

# Florida Gulf Coast University "The Entrepreneur's Law School"

Basic Personal Injury Law  
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Entrepreneurs sometimes overlook the legal aspects of personal injury until they are faced with a problem. This session is an overview of Florida law governing personal injury claims. Topics that will be discussed include Florida no fault law, premises liability, employer liability, role of insurance, bad faith, and alternative dispute resolution.

# Personal Injury claims generally

- Involve injury or damage to person or property
- Law of Torts – civil wrongs
- Intentional vs. Negligence
- Intentional Interference with person or property

# Florida's Court System

- Small Claims Court - cases under \$5,000
- County Court \$5,000 to \$15,000
- Circuit Court – cases over \$15,000
- Almost all personal injury cases are filed in Circuit Court

# Inherent Powers of Courts

- The courts have inherent equitable powers to force people, businesses, and other entities to do something, or to prevent them from doing certain activities. Injunctive Relief
- Courts of law versus courts of equity
- Today only one court with both legal and equitable powers.
- Actions for money are actions at law.
- Actions for injunctions are equitable actions.
- These inherent equitable powers are separate and distinct from the court's power and obligation to enter final judgments for damages in actions at law.

# Statutes of Limitation – Time Limits

- 4 years for general negligence cases
- 4 years for product liability
- 4 years for a statutory liability
- 2 years for medical malpractice
- Discovery rule extends SOL
- 5 years on a written contract

# Alternative Dispute Resolution:ADR

- 98% of personal injury cases are resolved through ADR.
- Mediation is now mandatory in all civil cases prior to trial.
- Mediation now also being used in the pre-suit phase.
- Collier County Judges also ordering many cases to mandatory non-binding arbitration.
- Mediation & Arbitration very successful in resolving cases.

# Background history – Torts 101

- Legal elements of common law negligence:
  - 1) Duty
  - 2) Breach of duty
  - 3) Causation
  - 4) Damages – Injury to person or property
- Plaintiff must prove all four elements of the cause of action to prevail.

# Origins of Legal Duty

- The duty element of negligence focuses on whether a defendant's conduct foreseeably creates a broader zone of risk that poses a general threat of harm to others.
- Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.
- As the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken.



# Origins of Legal Duty

- Duty exists as a matter of law and is not a factual question for the jury to decide.
- Duty is the standard of conduct given to the jury for gauging a defendant's factual conduct.
- The key test is whether the defendant's conduct created a foreseeable zone of risk, not whether the defendant could foresee the specific injury that actually occurred.

# Example of Scope of Legal Duty

- Electric utilities must shoulder a greater-than-usual duty of care in proportion to the greater-than-usual zone of risk associated with the business enterprise they have undertaken.
- Because electricity has power to kill or maim, the duty imposed upon power companies is a heavy one, because the risk defines the duty.
- If there is any general and foreseeable risk of injury through (the transmission of electricity), the courts are not free to relieve the power company of this duty.
- Compare blind man at intersection example.

# Breach of Duty

- Can be an act or an omission - failure to act.
- Example: In order for the proprietor of a public place to be held liable for a breach of duty to a customer he must have either actual or constructive knowledge of the particular risk involved and/or a reasonable opportunity to protect him from that risk.

# Causation

- Proximate causation: whether and to what extent a defendant's conduct foreseeably and substantially causes a specific injury that actually occurs.
- Harm is proximate in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question.
- Human experience teaches that the same harm can be expected to recur if the same act or omission is repeated in a similar context.
- It is immaterial that a defendant could not foresee the precise manner in which the injury occurred or its exact extent.

# Causation

- Unlike the duty element, the question of foreseeability as it relates to proximate causation generally must be left to the jury to resolve.
- Where reasonable persons could differ as to whether the facts establish proximate causation--i.e., whether the specific injury was genuinely foreseeable or merely an improbable freak--then the resolution of the issue must be left to the fact-finder. The judge is free to take this matter from the jury only where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference.

# Damages – Compensatory/Punitive

- Economic Damages – medical bills & wages/earnings
- Non-Economic Damages  
Pain & Suffering, Loss of Capacity for the Enjoyment of Life, Mental Anguish, Inconvenience, Scarring & Disfigurement
- Punitive Damages

# Economic Damages

- “Economic damages” means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action. Florida Statute 768.81

# Comparative Negligence

- Old Contributory Negligence rule barred a plaintiff even 1 % at fault from recovering.
- Florida now follows the modern rule of pure comparative negligence.
- Plaintiff may be comparatively negligent and still make a recovery that is reduced by his percentage of fault.
- Juries may also compare the fault of non parties and apportion liability to them even though not in the case.



# What is Joint & Several Liability?

- Applies to cases in which there are multiple defendants.
- Defendant must resort to contribution among his joint tort-feasors in order to obtain relief. If the codefendant is judgment proof, then the solvent defendant must pay it all.
- Modern trend is moving away from joint and several to pure percentage of fault based liability.

# Apportionment of Econ. Damages

- If plaintiff is found to be at fault:
- 1. Any defendant found 10 percent or less at fault shall not be subject to joint and several liability.
- 2. For any defendant found more than 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of \$200,000.
- 3. For any defendant found at least 25 percent but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of \$500,000.
- 4. For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of \$1 million.

# Apportionment of Econ. Damages

- If plaintiff is without fault:
- 1. Any defendant found less than 10 percent at fault shall not be subject to joint and several liability.
- 2. For any defendant found at least 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of \$500,000.
- 3. For any defendant found at least 25 percent but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of \$1 million.
- 4. For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of \$2 million.

# Apportionment of Econ. Damages

- For any defendant under subparagraph 2., subparagraph 3., or subparagraph 4., the amount of economic damages calculated under joint and several liability shall be in addition to the amount of economic and noneconomic damages already apportioned to that defendant based on that defendant's percentage of fault.

# Apportionment of Damages

- (c) With respect to any defendant whose percentage of fault is less than the fault of a particular plaintiff, the doctrine of joint and several liability shall not apply to any damages imposed against the defendant.
- (d) In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.
- (e) In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.

# Punitive Damages Fla. Stat. §768.73

- (1) (a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:
  - 1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
  - 2. The sum of \$ 500,000.

# Punitive Damages Fla. Stat. §768.73

- (b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was **actually known** by the managing agent, director, officer, or other person responsible & for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of: (1) Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or (2) The sum of \$ 2 million.

# Punitive Damages Fla. Stat. 768.73

- (c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.



# Insurance Bad Faith

- Duty to Defend & Duty to Indemnify the insured.
- Duty of good faith of insurer to pay claims when under all the circumstances it “could and should” acting in the best interests of the insured.
- Bad faith is a consumer cause of action.
- Bad faith laws are the primary motivating force for carriers to pay claims in a timely manner.
- Civil Remedy Notices with Dept. of Financial Services.

# Florida Auto Insurance Basics

- No fault provides minimum baseline coverage.
- It is critical to carry liability insurance.
- It is equally important to carry the most uninsured/underinsured motorist coverage (UM) benefits that you can afford.
- UM coverage is the only auto coverage that you buy that truly protects YOU and yours.
- Good PD, Collision, Med Pay coverage also important.

# Florida Auto Insurance Laws

- Requires owners of motor vehicles to carry a minimum of \$10,000 in personal injury protection (PIP) coverage and \$10,000 in property damage liability coverage (PD).
- No mandatory bodily injury liability coverage.
- An accident victim can only collect economic damages under the Florida No Fault law, for example, medical expenses and lost wages, unless he or she has a “threshold” claim.
- PIP /No fault law set to Sunset this year.

# Florida No Fault Liability Threshold

- Plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:
  - (a) Significant and permanent loss of an important bodily function.
  - (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
  - (c) Significant and permanent scarring or disfigurement.
  - (d) Death.

# Premises Liability

- (1) The person or entity in possession or control of business premises owes a duty of reasonable care to maintain the premises in a reasonably safe condition for the safety of business invitees on the premises, which includes reasonable efforts to keep the premises free from transitory foreign objects or substances that might foreseeably give rise to loss, injury, or damage.
- (2) In any action for negligence involving loss, injury, or damage as a result of a transitory foreign object or substance on business premises, the claimant shall have the burden of proving that:

# Premises Liability

- (a) The person or entity in possession or control of the business premises owed a duty to the claimant;
- (b) The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises. Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of notice or lack of notice offered by any party may be considered together with all of the evidence; and
- (c) The failure to exercise reasonable care was a legal cause of the loss, injury, or damage.

# Product Liability

- 4 year statute of limitations.
- Strict liability on product manufacturers, distributors, and retailers.
- Florida follows the consumer expectation test.
- If product does not perform as an ordinary consumer would expect, the manufacturer, distributor and retailer may be held liable for personal injury or property damage.

# ALF & Nursing Home Cases

- Elderly at risk for suffering injuries due to negligence of ALF and NH providers.
- Statutory and Common Law duties of care.
- Florida's statutory Resident's bill of rights protects residents from abuse and inadequate care by ALF & NH providers.
- Mandatory pre-suit mediation.



# Nursing Home & Assisted Living

- The National Center on Elder Abuse says that in 2003 alone, state long-term-care ombudsman programs investigated more than 20,000 neglect, abuse, and exploitation complaints by nursing home residents.
- Many incidents are never investigated by states.
- The federal government does not regulate ALF's unless they accept Medicare or Medicaid.
- The state does not have enough resources to investigate all of the neglect cases that occur.
- Attorneys act as “private attorney generals” in regulating the field of nursing home and assisted living.

# Medical Malpractice

- Strict pre-suit procedures.
- Mandatory pre-suit mediation.
- Must obtain an affidavit from a health care provider attesting to medical negligence.
- Cases very expensive to litigate.
- Expert testimony required to establish standard of care, deviation(s) from standard of care, and legal and medical causation.
- Damages must be significant to justify the time and expense of litigating such a case.

# FL BRNI Act – Birth Related Neurological Injury Law

- Cases involving deprivation of oxygen to the brain.
- If statutory definition of a "birth-related neurological injury" is met, NICA preempts the plaintiff's tort case.
- For NICA to apply, the brain injury (or injury to the spinal cord if applicable) must actually occur during the labor, during the delivery, or during the resuscitation in the immediate post-delivery time period.
- Provides for a \$100,000 cap on non-economic damages.

# Employer Immunity from Liability in Tort to Employees

- Workers' compensation immunity did not exist during the common law. The concept of granting an employer immunity from tort liability was enacted by the Florida Legislature and as such is merely a creature of statute. See F.S. Chapter 440.
- When the Legislature enacts a law that limits the rights citizens had, judges are required to interpret such new laws strictly and in favor of preserving common law rights.
- Workers Comp. Immunity very strong.
- Very difficult for injured workers to be compensated outside the workers compensation system.

# Sovereign (Government) Immunity

- “You can’t sue the king.”
- Modern Florida law allows limited tort liability claims against the State under limited circumstances.
- Planning level governmental decisions are immune from liability.
- Operation level governmental decisions can be subject to liability in tort.
- Example of traffic light.

# Medicare, Medicaid & Health Insurance liens

- Subrogation - a right of reimbursement from proceeds of a tort settlement.
- Collateral Source rule prohibits a defendant from introducing evidence that a plaintiff collected damages for, ie medical expense damages paid by health insurance.
- Judge will set off from the verdict any amounts paid by Medicare, Medicaid, or health insurance (but not auto PIP/MP benefits).

# Hospital liens & Letters of Protection to Health Care Providers

- Taxing district – Governmental – hospitals have rights to file and pursue liens for unpaid hospital bills.
- These liens must be satisfied by the injured plaintiff in his or her personal injury case.
- Without adequate auto medical or health insurance, some health care providers will accept a “letter of protection” to afford plaintiff access to reasonable and necessary care.

# Annual Political Battles

- Battle between interest groups plays out in Legislature, Lobbyists & Constitutional Amendments
- Associated Industries and Florida Medical Association
- Academy of Florida Trial Lawyers (AFTL)
- AFTL only interest group representing Florida's families otherwise unrepresented in the state legislature.



# Miscellaneous Notes

- PUP & CGL policies
- DEC actions
- FIGA & FWCIGA coverages
- Annuities & Structured Settlements
- Financing companies
- Sample Case evaluations
- Attacks on Constitutional Right to jury trial
- Caps on damages

# Thank You Very Much

- For more information go to [www.jloesq.com](http://www.jloesq.com)
- Links to Florida statutory laws, regulations, Constitution, and Florida Courts web sites.
- Law Office of James L. O'Leary serving citizens of Bonita Springs, Naples & Fort Myers since January 1, 1997.