

# Torts Wypadki

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Torts I  
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# Negligence

**Abbreviations** P = plaintiff, D = defendant

An "(L)" behind a case means it was talked about in lecture but we did not read it!

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## [] NEGLIGENCE: UNINTENTIONAL TORTS

[] **Definition: Conduct falling below the standard of care established by law for the protection of others against the unreasonable risk of harm. You did not want to hurt person but you did create a reasonable risk.**

[] **ELEMENTS: Duty, Standard of Care, Breach of Duty, Actual Causation, Proximate Causation, Damages**

### [] DUTY

GENERAL DUTY: - A general duty of care is owed to all foreseeable Plaintiffs and/or reasonable care is required under certain circumstances.-- A *duty* owed to a class of persons, including P, to take care not to cause an injury of the kind suffered by P

### [] Specific Situations

1. RESCUERS: A rescuer is a foreseeable plaintiff where the defendant negligently put himself or another person in peril. "Danger invites rescue." The rescuer takes on the care of a reasonable person and must see to it that the person caring for receives proper medical attention or they are negligent--See Sawmill Case
2. UNBORN/UNCONCEIVED CHILDREN: differs by jurisdiction
  1. Wrongful birth: ex. birth defects without abortion option given
  2. Wrongful life: ex. tubal ligation or vasectomy gone wrong

### [] Unqualified Duties of Care

1. P alleges that D carelessly pursued an affirmative course of actions that caused physical harm to P
2. i.e. driving is dangerous and people know to take reasonable care, it is not hard to determine if they did
3. If D hits P and P's nose is bleeding

### [] Evolution of Duty Rules

1. The Privity Rule
  1. A duty to regulate ones conduct with care not to cause physical harms to another
  2. *Winterbottom v. Wright*: A P who is injured by carelessness on the part of a manufacturer may not recover in tort absent contractual privity between P and manufacturer.
2. Ordinary Sense of Duty
  1. *Heaven v. Pender*: An unqualified duty to take reasonable care not to cause physical harms is owed to another whenever a person "of ordinary sense" would recognize that careless conduct on his part would cause "danger of injury to the person or property of another" (p 15)

3. Imminently Dangerous Products
  1. *Thomas v. Winchester*(poison in medicine bottle): The P can recover if the D's negligence put human life in imminent danger. The danger was to be foreseen, and the product must be imminently dangerous.
4. Reasonable Care (rejected privity)
  1. *MacPherson v. Buick Motor Co.*: If the nature of a thing is such that it is reasonably certain to place someone in danger when made negligently, the thing is a thing of danger. NOTE: Manufacturer must fail in his duty to inspect.

### **[] Qualified Duties of Care**

1. Arise out of allegations that D's carelessness consisted of a failure to act for the benefit of P, or that D caused some other kind of injury besides physical harm

### **[] Premises Liability**

1. *Salamon v. City of Waterbury*(drowns in city reservoir): Legal relationship that decedent has with D (i.e. invitee, licensee, trespasser) impacts D's duty to rescue and liability. There is a different standard of care owed by the D when decedent's activities are known by everyone to be dangerous AND if there were no hidden hazards present. D's standard of care = none.
2. Talked about 3 categories: Trespasser, licensee, invitee distinction
  1. See section Standard of Care: Owners/Occupiers of Land
3. *Rawland v. Christian*: abolished 3 categories, reasonable duty of care owed to all people

### **[] Affirmative Duty to Rescue and Protect**

1. No Affirmative Duty to Act:
2. Exceptions/Unless:
  1. Assumption of duty by acting
  2. once you undertake an attempt to rescue, the rescue has to be done reasonably
    1. i.e. Car is broken down. You stop to chat, not to rescue. Once you stop, you prevent someone else from stopping and created a greater peril.
  3. Exception: Good Samaritan statutes exempting medical professionals from liability for ordinary, but not gross, negligence in voluntarily acting to help someone
  4. Peril caused by negligence
    1. Defendant has a duty to assist someone in peril because of the defendant's negligence
    2. The placing of someone in peril itself does not have to be actionable, but you can incur liability (i.e. someone sells someone drugs, you can't sue someone for supplying narcotics)
  5. Special Relationships: Common carriers (*Jones*), innkeepers, shopkeepers, doctor/patient (*Tarasoff*)
    1. Those who solicit and gather the public for their own profit owe a duty to aid patrons
3. *Osterlind v. Hill* (drunk rents canoe, drowns): There is NO duty to rescue if there is not a special relationship between the D and the decedent/intestate. When P is able to take steps to protect oneself, then D does not owe him/her a duty.

1. Further Harm exception: when D's conduct opens P to further harm, he has a duty to stop further harm from occurring (Osterlind was exception to this rule)
4. *Theobald v. Dolcimascola* (Russian Roulette): There is NO duty to rescue if the Ds are merely observers to the decedent's dangerous actions. EXCEPTION: If you placed that person in peril and they were injured, you are liable for damages (i.e. if one of the teenagers had put the bullet in the gun and told decedent it was not loaded)
5. *Tarasoff v. The Regents of the U of CA* (psycho guy killed girl): A duty to warn was owed to decedent. When the avoidance of foreseeable harm requires D to control the conduct of another or to warn of such a danger, common law imposed liability only if D bears some *special relationship* to the dangerous person or potential victim (i.e. doctor/patient relationship satisfies this).
  1. Rule: When a therapist determines or should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.
  2. NOTE: Special relationship can be between either:
    1. Actor and 3rd person which imposed duty upon actor to control 3rd person's conduct, OR
    2. Actor and other person which gives other person a right of protection
6. *McGuiggan v. NET*(grad party drunk driving): No duty was owed by social host in this situation.
  1. Traditional View: A drinker's voluntary consumption alone is the "proximate" cause of the 3rd party's injury, and the third person who sold/gave liquor is not liable.
  2. Court here recognized social host liability to person injured by intoxicated guest's negligence in driving where 1) a social host knew or should have known that his guest was drunk and still gave/permitted the guest to drink, and 2) because of his intoxication, guest negligently operated a motor vehicle causing 3rd party's injury.
  3. Licensed Vendors: Owe a duty to a 3rd person who is injured in a motor vehicle accident caused by negligence of a customer to whom the vendor sold a drink when he knew or should have known the customer was intoxicated(reasonableness)
7. Other Examples of Affirmative Duty
  1. Contagious Diseases: physician has duty to protect when immediate family members and significant others are at risk
  2. School Shootings: no liability to teachers
  3. Duty to 3rd Party from physical lapses: physician's duty to protect public from a patient's epileptic lapses while driving
  4. Forgotten Keys: owner of car has duty to 3rd parties when car is stolen because of carelessly leaving out keys and an accident occurs (jurisdictions are split)

### **[] Policy-Based Duty Exceptions**

1. *Strauss v. Bell Realty Co.* (apartment building blackout): Court concluded that in the case of a blackout of a large city of several million people, each person similarly affected by the power failure, liability for injuries in an apartment building's common areas should, as a matter of policy, be limited by the contractual relationship. NO duty was owed to individual tenant (lack of contractual relationship).
  1. Rule: Privity

2. *Moch v. Rensselaer Water Co.* (water pump failed to pump enough water to put fire out at P's warehouse): Court found that P was not a contracted party. Only the city was eligible to bring suit against D.

## [] Standard of Care

1. General Standard:
  1. Reasonable Person: The care that would be exercised by a reasonable person under the circumstances.
  2. Example: Looking in the rear-view mirror before backing up.
2. Objective Standard:
  1. Mental deficiencies not taken into account, inexperience not taken into account
  2. Physical disabilities and limitations are taken into account! (blind man should be reasonable by using a cane)
3. Specific Standards:
  1. Professionals:
    1. General Practitioner: The knowledge, skill, and custom of practice among practitioners in local community
    2. Specialist: The knowledge, skill, and custom of practice among members of the specialty across the nation
  2. Children: that of a child of like age, education, intelligence, and experience. Children under four generally do not have the capacity to be negligent.
    1. EXCEPTION: Children engaged in adult activity.
    2. The relevant adult standard of care for activity applies.
    3. *Appelhans*
    4. Direct Negligence by Parents
      1. Negligent Supervision - if they know of a minor's tendencies
      2. Negligent Entrustment - if they give a child a dangerous instrument without the ability to handle it safely
4. Bailment:
  1. Bailor:
    1. Gratuitous bailment (let friend borrow car): must inform of known, dangerous defects in chattel;
    2. Bailment for hire (rent from Hertz): must inform of known and reasonably discoverable defects in chattel
  2. Bailee:
    1. Sole benefit for bailor: low standard
    2. Mutual benefit: ordinary care standard (See hotel case with the lost ring)
    3. Sole benefit of bailee: high standard of care
5. Owners/occupiers of land:
  1. Trespassers: Undiscovered = no duty
    1. Discovered or anticipated = duty to warn or make safe concealed artificial conditions, known to the owner/occupier, involving risk of death or serious injury
  2. Infant Trespassers: "Attractive nuisance" doctrine
    1. Duty to avoid foreseeable risk to children caused by **artificial** conditions, if: - A dangerous artificial condition the owner/occupier does or should know about - The owner/occupier knows or should know children frequent the area - The condition is dangerous to children

3. NOTE: Cost/benefit analysis: the expense of remedying condition is slight compared to magnitude of risk
4. NOTE: Less liable if condition is natural
2. Licensees: Persons who enter land with permission for **their own** benefit, rather than the benefit of the owner/occupier
  1. Licensees include friends and contractors coming on the premises to make sales or repairs.
  2. Duty to warn of or make safe any known, concealed, dangerous condition (whether natural or artificial)
  3. No duty to inspect
  4. *Salaman*: swimmer was deemed licensee
  5. *Rowland*: social guests are licensees
3. Invitees: Persons entering land with permission for the owner/occupier's business or as members of the public on land open to the public (Sawmill Quiz Example)
  1. Same duty as to licensees, plus a duty to inspect and render safe concealed dangers
  2. Duty to control 3rd Persons on premises
6. Statutory Standard (Negligence per se)
  1. When applicable, statute's specific standard replaces the general negligence standard.
  2. Test: class-of-persons/class-of-risk The plaintiff is in the class of persons the statute was designed to protect. The harm suffered is among the risks that the statute was designed to protect against.

## [] Breach of Duty

1. Definition: A person's failure to conform to the "reasonable person" std. of care, in a way that creates an unreasonable risk of harm to others.
1. Generally: Issue for jury or trier of fact
2. Special Cases: Res ipsa loquitur "the thing speaks for itself"
  1. The very occurrence of an even may refutably establish negligence, if: The accident is of the type that would not normally occur absent negligence The instrumentalities of the accident were in defendant's sole control
  2. I.e. barrel falls out of a window onto someone (*Byrne v. Boadle*)

## [] Duty, Breach, and 2 Meanings of Negligence

1. Duty Precedes Breach: A judge must first determine if a duty of care was owed by D to persons such as P before the question of whether that duty was fulfilled can be put to the jury.
2. 2 meanings of negligence
  1. Negligence = careless conduct not sufficient to establish that D can be held liable for having committed the tort of negligence (AKA carelessness, breach, fault)= one element of the tort
  2. Negligence = tort fulfilling all the elements
3. *Rogers v. Retrum* (school open campus policy): Court concludes that the school had a duty to take care to protect its students from being injured in car accidents, but that it fulfilled that duty in this instance.

1. The school district did not have an obligation to take precautionary measures to prevent car accidents because the injury was not a result within unreasonable risk created by the school.
2. The test for breach is **reasonableness**. Was it reasonable for the school, in light of the foreseeable risks, to leave the building open? Yes.
3. If P's injury was not a result within unreasonable risk created by D, D did not breach.
4. *Caliri v. New Hampshire Dept. of Trans* (icy road): jury instructions case, trial court did NOT err in the jury instructions they gave
  1. "A jury charge is sufficient as a matter of law, if taken as a whole, it fairly presents the case to the jury in such a manner that no injustice is done to the legal rights of the litigants."
  2. Negligence instruction: Negligence is a deviation from that degree of care that would be exercised by the **reasonable person of ordinary prudence**.
5. *Jones v. Port Authority of Allegheny County* (bus driver): jury instructions case, trial court DID err by giving the jury instructions they gave
  1. The instructions use did not say that the PAT, as a common carrier, owes the highest duty of care to its fare paying passengers.
  2. While the trial court attempted to explain the heightened level of care, the attempt was not sufficient.
  3. Common carrier owes a duty of "**extraordinary care**" (*Philadelphia & Reading R.R. Co. v. Boger*); Common carrier owes the "highest duty of care" (Standard Civic Jury Instructions)
6. *Pingaro v. Rossi* (dog bite): The owner of a dog who bites a person while the person is on or in a public place or lawfully on or in a private place, including the property of the dog owner, is **strictly liable** for damages suffered by person bitten, regardless of the former viciousness of the dog or the owner's knowledge of its viciousness.

## [] Defining the Reasonable Person

1. *Vaughan v. Menlove* (spontaneous hay fire): The conduct of a prudent man is the criterion for the jury in these cases. What care would a prudent man have taken?
  1. Did Menlove act honestly and bona fide to the best of his own judgment?
    1. If YES, he should not be responsible for not being very smart
    2. But the court said "NO" that he was warned and should have known what might happen; instead of fixing it he said "he would chance it" (established gross negligence)
2. *Appelhaus v. McFall* (kid on bike hits old person)
  1. Tender Years Doctrine: A child is incapable of negligence if he is less than 7 years old.
  2. Old lady tried to convince court to abandon the doctrine, but court showed reverence to stare decisis.
  3. Modification of the law was too far sweeping; court invites their supreme court or legislature to look at the tender years doctrine
  4. NOTE: Parent/child relationship does not automatically render parents liable for the torts of their minor.
    1. must prove a claim of Negligent Supervision (not an easy task)
      1. P must show that parents were aware of specific instances of prior conduct to put them on notice that the act complained of was likely to occur, AND



2. P must show the parents had the opportunity to control the child
2. Reasonable Children standard- Child is held to standard of a reasonable child that age (Mass. Rule) MINORITY

## [] Industry and Professional Custom

1. *The T.J. Hooper* (tug boat radio)
  1. Whether or not something was the industry custom does not in and of itself answer the question of whether the owners breached a standard of care by not supplying their tug boats with radios.
  2. Just because it was not custom to carry radios does not mean it was not the standard of care to require them to carry radios.
  3. Custom does not dictate standard of care!
  4. The court held that the tugs were unseaworthy (comparative to not reasonable in reasonable person standard) because they did not have receiving sets, even though such sets were not standard in the industry. (The court also said the barges were unseaworthy, but that wasn't important in regard to the custom question. Custom question involved whether radios on tugs were industry custom.)
2. *Johnson v. Riverdale Anesthesia Assoc.* (preoxygenation): In order to establish medical malpractice, the evidence presented by the patient must show a violation of the degree of care and skill required of a physician.
  1. Standard of care = that which, under similar conditions and like circumstances, is ordinarily employed by the medical profession generally; SOC can't be derived from the disposition of an individual physician
  2. Custom is determinative in malpractice actions!
    1. T.J. Hooper rule does not apply in malpractice.
    2. Custom can be used as a shield (by D) or a sword (by P)
  3. Respective Minority Rule: The professional SOC doesn't automatically deem them in breach because differing techniques can be acceptable and customary within the applicable SOC
3. *Largey v. Rothman* (informed consent - biopsy)
  1. Prudent Patient Rule: Physician should divulge information in context to the needs of each individual patient.
  2. Informed Consent Disclosure: **Elements**:
    1. Nature of the treatment
    2. What alternatives are available
    3. What are the risks of the treatment (material)
    4. What are the benefits of the treatment
  3. Reasonable Standard of Care: From what point of view?
    1. Patient's point of view: *Canterbury*: focuses on what the physician should disclose to a reasonable patient in order that the patient might make an informed decision
    2. Doctor's point of view: *Kaplan*: focuses on what information a reasonable doctor should impart to the patient
      1. Majority: A physician is required to make such disclosure as comports with the prevailing medical standard in the community - that is, the disclosure of those risks that a reasonable physician in the community, of like training, would customarily make in similar circumstances

2. Minority: do not relate the test to any kind of community standard, but require only such disclosures as would be made by a reasonable medical practitioner under similar circumstances
4. 3 Prongs for Liability for Informed Consent:
  1. There was no a proper disclosure
  2. The treatment resulted in/caused injury
  3. If proper disclosure had been made, the patient would have foregone the treatment
    1. Objective: point of view of reasonable patient in same circumstances
    2. Subjective: point of view of that particular plaintiff
4. NOTE: Industry standard is usually established through expert witnesses

### [] Reasonableness, Balancing, & Cost-Benefit Analysis

1. *United States v. Carroll Towing Co.* (absent bargee)
  1. Whether the barge owner violated a duty of care by not providing a bargee at that time? It is a fair requirement that the company should have a bargee aboard (unless he had some excuse for his absence) during the working hours of daylight (BPL Analysis)
  2. On occasion every vessel will break away, the owner's duty to provide against resulting injuries is a function of 3 variables
    1. probability that she will break away,
    2. gravity of resulting injury,
    3. burden of adequate precautions
  3. Here: (the burden of a bargee on board) is  $< ((\text{bad injury} - \text{sinking barge}) \times (\text{great likelihood of breaking away})) = B < PL$
2. Loss vs. Benefit – utility of keeping condition vs. costs of preventing harm
3. Factors:
  1. Character and location of premise
  2. Purpose of use
  3. Probability of injury
  4. Precautions needed to undertake
4. (BPL) Cost/Benefit Analysis
  1. P: probability
  2. L: extent of harm/damage
  3. B: burden of prevention
  4.  $B \_ (P) \times (L)$ 
    1. If  $B < PL$ , then liability exists because of unreasonable conduct
    2. If  $B > PL$ , then does not exist because the conduct is reasonable
    3. B is fairly static, where as P and L vary over time
5. *Zapata* (L): bank case, Zapata's checks stolen, \$110,000 withdrawn. Under UCC, bank is responsible if they don't compare signatures. The burden of looking at every check would cost \$125,000/year. Probability of loss would be 0 b/c they wouldn't find any more fraud than they were already finding. (Case is not convincing that BPL analysis is useful)

### [] Proving Breach: Res Ipsa Loquitur

1. *Res Ipsa Loquitur* (RIL): **Definition:** it permits a jury to infer that the plaintiff's injury was caused by the defendant's carelessness even when the P presents no evidence of

- particular acts or omissions on the part of the D that might constitute carelessness (common sense theory)
2. **Elements:**
    1. the injury must be of a kind that ordinarily does not result absent carelessness on someone's part
    2. the instrumentality causing the injury must have been in the D's exclusive control
    3. the injury must not have arisen from acts or carelessness on the part of the P
  3. *Byrne v. Boadle* (flour barrel fell): No evidence of negligence for the injury. It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out. A barrel could not roll out without some probable negligence.
    1. Court recognizes doctrine of RIL as they had before in train accidents
    2. RIL shifts the burden of production to the party who is in possession of the evidence
  4. *Ybarra v. Spongard* (L): patient underwent surgery under general anesthetic, woke up with partial paralysis which could have been caused by anyone in the operating room. Court said P could invoke RIL to establish the carelessness of each.
  5. *Kambat v. St. Francis Hosp.* (surgical pad left in body)
    1. The inference of negligence could reasonably have been drawn when looking at the circumstantial evidence (the laparotomy pad found in abdomen).
    2. Submission of RIL merely permits the jury to infer negligence from the circumstances of the occurrence. The jury is allowed but not compelled to draw the permissible inference.
    3. When an operation leaves a sponge or implement in the patient's interior, the thing speaks for itself without the aid of any expert's advice.
    4. A prima facie case of negligence exists & P is entitled to have RIL charged to the jury if P can show that:
      1. the event is of a kind that ordinarily does not occur in the absence of someone's negligence
      2. the event is caused by the agency or instrumentality w/n the exclusive control of D
      3. it is not due to any voluntary action or contribution on the part of the P

## [] Causation

1. Breach of duty must cause the injury
2. There must be a causal connection b/n D's acts or omission and P's injuries
  1. Causation in Fact
    1. - Without the negligence, would the harm still have occurred?
    2. - Did the harm occur because of the negligence?
  2. Proximate Causation
    1. - A's breach was an actual and proximate cause of P's injury.
1. NOTE: Problems with terminology here. Different courts use different terms for causation.
  1. cause in fact (actual cause)
  2. legal cause (proximate cause)
  3. one main term to mean both = legal cause or proximate cause
2. 4 General Principles in Determining Causation
  1. But-for test is the primary test
  2. P has a burden of proof on the preponderance of evidence standard

3. Preponderance standard is > 50% or 50.1% or more
4. Determinations about causation are generally a jury issue

## [] Actual Causation

### [] Key Terms and Concepts

1. "But for" Test is primary test
2. Actual Causation is supported by the employment of "substantial factor" as an alternative and more plaintiff friendly test for actual causation (Hamil)
3. Joint Cases: Substantial Factor Test
4. *Summers v. Tice* Problem: Multiple defendants acted, but only one caused injury Burden of proof shifts to defendants, each to negate his or her own negligence-joint tortfeasor

### [] Proving But-For Causation under the Preponderance Standard

1. *Skinner v. Square D Co.* (electrocution): The actual cause element generally requires showing that "but for" the defendant's actions, the P's injury would not have occurred
  1. P's circumstantial evidence here did not afford a reliable basis from which reasonable minds could infer that more probable than not, "but for" the defective switch, the Mr. Skinner would not have been electrocuted
    1. All that is necessary is that proof amount to a reasonable likelihood of probability rather than just a possibility
    2. P must present substantial evidence from which a jury may conclude that more likely than not, but for the D's conduct, the P's injuries would not have occurred
    3. Absolute certainty cannot be achieved in proving negligence circumstantially
  2. If such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established
2. *Beswick v. City of Philadelphia* (ambulance)(did not follow protocol)
  1. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if his failure to exercise such care increases risk of such harm (Restatement 2nd sec 323)
  2. Once a plaintiff has introduced evidence that a D's negligent act or omission created the risk of harm to a person in P's position and harm was sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm. (Hamil)
  3. preponderance of evidence means that a jury may only deem a fact proven if the jurors reasonably and actually conclude that it is more likely than not to have occurred

### [] Multiple Necessary and Multiple Sufficient Causes

1. *McDonald v. Robinson* (vehicles collide and hit pedestrian - joint liability): IF the acts of two or more persons concur in contributing to and causing an accident, and but for such concurrence the accident would not have happened, the injured person may sue the actors

- jointly and severally, and recover against one or all, according to the proven or admitted facts of the case. The actions of D merely need to be "a" cause of the P's accident, not "the" cause.
2. When each of multiple careless acts is a necessary condition for an injury, each is deemed an actual cause of the injury
    1. If someone is a but-for cause of someone else's injury, they can't get out of it by pointing to someone else
    2. Analysis: Ask the "but for" question: Would the P have not been injured but for the actions of \_\_\_\_?
  3. When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test
    1. Caveat: If the act is only a trivial necessary condition, then proximate cause is not satisfied
  4. Substantial Factor Test
    1. If any of multiple acts was sufficient to cause the injury, any actor whose conduct was a substantial factor in bringing about the injury is liable
    2. Some courts view this as an alternative to the but-for test for actual causation in multiple tortfeasor situations (Aldridge)
  5. *Aldridge v. Goodyear Tire Co* (chemicals may cause diseases)
    1. Whether Goodyear's chemicals or conduct were independently sufficient causes of harm to the plaintiff's or plaintiff's decedents? (A cause must be sufficient before it can be substantial)
    2. The proof relied upon by the plaintiff's does not show by a preponderance of the evidence that any particular, identifiable Goodyear-supplied chemical was of itself sufficient to the cause of harm to the plaintiff's/decedents.
    3. Toxic Soup, not determinative factor in causation
    4. It's really hard to prove causation in toxic chemicals cases
    5. Daubert test (for admissibility of expert testimony)
      1. Is it reliable "scientific knowledge" - i.e. tested, peer-reviewed, scientifically accepted
      2. Is it relevant?

## [] Causation and Burden-Shifting

1. *Summers v. Tice* (hunting, joint tortfeasors): Where a group of persons are on a hunting party, or otherwise engaged in the use of firearms, and two of them are negligent in firing in the direction of a third person who is injured by a shot, both of those negligently firing are liable for injury suffered by the third person, even though the negligence of only one of them could have caused the injury.
  1. Burden of cause shifts to defendants
  2. The burden is shifted to each defendant to absolve himself of liability if he can
  3. If no proof as to which defendant is liable is given by the defendants, then they are jointly liable

## [] Proximate Causation

1. Definition: an event that set in motion the resulting injury AKA a cause that does not necessarily or immediately cause an event or injury (i.e. butterfly effect concept)
2. Two Tests for Proximate Cause

1. Foreseeability Test: The extent or severity of harm is always considered foreseeable (Palsgraf v. Long Island RR Co.); Who might get hurt here and how might they get hurt?
2. Harm-Within-the-Risk Test: Is the harm suffered the kind of harm that makes the D's action negligent? i.e. is avoiding hitting another car the kind of risk that makes it negligent to run a red light?
3. Specific Situations: Objects of Foreseeability
  1. Unforeseeable Ps (Palsgraf): If Ps are unforeseeable, there is not proximate cause
  2. Unforeseeable Extent of Harm: You take P as you find them (eggshell P rule)
  3. Unforeseeable Type of Harm (Polemis, overruled by Wagon Mound I): NO general rule, case by case basis
  4. Unforeseeable Manner of Harm: i.e. D is driving negligently, forced P off the road, foreseeable that P would be injured and hurt in accident, he was fine, got hurt when he got out of his vehicle and was hit by another driver, D not let off the hook
4. Recurring Situations
  1. Rescuers: considered legally foreseeable
  2. Subsequent Medical Treatment: harm coming from treatment is always considered to be foreseeable
  3. Criminals or Intentional Tortfeasors: This is a superseding cause (unless in a dangerous place); normally they breach the chain of causation but not if it is really germane
5. *Palsgraf v. Long Island R.R. Co.* --not foreseeable
  1. Majority Opinion: Cardozo: Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. A wrong is defined in terms of the natural or probable (when unintentional).
    1. Framed the issue was one of duty: "The risk reasonably to be perceived defines the duty to be obeyed" (294)
    2. Theory is rights-based: Duty is only owed when action inhibits a person's rights. Palsgraf's rights weren't being invaded.
  2. Dissenting Opinion: Andrews: When an act imposing an unreasonable risk of harm to the world at large occurs, not only is she wronged to whom one might reasonably expect to be injured, but also he who is injured, even if he is outside what would generally be thought to be the danger zone
    1. Factors to Consider
      1. Was there a "natural and continuous sequence" between cause and effect
      2. Was there a "direct connection" between them without too many intervening causes?
      3. Was the result too remote from the cause (in time and space)?
6. *Ryan v. New York Cen. R.R. Co.* (steam engines cause fire: damages were too remote): anti-P and pro-rich people case, someone has to pay for houses that burned down
  1. Damages were not the immediate but the remote result of negligence. The immediate result was only the destruction of R.R.'s own wood and sheds.
  2. Remoteness of Damage Rule: if the damage is "too remote" P cannot recover

## [] Statutory Supplements

### [] Negligence Per Se

1. The court may adopt as the standard of conduct of a reasonable person the requirements of a legislative enactment or an administrative regulation whose purpose is:
  1. To protect a class of persons which includes person whose interest is invaded
  2. To protect the particular interest invaded
  3. To protect that interest against the kind of harm which has resulted
  4. To protect that interest against the particular hazard from which the harm results
2. *Dalal v. City of New York* (car accident, D had license restriction): Statute said that no person could drive a car in violation of any license restriction. Alicia (D) did. And an unexcused violation of a statutory standard of care constitutes negligence per se.
3. *Bayne v. Todd Shipyards Corp.* (DOL claim for hand rails-employee v. independent contractor)
  1. Issue: Is a violation of an administrative safety regulation negligence per se or only evidence of negligence?
  2. The violation of an administrative safety regulation is negligence per se because the regulation was a safeguard for the public which includes someone making a delivery who is not the D's employee.
  3. Did NOT extend the protection to the public generally, just to people who get injured in the course of their employment in this situation.

### [] Damages

1. *Kenton v. Hyatt Hotels Corp.* (hotel skyways collapsed): Ds agreed to stipulate liability (leaving only question of damages) if Ps agreed not to present evidence of D's conduct in maintaining skyways. P, Kenton, introduced evidence of the collapse for purposes to establishing her PTSD. Court set aside remittitur and reinstated verdict and judgment for 4 mil.
  1. Remittitur: If P takes a smaller reward, then no new trial ordered. If P rejects it, then there is a new trial (i.e. this case, take \$250,000 off – taking this amount off is not really doing anything)
  2. Additur: judge offers the defendant a new trial or a verdict of something more than the verdict was returned for
2. Sufficient kinds of compensatory damages:
  1. Personal injury
  2. Property damage
  3. Severe emotional distress (for NIED only)
  4. NOT: mere economic damages, harm to reputation, or other oblique injuries
  5. Note: Oblique injuries may create liability covered under the heading of oblique torts.
  6. Types of Losses
    1. Economic Losses: things you'd get a bill for - past and future medical bills, lost earnings, repair costs
    2. Non-economic losses - harm to reputation, pain and suffering, depression, anxiety, loss of enjoyment of life
3. Punitive damages: Compensatory damages are a prerequisite Conduct must be wanton, willful, reckless, or malicious

1. *National By-Products v. Searcy House Moving Co* (truck driver hit car which hit house trailer)
  1. Gross negligence is not sufficient to justify punitive damages
  2. Justified only where the evidence indicates that the D acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred
2. *Mathias v. Accor Economy Lodging* (Motel 6 Case: famous bedbug case)
  1. Limits the D's ability to profit from its fraud
4. Duty to Mitigate
5. Collateral Source Rule: damages are not reduced because plaintiff has collateral sources (insurance, charity)
6. Punitive damages are rightly given in cases of “dignitary” issues. Ex: someone spitting in your face. If there are only compensatory damages, you wouldn't receive anything in damages. Thus, awarding punitive damages would deter the tortfeasor from committing the act again.

#### Reasons for damages

1. Compensate P's for injuries
2. Punish the wrongdoer
3. Deterrent
4. Divest the other party for ill-gotten gains
5. To recognize the wrong has occurred

## [] Negligence Defenses

### [] Plaintiff's Negligence:

1. Contributory Negligence: Complete bar to recovery -- Most jurisdictions have rejected contributory negligence in favor of comparative negligence.
2. Comparative Negligence:
  1. Pure comparative negligence: P's award is reduced by percentage of fault
  2. Partial comparative negligence: (*Baldwin*)  
P's award is contingent upon D meeting a certain threshold percentage of fault.  
P's award is then reduced by percentage of fault.
3. *U.S. v. Reliable Transfer CO.* (tanker ran on sand bar, coast guard light out): Divided Damages Rule was previously used in admiralty cases and required each party to pay 50% of damages to vessel. Applied rule of Proportional Fault.
  1. When 2 or more parties have contributed by their fault to cause damage, liability for damage should be allocated among the parties proportionately to the comparative degree of their fault.
  2. AND liability for damages should be allocated equally when parties are equally at fault or when it is not possible to measure the comparative degree of their fault.
4. *Hunt v. Ohio Dept. of Rehab & Corrections* (prisoner stuck hand in snow blower without good instructions): The P's negligence constituted 40% of the injury. P proved that the D breached its duty of reasonable care. Contributory negligence reduced the P's award by 40%.
  1. Most states have comparative responsibility regimes – The Plaintiffs fault operates to defeat her cause of action



1. Modified Comparative Responsibility Regime
    1. P's fault = 50% or more – no recovery
  2. Pure system
    1. P's fault = 99%, she can still recover 1% from D
1. *Baldwin v. City of Omaha* (football player with mental illness): Player discontinued his meds for mental illness, had a psychotic episode, officers (D) tried to subdue him but failed to follow procedures, player was shot and paralyzed from the neck down
1. Because the player (P) was allocated greater fault for the injury, the judgment was entered for the Ds

### [] Assumption of Risk:

1. Express Agreement: Not valid for certain defendants, including common carriers AND Not valid for gross negligence and willful acts AND usually not parking garages
  1. *Jones v. Dressel* (skydiving airplane crash): Reached legal conclusion with no apparent analysis! Concluded that agreement between Jones and Free Flight was valid, ratified by Jones using their facilities, was not an adhesion contract, and did not affect public interest. Upheld the agreement insulated Free Flight from liability for simple negligence involving the plane crash.
    1. 4 Factors assessing an exculpatory agreement's validity
      1. Existence of a duty to the public
      2. The nature of the service performed
      3. Whether the contract was fairly entered into
      4. Whether the intention of the parties is expressed in clear and unambiguous language
  2. *Dalury v. S-K-I, Ltd.* (ski area pole): P signed agreement releasing Ds from liability resulting from negligence. Critical issue concerned the social interests affected. Court determined the agreement was unenforceable as a matter of public policy: area was open to the public, advertised to the public. If Ds were permitted to obtain waivers for liability, ski areas would not have to manage risks and the public would pay for the resulting injuries.
    1. Restatement 496B - Exculpatory Agreements should be upheld if it is:
      1. Freely and Fairly Made
      2. Between parties who are in an equal bargaining position
      3. No social interest with which it interferes
2. Implied: Based on the circumstances, plaintiff impliedly assumed the risk.
  1. *Monk v. Virgin Islands Water & Power Auth.* (lost limbs from electrocution): Monk argued that when Virgin Islands abolished the contributory negligence statute, they impliedly abolished the assumption of risk statute. The court said "no" and said it was the legislature's responsibility to change it. Monk assumed the risk because he knew the danger and still put himself in risk by the power lines.
    1. Question from class: Did he really assume "that" risk?
    2. When you assume the risk, what risk are you assuming? a foreseeable one?

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# Intentional Torts

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## [] 7 Intentional Torts

Assault

Battery

False imprisonment

Outrage

Trespass to land

Trespass to chattels

Conversion

### Generally

#### 1. Act

- Volitional movement
- Not reflex

#### 2. Intent

- The conception of intent differs from tort to tort under the heading of "intentional torts"
- Substantial certainty counts as intent
- Transferred intent

- Person to person
- Tort to tort
- Motive is irrelevant, and is distinguished from intent.
  - (Note that whether evidence of motive can be used at trial to establish intent or another element is a question for evidence law.)

### 3. No issue of incompetence

- Children as well as the mentally ill, developmentally disabled, and demented can commit intentional torts

### 4. Causation

- Actual
- Proximate
  - (Causation is considered in more depth under the heading of negligence, but the same concepts apply)

## [] The 7 Intentional Torts

### [] 1. Assault

#### Statement

- An intentional creation of an immediate apprehension of a harmful or offensive touching

#### Elements

#### Act

#### Intent

- Can be intent to effect an assault
  - Or intent to effect a battery

#### Causation

- Apprehension
  - Fear distinguished from apprehension
  - Apparent ability sufficient
  - Words alone are not sufficient
    - But words can negate the effect of conduct

#### Immediacy

## [] 2. Battery

### Statement

- An intentional infliction of a harmful or offensive touching of a person

### Elements

#### Act

#### Intent

- Can be intent to effect a battery
  - or intent to effect an assault

#### Causation

#### Touching

- Can be direct or indirect (e.g., setting something in motion, laying a trap)
  - Touching of a person includes anything connected to the person

#### Harmful or Offensive

- Judged by a reasonable-person standard

#### Issues

- "Eggshell plaintiff" rule

Ex: Vosburg v. Putney

## [] 3. False Imprisonment

### Statement

- The intentional confinement, experienced or harmful, of a person to a bounded area

### Elements

#### Act (or omission)

- Failure to release

#### Intent

#### Causation

### Confinement

- Sufficient methods of confinement
  - Physical barriers
  - Physical force
  - Threats of force
  - Invalid assertion of legal authority
- Insufficient methods of confinement
  - Moral pressure
  - Future threats
- Duration of confinement is irrelevant

### Bounded area

- Movement must be limited in all directions
- Any reasonable and reasonably knowable means of escape negates this element
- The bounded area cannot be the rest of the world

### Awareness of harm

- If plaintiff is unharmed, but is aware of the confinement, this element is satisfied
- Likewise, if plaintiff is unaware of the confinement, but is harmed by it, the confinement, this element is satisfied

## [] 4. Outrage

### Statement

- The intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress

### Elements

#### Act

#### Intent or recklessness

- Note that recklessness counts as "intent" for outrage
  - Extreme and outrageous conduct
- The standard here is high -- must be truly outrageous

#### Causation Severe emotional distress

- Must be enough that plaintiff sought medical attention

#### Issues

- The "eggshell plaintiff" doctrine does not apply to allow unusually sensitive plaintiffs to recover for act that would not cause severe emotional distress in persons generally

- However, if the defendant knows about the unusual sensitivity, a cause of action will lie
- Outrage is also known as "intentional infliction of emotional distress" or "IIED"

## [] 5. Trespass to land

Statement

- An intentional physical invasion of a person's real property

**Elements**

Act

Intent

- The only intent needed is the intent to do the act that results in the physical invasion
- Not knowing that the land belongs to another person does not negate the intent element

Causation

Physical invasion

- Person or object
- Does not include intangibles, e.g., vibrations or odors

Real Property

- Surface
- Subsurface
- Airspace to a reasonable distance

## [] 6. Trespass to chattels

Statement

- An intentional interference with plaintiff's chattel by physical contact or dispossession

**Elements**

Act

Intent Causation Interference With right of possession

- Physical contact
- Dispossession
- Interference with use

Chattel

- something tangible that you own, livestock, computer
- Not people
- Not real property
- Not intangible property
  - Unless reduced to a tangible form (e.g., negotiable bearer bond)

#### Issues

- Distinguish from conversion
  - See notes below

## [] 7. Conversion

#### Statement

- An intentional exercise of dominion or control over a chattel which so substantially interferes with the plaintiff's rights as to require defendant to be forced to purchase it

#### Elements

##### Act

##### Intent

##### Interference

##### Chattel

##### Substantiality

- So substantial, the act warrants a forced sale

#### Issues

- Distinguishing conversion from trespass to chattels
  - Factors mitigating in favor of conversion
    - Length of time withheld
    - Amount and severity of damage
    - "Totaled"
  - Factors tending to negate conversion
    - Repairable damage
    - Temporary nature of deprivation
- In the remedy for conversion, after paying damages, the defendant retains the converted property

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# Strict Liability

1. Generally
  1. Under special circumstances, liability may be imposed without a showing of negligence or other form of culpability
2. Elements
  1. Absolute responsibility for safety
    1. Trespassing animals
    2. Wild animals on property, to licensees and invitees
    3. Domestic animals with known, uncommon, dangerous propensities
    4. Ultra-hazardous / abnormally dangerous activities
      1. Factors
        1. Degree of danger
          1. Risk of serious harm
          2. Inability to render safe
        2. Uncommonness of activity in area
      2. Examples
        1. Blasting
        2. Oil Drilling
        3. Fumigation
        4. Crop Dusting
  5. Defective Products
    1. Defendant must be a "commercial supplier" of the product at issue
      1. Manufacturers, wholesalers, and retailers are commercial suppliers
      2. Not casual sellers
2. Actual Causation
  1. Generally the same as for negligence, see above
3. Proximate Causation
  1. Generally the same as for negligence, see above
4. Damages
  1. Generally the same as for negligence, see above

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# North Dakota Law Memos

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## [] Land Owner/Occupier Standards of Care

**Question:** What are the different standards of duty in North Dakota, if any, owed by land owners to trespassers, invitees, and/or licensees?

**Answer:** In North Dakota the courts have abolished the common-law distinction between an invitee and a licensee. *O’Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977). The court now uses the ordinary principles of negligence for both invitees and licensees, where the occupier of the premises is held to the reasonably prudent person standard in maintaining a safe environment on his property that is reasonable under the circumstances, “including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk.” *Id.*

The North Dakota courts have held that an occupier owes an ordinary duty of care to avoid injuring a known trespasser. However, if the trespasser is unknown, then the occupier owes only a slight duty of care as to refrain from harming the trespasser willfully and wantonly. *Smith v. Kulig*, 696 N.W.2d 521 (N.D. 2005).

*(Submitted by: Mark Krogstad, Paul Tuchscherer, Dan Tyler, Tyler Johannes, Adam Gallant, and Michael Lies)*

## [] Comparative Negligence/Jury Instructions

**Question:** If it turns out that North Dakota is a partial comparative negligence state, then determine whether or not there is any law about whether the jury finds out that their percentage allocation may determine the outcome of the verdict.

**Answer:** The modern trend in North Dakota courts allows the jury to be informed of the ultimate legal consequences of its special verdict answers. *Sollin v. Wangler*, 2001 ND 96. At this time, if either party requests an "ultimate outcome" instruction, the courts are required to provide said instructions for the jury. N.D. Cent. Code § 9-10-07. Therefore, without the party's specific request for "ultimate outcome" instruction, the court is not required to instruct the jury of the consequences of how they allocate the percentages of fault. North Dakota courts have generally held that the instruction must be given if requested, and only if the court believes the instruction will not confuse or mislead the jury. *Sollin v. Wangler*, 2001 ND 96.

*(Submitted by: Mikayla Jablonski, Meedith Vukelic, Megan Jahner, Brittney Bornemann, Bethany Langton, and Kelly Olson)*

## **[] Comparative Negligence/Injury Instructions 8th Circuit**

**Question:** Under Federal Rules of Civ. Procedure 49(a) referring to special verdict forms, does it mean that juries cannot be told about the effect of a 50% or more assignment of negligence in the 8th Circuit?

**Answer:** The 8th Circuit has not ruled on this issue that we can find. All of the cases we have found do not include an instruction about the effect of comparative negligence on the verdict. *Alholm v. American Steamship Co.*, 114 F.3d 1172

*(Submitted by: Wendy Ellis, Stephanie Dassinger, Kelly Cunningham, Sam Schmitz, and Tyler Morrow)*

## **[] Standard of Care for a Common Carrier in ND**

**Question:** Do common carriers owe a heightened standard of care to their passengers?

**Answer:** Yes. ND Century Code states that common carriers shall use the "the utmost care and diligence" in regards to keeping passengers safe. Furthermore, the code requires carriers to "provide everything necessary" for safe transfer including the implementation of a "reasonable degree of skill." N.D. Cent. Code § 8-02-02 (2007). The North Dakota Supreme Court affirmed the statute in *Kuntz v. Stelmachuk* upholding the common carrier's elevated responsibility. *Kuntz v. Stelmachuk*, 136 N.W.2d 810 (N.D. 1965).

*(Submitted by: Clint Morgenstern, Deanna Longtin, Tom Duppong, Levi Andrist)*

## **[] Tender Years Doctrine in North Dakota**

**Question:** Is there a tender years doctrine in North Dakota and if so, what is the age?

**Answer** No. The Tender Years statute was a child custody issue that required the courts to consider the mother as the most likely custody holder of minor children to a certain age; however, it was repealed in 1973. With regard to liability under NDCC 14-09-21: Neither parent nor child

is answerable as such for the act of the other. In *Peterson v. Rude*, the court held a parent is liable if he has knowledge of the child's previous conduct of the same character and the parent fails to take reasonable steps to avoid the incident. *Peterson v. Rude* 146 N.W.2d 555 (N.D. 1966).

*(Submitted by: Laura Barrett, Stef Haarsager, Brad McCamy, Tosh Onishi, Mark Kaffar, Ross Keeling)*

## [] Medical Malpractice in North Dakota

**Question:** Does North Dakota have a cap or limit on pain and suffering damages? Does it apply to only medical malpractice or is there a different limit (please note the difference(s), if any).

**Answer:** Yes. North Dakota has a cap of \$500k that only applies to medical malpractice, regardless of the number of health care providers the action is brought against or the number of the actions brought with respect to the injury. N.D. Cent. Code §32-42-02. In all other cases there is no cap as per North Dakota Century Code §32-03-04. As stated in *Albrecht v. Metro Area Ambulance*, "Human suffering is not a commodity; it has no price, and therefore, it is left to the best judgment and sound discretion of the jury to determine compensation for the injuries sustained and the pain and suffering arising therefrom." *Albrecht v. Metro Area Ambulance*, 623 N.W.2d. 367 (ND 2001).

*(Submitted by: Holly Annis, Patrick Hope, Joseph Quinn, Mardy Berlinger, Mark Reitan, and Woosug Choi)*

## [] Statute of Limitations and Statute of Repose for Negligence

**Question:** What are the statutes of limitations for torts in North Dakota for intentional torts, negligence, and medical malpractice and what is the statute of repose?

**Answer:** Statute of limitations for intentional torts such as libel, slander, assault, battery, or false imprisonment, have a two year limitation. These actions must be commenced within two years after the claim for relief has accrued. *Johnson v. Haugland*, 303 N.W.2d 533 (N.D. 1981). Statute of limitations for trespass to chattels and land have a 6 year term for bringing a claim after an act has commenced. *Erickson v. Scotsman, Inc*, 456 N.W.2d 535 (N.D. 1990). Statute of limitations for medical malpractice also has two years from the time the action was commenced in addition to a six year statute of repose whereas an action against a physician or licensed hospital will not be extended beyond six years of the act or omission of alleged malpractice. *Hoffner v. Johnson*, 2003 ND 79, 660 N.W.2d 909, 5 A.L.R.6th 611 (N.D. 2003).

*(submitted by: Cassie Scheving O'Connell, Arin Ridl, Jennifer Ready, Brad, Bowyer, Luke Turner, Christopher Davis)*

## [] Joint and Several Liability Rule

**Question:** Has North Dakota statutorily modified the joint and several liability rule?

**Answer:** Yes, but when the parties are not acting in concert. When more than one party contributes to the plaintiff's injury, the liability of each party is only for the amount of his or her percentage of fault, except when parties act in concert. In a situation where the parties act in concert to commit a tortious act or aid or encourage the act, they are jointly liable for all damages attributed to their combined percentage of fault. Modified Comparative Fault Statute N.D. Cent. Code § 32-03.2-02

*(Submitted by Michael Lockhart, Kurt Porter, Andrea Polries, Sarah Finstad, Dawn Isaak)*

## [] Comparative Negligence

**Question:** Is North Dakota a contributory negligence or comparative responsibility regime?

**Answer:** Comparative.

**Question:** If comparative Responsibility, is it pure or partial?

**Answer:** Partial.

**Question:** If partial, is plaintiff's claim barred if plaintiff is 50% or more responsible?

**Answer:** Yes, the North Dakota Century Code Section 32-03.2-02, provides: "Contributory fault does not bar recovery... unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering." Therefore, if a Plaintiff's fault is equal to or greater than the Defendant's fault (or the combined fault of multiple defendants), then the Plaintiff is barred from recovery. Ex.) PL and 2 DF. PL is found 50% responsible and each DF is found 25% responsible So,  $50\% = (25\%+25\%)$ , and PL claim would be barred Ex.) PL and DF. PL is found 49% responsible and DF is found 51% responsible So,  $49\% < 51\%$ , and PL claim would be reduced by 49%

*(Submitted by: Mark Dunn, Julie Binstock, Daniella Klein, and Shelby Larson)*

## [] Medical Informed Consent

**Question:** Does North Dakota Follow the lay or professional person informed consent standard for medical treatment? Canterbury or Kaplin.

**Answer:** North Dakota follows the Canterbury standard, also referred to as the prudent patient standard.

The doctrine of informed consent is the duty of a physician to disclose sufficient information to permit a patient to make an informed and intelligent decision on whether to submit to a proposed

course of treatment or surgical procedure, and to disclose available choices for treatment along with the known risks. *Long v. Jaszczak*, 2004 ND 194.

There is one statute addressing requirements of informed consent for abortion in NDCC § 14-02.1. (Submitted by Pam Crawford, Jeff Rost, Quinn Fylling, Jonathan OKonek, Carly Kahan)

## [] Collateral Source Rule

**Question:** Has North Dakota statutorily modified the collateral source rule?

**Answer:** 32 NDCC 32-32-03.2-10 provides that a jury may not be informed of any collateral sources the winning party may have in determining economic damages. However, 32 NDCC 32-03.2-06 does allow the losing party to apply to the court for a reduction of economic damages IF THOSE COLLATERAL SOURCES ARE NOT EXEMPT. Exemptions include life insurance, death or retirement benefits, etc. This information is presented directly to the court itself after damages have been awarded and not to the jury.

(Submitted by Kiara Kraus-Parr, Ashmit Patel, Belete Shiferaw, John Osborne, Vanessa Henderson)

## [] Cap on Punitive Damages

**Question:** Is there a cap on punitive damages in North Dakota?

**Answer:** No, according to the North Dakota Century Code, there is no cap on punitive damages. Punitive damages are only considered excessive when the amount of the award is so great that it indicates passion or prejudice on the part of the jury. *Dewey v. Lutz*, 462 N.W.2d 435 (N.D. 1990).

(Submitted by Peggy Larsen, Sandra Voller, Jen Reimer, Denitsa R. Mavrova, David T. Nameniuk)

## [] Locality Rule for General Practitioners

**Question:** Has ND entirely rejected the locality rule for general practitioners? (Are general practitioners held to a national standard?)

**Answer:** In North Dakota a physician must exercise the same reasonable care as physicians practicing in similar localities. A physician has a duty to exercise such reasonable care, diligence, and skill as are ordinarily possessed, exercised by, and expected of physicians in the same general line of practice. *Winkjer v. Herr*, 277 N.W.2d 579 (N.D. 1979).

In other words, the state of North Dakota has not abandoned the locality rule. This does not mean they do not apply a national standard to their practice, it just means that procedurally they tend to follow a local protocol.

(Submitted by Brett Erickson, Rhiannon Gorham, Sean Kasson, Patrick Rosenquist)

## [] Standard For Informed Consent

**Question:** Does North Dakota follow the objective or subjective plaintiff standard for informed consent?

**Answer:** In ND, there has been a tendency to follow both the objective and the subjective standard.

Under both the subjective and objective standards for informed consent, a physician must disclose material risks involved in a procedure, but the physician need not disclose all possible risks and dangers of a proposed procedure, and expert medical testimony is generally necessary to identify the material risks of treatment, their likelihood of occurrence, their gravity, that the physician reasonably should have known of the risk, and reasonable alternatives. *Flatt v. Kantak*, 687 N.W.2d 208 (ND 2004).

*(Submitted by Sue Swanson, Leonardo Maldnado, Thomas Nikolaisen, Jonathan Godfread)*

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