

# NEW JERSEY STATE LAW SUMMARY

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**A. CAUSES OF ACTION**

1. **Negligence**

New Jersey follows the traditional rule for establishing a cause of action in negligence. Plaintiff must prove that defendant had a duty to protect plaintiff from injury, defendant failed to perform that duty, and plaintiff's injuries were proximately caused by defendant's failure to perform that duty.<sup>1</sup>

The degree of care required of defendant must be in proportion to the apparent risk. As the danger becomes greater, defendant is required to exercise greater care commensurate with the danger.<sup>2</sup>

2. **Negligence Per Se**

Generally, proof of a violation of a statutory duty is not the same as proof of negligence, although it is evidence to be considered by the jury. Where, however, a statute specifically incorporates a common-law standard of care, a jury finding of a statutory violation constitutes a finding of negligence.

The Careless Driving statute is the best example of this principle because it provides that a person is guilty of careless driving if a person drives a vehicle "carelessly or without due caution and circumspection, in a manner so as to endanger or be likely to endanger, a person or property."<sup>3</sup> Since the statute contains a standard of care, a violation is negligence per se.

Similarly, where a following automobile fails to maintain a reasonably safe distance behind the automobile ahead in violation of N.J.S.A. 39:4-89 and the failure to do so results in a collision, the violation of the statute is also negligence per se.<sup>4</sup>

3. **Respondeat Superior**

The doctrine has traditionally been used to hold an employer liable for the torts of its employees when the employee was acting within the scope of employment.<sup>5</sup> The employee's action will generally be deemed to be within the scope of employment if it is the kind of action that the employee is employed to perform, it occurs within the authorized time and space limits, and it is activated, at least in part, by a purpose to serve the employer.<sup>6</sup>

New Jersey has adopted the “dual purpose” rule which states that when a trip serves the employee/driver’s private affairs and is also in furtherance of the master’s business, the master is subject to liability for the employee’s actions.<sup>7</sup>

The determination of whether a deviation from the required route is a detour (which allows for recovery against an employer) or a frolic (which relieves the employer of liability) is a fact-based determination to be made by a jury.<sup>8</sup>

In addition, where a transportation company leases a vehicle from its owner by written agreement, a rebuttable presumption arises that the driver of the vehicle was operating the vehicle as an agent of the lessee.<sup>9</sup>

#### 4. **Negligent Hiring, Training and Retention**

New Jersey recognizes a cause of action for negligent hiring, supervision, and training.<sup>10</sup> An action for negligent hiring or retention of an employee, requires proof that the employer knew or had reason to know of the particular unfitnes, incompetence, or dangerous attributes of the employee and the employer could reasonably have foreseen that those qualities created a risk of harm to other persons. Additionally, the employee’s unfitnes or dangerous characteristics must have proximately caused the injury.<sup>11</sup>

There is one unreported case interpreting New Jersey law which holds that where an employer has admitted that the employee acted within the course and scope of his employment, evidence of negligent hiring, training, supervision or retention becomes unnecessary, irrelevant, redundant and prejudicial.<sup>12</sup>

#### 5. **Negligent Entrustment**

New Jersey recognizes a cause of action for negligent entrustment based on the ownership and use of a vehicle.<sup>13</sup> An owner of a vehicle who loans or rents a vehicle to another is not vicariously liable for the borrowee’s negligence unless that individual is an agent or employee of the owner. Other than noted above, the owner of a motor vehicle may be liable to a third party only if there is an agency relationship between the owner and the driver.<sup>14</sup> Moreover, neither an accommodation signer nor co-lessee of a vehicle has any duty to determine the competence or fitness of a lessee to operate the vehicle, and neither may be held liable for injuries caused by a lessee’s incompetence as a driver.<sup>15</sup>

#### 6. **Negligent Inflection of Emotional Distress**

New Jersey recognizes a cause of action for negligent infliction of emotional harm to a bystander provided that four elements are established: (1) the death or serious

physical injury of another was caused by defendant's negligence; (2) a marital or intimate family relationship existed between plaintiff (bystander) and the injured person; (3) there was an observation of death or serious physical injury by the bystander who witnessed the death or physical injury at the scene of the accident; and (4) the observation resulted in severe emotional distress. Moreover, the "intimate family relationship" standard has been liberalized to include relationships outside those of blood or marriage, such as an engaged couple living together who are considering marriage.<sup>16</sup>

### 7. **Wrongful Death**

New Jersey permits a wrongful death action to be brought in the name of the administrator of the estate of the decedent for injuries which were caused by a wrongful act, neglect, or default and for which, if death had not ensued, the person would have been entitled to recover damages.<sup>17</sup>

### 8. **Survival Action**

The New Jersey's Survivor's Act was intended to supplement the Wrongful Death Act and therefore, affords complete and adequate redress to the estates of those who were injured in person or property by injuries causing the death.<sup>18</sup> To that end, the Act allows the decedent's estate to recover any loss to the decedent that accrued between injury and death. The Survivor's Act, in contrast to the Wrongful Death Act, does not contain an express limitation on the types of damages recoverable under the Act.<sup>19</sup> Under New Jersey law, punitive damages are permitted under the Survivor's Act.<sup>20</sup>

### 9. **Third Party Bad Faith Claims**

New Jersey permits both first-party bad faith claims<sup>21</sup> and third-party bad faith claims.<sup>22</sup> In order to establish bad faith, plaintiff must "show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard or the lack of a reasonable basis for denying the claim."<sup>23</sup>

### 10. **PIP Subrogation**

Insurers paying PIP benefits for medical expenses have the right to recover the amount paid from any tortfeasor which was not, at the time of the accident, required to maintain personal injury protection or medical expense benefits coverage, other than for pedestrians, under the laws of New Jersey, including personal injury protection coverage required to be provided in accordance with Section 18 of P.L.1985, c. 520 (C.17:28-1.4), or although required, did not maintain personal injury protection or medical expense benefits coverage at the time of the accident.<sup>24</sup>

The accident must occur in the State of New Jersey. This does not represent a lien against plaintiff's recovery from a third-party; but instead a direct claim which may be asserted by the PIP insurer.

However, the insurer's right to recover must be asserted within two years from the date of receipt of the PIP application.<sup>25</sup> N.J.S.A. 39:6A-9.1 mandates that a claim for the reimbursement of PIP benefits made against a tortfeasor's insurer must be submitted to arbitration.<sup>26</sup> However, whether a claim for the reimbursement of PIP benefits made against a tortfeasors with a self-insured retention must be submitted to arbitration remains an open issue in New Jersey.

11. **Loading/Unloading Doctrine - Demand for Defense and Indemnification under Omnibus Insurance Clause**

In New Jersey, all motor vehicle insurance policies must include coverage (omnibus coverage) for an individual, other than the named insured, who uses the vehicle with the consent of the insured.<sup>27</sup> The omnibus clause extends coverage to any person using, operating or riding in the insured vehicle if done with permission.<sup>28</sup> The term "use" has been given a broad interpretation, including, but not limited to, encompassing the "loading and unloading" of the insured vehicle.<sup>29</sup>

Under the "loading and unloading" doctrine, a trucking company may be held to defend and indemnify other parties involved in the loading and unloading of its truck.<sup>30</sup> However, the Courts have begun to create exceptions to this doctrine such as where the accident occurs after the completion of the loading and unloading of the freight or where the cause of the accident is not "necessary" to the loading and unloading of the freight.<sup>31</sup>

## B. STATUTES OF LIMITATION

1. **Bodily Injury**

A cause of action for bodily injury and property damage based on negligence must be filed within two (2) years from the time of the injury.<sup>32</sup>

2. **Property Damage Claims**

A cause of action for property damage must be filed within six (6) years from the time of injury.<sup>33</sup>

3. **Wrongful Death**

A wrongful death action must be filed within two (2) years from the death of the decedent.<sup>34</sup>

4. **Breach of Contract/Bad Faith Claims**

A contract action must be filed within six (6) years from the time the cause of action accrued.<sup>35</sup> A cause of action accrues when the breach is or should have been discovered.<sup>36</sup>

Contract actions are governed by the Uniform Commercial Code and it is four (4) years.<sup>37</sup> By agreement, the parties may reduce the period of limitation to not less than one (1) year, but they may not extend it beyond 4 years. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.<sup>38</sup>

5. **PIP Reimbursement**

A formal demand for arbitration or a cause of action seeking reimbursement of PIP benefits must be filed within two (2) years from the receipt of the PIP Application.<sup>39</sup>

**C. DAMAGES**

1. **Damages Recoverable in Personal Injury Action**

Plaintiff is generally entitled to recover compensatory damages if he/she has met the burden of proving some loss or injury and if the jury has been provided some evidence from which to estimate the amount of damages, even if plaintiff is unable to prove the exact measure of damages.<sup>40</sup> Damages are generally awarded to compensate plaintiff for past and future medical expenses and lost wages directly attributable to defendant's negligence, as well as pain and suffering. A spouse may recover damages for loss of consortium which includes fair and reasonable compensation for the loss of the spouse attending to household duties, loss of companionship, loss of comfort, and loss of marital relations.<sup>41</sup>

2. **Damages in Wrongful Death Action**

In a wrongful death case, plaintiffs can recover only for pecuniary damages resulting from death as well as hospital, medical and funeral expenses.<sup>42</sup> Pecuniary losses include the value of the decedent's services, companionship (but not solace), guidance and nurture of children, and future lost earnings, reduced by income taxes and the cost of necessities, had the decedent lived.<sup>43</sup>

### 3. **Survival Action**

The Survival Act is designed to compensate for damages sustained by the decedent prior to death.<sup>44</sup> These losses include pain and suffering and loss of earnings between the time of injury and death. The pain and suffering of decedent must be conscious pain and suffering.<sup>45</sup>

### 4. **Punitive Damages - Standards for Recovery**

Punitive damages may be awarded in a personal injury action based on negligence. To warrant an award of punitive damages, defendant's conduct must amount to intentional wrongdoing in the sense of an "evil-minded act", or an act accompanied by a wanton and willful disregard of the rights of another.<sup>46</sup> The key to the recovery of punitive damages is the intentional aspect of the wrongful act.

The Punitive Damages Act became law in 1995 as part of New Jersey's Tort Reform. The Punitive Damages Act provides (1) a punitive damages cap of \$350,000 or five times the liability of the defendant for compensatory damages, whichever is greater; (2) changes the standard of proof from "preponderance of the evidence" to "clear and convincing evidence"; (3) requires an award of compensatory damages of at least \$500; and (4) is effective for causes of action filed on or after October 27, 1995.<sup>47</sup>

New Jersey, like many other states, has decided that there should not be an exception for those torts in which liability is vicariously imposed on the employer for a wrong of his servant.<sup>48</sup>

### 5. **Insurability of Punitive Damages**

Defendants are not permitted to insure for punitive damages because the public policy for punitive damages, that is punishment and deterrence, would be defeated.<sup>49</sup>

### 6. **Effect of Settlement With A Co-Defendant**

Settlement by plaintiff with a joint tortfeasor, even if for less than the joint tortfeasor's share of the *pro rata* claim, reduces plaintiff's claim by the *pro rata* amount and bars an action for contribution against the settling defendant. If the settling party is found not to be a joint tortfeasor, plaintiff's claim is reduced by the amount received from the settling defendant.<sup>50</sup>

### 7. **No-Fault Verbal Threshold**

The verbal threshold exempts a person from tort liability for non-economic loss unless a person can demonstrate a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a bodily organ, member, function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.<sup>51</sup>

However, the verbal threshold is only applicable to an "automobile" which is defined as a: (1) private passenger automobile not used as a public or livery conveyance for passengers and not rented to others with a driver, (2) a vehicle used for recreational purposes, or (3) an automobile owned by a farm family copartnership or corporation principally garaged on a farm or ranch.<sup>52</sup> Therefore, an "automobile" does not include a commercial motor vehicle, and a plaintiff is not required to exceed the verbal threshold in an action involving a commercial motor vehicle.

In cases where an "automobile" is owned by a commercial carrier, but is not used as a passenger vehicle or vehicle for hire, then PIP coverage is required and the verbal threshold will apply.<sup>53</sup>

### 8. **Buses**

Owners and operators of some buses are exempted from tort liability for non-economic losses as a result of bodily injury unless the plaintiff has sustained a personal injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.<sup>54</sup> An injury is considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment. However, the threshold limitation does not apply to passengers on New Jersey Transit buses and other buses not eligible for bus-PIP benefits [e.g. school buses] who are not named insureds electing the verbal threshold.<sup>55</sup>

In order to comply with the above, a plaintiff must satisfy certain requirements. Within 60 days following the date of the answer to the complaint by the defendant, plaintiff must provide the defendant with a certification from the licensed treating physician or a board-certified licensed physician to whom the plaintiff was referred

by the treating physician. The certification must state that the plaintiff sustained an injury described above.

9. **Loss of Use**

Under New Jersey Law, recovery is permitted for all damages naturally and proximately caused by wrongful conduct, including loss of use.<sup>56</sup> Loss of use has been defined as those damages occasioned to the plaintiff by reason of the detention, including personal loss, inconvenience and capital outlay.<sup>57</sup>

10. **Diminished Value**

Diminished value is a viable theory of recovery for property damage in New Jersey.<sup>58</sup> Expert testimony is required in order to establish diminished value<sup>59</sup> and evidence of cost of repair is generally admissible as a proper element to be considered in ascertaining diminished value.<sup>60</sup>

11. **Fear of Impending Death**

While no New Jersey state court has yet addressed the validity of a claim for fear of impending death, the issue has been addressed in an unpublished opinion issued by the District Court of New Jersey.<sup>61</sup> The court held that the New Jersey Supreme Court would likely permit evidence of fear of impending death, given the evolution of New Jersey law generally with respect to emotional distress claims. However, expert testimony is necessary to support this claim.

### D. COMPARATIVE FAULT

1. **Type of Comparative Fault System**

The modified comparative negligence statute will not bar recovery if plaintiff's negligence was not greater than the negligence of the defendants. Therefore, plaintiff may recover damages only if plaintiff is found to be less than 51 percent at fault. Any damage award received by plaintiff will be reduced by plaintiff's percentage of negligence, if any.<sup>62</sup>

2. **Status of Joint and Several Liability**

A recovering party may recover the full amount of its damages against any party determined to be responsible for 60% or more of the total damages. If a party is found to be less than 60% responsible for total damages, it can be held responsible only for payment of that percentage of damages directly attributable to its negligence.<sup>63</sup>

3. **Request for Apportionment of Liability at Closing Arguments**

New Jersey courts have ruled that it is proper for a lawyer to propose specific percentages of liability at trial in opening and closing arguments when asking juries to apportion liability among multiple tort defendants.<sup>64</sup>

**E. DEFENSES**

1. **Standard Defenses That Should Be Raised**

The Answer to the Complaint must set forth defenses of accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and jurisdictional defenses.

In addition, in motor vehicle cases, it is appropriate to plead failure to wear a seat belt, failure to exceed the no-fault verbal threshold (if applicable), failure to mitigate damages, and the collateral source rule.

2. **Affirmative Defenses**

R. 4:5-4 provides in part that “[a] responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense . . . .” An affirmative defense is waived, if not pled or otherwise timely raised.<sup>65</sup> New Jersey recognizes the affirmative defenses of contributory negligence, assumption of risk<sup>66</sup>, last clear chance<sup>67</sup>, and the Entire Controversy Doctrine<sup>68</sup>.

3. **Sudden Emergency**

To invoke the sudden emergency doctrine and to be entitled to that charge to the jury, a party must have been confronted by a sudden emergency over which he had no control, without fault on his part. The doctrine negates negligence if the jury finds that the party chose one of alternative reasonably prudent courses of action, even though, by hindsight, another course of action would have been safer. If applicable, a jury charge incorporating the sudden emergency doctrine is available both on the issue of negligence of a defendant and on the issue of contributory negligence of a plaintiff.<sup>69</sup>

4. **Any Special Defenses To A Particular Type of Lawsuit**

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The Entire Controversy Doctrine: This doctrine was designed to achieve economy in litigation by avoiding piecemeal or fragmented litigation and it requires parties to assert all claims against a defendant in one legal proceeding. Failure to do so may result in a bar of any subsequently filed claim.

The Seat Belt Defense: Although not the basis of a defense, New Jersey has a mandatory seat belt law.<sup>70</sup> First, the failure to wear a seat belt is not negligence per se.<sup>71</sup> Second, defendant has the burden of producing evidence that nonuse of a seat belt enhanced plaintiff's injuries.<sup>72</sup> Third, assuming the defense has been properly raised, any percentage of fault attributed to a plaintiff will not reduce the full amount of damages.<sup>73</sup> Rather, only those injuries and damages determined to have been caused by the failure to use a seat belt will be diminished and, as a result of the unique formula prescribed by the court, the damages will never be reduced in total.<sup>74</sup> Recently, a New Jersey court held that a defendant may also present evidence of a rear seat passenger's failure to wear a seatbelt to prove that party's comparative negligence in order to reduce her damages.<sup>75</sup> This is significant as back-seat passengers over the age of 18 are not required by law to wear a seat belt. The court held that the seatbelt defense is one based on common sense and its applicability should not depend on where one is seated in the automobile.

The Bicycle Helmet Defense: In New Jersey, everyone under 17 years of age must wear a helmet when riding a bicycle.<sup>76</sup> The rule requires anyone who is either riding or a passenger on a bicycle to wear a helmet approved by the Consumer Safety Product Commission. Courts have likened the "Bicycle Helmet Defense" to the Seat Belt Defense. While adults are not required to wear helmets, evidence that the plaintiff was not wearing a helmet can be introduced as proof of their comparative negligence in order to reduce damages.<sup>77</sup>

The Collateral Source Rule: This rule prevents plaintiff from obtaining a double recovery in excess of the party's actual loss.<sup>78</sup> The rule is also intended, to some extent, to shift the burden from liability insurance carriers to health and disability carriers.<sup>79</sup> Thus, a plaintiff injured as a result of a third party's negligence who receives medical treatment paid by his health insurer cannot recover his medical expenses from the defendant. The exception to this rule is contained in the no fault provisions of the motor vehicle and traffic regulations which provide that the benefits allowed for personal injury protection shall be payable as loss accrues without regard to collateral sources, except that benefits collectible under workers' compensation insurance, employees' temporary disability benefit statutes, Medicare provided under federal law, and benefits, in fact collected, that are provided under federal law to active and retired military personnel shall be deducted from the benefits collectible.<sup>80</sup> The New Jersey Supreme Court ruled that the collateral source rule prohibits a health insurer from asserting its rights of

reimbursement from plaintiff or subrogation against a tortfeasor which may arise by express agreement between the insurance company and the insured, statute or an equitable right of subrogation.<sup>81</sup>

Venue: A motion for a change of venue shall be made not later than 10 days after the expiration of the time prescribed by R. 4:6-1 for the service of the last permissible responsive pleading, or, if the action is brought pursuant to R. 4:67 (summary actions), on or before the return date. If not so made, objections to venue shall be deemed waived except that if the moving party relies on R. 4:3-3(a)(2), substantial doubt that a fair and impartial trial can be had in the county where venue is laid, the motion may be made at any time before trial.<sup>82</sup>

### 5. **Driving While Intoxicated**

Any person who is convicted of, or pleads guilty to, operating a motor vehicle while intoxicated, in connection with an accident, shall have no cause of action for recovering economic or non-economic loss sustained as a result of the accident.<sup>83</sup> However, this statute does not preclude an intoxicated motorist from recovering PIP benefits from their insurer.

### 6. **Loss of Right to Sue for Failure to Insure**

An owner of a motor vehicle who does not have liability insurance, cannot file a lawsuit for damages sustained as a result of an accident. In addition, he/she will be subject to a mandatory fine and a one year license suspension.<sup>84</sup>

## F. **EVIDENCE/DISCOVERY**

### 1. **Are Rules of Evidence Similar to the Federal Rules of Evidence?** Yes.

### 2. **Admissibility of Traffic Citations/Criminal Charges Against the Driver**

Evidence of a defendant's guilty plea to a traffic offense is admissible in a civil suit to establish liability arising from the same occurrence<sup>85</sup> unless the plea is made with a civil reservation. A civil reservation is a specific reservation made on behalf of defendant against the use of a guilty plea in a civil suit. In particular, pursuant to R. 7:6-2(a)(1), a Court may, upon the request of a defendant at the time a plea is entered, order that the guilty plea shall not be evidential in any civil proceeding.<sup>86</sup> The issuance of a traffic citation alone is not admissible evidence.<sup>87</sup> If a civil reservation is obtained, issuance of the ticket and guilty plea are discoverable, but neither will be admissible at trial.

### 3. **Discoverability of Statements/Claims Files**

A statement taken from an insured's driver by an attorney which was retained by a defendant transportation company in anticipation of litigation is protected by work product privilege and does not have to be produced in discovery.<sup>88</sup> However, the Courts have held that the defendant's statement which was taken by defendant's insurance adjuster to investigate the automobile accident which led to the lawsuit was not material prepared in anticipation of litigation.<sup>89</sup>

#### 4. **Discoverability of Insurance Information**

A party may obtain discovery of the "existence and contents" of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of the judgment or who may be required to indemnify or reimburse payments made to satisfy the judgment.<sup>90</sup>

#### 5. **Any Unique Discovery Rules**

Uniform Interrogatories are used in all actions seeking the recovery of damages for automobile property damage or personal injury, products liability, toxic torts, professional malpractice or wrongful death. The Uniform Interrogatories are set forth in Appendix II of the Rules Governing the Courts of the State of New Jersey. In addition to the Uniform Interrogatories, a party may serve ten (10) supplemental interrogatories without leave of court.<sup>91</sup> A defendant may also serve interrogatories directed to a plaintiff asserting only a claim for loss of consortium.

Service of the actual interrogatories is not required. A party defendant served with a Complaint in an action subject to Uniform Interrogatories shall be deemed to have been simultaneously served with such interrogatories and must serve answers within sixty (60) days after the service by that defendant of the answer to the Complaint.<sup>92</sup> The plaintiff in such an action shall be deemed to have been served with Uniform Interrogatories simultaneously with service of defendant's answer and shall serve answers within thirty (30) days after service of the answer to the Complaint.<sup>93</sup>

If a party fails to serve Answers to Interrogatories within the time frame or any extension provided, the propounding party may move for an Order dismissing or suppressing the pleading of the delinquent party. The delinquent party may move to vacate a dismissal or suppression order by showing that the discovery has been provided and by paying \$200 to the Clerk of the Court, if the motion to vacate is made within 30 days of the dismissal order and \$300 if made thereafter.<sup>94</sup> If an order of dismissal or suppression without prejudice has been entered and not thereafter vacated, the party entitled to the discovery may, after the expiration of

90 days from the date of the order, move on notice for an order of dismissal or suppression with prejudice. <sup>95</sup>

### **6. Subpoena of Foreign Corporation's Records Located Outside New Jersey**

Where a corporation has sufficient minimum contacts with a state, a subpoena addressing a foreign corporation's records located beyond the borders of this state is proper. <sup>96</sup> Generally, conducting business in New Jersey or having a terminal located in New Jersey will be considered sufficient minimum contacts such that the subpoena will be deemed proper.

### **7. Spoilation of Evidence**

Spoilation typically refers to the destruction or concealment of evidence by one party to impede the ability of another party to litigate a case. In civil litigation, depending on the circumstances, spoilation of evidence can result in a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. <sup>97</sup>

### **8. Mandatory Non-Binding Arbitration**

All personal injury actions, except those involving claims for professional malpractice and products liability, are subject to mandatory, non-binding arbitration.<sup>98</sup> However, any personal injury action not subject to mandatory, non-binding arbitration may be submitted to arbitration on written stipulation of all parties. As arbitration is non-binding, the award may be rejected by any party by filing a notice of rejection of the award, as well as, demand for trial de novo with the applicable fee.<sup>99</sup> However, a party rejecting an arbitration award may be liable to pay the reasonable costs, including attorney's fees, not to exceed \$750 in total nor \$250 per day, and witness costs, not to exceed \$500.<sup>100</sup> No costs shall be awarded if the demanding party obtained a verdict at least 20 percent more favorable than the award.<sup>101</sup> If the rejected arbitration award denied money damages, no costs shall be awarded if the party demanding the trial de novo has obtained a verdict of at least \$250. <sup>102</sup>

## **G. PLACARD LIABILITY**

A lessee which is a DOT authorized carrier assumes full responsibility for the leased equipment and the entire combination. Under case law, the lessee has liability for the negligence of the lessor or its driver at all times while the lessee's placards are displayed on the leased equipment. Under some federal cases, that liability has continued after the lessee's business has been completed, so long as the placards remain on the equipment. Although recent case law indicates that the

existence of a lease is not dispositive of whether a bobtail or trucking insurer is primary, the presence of the lessee's decals on a leased vehicle gives rise to a "strong presumption" that the vehicle is under the lessee's possession and control.<sup>103</sup>

### H. LIABILITY FOR UNAUTHORIZED PASSENGERS

If an employee has express or implied permission to carry passengers, the passenger is considered an invited guest and the employer may be held liable for an injury to the passenger.<sup>104</sup> However, if there is no consent by the employer, the carriage of a passenger is outside of the employee's scope of employment and there is no liability on the part of the employer.<sup>105</sup>

### I. LIABILITY FOR REMOVAL OF SNOW/ICE FROM VEHICLES

New Jersey recently enacted a law imposing responsibility to each driver of a motor vehicle to make reasonable efforts to remove accumulated snow or ice from exposed surfaces of the motor vehicle prior to operation. The identified surfaces include the hood, trunk, windshield, windows and roof, the cab of a truck, the top of a trailer or semitrailer, and the top of an intermodal freight container.<sup>106</sup> Excluded is any vehicle being operated during a snow or ice storm that began and continued for the duration of the motor vehicle's operation or to any vehicle while it is parked.<sup>107</sup> No fine shall be imposed if the driver of a commercial vehicle is traveling to a location where equipment is used to remove snow and ice from commercial vehicles, unless it has been determined that the driver of the commercial vehicle had already passed such a location. If an officer stops a commercial vehicle with accumulated snow or ice and claims the driver had already passed such a location, the officer shall have authority to inspect any documentation (i.e. driver's logs) related to the route traveled by the driver prior to being stopped.<sup>108</sup>

The person who is in physical possession of a motor vehicle, trailer or semitrailer or combination of vehicles carrying an intermodal freight container at the time snow or ice accumulates shall be responsible for removing same and shall be liable for a violation of the duty to remove same. If the driver was not in possession of the vehicle at the time the snow or ice accumulated, then the driver shall not be liable for a violation.<sup>109, 110</sup>

Fines are imposed depending on whether the snow or ice was found on the vehicle and whether it was dislodged and struck another vehicle or pedestrian causing injury or damage to property. If simply posing a threat by being on the vehicle, fines range between \$25 and \$75 for each offense. If snow or ice was dislodged and caused injury to property or person, fines for a commercial vehicle range

between \$500 and \$1,500 for each offense. No points will be assessed against a driver under either violation.<sup>111</sup>

**J. OFFERS OF JUDGMENT**

1. **When Can They Be Made?**

Any party may make an offer of judgment at any time more than 20 days before the first scheduled trial date or daily or weekly trial call (whichever is earliest).<sup>112</sup>

2. **Effect of An Offer of Judgment**

The party to whom the offer is made has until the tenth day prior to the first trial date or first listing to accept the offer. If the offer is not accepted, it is deemed withdrawn and is inadmissible for any purpose except the fixing of allowances after trial. An offer cannot be unilaterally withdrawn by the offering party. It is withdrawn only by the passage of time and thus, once made, must remain open for a period of 90 days or until ten days prior to trial, whichever period expires first.<sup>113</sup>

If the offer of a claimant is not accepted and the claimant obtains a verdict or determination at least as favorable as the rejected offer or, if a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit, reasonable litigation expenses incurred following non-acceptance, prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later and a reasonable attorney's fee, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance.<sup>114</sup>

If an offer made by a party other than the claimant is not accepted and the determination is favorable to the offeror, the offeror shall be allowed, in addition to costs of suit, a reasonable attorney's fee, for such subsequent services as are required by the non-acceptance, and this amount will belong to the client and constitute a prior charge upon the judgment. A favorable determination qualifying for allowances under this rule is a verdict or determination at least as favorable to the offeror as the offer or, if a money judgment, is in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less. No allowances shall be granted, however, if the claimant's claim is dismissed, a no-cause verdict is returned, or only nominal damages are awarded.<sup>115</sup>

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, a party defending a claim may serve on opposing party an offer of judgment. Same must be served at least 10 days before trial. If it is accepted within 10 days after being

served, both the offer and notice of acceptance, plus proof of service must be filed with the clerk. If an offer is not accepted it is considered withdrawn, but if the judgment that the plaintiff receives is not more favorable than the unaccepted offer, they must pay the costs incurred after the offer was made.

**K. AVAILABILITY OF UNINSURED/UNDERINSURED MOTORIST COVERAGE TO EMPLOYEE DRIVERS**

1. **Is It Available, Can It Be Limited?**

Every owner or registrant of an automobile registered or principally garaged in New Jersey must maintain uninsured/underinsured motorist coverage in the amounts of \$15,000 per person for bodily injury, \$30,000 per accident for bodily injury, and \$5,000 per accident for property damage with a \$500 deductible for each insured.<sup>116</sup> This statute differentiates between uninsured motorists and underinsured motorists.<sup>117</sup> However, the term “automobile” as defined by the statute is limited to private passenger automobiles and does not include commercial vehicles or buses.<sup>118</sup>

**L. WORKERS’ COMPENSATION**

1. **Suit Against Employer is Barred**

Under New Jersey law, an employee is barred from suing his/her employer directly for job related injuries. Employees can only recover against their employers for job related injuries through the workers’ compensation system.<sup>119</sup>

New Jersey law also recognizes that an employee can have two employers, both of whom may be liable in compensation.<sup>120</sup> As such, a recovery against one employer bars the employee from maintaining a tort action against the other for the same injury. A review of case law on this issue reveals the following five-step analysis to determine whether an employee has two employers: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; (3) the special employer has the right to control the details of the work; (4) the special employer pays the special employee’s wages; and (5) the special employer has the power to hire, discharge or recall the employee.<sup>121</sup>

2. **Lien Against Proceeds of Suit**

In situations where an employee is injured on the job by someone other than his employer, the employee can sue the responsible party for damages and can also file a workers compensation claim. However, in such circumstances the workers compensation carrier will have a statutory lien against any money that the injured party recovers from the responsible party, equal to 2/3 of the workers' compensation benefits that have been paid on the injured party's behalf.

### 3. **Suits Against Co-Employees**

Under the New Jersey Workers' Compensation Act, injured employees are barred from suing not only their employer, but co-employees.<sup>122</sup>

### 4. **Exception to the Worker's Compensation Bar for Intentional Wrongs**

Employers lose the protection of the workers' compensation bar and may be sued directly for job related injuries where they have committed an intentional wrong.<sup>123</sup> In order for an employer's act to be considered "intentional," two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.

## M. MISCELLANEOUS

### 1. **Loss of Consortium**

New Jersey recognizes a right of recovery, or *per quod* claim, on behalf of a spouse of a negligently injured plaintiff, for loss of the injured spouse's services and for loss of consortium. This claim, by Court Rule, must be joined in the Complaint filed by the injured spouse or it is deemed waived. The *per quod* claim is reduced by the amount of comparative negligence attributable to the injured spouse.<sup>124</sup>

### 2. **Medical Expense Benefit Coverage to be maintained by Motor Bus**

Every owner, registered owner or operator of a motor bus registered or principally garaged in New Jersey must maintain medical expense benefits coverage, for the payment of benefits without regard to negligence, liability or fault of any kind, to any passenger who sustained bodily injury as a result of an accident while occupying, entering into or alighting from a motor bus.<sup>125</sup>

Medical expense benefits coverage includes the payment of reasonable medical expenses in an amount not to exceed \$250,000 per person per accident. In event of

death, payments are made to the estate of the decedent.

Motor buses do not generally include certain vehicles including school buses, special paratransit vehicles and buses owned and operated by New Jersey Transit Corporation.<sup>126</sup>

### 3. **Deemer Statute**

Insurance policies written in another state by an insurance company licensed to do business in New Jersey are subject to the laws of New Jersey when the policyholder is injured in New Jersey.<sup>127</sup>

### 4. **County Jurisdictions**

Counties and, therefore, juries vary from conservative to liberal depending on socio-economic demographics. Specifically, the liberal counties are those with diverse cultural backgrounds in cities such as Trenton, Elizabeth, Jersey City, Newark, New Brunswick, Atlantic City, Hackensack, Paterson and Camden. These counties are Mercer, Union, Hudson, Essex, Middlesex, Atlantic, Bergen, Passaic and Camden counties.

The more conservative counties are rural communities such as Cumberland, Salem and Hunterdon. Other conservative counties are those in which older, more homogenous individuals reside such as Somerset, Warren, Morris, Burlington, Cape May, Gloucester, Monmouth, Ocean and Sussex.

In order to avoid the varying counties, one should consider removing the case to federal court. Federal court offers several advantages for the defense. First, plaintiff's counsel is generally less familiar with federal court. Second, the case is assigned to a federal judge and magistrate who will move the case at a faster pace. Third, the jury pool is drawn from a number of counties so it is more diverse.

In order for a case to be removable to federal court, the case must meet the requirements for "diversity jurisdiction", meaning that none of the plaintiffs is from the same state as any of the defendants.<sup>128</sup> However, if any defendant resides in New Jersey, the matter is not removable. A Notice of Removal must be filed within 30 days after the receipt of the initial pleading by the defendant or within 30 days after the matter becomes removable, if the action was not originally one that could be removed to federal court.<sup>129</sup>

The U.S. District Court for New Jersey is divided into three (3) vicinages: (1) Newark, (2) Trenton and (3) Camden. The Newark vicinage includes the counties of Sussex, Passaic, Bergen, Morris, Essex, Hudson, Union and Middlesex. The

Trenton vicinage includes the counties of Warren, Hunterdon, Somerset, Mercer, Monmouth and Ocean. The Camden vicinage includes the counties of Burlington, Camden, Gloucester, Salem, Cumberland, Cape May and Atlantic.

### 5. Choice of Law

The New Jersey Supreme Court has adopted the “most significant relationship” test to determine the choice-of-law applicable in personal injury cases.<sup>130</sup> The Court held that the analysis in personal injury cases begins with section 146 of the *Restatement (Second) of Conflict of Laws* (1971) and the presumption that the local law of the state of the injury will apply.<sup>131</sup> “Once the presumptively applicable law is identified, that choice is tested against the contacts detailed in section 145 and the general principles outlined in section 6 of the Second Restatement.”<sup>132</sup>

Therefore, the law of the state of injury is applicable unless another state has a more significant relationship to the parties and issues.<sup>133</sup> Once a conflict of laws is established, section 146 presumes that the local law of the state where the injury occurred will govern the rights and liabilities of the parties.<sup>134</sup> The Court noted that “Section 146 recognizes the intuitively correct principle that the state in which the injury occurs is likely to have the predominant, if not exclusive, relationship to the parties and the issues in the litigation. Next, you must determine whether New Jersey has a more significant relationship. “When both conduct and injury occur in a single jurisdiction, with only ‘rare exceptions, the local law of the state where the conduct and injury occurred will be applied’ to determine an actor’s liability. That is so because ‘a state has an obvious interest in regulating conduct of persons within its territory and providing redress for injuries that occurred there.’”<sup>135</sup> The third contact is “the domicile, residence, nationality, place of incorporation and place of business of the parties.” *Restatement, supra*, § 145(2)(c).<sup>136</sup> Moreover, as the Second Restatement underscores, the use of the term “domiciliary” when referring to corporations is imprecise. *See id.* § 145 comment e. Courts should focus not only on an entity’s place of incorporation but also on its principal place of business. *Ibid.* Indeed, in balancing those two epicenters, “[a]t least with respect to most issues, a corporation’s principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter place.” *Ibid.*<sup>137</sup> The final section 145 contact is the place where the relationship between the parties is centered.

Reduced to their essence, the section 146 principles are: “(1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states.”<sup>138</sup>

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## **NEW JERSEY LAW SUMMARY**

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