainly has no obligation to advise clients of every remote possibility that might exist.” *Id*. ¶ 18 (citing *Smith v. St. Paul Fire & Marine Ins*. 366 F. Supp. 1283, 1290 (M.D. La. 1973). Whether the burden of potential liability clearly outweighs the benefit to the client is a factor to consider when assessing a lawyer’s liability for failure to warn. *First Nat’l Bank*, 1985-NMCA-025, ¶ 20.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2408. Legal malpractice; duty to third-party intended beneficiaries. — *No instruction drafted*.

No instruction drafted.

Committee commentary. — Although the New Mexico Supreme Court has indicated that a duty to a third-party beneficiary may exist outside of the wrongful death context, New Mexico appellate courts have not specifically decided the issue. Two cases discuss an attorney's duty to third-party beneficiaries, *Leyba v. Whitley*, 1995-NMSC-066, ¶ 15, 120 N.M. 768, 907 P.2d 172, and *Spencer v. Barber*, 2013-NMSC-010, ¶¶ 10-14, 22, 299 P.3d 388. The *Leyba* court adopted a six-factor test from *Trask v. Butler*, 872 P.2d 1080, 1084 (Wash. 1994) "for analyzing the duty owed to statutory beneficiaries by an attorney for the personal representative prosecuting a wrongful death claim." 1995-NMSC-066, ¶ 20. However, these cases address the duty in the context of Wrongful Death Act claims. *See id*.

The *Trask* test may be useful in legal malpractice cases involving third-party beneficiaries outside of the wrongful death context. *See Leyba*, 1995-NMSC-066, ¶ 23 (observing that *Trask* had correctly applied the test to analyze the attorney-personal representative relationship in a probate proceeding); *id*. ¶ 21 n.5 (cautioning that the Court does "not intend to limit [the] recognition of an attorney's duty solely to beneficiaries of statutory rights and interests."). As the *Leyba* court observed, the *Trask* test combines the threshold third-party-beneficiary test with a multi-factor balancing test to analyze the duty owed in legal malpractice cases. *See id*. ¶ 20. That third-party-beneficiary test is the first *Trask* factor and can be found in UJI 13-820 NMRA. The remaining factors involve questions of fact and of law, and have not yet been developed outside of the wrongful death context.

Because New Mexico law does not specifically address the issue outside of Wrongful Death Act claims, no instruction is drafted for an attorney's duty to third party intended beneficiaries where the Wrongful Death Act does not apply. For the duty to wrongful death statutory beneficiaries, *see* UJI 13-2409 NMRA.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2409. Legal malpractice; duty to intended beneficiaries; wrongful death.

An attorney representing the personal representative in a wrongful death case owes a duty to the statutory beneficiaries to exercise reasonable care to protect the beneficiaries' interest in receiving any proceeds obtained in the wrongful death case.

[The attorney may end the duty to a statutory beneficiary by providing adequate notice that the beneficiary may not rely on the attorney to act for the benefit of the

beneficiary. In deciding whether adequate notice was given, you should consider whether _____ (*name of attorney*) informed _____ (*name of Plaintiff*)

[That _____ (*name of Plaintiff*) was a statutory beneficiary to a wrongful death case, and the parties to that case were _____ (*names of parties*);]

[The amount of the verdict or settlement, or of the terms of any existing settlement offers;]

[The percentage of the verdict or settlement that _____ (*name of Plaintiff*) was entitled to receive;]

[The position of the adverse party; namely, that _____ (*insert description of position of adverse party, e.g., that the personal representative did not believe the plaintiff was entitled to money because the plaintiff had abandoned her child*);]

[That _____ (*name of attorney*) represented the adverse party and was not working in the best interests of _____ (*name of Plaintiff*); and]

[_____ (*insert any other applicable factor*).]]

USE NOTES

This instruction should be used in a legal malpractice case in which an attorney represented a personal representative in a wrongful death case, and the plaintiff alleges that the plaintiff is a statutory beneficiary in the wrongful death case who, as a result of the attorney's negligence, received less than the plaintiff was entitled to. The bracketed section should be included if the attorney claims that the attorney ended the attorney's duty to the statutory beneficiary by providing adequate notice. Each of the five factors in the bracketed section should be included if appropriate. Normally, adequate disclosure will include, at a minimum, each of the factors. *See Spencer v. Barber*, 2013-NMSC-010, ¶ 34, 299 P.3d 388. If additional factors are warranted, they may be included in the final bracketed sentence.

If there is a dispute as to whether the defendant attorney represented the personal representative in the underlying wrongful death case, the parties should also include UJI 13-2402 NMRA (attorney-client relationship) to allow the jury to decide whether such a relationship existed. If there is a dispute as to whether the plaintiff was a statutory beneficiary in the underlying wrongful death case, an instruction specific to the relevant portion of the wrongful death statute and the facts in dispute will need to be prepared.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — "[A]n attorney handling a wrongful death case owes to the statutory beneficiaries of that action a duty of reasonable care to protect their interest in receiving any proceeds obtained." *Leyba v. Whitley*, 1995-NMSC-066, ¶ 2, 120 N.M. 768, 907 P.2d 172. However, when a conflict arises between the personal representative and the statutory beneficiary, the attorney may end the duty to the statutory beneficiary by providing "notice to the non[-]client that the latter cannot rely on the attorney to act for his or her benefit." *Spencer*, 2013-NMSC-010, ¶ 13 (citing *Leyba*, 1995-NMSC-066, ¶ 26).

[A]dequate disclosures will normally include, at a minimum: (1) the fact that the person is a beneficiary in a wrongful death lawsuit, as well as 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, e.g., 'she does not believe that you are entitled to any money because you abandoned your child'; and (5) the fact that the attorney now represents the adverse party against the beneficiary and is not looking out for the beneficiary's interests.

Spencer, 2013-NMSC-010, ¶ 34.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2410. Legal malpractice; expert testimony.

The only way in which you may decide whether _____ (*name of defendant*) breached a duty is from evidence presented by lawyers testifying as expert witnesses. In deciding this question, you must not use any personal knowledge of any of the jurors.

USE NOTES

This instruction shall be given when the alleged malpractice of a lawyer can be evaluated only in light of the testimony of another lawyer testifying as an expert witness. The trial court must make that determination.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — Usually in a legal malpractice case expert testimony by a lawyer is necessary to explain the applicable standard of care or standard of conduct and the defendant attorney's breach of the standard(s). The need for this testimony arises because legal malpractice cases in which professional negligence or breach of fiduciary duty is alleged typically involve "situations and requirements of legal practice unknown to most jurors and often not familiar in detail to judges." Restatement of the Law Governing Lawyers § 52 cmt. g, at 383 (1998). "Expert testimony is used as the evidence to establish the standard of care or conduct by which the defendant's conduct

is to be judged. Expert testimony [also] usually is necessary to show a breach of the appropriate standard." 4 R. Mallen, Legal Malpractice § 30:120, at 1781 (2017). *Accord First Nat'l Bank v. Diane, Inc*., 1985-NMCA-025, ¶ 24, 102 N.M. 548 ("To establish malpractice, testimony of another attorney as to the applicable standards of practicing attorneys is generally necessary."); *Sanders v. Smith*, 1972-NMCA-016, ¶ 14, 83 N.M. 706 ("[D]eparture from or neglect of legal standards lies within the field of knowledge in which only an attorney can give a competent opinion.").

Exceptions do exist in which expert testimony is not necessary in a legal malpractice case. "[E]xpert testimony is unnecessary when it would be plain to a nonlawyer . . . that the lawyer's acts constitute negligence . . . or breach of fiduciary duty." Restatement § 52 cmt. g, at 383; *see also* 4 Mallen, § 37:127; *accord Walters v. Hastings*, 1972-NMSC-054, ¶ 40, 84 N.M. 101, 500 P.2d 186 ("[C]ases may arise in which the asserted shortcomings of the attorney are such that they may be recognized or inferred from the common knowledge or experience of laymen."). Additionally, expert testimony is unnecessary "when it is established as a matter of law" that the attorney's conduct was negligent or a breach of fiduciary duty. Restatement § 52 cmt. g, at 383; *see also* 4 Mallen, § 37:127; *accord Delisle v. Avallone*, 1994-NMCA-012, ¶ 23, 117 N.M. 602, 874 P.2d 1266 ("Expert testimony is not necessary when the only question to be answered by a jury is whether an attorney, who knew that the filing time limit soon would expire and this extinguish his client's rights did nothing to protect his client's rights. In such a case, the question of breach of duty can be answered as a matter of law."). *See also* 4 Mallen, § 37:127 (identifying other potential exceptions); *Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, ¶ 52, 331 P.3d 942 (providing other illustrative examples of when expert testimony may not be necessary in a legal malpractice case).

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2411. Rules of Professional Conduct.

The Rules of Professional Conduct provide guidance to lawyers. Evidence regarding the Rules of Professional Conduct may be considered in deciding whether _____ (*name of defendant*) owed _____ (*name of plaintiff*) a duty and whether _____ (*name of defendant*) breached a duty. However, that evidence is not conclusive. You must consider all of the evidence that you have heard in deciding the questions of duty and breach.

USE NOTES

This instruction must be given in a legal malpractice case in which the court admits evidence regarding the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — Historically, the Rules of Professional Conduct were established to discipline lawyers. They were not intended to provide a basis to bring a legal malpractice claim. *See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A*., 1988-NMSC-014, ¶¶ 18, 20, 106 N.M. 757, 750 P.2d 118; *see also* Preamble (Scope) to the New Mexico Rules of Professional Conduct. Although the Rules of Professional Conduct were not intended to create a private cause of action for legal malpractice, the rules nevertheless may inform the analysis of the duty (or duties) that a lawyer owed to the client(s) (and possibly to others) as well as the analysis of whether the lawyer breached any such duty (or duties). *See Spencer v. Barber*, 2013-NMSC-010, ¶¶ 15-19, 299 P.3d 388 (discussing potential relevance of the rules to those issues); *see also* Restatement (Third) of the Law Governing Lawyers § 52 & cmt. f (2000) (reflecting that the Rules of Professional Conduct may provide evidence of both the standard of care or conduct owed and its breach); *accord Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp*., 1997-NMSC-030, ¶ 16, 123 N.M. 457, 943 P.2d 104 (a malpractice claim should not be barred because its substance enters the realm of conduct covered under the Rules of Professional Conduct). Therefore, the party bringing a legal malpractice claim may refer to the Rules of Professional Conduct in addressing those issues. *See Spencer*, 2013-NMSC-010, ¶ 17.

Proof of the standard of care or conduct owed by a lawyer or a law firm is an essential element of a legal malpractice claim. *See Spencer*, 2013-NMSC-010, ¶ 17. Evidence regarding the New Mexico Rules of Professional Conduct may provide guidance regarding the duty or duties that the lawyer or law firm owed to the client at the time of the conduct in question. *See id*.; *see also* Preamble (Scope) to the New Mexico Rules of Professional Conduct.

Violation of one or more of the Rules of Professional Conduct does not give rise to a presumption, or by itself, prove that a lawyer breached a duty. *See Spencer*, 2013-NMSC-010, ¶ 15. Nevertheless, because the rules do establish standards of care or conduct for lawyers and law firms, a lawyer's violation of a rule may be used as evidence of breach of the applicable standard of care or conduct. *See* Preamble (Scope) to the New Mexico Rules of Professional Conduct; *see also Spencer*, 2013-NMSC-010, ¶ 19 (the determination of whether a lawyer complied with the standard of care or conduct will depend on the evidence introduced at trial).

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2412. Legal malpractice; attorney error in judgment.

A lawyer does not necessarily breach a duty to a client just because the lawyer [chooses a legal strategy] [makes a decision] [makes a recommendation] and it turns out that another [strategy] [decision] [recommendation] would have been a better choice.

USE NOTES

This instruction should be given in all cases where a plaintiff alleges the attorney breached a duty through an error in judgment.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — A mere error of judgment does not automatically subject a lawyer to liability. *First Nat'l Bank v. Diane, Inc*., 1985-NMCA-025, ¶ 14, 102 N.M. 548, 698 P.2d 5. A lawyer is also not liable "for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule." *See* Restatement of the Law (Third) Governing Lawyers § 54. Accordingly, a lawyer is not required "in a situation involving exercise of professional judgment, to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways." *See id*. § 53, cmt. B. However, a lawyer can still be liable if the lawyer fails to exercise reasonable care or breaches a fiduciary obligation. *See First Nat'l Bank*, 1985-NMCA-025, ¶ 22 ("That defendant's interpretation of the statutes was based on an honest belief in the correctness of his advice should not under the circumstances here shield him from liability. The soundness of defendant's advice should be evaluated on more than a good faith belief; rather, whether he exhibited the requisite degree of competence.").

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2413. Legal malpractice; litigation not proof of malpractice.

The fact that a lawyer's recommended course of action results in litigation is not in and of itself proof that the lawyer breached a duty to the client.

USE NOTES

This is a proper instruction in a legal malpractice case where it is alleged that a lawyer's actions resulted in litigation.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — "The fact that an attorney's judgment may cause or result in litigation is not, in and of itself, a breach of duty to the client." *First Nat'l Bank v. Diane, Inc.*, 1985-NMCA-025, ¶ 21, 102 N.M. 548, 698 P.2d 5. "Risk of litigation is often a necessary element or result of legal advice and legal representation. In fact, litigation often results from a disparity of professional judgment." *Id.* (citing *Ramp v. St. Paul Fire & Marine Ins. Co*., 263 La. 774 (1972)); *cf.* UJI 13-1616 NMRA.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2414. Legal malpractice; measure of damages; general instruction.

The damages that may be recovered in a legal malpractice action are those which the plaintiff would have [recovered] [avoided] in the absence of the lawyer's [negligence] [and] [or] [breach of fiduciary duty]. [The damages that may be recovered also include expenses that the plaintiff incurred to avoid or reduce the loss caused by the lawyer's [negligence] [and] [or] [breach of fiduciary duty].] You will receive additional instructions regarding how you are to determine the damages the plaintiff would have [recovered] [avoided] in the absence of the lawyer's [negligence] [and] [or] [breach of fiduciary duty].

USE NOTES

This instruction should be used to provide the jury with an overall understanding of the appropriate measure of damages in a legal malpractice case. To the extent that it applies, the bracketed language should be included in the damages instruction.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — Generally speaking, "the measure of damages [in a legal malpractice case] is the difference between what the plaintiff's pecuniary position is and what it should have been had the attorney not erred." *See* 3 R. Mallen, *Legal Malpractice* § 21:8 at 16 (2016). The measure may vary depending upon the facts of a case, including the nature of the work that the attorney undertakes on behalf of a client. *Id.* at 16-17.

Ordinarily, substantive law will determine which elements of damage are recoverable in a case. The jury will need to be separately instructed on each of the elements. *Collins ex rel. Collins v. Perrine*, 1989-NMCA-046, 108 N.M. 714, 778 P.2d 912, illustrates those points. In that case, the plaintiffs' lawyer negligently prosecuted and advised the plaintiffs to settle the medical malpractice case that he had filed on their behalf. The appropriate measure of damages was the amount of the judgment that the plaintiffs could have recovered in their medical malpractice case but for the lawyer's negligence. The elements of damage on which the jury was instructed therefore included the nature, extent, and duration of the injury, pain and suffering, and loss of enjoyment of life suffered by the patient who had been injured through medical malpractice. There may be cases in which counsel will need to draft damages instructions to address a developing area of the law or a case-specific element or elements of damages.

Other jury instructions that may be given to the jury may impact the actual amount of damages that a legal malpractice plaintiff recovers. Examples of such instructions include comparative fault and mitigation of damages.

Consequential or special damages also may be recoverable. “Consequential damages are compensation for those additional injuries that are a proximate result of the attorney’s negligence or otherwise wrongful conduct, which do not flow directly from or concern the objective of the retention.” 3 Mallen, § 21:1 at 4. Ordinarily, substantive law will determine which consequential damages are recoverable. *See id.* §§ 21:17-21:24 (discussing the recoverability and non-recoverability of various types of consequential damages). *First Nat’l Bank v. Diane, Inc.*, 1985-NMCA-025, 102 N.M. 548, 698 P.2d 5, illustrates those points. In that case, a party named as a defendant brought a cross-action for legal malpractice against his attorney, whose negligent legal advice had resulted in an action being brought against the party. In his capacity as a cross-plaintiff, absent an applicable exception to the general rule that each party must pay his own legal fees, the party was not allowed to recover the attorney’s fees and costs that he incurred in bringing the cross-action. In his capacity as a defendant, the party was allowed to recover reasonable attorney’s fees that he had incurred in defending against litigation resulting from his attorney’s malpractice.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

13-2415. Legal malpractice; collectability. — *No instruction drafted*.

No instruction drafted.

Committee commentary. — Collectability refers to the ability to collect the damages that would have been recovered in the underlying case. There are only two New Mexico cases that touch upon this issue, *George v. Caton*, 1979-NMCA-028, 93 N.M. 370, 600 P.2d 822, and *Richardson v. Glass*, 1992-NMSC-046, 114 N.M. 119, 835 P.2d 835. New Mexico case law on collectability in a legal malpractice action is unsettled; therefore, no instruction is drafted.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

Appendix to Chapter 24

Appendix 1. Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case.

FACTS

Attorney Adams represented Ruben in a divorce with Maria. The result of the divorce was a division of assets between the two parties. The assets consisted of real property and cash. Maria received the real estate that was community property, as well as a large lump sum cash payment. Ruben later discovered that the property Maria received in the divorce may have been significantly undervalued in the divorce decree, which

may have resulted in a larger cash payment to Maria than she would have otherwise received.

Ruben did not know when he hired Attorney Adams that: 1) Adams in the past had represented Maria as her real estate lawyer and real estate development lawyer related to separate property that she owns; and 2) Maria still owes Adams a considerable fee for work he performed for her land development company.

Ruben brings a legal malpractice suit against Adams, alleging breach of fiduciary duty.

INSTRUCTIONS

The instructions set forth below represent one way in which the instructions in a legal malpractice case for breach of fiduciary duty could be structured. There are other equally acceptable ways to arrange these instructions, provided the general design of the 302 series of instructions (UJI 13-302A through 13-302F) is followed. The goal is to provide the jury with a clear set of instructions. Logic should be the guide in sequencing instructions. For purposes of this example, preliminary jury instructions (e.g., those found in Chapter 1), general instructions (e.g., those found in Chapter 2 and Chapter 20), and verdict forms have not been included. (Examples of verdict forms can be found in Chapter 22.) For purposes of trial, such instructions should be used as appropriate given the facts and circumstances of the case. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

UJI 13-302A

In this civil case, Ruben is seeking compensation from Adams for damages Ruben claims were caused by Adams' failure to disclose that Adams had a conflict of interest in representing Ruben because he had previously represented Maria in a substantially related matter, and is owed money by Maria.

UJI 13-302B

To establish his claim of legal malpractice, Ruben has the burden of proving that Adams put his own interests before those of Ruben, and that Adams did not disclose his representation of Maria and obtain a written waiver of conflict.

UJI 13-302C

Adams denies Ruben's contentions. Adams contends there was no conflict of interest because the previous representation of Maria regarding her separate property was not substantially related to the divorce proceeding.

UJI 13-2401

For Ruben to recover from Adams on Ruben's claim of legal malpractice, you must find that the following have been proved by a preponderance of the evidence:

1. Adams owed a duty to Ruben;

2. Adams breach that duty; and

3. That breach was a cause of a loss to Ruben.

UJI 13-2404

A lawyer has a fiduciary duty to

1. Have undivided loyalty to the client.

2. Disclose conflicts of interest to the client and obtain informed consent in writing that the client has waived the conflict.

A lawyer who fails to do so breaches his fiduciary duties.

UJI 13-2406

A lawyer has a duty of loyalty to a client. A lawyer breaches the duty of loyalty by putting the lawyer's own interests, or the interests of another, before those of the client.

UJI 13-2411

The Rules of Professional Conduct provide guidance to lawyers. Evidence regarding the Rules of Professional Conduct may be considered in deciding whether Adams owed Ruben a duty, and whether Adams breached that duty. However, that evidence is not conclusive. You must consider all of the evidence that you have heard in deciding the questions of duty and breach.

Part B: Sample fact pattern and jury instructions for malpractice of attorney in handling personal injury case.

FACTS

Lawyer Ana Lee represented client Lawrence Marton in his medical malpractice case against General Hospital and Dr. Park after Mr. Marton was injured when his stroke was not timely diagnosed by Dr. Park. Before being credentialed by General Hospital, Dr. Park lost credentials at another hospital for failing to timely complete medical records. Ms. Lee decided not to hire an expert in support of Mr. Marton's negligent credentialing claim against General Hospital for credentialing a doctor who

had been fired from another hospital in the past, reasoning that the negligence would be clearly understood by the jury. Mr. Marton then settled his claim against the doctor. Mr. Marton's only claim against the hospital was for negligent credentialing. The hospital filed a motion for summary judgment on the negligent credentialing claim because there was no expert testimony as to the standard of care. The motion was granted. After the conclusion of his medical malpractice case, Mr. Marton brought suit against Ms. Lee, claiming he would have prevailed on his negligent credentialing claim if Ms. Lee had retained an expert. As there was no issue of untimely completed medical records Mr. Marton's case, the hospital disputed that any causal link between the malpractice and the negligent credentialing claim existed.

INSTRUCTIONS

The instructions set forth below represent one way in which the instructions in a legal malpractice case for negligence could be structured. This case provides an example for compiling instructions in a case where causation and damages in the underlying case are at issue. The New Mexico Supreme Court has not expressly adopted the "trial-within-a-trial" approach. George v. Caton, 1979-NMCA-028, ¶¶ *46-47, 93 N.M. 370, 600 P.2d. 822. In a legal malpractice case where the malpractice asserted is negligence in handling an underlying claim or case, the jury must determine whether the plaintiff would have achieved a more favorable outcome in the underlying case. To enable the jury to assess the underlying claim, it may be appropriate either to present expert testimony as to the likely result of the underlying case, or for the jury to decide the probable outcome of the underlying case as if the jury were the jury on that case (i.e., calling and examining those persons who would have been witnesses and presenting the demonstrative and documentary evidence that would have been presented but for the attorney's negligence).* See *5 R. Mallen & J. Smith, Legal Malpractice, § 33.8;* see also Andrews v. Saylor, *2003-NMCA-132, ¶ 16, 134 N.M. 545, 80 P.3d 482. The method employed will depend on whether the trial court adopts the "trial-within-a-trial" approach, or an approach based on the use of expert testimony. If the trial court adopts the "trial-within-a-trial" approach, the jury should be provided with instructions for determining the probable outcome of the underlying case.*

UJI 13-302A

In this civil case, Lawrence Marton is seeking compensation from Ana Lee for damages Mr. Marton claims were caused by Ms. Lee's decision not to hire an expert in support of Mr. Marton's negligent credentialing claim against General Hospital.

UJI 13-302B

To establish his claim of legal malpractice, Mr. Marton has the burden of proving that he would have prevailed on his negligent credentialing claim had Ms. Lee retained an expert.

UJI 13-302C

Ms. Lee denies that Mr. Marton would have had been awarded damages had his negligent credentialing claim gone to the jury. She also claims that her decision not to hire an expert was not negligent, but was a reasonable decision at the time based on the information she had.

UJI 13-2401

For Mr. Marton to recover from Ms. Lee on Mr. Marton's claim of legal malpractice, you must find that the following have been proved by a preponderance of the evidence:

1. Ms. Lee owed a duty to Lawrence;

2. Ms. Lee breached that duty; and

3. That breach was a cause of a loss to Mr. Marton.

UJI 13-2403

A lawyer has a duty to use the same degree of care, skill, and diligence ordinarily used by attorneys under similar circumstances. A lawyer who fails to do so is negligent.

UJI 13-2407

A lawyer has a duty to advise the client of negative consequences a reasonable lawyer would conclude may result from the course of action the lawyer recommends. This duty does not require a lawyer to discuss with his client every possibility, no matter how small or remote.

UJI 13-2412

A lawyer does not necessarily breach a duty to a client just because she makes a decision and it turns out that another decision would have been a better choice.

UJI 13-2414

The damages that may be recovered in a legal malpractice action are those which the plaintiff would have recovered in the absence of the lawyer's negligence. The damages that may be recovered also include expenses that the plaintiff incurred to avoid or reduce the loss caused by the lawyer’s negligence. You will receive additional instructions regarding how you are to determine the damages the plaintiff would have recovered in the absence of the lawyer’s negligence.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]

CHAPTER 25
Unfair Practices Act

Introduction

The instructions in this chapter are for use in cases involving claims brought under the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with instructions that set forth the elements a plaintiff must prove in a UPA claim based on unfair or deceptive trade practices or unconscionable trade practices. Following the elements instructions are three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); Rule Set 13, Chapter 18 NMRA (Damages).

The instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter. Instructions from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these instructions for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists).

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

13-2501. Unfair or deceptive trade practices; elements; misrepresentation.

The Unfair Practices Act prohibits unfair or deceptive trade practices. For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) engaged in an unfair or deceptive trade practice, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was false or misleading; and

2. The [statement] [description] [or] [representation] was knowingly made; and

3. [The [statement] [description] [or] [representation] was made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] [and] [in the regular course of the defendant's business]; and]

4. The [statement] [description] [or] [representation] was of the type that may, tends to, or does deceive or mislead any person.

[Practices prohibited by the Unfair Practices Act include _____ (*insert enumerated practice(s) from NMSA 1978, § 57-12-2(D)*).]

[A representation need not involve words in order to violate the Unfair Practices Act. A nonverbal action or failure to act may amount to a false or misleading representation.]

[A [statement] [description] [or] [representation] is false or misleading if it omits a material fact and, as a result, is deceptive or tends to deceive. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining a choice of action or if the maker of the [statement] [description] [or] [representation] knows or has reason to know that its recipient regards or is likely to regard the fact as important.]

[A false or misleading [statement] [description] [or] [representation] need not actually deceive any person in order to violate the Unfair Practices Act. The Act may be violated by any [statement] [description] [or] [representation] that may, tends to, or does deceive.]

USE NOTES

This instruction should be given in every case alleging an unfair or deceptive trade practice under the UPA. It sets out the elements of the claim with a focus on the foundational element of a false or misleading representation. The bracketed text in the four numbered sentences of the first paragraph should be used as required by the circumstances of the case. The third numbered sentence should be given, if at all, only to the extent it frames disputed issues for determination by the jury. The bracketed text in the second paragraph may be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in Section 57-12-2(D) NMSA 1978. The bracketed text in the third paragraph may be used when the defendant's nonverbal actions are alleged to amount to a false or misleading representation and the court determines that the conduct in question could be found to be a representation within the scope of the UPA. The bracketed text in the fourth paragraph should be used if the plaintiff's claim is based on an alleged material omission. The bracketed text in the final paragraph should be used if the court determines it would be helpful to the jury in understanding "tends to deceive." The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

Committee commentary. — "The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services." *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437,166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

> (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

Nonverbal conduct may implicate the UPA. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459, 50 P.3d 554 ("The UPA does not require a statement, but rather any representation."). For example, acts or failures to act which indicate that the defendant has a right to act in a particular way or that the defendant owes no legal obligation to the plaintiff, if false or misleading, can be the basis for a UPA claim. *See id.*

Omission of a material fact, if deceptive, may violate the UPA. *See* NMSA 1978, § 57-12-2(D)(14). "[A] fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important." *Azar v. Prudential Ins. Co.*, 2003-NMCA-062, ¶ 72, 133 N.M. 669, 68 P.3d 909 (internal quotation marks and citation omitted).

Although a breach of contract may fit the statutory definition of "failing to deliver the quality or quantity of goods or services contracted for," *see* NMSA 1978, § 57-12-2(D)(17), a breach must also satisfy the "knowingly made" element in order to be actionable as a UPA violation. *See Stevenson*, 1991-NMSC-051, ¶¶ 15-17, 112 N.M. 97, 811 P.2d 1308. *See also* UJI 13-2503 committee commentary.

An unfair or deceptive trade practice is one "that may, tends to or does deceive or mislead any person." NMSA 1978, § 57-12-2(D). A UPA violation may be established without proof of actual deception. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545 ("[T]he UPA does not require that the defendant's conduct actually deceive a consumer; it permits recovery even if the conduct only 'tends to deceive.'").

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434. *Cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F. Supp. 3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

13-2502. Unconscionable trade practices; elements.

The Unfair Practices Act [also] prohibits unconscionable trade practices. For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) engaged in an unconscionable trade practice, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____'s (*name of plaintiff*) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (*name of plaintiff*) and the price paid].

[Conduct may be said to take advantage of a person's lack of knowledge, ability, experience, or capacity to a grossly unfair degree if the conduct was designed to take advantage of particular characteristics or vulnerabilities of the person and resulted in gross unfairness.]

[A gross disparity exists between value received and price paid if, considering the transaction between the parties, the value received by a person from the transaction is grossly disproportionate to what the person gave up in the transaction.]

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in an unconscionable trade practice. The last two bracketed paragraphs are definitional and may be used when they would be helpful to the jury's understanding of "grossly unfair degree" and/or "gross disparity" in the circumstances of the case. It may be appropriate to draft other definitional instructions to assist the jury in evaluating the conduct at issue in the case.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

Committee commentary. — The UPA defines an unconscionable trade practice as:

> [A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:
>
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
>
> (2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, § 57-12-2(E) (2019).

“Given Plaintiff's potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

> to support the district court’s ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers’ detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree, we look “at practices in the aggregate, as well as the borrowers’ characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134 N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank’s pattern of conduct and demographic factors of the borrowers in determining

whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple's ranch:

> [T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a 'grossly unfair degree' because of (1) the Ribbles' advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants' pattern of conduct demonstrated that "they were leveraging the borrowers' cognitive and behavioral weaknesses to Defendants' advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico." 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that "[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a 'grossly unfair degree.' " *Id.*

Gross disparity

"In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity." *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See id.* ("Under Plaintiff's view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff's subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.").

"[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate." *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). "Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate." *Id.*

Under the common law, substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair. *See B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

13-2503. Knowingly; definition.

A claim of unfair or deceptive trade practices under the Unfair Practices Act requires that a [statement] [description] [or] [representation] be "knowingly" made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____ (*name of defendant*) was actually aware that the statement was false or misleading when it was made, or

_____ (*name of defendant*), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA — *i.e.*, that the false or misleading representation was knowingly made — is disputed.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

Committee commentary. — The UPA requires, as an element of a claim of unfair or deceptive trade practices, that a "false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business." *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). "'[K]nowingly made' is an integral part of all UPA claims and must be the subject of actual proof." *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal quotation marks, and citation omitted).

"[T]he misrepresentation need not be intentionally made, but it must be knowingly made." *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed "knowledge" and "knowingly made," in this context, as follows:

> 'Knowledge' does not necessarily mean 'actual knowledge,' but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.
>
> The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very

> limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

13-2504. In connection with the sale of goods or services.

A claim of unfair or deceptive trade practices under the Unfair Practices Act requires that a false or misleading [statement] [description] [or] [representation] be made in connection with the sale, lease, rental, or loan of goods or services. A transaction between _____ (*name of defendant*) and _____ (*name of plaintiff*) is not required. It is sufficient if _____ (*name of defendant*) made a false or misleading misrepresentation in connection with a sale, lease, rental, or loan of goods or services to a third party.

USE NOTES

This instruction should be given when the alleged UPA violation does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the Act. "The conjunctive phrase 'in connection with' seems designed to encompass a broad array of commercial relationships." *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An "unfair or deceptive trade practice" does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* ("Similarly, the UPA allows claims to be brought by 'any person' who suffers damages 'as a result' of any unfair or deceptive trade practice by another." (citing NMSA 1978, § 57-12-10(B) (2005)). "[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally" by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329 P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—"arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties." *Lohman*, 2007-NMCA-100, ¶ 30. "[A] commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim." *Id.* ¶ 33.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

13-2505. Willful conduct.

In this case _____ (*name of plaintiff*) claims that _____'s (*name of defendant*) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____'s (*name of plaintiff*) claim only if you first find that _____ (*name of defendant*) violated the New Mexico Unfair Practices Act. Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

Committee commentary. — "The UPA provides for two tiers of monetary remedies for individuals." *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. "For a basic violation, a private party can recover 'actual damages or the sum of one hundred dollars ($100), whichever is greater.'" *Id.* (quoting Section 57-12-10(B)). "For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars ($300), whichever is greater." *Id.* (internal quotation marks, citation, and alteration omitted). "Thus, in a jury trial (1) the jury may assess actual, or compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct." *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define "willfully." In addressing the issue as a matter of first impression in *Atherton*, the Court of Appeals concluded that, "[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate 'willfulness.'" 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 ("Multiplication of damages pursuant to statutory authority is a form of punitive damages."). Correspondingly, the Court of Appeals concluded that the definition of "willful" in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines "[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result." The definition provides "a clear method for proof of a culpable mental state by requiring a showing of deliberation and a

disregard for foreseeable risk." *Atherton*, 2015-NMCA-003, ¶ 54. "Proof of these two elements provides a solid foundation for punishment." *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12. *Cf. Hale*, 1990-NMSC-068, ¶ 21 ("When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages."); *see also id.* ¶ 20 (citing illustrative cases). Second, "to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA." *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g.*, *Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

13-2506. Damages.

If you decide that _____ (*name of defendant*) violated the Unfair Practices Act, _____ (*name of plaintiff*) is entitled to recover the amount of money that will reasonably and fairly compensate _____ (*name of plaintiff*) for the following damages proved by _____ (*name of plaintiff*) to have resulted from the violation.

(*insert brief description of elements of damages claimed*).

Whether _____ (*name of plaintiff*) has proved any damages is for you to determine based on the evidence presented at trial.

_____ (*name of plaintiff*) is not required to prove damages as a result of the Unfair Practices Act violation in order to recover from _____ (*name of defendant*). If _____ (*name of plaintiff*) does not prove that _____ (*name of plaintiff*) suffered damages as a result of the Unfair Practices Act violation, the law requires the judge to award the plaintiff the sum of one hundred dollars ($100) as a consequence of the violation.

USE NOTES

This instruction is to be used in all cases claiming damages for violation of the Unfair Practices Act (UPA). The elements of damages claimed by the plaintiff (*e.g.*, "the

amount of money the plaintiff contributed to the defendant's allegedly bogus charity") should be included in the instruction if the court determines that the damages claimed are recoverable under the UPA and are supported by evidence. If the jury finds that the plaintiff's damages are less than $100 or that the plaintiff failed to prove any damages, the court must award the plaintiff $100 as statutory damages. The court may award up to treble damages or three hundred dollars ($300), whichever is greater, if the jury finds by special verdict that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the practice. *See* NMSA 1978, § 57-12-10(B) (2005); UJI 13-2505 NMRA.

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

Committee commentary. — Under the Unfair Practices Act,

> [a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the practice.

NMSA 1978, § 57-12-10(B). The New Mexico appellate courts have not yet determined whether "actual damages" recoverable under this provision may encompass non-economic damages such as emotional distress or special damages.

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars ($100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that "the UPA . . . require[s] proof of a causal link between conduct and loss." 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found "nothing in the language of [the UPA] requiring proof of a link between conduct

and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant's conduct actually deceive a consumer; it permits recovery even if the conduct only 'tends to deceive.'" *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No.22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

Appendix to Chapter 25

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing such a claim could be structured. The appendix is illustrative and does not preclude other approaches, provided the general design reflected in the Uniform Jury Instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in Chapter 1) and general instructions (such as those found in Chapters 2, 3, and 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was sold as a "new demonstrator." Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and repairs had been made to the fender and door by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at $13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at $10,500. The Romeros had the car repainted at a cost of $1,000. They testified that they were extremely upset by the dealer's deceptive tactics and that they were inconvenienced by being unable to use the car during the time it was being repainted.

The Romeros brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

UJI 13-302A

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

UJI 13-302B

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it sold the Ford Fiesta to them as a “new demonstrator” and did not disclose that the vehicle had been involved in a collision and had been repaired.

UJI 13-302C

Defendant Desert Auto Sales denies that it violated the Unfair Practices Act, because its description of the vehicle disclosed that it had a history of use as a demonstrator before being sold to the Romeros.

UJI 13-302E

Related to the above, the Romeros say, and have the burden of proving, that any misrepresentation regarding the Ford Fiesta by Desert Auto Sales was willful.

UJI 13-2501

The New Mexico Unfair Practices Act prohibits unfair or deceptive trade practices. For the Romeros to prove that Desert Auto Sales engaged in an unfair or deceptive trade practice, the Romeros must prove that:

1. Desert Auto Sales made an oral or written statement or a representation of any kind that was false or misleading; and

2. The statement or representation was knowingly made; and

3. The statement or representation was of the type that may, tends to, or does deceive or mislead any person.

Practices prohibited by the Unfair Practices Act include:

- Representing that goods are new if they are deteriorated or altered;

- Representing that goods are of a particular quality or standard if they are not;

- Failing to state a material fact if doing so deceives or tends to deceive.

A statement or representation is false or misleading if it omits a material fact and, as a result, is deceptive or tends to deceive. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining a choice of action or if the maker of the statement or representation knows or has reason to know that its recipient regards or is likely to regard the fact as important.

A false or misleading statement or representation need not actually deceive any person in order to violate the Unfair Practices Act. The Act may be violated by any statement or representation that may, tends to, or does deceive.

UJI 13-2503

A claim of unfair or deceptive trade practices under the Unfair Practices Act requires that a statement or representation be "knowingly" made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto sales was actually aware that the statement was false or misleading when it was made, or

Desert Auto Sales, by using reasonable diligence, should have been aware that the statement was false or misleading.

UJI 13-2505

In this case, the Romeros claim that Desert Auto Sales' conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros' claim only if you first find that Desert Auto Sales violated the Unfair Practices Act. Willful conduct is the intentional doing of an act with knowledge that harm may result.

UJI 13-2506

If you decide that Desert Auto Sales violated the Unfair Practices Act, Joseph and Kathryn Romero are entitled to recover the amount of money that will reasonably and fairly compensate them for the following damages proved by them to have resulted from the violation.

(*insert brief description of elements of damages claimed*)

Whether the Romeros have proved any damages is for you to determine based on the evidence presented at trial.

The Romeros are not required to prove damages as a result of the Unfair Practices Act violation in order to recover from Desert Auto Sales. If the Romeros do not prove that they suffered damages as a result of the Unfair Practices Act violation, the law requires the judge to award them the sum of one hundred dollars ($100) as a consequence of the violation.

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

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

Question No. 2: Was Desert Auto Sales' violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is "Yes" or "No," you are to answer Question No. 3.

Question No. 3: Did the Romeros suffer damages as a result of Desert Auto Sales' violation of the Unfair Practice Act?

Answer: _____ (Yes or No)

If the answer to Question No. 3 is "Yes," you are to answer Question No. 4. If the answer to Question No. 3 is "No," you are not to answer further questions. Your foreperson must sign this special verdict. The judge will award $100 to the Romeros as a consequence of Desert Auto Sales' violation of the Unfair Practices Act.

Question No. 4: In accordance with the damages instruction given by the court, we find the total amount of damages suffered by the Romeros to be _____. (*Here enter the amount of the Romeros' damages.*)

_____
Foreperson

[Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or after February 21, 2022.]

UJI CIVIL INSTRUCTIONS
POST-1986 RECOMPILATION TABLES

1986 Compilation	New UJI Number
13-101	13-101
	13-102A
13-101	13-103A
13-101	13-104A
13-102	13-105A
13-103	13-106A

New UJI Number	1986 Compilation
13-101	13-101
13-103A	13-101
13-104A	13-101
13-105A	13-102
13-106A	13-103
13-107A	13-104

13-104	13-107A
13-105	13-108A
13-106	13-110
	13-111
	13-112
	13-113
13-107	13-118
13-108	13-119
13-206	13-114
13-1119	13-1119A
13-1120	13-1120A
13-1104C	13-1104A
13-1104A	13-1104B
13-1104B	13-1104C
13-1901	13-115
13-1902	13-116
13-1903	13-117

13-108A	13-105
13-110	13-106
13-111	13-106
13-112	13-106
13-113	New instruction
13-114	13-206
13-115	13-1901
13-116	13-1902
13-117	13-1903
13-118	13-107
13-119	13-108
13-1119A	13-1119
13-1120A	13-1120
13-1104A	13-1104C
13-1104B	13-1104A
13-1104C	13-1104B

Table Of Corresponding Instructions

The first table below reflects the disposition of the former Uniform Jury Instructions - Civil. The left-hand column contains the former rule number, and the right-hand column contains the corresponding present Uniform Jury Instructions - Civil.

The second table below reflects the antecedent provisions in the former Uniform Jury Instructions - Civil (right-hand column) of the present Uniform Jury Instructions - Civil (left-hand column).

Former Instruction	UJI
1.0	Ch. 1 Introduction
1.1	13-101
1.2	13-102
1.3	13-103
1.4	13-104
1.5	13-105

Former Instruction	UJI
4.11	13-411
4.12	13-412
4.13	13-413
5	Ch. 5 Introduction
5.1	13-501
5.2	13-502

1.6	13-106
1.7	None
1.8	13-107
1.9	13-108
2.0	Ch. 2 Introduction
2.1	13-201
2.2	13-202
2.3	13-203
2.4	13-204
2.5	13-205
2.6	13-206
2.7	13-207
2.8	13-208
2.9	13-209
2.10	13-210
2.11	13-211
2.12	13-212
2.13	13-213
3.0	Ch. 3 Introduction
3.1	13-301
3.2	13-302
3.2(A)	13-302A
3.2(B)	13-302B
3.2(C)	13-302C
3.2(D)	13-302D
3.2(E)	13-302E
3.2(F)	13-302F
3.3	13-303
3.4	None
3.5	None
3.6	13-304
3.7	13-304
3.8	13-305
3.9	13-306
3.10	13-307
3.11	13-308
4.0	Ch. 4 Introduction
4.1	13-401
5.3	13-503
5.4	13-504
5.5	13-505
5.6	13-506
6.0	Ch. 6 Introduction
6.1	13-601
6.2	13-602
6.3	13-603
6.4	13-604
6.5	13-605
7.0	Ch. 7 Introduction
7.1	13-701
7.2	13-702
7.3	13-703
7.4	13-704
7.5	13-705
7.6	13-706
7.7	13-707
7.8	13-708
7.9	13-709
7.10	13-710
7.11	13-711
7.12	13-712
7.13	13-713
7.14	13-714
7.15	13-715
7.16	13-716
7.17	13-717
7.18	13-718
7.19	13-719
7.20	13-720
7.21	13-721
7.22	13-722
7.23	13-723
7.24	13-724
8.0	Ch. 8 Introduction
8.1	None
8.2	None

4.2	13-402
4.3	13-403
4.4	13-404
4.5	13-405
4.6	13-406
4.7	13-407
4.8	13-408
4.9	13-409
4.10	13-410

Former Instruction	UJI
8.12	13-841
8.13	13-840
8.14	None
8.15	None
8.16	None
8.17	13-829
8.18	13-826
8.19	None
8.20	None
8.21	13-837
8.22	13-839
8.23	13-839
8.24	13-838
8.25	13-814
8.26	13-830
8.27	13-843
8.27A to 8.27F	13-846—13-852
8.28	None
8.28A	None
8.28B	None
8.28C	None
8.28D	None
8.28E	None
8.28F	None
9.0	Ch. 9 Introduction
9.1	13-901
8.3	None
8.4	None
8.5	13-807—13-813
8.6	13-817
8.7	None
8.8	13-842
8.9	13-831
8.10	None
8.11	None

Former Instruction	UJI
11.4A	13-1104A
11.4B	13-1104B
11.5	13-1105
11.6	13-1106
11.7	13-1107
11.8	13-1108
11.9A	13-1109A
11.9B	13-1109B
11.9C	13-1109C
11.10	13-1110
11.11	13-1111
11.12	13-1112
11.13	13-1113
11.14	13-1114
11.15	13-1115
11.16	13–1116A, 13–1116B
11.17	13-1117
11.18	13-1118
11.19 to 11.21	None
11.22	13-1119
11.23	13-1120
11.24	13-1121
11.25	13-1122
11.26	13-1123
11.27	None
11.28	13-1124

9.2	13-902
9.3	13-903
9.4	13-904
9.5	13-905
9.6	13-906
9.7	13-907
9.8	13-908
9.9	13-909
9.10	13-910
9.11	13-911
9.12	13-912
9.13	13-913
9.14	13-914
9.15	13-915
9.16	13-916
9.17	13-917
9.18	13-918
9.19	13-919
9.20	13-920
9.21	13-921
10.0 to 10.9	None
10.10	13-1009
10.11	13-1007
10.12, 10.13	13-1009
10.14	13-1009
10.15	13-1007
10.16	13-1008
10.17	13-1009
10.18	13-1013
10.19 to 10.21	13-1010
10.22	13-1014
10.23, 10.24	13-1012
10.25	13-1002, 13-1005
10.26	None
11.00	Ch. 11 Introduction
11.1	13-1101
11.2	13-1102
11.29 to 11.39	None
11.40	13-1125
11.41	13-1126
12.0	Ch.12 Introduction
12.1	13-1201
12.2	13-1202
12.3	13-1203
12.4	13-1204
12.5	13-1205
12.6	13-1206
12.7	13-1207
12.8	13-1208
12.9	13-1209
12.10	13-1210
12.11	13-1211
12.12	13-1212
12.13	13-1213
13.0	Ch. 13 Introduction
13.1	13-1301
13.2	13-1302
13.3	13-1303
13.4	13-1304
13.5	13-1305
13.6	13-1306
13.7	13-1307
13.8	13-1308
13.9	13-1309
13.10	13-1310
13.11	13-1311
13.12	13-1312
13.13	13-1313
13.14	13-1314
13.15	13-1315
13.16	13-1316
13.17	13-1317
13.18	13-1318
13.19	13-1319

Former Instruction	UJI
11.3	13-1103
14.0	Ch. 14 Introduction
14.1	13-1401
14.2	13-1402
14.3	13-1403
14.4	13-1404
14.5	13-1405
14.6	13-1406
14.7	13-1407
14.8	13-1408
14.9	13-1409
14.10	13-1410
14.11	13-1411
14.12	13-1412
14.13	13-1413
14.14	13-1414
14.15	13-1415
14.16	13-1416
14.17	13-1417
14.18	13-1418
14.19	13-1419
14.20	13-1420
14.21	13-1421
14.22	13-1422
14.23	13-1423
14.24	13-1424
14.25	13-1425
14.26	13-1426
14.27	13-1427
14.28	13-1428
14.29	13-1429
14.30	13-1430
14.31	13-1431
14.32	13-1432
14.33	13-1433
15.0	Ch. 15 Introduction

Former Instruction	UJI
Appendix	None
17.1—17.3	None
17.4	13-843
17.5	None
18.0	Ch. 18 Introduction
18.1	13-1801
18.2	13-1802
18.3	13-1803
18.4	13-1804
18.5	13-1805
18.6	13-1606
18.7	13-1807
18.8	13-1808
18.9	13-1809
18.10	13-1810
18.11	13-1811
18.12	13-1812
18.13	13-1813
18.14	13-1814
18.15	13-1815
18.16	13-1816
18.17	13-1817
18.18	13-1818
18.19	13-1819
18.20	13-1820
18.21	13-1821
18.22	13-1822
18.23	13-1823
18.24	13-1824
18.25	13-1825
18.26	13-1826
18.27	13-1827
18.28	13-1828
18.29	13-1829
18.30	13-1830
18.31	13-1831

15.1	13-1501
15.2	13-1502
15.3, 15.4	None
15.5	13-1505
16.0	Ch. 16 Introduction
16.1	13-1601
16.2	13-1602
16.3	13-1603
16.4	13-1604
16.5	13-1605
16.6	13-1606
16.7	13-1607
16.8	13-1608
16.9	13-1609
16.10	13-1610
16.11	13-1611
16.12	13-1612
16.13	13-1613
16.14	13-1614
16.15	13-1615
16.16	13-1616
16.17	13-1617
16.18	13-1618
16.19	13-1827
16.20	13-1620
16.21	13-1621
16.22	13-1622
16.23	13-1623
17.0	Ch. 8 Introduction

Former Instruction	UJI
19.0	Ch. 19 Introduction
19.1	13-1901
19.2	13-1902
19.3	13-1903
19.4	13-1904
19.5	13-1905
19.6	13-1906
20.0	Ch. 20 Introduction
20.1	13-2001
20.2	13-2002
20.3	13-2003
20.4	13-2004
20.5	13-2005
20.6	13-2006
20.7	13-2007
20.8	13-2008
20.9	13-2009
21.0	Ch. 21 Introduction
21.1	13-2101
21.2	13-2102
21.3	13-2103
21.4	13-2104
21.5	13-2105
21.6	13-2106
21.7	13-2107
21.8	13-2108
21.9	13-2109
21.10	13-2110
21.11	13-2111

Former Instruction	UJI
21.12	13-2112
21.13	13-2113
21.14	13-2114
21.15	13-2115
21.16	13-2116
21.17	13-2117
21.18	13-2118
22.4	13-2204
22.5	13-2205
22.6	13-2206
22.7	13-2207
22.8	13-2208
22.9	13-2209
22.10	13-2210

21.19	13-2119
21.20	13-2120
21.21	13-2121
21.22	13-2122
21.23	13-2123
21.24	13-2124
21.25	13-2125
22.0	Ch. 22 Introduction
22.1	13-2201
22.2	13-2202
22.3	13-2203
22.11	13-2211
22.12	13-2212
22.13	13-2213
22.14	13-2214
22.15	13-2215
22.16	13-2216
22.17	13-2217
22.18	13-2218
22.19	13-2219
22.20	13-2220
22.21	13-2221

UJI	Former Instruction
Ch. 1 Introduction	1.0
13-101	1.1
13-102	1.2
13-103	1.3
13-104	1.4
13-105	1.5
13-106	1.6
13-107	1.8
13-108	1.9
Ch. 2 Introduction	2.0
13-201	2.1
13-202	2.2
13-203	2.3
13-204	2.4
13-205	2.5
13-206	2.6
13-207	2.7
13-208	2.8
13–209	2.9
13-210	2.10
13-211	2.11
13-212	2.12
13-213	2.13
Ch. 3 Introduction	3.0
13-301	3.1
13-605	6.5
Ch. 7 Introduction	7.0
13-701	7.1
13-702	7.2
13-703	7.3
13-704	7.4
13-705	7.5
13-706	7.6
13-707	7.7
13-708	7.8
13-709	7.9
13–710	7.10
13-711	7.11
13-712	7.12
13-713	7.13
13-714	7.14
13-715	7.15
13-716	7.16
13-717	7.17
13-718	7.18
13-719	7.19
13-720	7.20
13-721	7.21
13-722	7.22
13-723	7.23

13-302	3.2
13-302A	3.2(A)
13-302B	3.2(B)
13-302C	3.2(C)
13-302D	3.2(D)
13-302E	3.2(E)
13-302F	3.2(F)
13-303	3.3
13-304	3.6, 3.7
13-305	3.8
13-306	3.9
13-307	3.10
13-308	3.11
Ch. 4 Introduction	4.0
13-401	4.1
13-402	4.2
13-403	4.3
13-404	4.4
13-405	4.5
13-406	4.6
13-407	4.7
13-408	4.8
13-409	4.9
13-410	4.10
13-411	4.11
13-412	4.12
13-413	4.13
Ch. 5 Introduction	5.0
13-501	5.1
13-502	5.2
13-503	5.3
13-504	5.4
13-505	5.5
13-506	5.6
Ch. 6 Introduction	6.0
13-601	6.1
13-602	6.2
13-603	6.3
13-724	7.24
Ch. 8 Introduction	8.0
13-801—13-806	None
13-807 to 13-813	8.5
13-814	8.25
13-815, 13-816	None
13-817	8.6
13-818 to 13-825	None
13-826	8.18
13-827	None
13-828	None
13-829	8.17
13-830	8.26
13-831	8.9
13-832—13-836	None
13-837	8.21
13-838	8.24
13-839	8.22
13-840	8.13
13-841	8.12
13-842	8.8
13-843	8.27
13-844, 13-845	None
13-846—13-849	8.27A to 8.27D
13-850	8.27E
13-851	8.27F
13-852 to 13-861	None
Ch. 9 Introduction	9.0
13-901	9.1
13-902	9.2
13-903	9.3
13-904	9.4
13-905	9.5
13-906	9.6
13-907	9.7
13-908	9.8
13-909	9.9
13-910	9.10

13-604	6.4

13-911	9.11

UJI	Former Instruction
13-912	9.12
13-913	9.13
13-914	9.14
13-915	9.15
13-916	9.16
13-917	9.17
13-918	9.18
13-919	9.19
13-920	9.20
13-921	9.21
13-1001	None
13-1002	10.25
13-1003	None
13-1004	None
13-1005	10.25
13-1006	None
13-1007	10.11, 10.15
13-1008	10.16
13-1009	10.10, 10.12, 10.13, 10.14, 10.17
13-1010	10.19, 10.20, 10.21
13-1011	None
13-1012	10.23, 10.24
13-1013	10.18
13-1014	10.22
Ch. 11 Introduction	11.0
13-1101	11.1
13-1102	11.2
13-1103	11.3
13-1104A	11.4A
13-1104B	11.4B
13-1104C	None
13-1105	11.5
13-1106	11.6

UJI	Former Instruction
13-1209	12.9
13-1210	12.10
13-1211	12.11
13-1212	12.12
13-1213	12.13
Ch. 13 Introduction	13.0
13-1301	13.1
13-1302	13.2
13-1303	13.3
13-1304	13.4
13-1305	13.5
13-1306	13.6
13-1307	13.7
13-1308	13.8
13-1309	13.9
13-1310	13.10
13-1311	13.11
13-1312	13.12
13-1313	13.13
13-1314	13.14
13-1315	13.15
13-1316	13.16
13-1317	13.17
13-1318	13.18
13-1319	13.19
Ch. 14 Introduction	14.0
13-1401	14.1
13-1402	14.2
13-1403	14.3
13-1404	14.4
13-1405	14.5
13-1406	14.6
13-1407	14.7

13-1107	11.7
13-1108	11.8
13-1109A	11.9A
13-1109B	11.9B
13-1109C	11.9C
13-1110	11.10
13-1111	11.11
13-1112	11.12
13-1113	11.13
13-1114	11.14
13-1115	11.15
13-1116A, 13-1116B	11.16
13-1117	11.17
13-1118	11.18
13-1119	11.22
13-1120	11.23
13-1121	11.24
13-1122	11.25
13-1123	11.26
13-1124	11.28
13-1125	11.40
13-1126	11.41
Ch. 12 Introduction	12.0
13-1201	12.1
13-1202	12.2
13-1203	12.3
13-1204	12.4
13-1205	12.5
13-1206	12.6
13-1207	12.7
13-1208	12.8
13–1408	14.8
13-1409	14.9
13-1410	14.10
13-1411	14.11
13-1412	14.12
13-1413	14.13
13-1414	14.14
13-1415	14.15
13-1416	14.16
13-1417	14.17
13-1418	14.18
13-1419	14.19
13-1420	14.20
13–1421	14.21
13-1422	14.22
13-1423	14.23
13-1424	14.24
13-1425	14.25
13-1426	14.26
13-1427	14.27
13-1428	14.28
13-1429	14.29
13-1430	14.30
13-1431	14.31
13-1432	14.32
13-1433	14.33
Ch. 15 Introduction	15.0
13-1501	15.1
13-1502	15.2
13-1503, 13-1504	None
13-1505	15.5

UJI	Former Instruction
Ch. 16 Introduction	16.0
13-1601	16.1
13-1602	16.2
13-1603	16.3
13-1904	19.4
13-1905	19.5
13-1906	19.6
Ch. 20 Introduction	20.0

13-1604	16.4	13-2001	20.1
13-1605	16.5	13-2002	20.2
13-1606	16.6	13-2003	20.3
13-1607	16.7	13-2004	20.4
13-1608	16.8	13-2005	20.5
13-1609	16.9	13-2006	20.6
13-1610	16.10	13-2007	20.7
13-1611	16.11	13-2008	20.8
13-1612	16.12	13-2009	20.9
13-1613	16.13	Ch. 21 Introduction	21.0
13-1614	16.14	13-2101	21.1
13-1615	16.15	13-2102	21.2
13-1616	16.16	13-2103	21.3
13-1617	16.17	13-2104	21.4
13-1618	16.18	13-2105	21.5
13-1620	16.20	13-2106	21.6
13-1621	16.21	13-2107	21.7
13-1622	16.22	13-2108	21.8
13-1623	16.23	13-2109	21.9
13-1624 — 13-1633	None	13-2110	21.10
Ch. 17 Introduction	None	13-2111	21.11
13-1701 — 13-1718	None	13-2112	21.12
Ch. 18 Introduction	18.0	13-2113	21.13
13-1801	18.1	13-2114	21.14
13-1802	18.2	13-2115	21.15
13-1803	18.3	13-2116	21.16
13-1804	18.4	13-2117	21.17
13-1805	18.5	13-2118	21.18
13-1806	18.6	13-2119	21.19
13-1807	18.7	13-2120	21.20
13-1808	18.8	13-2121	21.21
13-1809	18.9	13-2122	21.22
13-1810	18.10	13-2123	21.23
13-1811	18.11	13-2124	21.24

13-1812	18.12
13-1813	18.13
13-1814	18.14
13-1815	18.15
13-1816	18.16
13-1817	18.17
13-1818	18.18
13-1819	18.19
13-1820	18.20
13-1821	18.21
13-1822	18.22
13-1823	18.23
13-1824	18.24
13-1825	18.25
13-1826	18.26
13-1827	16.19, 18.27
13-1828	18.28
13-1829	18.29
13-1830	18.30
13-1831	18.31
Ch. 19 Introduction	19.0
13-1901	19.1
13-1902	19.2
13-1903	19.3
13-2125	21.25
Ch. 22 Introduction	22.0
13-2201	22.1
13-2202	22.2
13-2203	22.3
13-2204	22.4
13-2205	22.5
13-2206	22.6
13-2207	22.7
13-2208	22.8
13-2209	22.9
13-2210	22.10
13-2211	22.11
13-2212	22.12
13-2213	22.13
13-2214	22.14
13-2215	22.15
13-2216	22.16
13-2217	22.17
13-2218	22.18
13-2219	22.19
13-2220	22.20
13-2221	22.21