

THE NEW MEXICO TRIAL LAWYER

The Journal of the New Mexico Trial Lawyers' Foundation

October-December 1999

VOL. XXIX, NO. 9

THE DEMISE OF INDEPENDENT INTERVENING CAUSE:

TORRES VS. EL PASO ELECTRIC COMPANY

T.O. Gilstrap, Jr., JD



Lawrence M. Pickett, JD



Credit should be given to the New Mexico Court of Appeals and Supreme Court for their in-depth consideration and eventual ruling by the Supreme Court as to whether the doctrine of independent intervening cause to negligent acts is inconsistent with New Mexico's system of pure comparative fault. In this personal injury case, a jury verdict in May 1996 found the defendant El Paso Electric Company negli-

gent and negligent per se following Francisco Torres' contact with an overhead high voltage distribution line while repairing the roof of a greenhouse for his employer, Aldershot of New Mexico, Inc. However, the jury found no proximate cause which resulted in the appeal of this negligence case on numerous grounds which will be discussed below. On June 30, 1999 the New Mexico Supreme Court, following a certification from the New Mexico Court of Appeals, reversed the trial court verdict and a directed verdict on the issue of punitive damages, allowing Francisco and Sonia Torres a new trial.

Significantly, one (1) of the points of appeal asserted by the plaintiff to the Court of Appeals was the trial court's use of the defense of independent intervening cause. Plaintiff's argument was based upon the facts of the Torres case that a sophisticated utility company with its policies and experience, and the state of condition of its equipment in this case, did not support an issue to the jury that the conduct of the plaintiff, his employer and/or other third parties was not foreseeable, and that therefore the independent intervening cause theory of defense was inapplicable. The plaintiffs' appeal point was simple, the facts of this case did not support an independent intervening cause theory of defense. However, the New Mexico Court of Appeals went beyond the presentation of issue in the Appellants' brief and certified the case to the New Mexico Supreme Court on the issue of whether independent intervening cause has outlived its usefulness in New Mexico's system of pure comparative fault.

"Demise of Independent Intervening" cont. on page 211

IN THIS ISSUE:

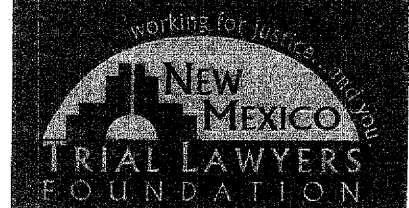
195 In the United States
District Court
by Philip Davis

197 Seminar Editor
by Patrick Sullivan

199 Maximizing Recovery:
Medical Payments
and Equitable
Subrogation
by David J. Berardinelli

"Did this Jury Go
Crazy? NOT!
-The Ivey Memo

Tort Reform Does
Not Reduce Insurance
Rates
by Jeanne Benschow



"Demise of Independent Intervening"

continued from front page

The Supreme Court held:

1. That in New Mexico the doctrine of independent intervening cause does not apply to a plaintiff's negligence;
2. That the jury shall not be instructed on independent intervening cause for a plaintiff's alleged comparative negligence;
3. Instruction on independent intervening cause is sufficiently repetitive of the instruction on proximate cause and in the task of apportioning fault that any potential for jury confusion and misdirection outweighs its usefulness; and
4. We believe the instruction on proximate cause will adequately insure a proper verdict. Therefore, trial courts should not give you UJI 13-306, or include a reference to independent intervening cause in UJI 13-305, in cases involving multiple acts of negligence.

The Supreme Court also reversed the trial court's directed verdict in favor of El Paso Electric Company on Torres' claim for punitive damages... "because reasonable minds could differ as to whether the cumulative actions of El Paso Electric Company, including design, installation and maintenance of the power pole, indicated recklessness with regard to the management of an inherently dangerous activity". However, the

scope of this article is to review the facts of the Torres case and the unique instructions to the jury tendered by the trial court that led to the Supreme Court's rulings on independent intervening cause. The issue of punitive damages is left to another day.

FACTS

On July 31, 1992 in Las Cruces, New Mexico it was a typical beautiful day with clear blue skies, a fact significant to this accident as discussed below. Plaintiff Francisco Torres was a twenty-five year old em-

ployee of Aldershot of New Mexico, a company which grows and sells plants and flowers to wholesalers. Francisco and a fellow worker who was younger in age, were allocated the task of replacing the roof on greenhouses at the Aldershot facility. The task required the installation of new glass panels on the roof of each greenhouse and the placement of a long aluminum cap along the crest of the greenhouse. Each aluminum cap was approximately twelve (12) feet in length and six (6) inches wide. A third party contractor (Beukel) was at the site, having sold to Aldershot the glass for the new greenhouse roof. Although not present

at the time of the accident in question, Aldershot regularly used the services of an electrical contractor (L.E. Electric). Immediately adjacent to a greenhouse which Francisco Torres was working, was an El Paso Electric Company utility pole that had been installed next to the greenhouse on or about April 1981. The uncontroverted evidence showed that the utility pole installed next to the greenhouse was bent or crooked at the time of installation. The evidence was also uncontroverted that the bend in the utility pole was directed towards the greenhouse at the time of

*Over the years the utility pole
apparently became stressed and bent yet
further over the greenhouse where
Francisco Torres was injured.*

installation. The pole was installed in typical Mesilla Valley sand near the Rio Grande. Atop the utility pole El Paso Electric Company affixed two (2) jumbo Westinghouse transformers, each weighing approximately 1,975 pounds. Over the years the utility pole apparently became stressed and bent yet further over the greenhouse where Francisco Torres was injured.

The distribution lines attached to the pole in question were high voltage and uninsulated. The next pole in the span of the electric distribution line was south of the bent pole and further in distance from the greenhouse, thus causing the

overhanging wires to gradually, as one on the roof moved from the south end of the greenhouse in a northerly direction, to become nearer and nearer to a worker on the roof. Francisco Torres and his helper began the roof repairs at the south end of the greenhouse moving north toward the bent pole and overhanging high voltage wires. Expert testimony reflected that the twelve (12) foot aluminum caps being handed from the ground by a co-worker, to Francisco Torres who was standing on the greenhouse roof, could not, despite their length, reach the more distant high voltage wires, until the workers progressed to the point near or under the bent utility pole. Uncontroverted testimony from plaintiffs' safety engineer also showed that it is difficult if not impossible to accurately judge the distance of overhead electric lines with the homogenous background of a typical southern New Mexico blue sky. In addition, where contact was made with the high voltage line, the line was behind Francisco Torres. As Francisco received the twelve (12) foot aluminum roof caps from his co-worker on the ground, raising the lengths of aluminum over his shoulder, the aluminum came in contact with the defendant's high voltage electric line, emitting thirteen thousand eight hundred (13,800) volts into Francisco, causing him to be catapulted from the roof of the greenhouse which was approximately ten (10) feet high, landing on his back on the ground. Francisco suffered brain damage, amputation of his

Continued on next page

Continued from previous page

left leg immediately below the knee, neck and back injuries, severe burns to his hands, the inevitable state of depression, and the inability to ever work again. Francisco was and is married to plaintiff Sonia Torres. At the time of the accident, their son Javier Torres was four (4) years of age.

An El Paso Electric Company representative at the scene after the accident took measurements of both the distance of the high voltage line from the roof of the greenhouse and the distance between the end of the twelve (12) foot aluminum cap held by Francisco and the point on that length of aluminum where the high voltage line made contact. The individual taking the measurements on the aluminum cap at the scene was an engineer employed by the defendant. A claims representative for the defendant, on a later date changed the conclusion as to the extent of distance from the end of the cap to the mark where the aluminum rod made contact with the high voltage line, claiming that the distance from the end of the aluminum rod to the "real" mark contact was a shorter distance based on his investigation. It was obvious that the less distance between the end of the aluminum rod and the point of contact with the electric line, would imply that the sagging line was higher.

The evidence showed that on three (3) occasions El Paso Electric Company had been advised by Aldershot employees and representatives of L.E. Electric, that the bent pole and sagging wires

The evidence showed that on three (3) occasions El Paso Electric Company had been advised by Aldershot employees and representatives of L.E. Electric, that the bent pole and sagging wires over the greenhouse presented a dangerous condition that should be viewed and hopefully remedied by the El Paso Electric Company.

over the greenhouse presented a dangerous condition that should be viewed and hopefully remedied by the El Paso Electric Company. One (1) witness, a previous employee of L.E. Electric and prior to that a lineman with the defendant El Paso Electric Company, testified that he took an El Paso Electric Company employee to the scene sometime prior to that accident and specifically pointed out the deficiencies in the pole, its location and the sagging high voltage lines. This witness also testified that he specifically showed the El Paso Electric Company employee severe cracks in the utility pole into which he could place his hand, thus indicating stress on the pole due to its heavy load transformers. These combined conditions created a risk of the collapse of the pole onto the greenhouse, spreading high voltage electricity throughout that greenhouse and the connecting greenhouses, of which there were many.

In addition, on a separate occasion, the owner of L.E. Electric called a management representative of the

defendant to express his concern with the condition of the pole and sagging wires in question. On a third occasion while an El Paso Electric Company lineman was at the scene of this pole repairing a problem created by a flying bird into the transformer, a supervisor of Aldershot asked if the bent pole and sagging wires were okay. He received an affirmative response. No remedial action was undertaken by El Paso Electric Company until after this tragic accident. At that time, the bent utility pole was removed and disposed of. Multiple poles were installed to replace the bent pole. The multiple poles were installed away from the greenhouse, and supported a platform that held the heavy transformers.

In passing, the plaintiffs' complaint also included a claim of spoliation of evidence due to the defendant having disposed of the utility pole after the accident. The defendant asserted in evidence that is not unusual for El Paso Electric Company to cut up such poles and charitably donate them to churches. El

Paso Electric Company preserved the two (2) jumbo Westinghouse transformers. The trial court directed a verdict for the defendant on the claim of spoliation of evidence. This point of appeal was upheld by the Supreme Court for a failure to introduce evidence from which a reasonable juror could conclude that El Paso Electric Company maliciously intended to injure Francisco Torres. This point is also left for another day and another article, although it is a blow to injury victims, that even given the facts of this case, to prevail on a claim of intentional spoliation of evidence, a plaintiff must produce objective findings of purely subjective conduct.

INDEPENDENT INTERVENING CAUSE

The term independent intervening cause appeared in three (3) separate instructions submitted to the jury. This together with the facts of this case go to the heart of the Supreme Court's decision to eliminate the doctrine of independent intervening cause to both a plaintiff's alleged negligence and cases involving multiple acts of negligence.

At Instruction No. 4, the defendant, denied the contentions of the plaintiff under his claims of negligence and negligence per se and alleged that the damages were "the result of an independent intervening cause...". This instruction was based upon an affirmative defense pleading of the defendant and the instruction, over the objection of plaintiffs, went on the state:

"To establish the affirmative defense of Plaintiff's negligence, the Defendant has the burden of proving the following contentions applicable to Plaintiff, Francisco Torres: that the location of the wire and the probability that it was carrying electric current was known or should have been known, to Plaintiff, Francisco Torres; and in exercising ordinary care for his own protection, Plaintiff, Francisco Torres, should have avoided contacting the wire with the aluminum pole."

A similar affirmative defense instruction was contained in Instruction No. 4 as to Beukel and L.E. Electric.

Instruction No. 4 went further to state:

"To establish the affirmative defense that Plaintiff's alleged damages were the result of independent intervening cause, the Defendant has the burden of proving that something unrelated to Defendant El Paso Electric Company's own action or omission interrupted and turned aside a course of events and produced that which was not foreseeable."

Instruction No. 7 stated in pertinent part:

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

"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."

Instruction No. 18 stated:

"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."

El Paso Electric Company has a policy prohibiting the installation of electric lines over a building. In addition, one of their safety brochures given to customers stated that contact with electric lines typically occurs from contact with those lines by a male person twenty-five years of age and under, holding a long metal object. The defendant's electric expert gives seminars to utility companies nationwide. Part of the extensive seminar written material and apparently presentations at the seminar, include the frequency of injuries and fatal electrocutions as a result of people on roofs of buildings, holding long metal objects.

The above was urged to the trial court for the reason that El Paso Electric Company should not be allowed to assert that the conduct of the plaintiff, his employer or others was unforeseeable and therefore an independent intervening cause that would protect the defendant

from liability. The argument was futile.

Plaintiff also strenuously argued to the trial court that its proposed instruction No. 4, "that to establish its affirmative defense the Defendant had the burden of proving that the Plaintiff and others knew the location of the wire and the probability that it was carrying electric current and should have avoided contact in the exercise of ordinary care", effectively was yet a third directed verdict. The evidence was clear that the plaintiff and his employer knew the electric line was there and that it carried electric current. Certainly all of us, including the plaintiff must exercise ordinary care for their own protection. Is this not the essence of comparative fault in the trial of such cases?

With Instructions Nos. 4, 7 and 18, the term independent intervening cause was mentioned three (3) times and given two (2) different definitions. As held by the Supreme Court, a jury could be potentially confused in light of New Mexico's use of several liability. The Supreme Court also held that independent intervening cause was inapplicable in this case, as alleged on appeal by appellants "because EPEC presented no

other cause that could reasonably be seen as breaking the chain of causation".

Incomprehensible instructions provide a medium on which a judge may communicate nonverbally his or her views of how a case should be decided. It has been found that judge's nonverbal behavior varies with the judge's views of a case and juries detect these nonverbal cues and tend to decide cases in line with them. See *Peter D. Blanck, et al.*, Note the Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials, 36 Stan. L. Rev. 89 (1985); *Allen Hart*, Expectancies in the Courtroom: Judicial Nonverbal Behavior and Influence, J. Personality & Soc. Psychol.

Juries have the disadvantage of being treated like children while the testimony is going on, but then being doused with a kettleful of law during the charge that would make a third-year law student blanch. *Skidmore v. Baltimore & O.R.*, 167 F.2d 54, (2d Cir. 1948).

Effectively and persistently offering juries instructions that cannot be understood, judges regularly nullify the law. Differently, judges routinely nullify the law by rendering it meaningless, thereby requiring jurors to invent the law themselves. (68 Ind. L.J. 1281).

To the temporary detriment of Francisco and Sonia Torres, the multiple and varying jury instructions on independent intervening cause and the inherent conflict of that defensive

Continued on page 214

Continued from page 213

theory with pure comparative negligence, resulted in a miscarriage of justice. Now, thanks to both the New Mexico Court of Appeals and Supreme Court, independent intervening cause has met its demise in New Mexico, but only remotely in time in comparison to the demise of contributory negligence and its long deceased associated doctrines of sudden emergency, unavoidable accident, last clear chance an open and obvious danger.

CONCLUSION

At this writing, and perhaps never, our Supreme Court has refused to adopt a theory of strict products liability as pertains to the transmission of electricity through high voltage overhead power lines. California has adopted this theory under policy justifications that: (1) to provide a "short cut" to liability where negligence may be present but is difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce allocation the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product. *Pierce vs. Pacific Gas & Electric Company*, 161 Cal. App. 3d 68, 212 Cal. Rptr. 283. However, the Supreme Courts of Colorado and Wyoming have held differently. The Supreme Court of Colorado stating that "until electricity reaches a point where it is made available for consumer use, it is not a product that has been sold or otherwise placed in a

stream of commerce for purpose of strict products liability... electricity is a product when it has reached a location in distribution system where it is expected to have been stepped down to a usable voltage and delivered to a consumer... transmission of electricity through high voltage overhead power lines does not constitute a sale for products liability purposes." *Smith v. Home Light and Power Company*, 734 P.2d 1051 (1987). The Supreme Court of Wyoming in a 1993 decision came to a similar conclusion in refusing to classify electricity as a product for strict liability purposes pursuant to Section 402A of the Restatement (2nd) of Torts. *Wyrulec Company vs. Schutt*, 866 P.2d 756 (1993).

The Supreme Court of New Mexico has also restricted the application of the ultra hazardous activity doctrine to cases involving explosives in blasting. *Thigpen v. Skousan & Hise*, 64 N.M. 290, 327 P.2d 802 (1958).

In *Saiz vs. Belen School District*, 113 N.M. 387 (1992), our Supreme Court, as in this case, defines the transmission of high voltage electricity as "inherently dangerous". The difference is significant in that an ultra hazardous activity imposes responsibility for persons engaged in such activities for any resulting harm even though all reasonable precautions have been taken against the risk of harm the activity creates. An "inherently dangerous" activity according to *Saiz* represents an intermediate category of hazardous activity between those that are nonhazardous (or only slightly so) in which harm is merely a foreseeable

consequence of negligence, and activities that are ultra hazardous, in which the potential for harm cannot be eliminated with the highest degree of care.

In evaluating an electrocution case it is apparent at present that the theory of negligence is the only hope

of recovery for an injured person, at least in the near future. This obviously invokes defensive theories of comparative negligence, but no longer the repetitive and conjunctive theory of independent intervening cause.



About The Authors

T.O. GILSTRAP, JR.

T.O. Gilstrap, Jr. graduated from South Texas College in Law in August 1975, having attained the position of Editor in Chief of the South Texas Law Journal. After the Texas October 1975 bar exam he joined the El Paso, Texas law firm of Edwards, Belk, Hunter & Kerr.

Mr. Gilstrap now has his own firm in El Paso largely dedicated to litigation. He is a member of the New Mexico Bar Association, Texas Bar Association, American Trial Lawyers' Association, Texas Trial Lawyers' Association and El Paso Bar Association.

LAWRENCE M. PICKETT

Lawrence M. Pickett is a graduate of the University of Oklahoma Law School (1969). He is a member of the Oklahoma Bar Association (1969), Colorado Bar Association (1970), and the New Mexico Bar Association (1970).

Other than being an assistant district attorney in the Third Judicial District Court early in his career, he has been in private practice in Las Cruces, New Mexico for the past twenty-nine (29) years. He owns his own firm, Pickett & Murphy, which is primarily a trial litigation firm. He is an active member of the New Mexico Trial Lawyers' Association.