

NOTICE TO THE BAR

UPDATES TO MODEL CIVIL JURY CHARGES

Appended to this Notice are two new charges and four updated charges prepared by the Supreme Court Committee on Model Civil Jury Charges ("Committee"). The Administrative Office of the Courts has posted these charges on the Judiciary's Internet web site. The address for the web page is <http://www.judiciary.state.nj.us/civil/civindx.htm>.

The Committee approved publication of the following new model civil jury charges for use by the bar and the trial courts:

- 5.76 (new) *Negligent Hiring (4/2007)*
- 5.200 (new) *Intersection Controlled with a Flashing Amber Traffic Control Device (6/2007)*

The Committee also has approved content revision to the following model civil jury charges:

- 1.11C *Jurors Not to Visit Accident Scene or Do Investigations (Revised 5/2007)*
- 1.11I *Cell Phone, Pager and other Wireless Communication Devices (Revised 5/2007)*
- 5.20N *Intersection Controlled by a Stop Sign/Flashing Red Traffic Control Device (Revised) (6/2007)*
- 5.42B *Limitation on Lawsuit Option (Revised 6/2007)*

These two new model charges and four revised model charges are published with this notice.

Further, the Committee has approved a minor revision to the Products Liability - Manufacturing Defect model charge (Charge 5.34A(5)), substituting the words "manufacturing defect" for "failure to warn instruct." Only the revised paragraph is published with this notice, rather than the full charge, as follows:

5.34A(5) *Products Liability - Manufacturing Defect (revised paragraph only):*

Proximate cause means that the manufacturing defect was a substantial factor which singly, or in combination with another cause or causes brought about the accident. [Plaintiff] need not prove that this same accident could have

been anticipated so long as it was foreseeable that some significant harm could result from the manufacturing defect. If the manufacturing defect does not add to the risk of the occurrence of this accident [*or if there was an independent intervening cause of the accident*] and therefore is not a contributing factor to the happening of the accident, then plaintiff has failed to establish that the [failure to warn instruct] manufacturing defect was a proximate cause of the accident.

Any questions or comments regarding these model jury charges should be directed to:

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/s/ Philip S. Carchman

Philip S. Carchman, J.A.D.
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Dated: September 10, 2007

[corrected notice]

5.76 NEGLIGENT HIRING¹ (4/07)

A. Introduction

The plaintiff, *[insert the plaintiff's name]*, alleges that the defendant, *[insert the employer's name]*, was negligent in the manner in which *[he]* *[she]* *[it]* hired and supervised *[insert the alleged dangerous employee's name]*. The plaintiff further claims that as a result of *[insert employer's name]*'s negligence, *[he]* *[she]* was exposed to *[insert the alleged dangerous employee's name]*, a dangerous individual, who ultimately *[insert a brief description of the alleged damage or injury]*.

B. Duty Of An Employer Generally

The mere happening of an unfortunate event does not provide a basis for liability. Liability is established only if it is proven that a person owing a duty to another breached that duty, and the breach of duty caused the injury or damages claimed.

Generally, an employer is not liable for an employee's criminal or tortious act, whether negligent or intentional, unless the act was committed during the course of, and within the scope of, employment. An exception exists in the case of

¹ The Court specifically recognized the tort of negligent hiring in *DiCosala v. Kay*, 91 N.J. 159, 174 (1982). The Appellate Division first identified the theory in *Bennett v. T&F Distrib. Co.*, 117 N.J. Super. 429 (App. Div. 1971), *cert. den.* 60 N.J. 350 (1972).

a claim of negligent hiring. An employer may be held responsible for the criminal or wrongful acts of [*his*] [*her*] [*its*] employee, even if those acts occur outside the scope of employment, if the employer was negligent in the manner in which [*he*] [*she*] [*it*] hired, supervised or retained an inappropriate or unfit employee.²

C. Negligent Hiring Exception

An employer in a business providing services to the public has a duty to use reasonable care in selecting competent and fit employees for the work assigned to them. An employer is also bound to refrain from retaining the services of an unfit employee.³

An unfit employee is one whose dangerous propensities make him or her inappropriate for a particular job assignment⁴ and who is likely to cause harm to the public if hired for that position.

² *DiCosala v. Kay*, 91 N.J. 159, 173 (1982).

³ The focus of the tort of negligent hiring is on the risk the employer creates by exposing members of the public to a potentially dangerous individual. *DiCosala v. Kay*, 91 N.J. 159, 172 (1982). *See Id.* at 171 (citing *Restatement 2d Agency*, §213, Comment d: “Agent dangerous: The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him....”). *See also Bennett v. T&F Distrib. Co.*, 117 N.J. Super. 429, 445 (App. Div. 1971), *cert. den.* 60 N.J. 350 (1972) (“The protection of innocent third persons is a major interest in favor of a rule imposing a duty of reasonable care in the selection of employees or independent contractors who may have vicious propensities”).

⁴ “The dangerous quality in the [employee] may consist of his incompetence or unskillfulness due to his youth or his lack of experience considered with reference to the act to be performed. An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if an [employer], without exercising due care in selection,

D. Elements Explained

In this matter, you may hold the employer liable for the plaintiff's injuries or damages if you find that [he] [she] [it] was negligent in failing to exercise due care in hiring, supervising or retaining an unfit individual and that such negligence was a proximate cause of the plaintiff's injuries or damages.⁵

In order to find that the employer failed to exercise reasonable care in hiring the employee in question,⁶ you must find two things:

One, *[insert employer's name]* knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee, *[insert dangerous employee's name]*⁷; and

employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity....” *DiCosala v. Kay*, 91 N.J. 159, 171 (1982) (citing *Restatement 2d Agency*, §213, Comment d).

⁵ Alternative Charge: “Therefore, for you to find (employer) liable for negligent hiring, you must first find (employer) negligent and then find that [his] [her] [its] negligence proximately caused the plaintiff's injuries or damages.”

⁶ An employer may not be held responsible under a theory of negligent hiring, supervision or retention for criminal or other wrongful acts of its employee if in the exercise of reasonable care and diligence, a reasonable employer would not have ascertained the employee's incompetence, unfitness or dangerous propensities. In other words, the employer took reasonable care and diligence in researching that individual's background, references, and other relevant information.

⁷ *DiCosala v. Kay*, 91 N.J. 159, 173 (1982).

Two, *[insert employer's name]* could have reasonably foreseen that hiring a person with the employee's attributes created a risk of harm to others, whether on or off the premises.⁸

An employer may be held liable if, during the hiring process or course of employment, the employer actually knew the employee had an inappropriate or dangerous characteristic, attribute or tendency that made the employee an unacceptable candidate for the position.⁹ An employer may also be held liable if reasonable investigation would have disclosed the employee's undesirable characteristic, attribute or tendency.¹⁰

In determining whether the employer exercised due care in this matter, you must examine all the circumstances surrounding the hiring and employment of the employee.¹¹ Since there is no hard and fast rule as to what constitutes an

⁸ *DiCosala v. Kay*, 91 N.J. 159, 173 (1982). *But see Johnson v. Usdin Louis Co., Inc.*, 248 N.J. Super. 525 (App. Div. 1991), *cert. den.* 126 N.J. 386 (1991) (negligent hiring not found where the employer could not have reasonably foreseen the employee would steal nitric acid from the employer and use it to attack his wife and daughter.)

⁹ *For instance, the employer may hire someone without a license as a taxi driver.*

¹⁰ Using the same example of a taxi driver, the employer may check that the applicant has a license on his person but not check whether the license was revoked. Had the employer checked the status of the license, the employer would have a reason to know that the applicant was unlicensed.

¹¹ *Lingar v. Live-In Companions, Inc.*, 300 N.J. Super. 22, 32 (1997).

appropriate hiring process, you should consider all of the facts and circumstances of this particular case, including but not limited to:

- a) The employer's application and interview process;
- b) The nature of the job;
- c) The checking of references;
- d) The nature and extent of information reasonably available to the employer at the time of hire, including access to public records of criminal or other convictions;¹²
- e) Whether such information was available to the employer through reasonable, and not extraordinary means, including extraordinary cost;
- f) The nature of the criminal conviction, if any; and
- g) Whether the pre-hiring investigation of the employee, if any, was adequate under the totality of the circumstances.

¹² Insert the following if criminal history investigation is applicable: "In this case, the employee, *[insert employee's name]*, had an undisclosed and undiscovered criminal history which made [him] [her] unfit and dangerous for the duties of the position. Liability of *[insert employer's name]*, though, is not predicated solely upon [his] [her] [its] failure to investigate the criminal history of the applicant. With regard to the criminal record of a candidate for employment, you must consider the totality of the circumstances, and specifically: (a) What investigation, if any, the employer could have legally taken; and (b) What information was reasonably available to the employer at the time of hire.

If you find the employer knew or could have known of the employee's unfit characteristic, you must then decide whether the employer could have reasonably foreseen that such qualities created a risk of harm to others.¹³

Foresight, not hindsight, is the standard by which an employer's duty of care must be judged.¹⁴ The fact that one may look back now and decide the employee was unfit does not satisfy this element of the claim. The employer must be judged on what [he] [she] [it] had reason to know at the time the employee was hired or retained.¹⁵ In deciding if the employer knew or could have known about the employee's characteristic and should have foreseen it to be dangerous, you may take into consideration the following:

- 1) The nature of the work;
- 2) The extent to which the employee would or would not be supervised;
- 3) Whether the employee would have access to the home and valuables of the public in general, and the plaintiff in particular; and

¹³ *DiCosala v. Kay*, 91 N.J. 159, 173 (1982). *But see Johnson v. Usdin Louis Co., Inc.*, 248 N.J. Super. 525 (App. Div. 1991), *cert. den.* 126 N.J. 386 (1991) (Where the Appellate Division refused to find negligent hiring judging the employer could not have reasonably foreseen the employee would steal nitric acid from the employer and use it to attack his wife and daughter.)

¹⁴ *Johnson v. Usdin Louis Co., Inc.*, 248 N.J. Super. 525 (App. Div. 1991), *cert. den.* 126 N.J. 386 (1991) (quoting *Hill v. Yaskin*, 75 N.J. 139, 144 (1977)).

¹⁵ *The Foreseeability Charge, 5.11, may be used to supplement.*

4) The particular vulnerability, if any, of members of the public to abuse, harm or other loss caused by exposure to a potentially unsuitable, incompetent or dangerous employee.¹⁶

E. Proximate Cause

If you find the employer, *[insert employer's name]*, was negligent in the manner in which *[he]* *[she]* *[it]* hired the employee, *[insert dangerous employee's name]*, the employer still will not be liable for the plaintiff's injury or damage unless you also find the employer's negligence proximately caused the plaintiff's injury or damage.¹⁷

This means that, in order to find the employer liable, you must find that the employer's negligence in hiring the unfit employee was a substantial factor that singly, or in combination with one or more other causes, brought about the plaintiff's injury or damage.¹⁸

¹⁶ *Lingar v. Live-In Companions, Inc.*, 300 N.J. Super. 22, 23 (1997) discusses these factors at some length.

¹⁷ *DiCosala v. Kay*, 91 N.J. 159, 174 (1982).

¹⁸ Adapted from the Proximate Cause Products Liability, Charge 5.34(G)(1).

5.20 NEGLIGENCE – AUTOMOBILE (cont.)

O. Duty Of Care: Driver Of Motor Vehicle Proceeding Through An Intersection With A Flashing Amber Traffic Control Device (Revised 6/07)

Our motor vehicle laws set forth a standard of conduct to be exercised by the driver of a motor vehicle while approaching and proceeding through an intersection controlled by a flashing amber traffic control device.

N.J.S.A. 39:4-119(b) provides:

Flashing amber: The amber lens when illuminated with rapid intermittent flashes shall indicate the presence of danger and require drivers to proceed only with caution.

The above provision requires that the motorist proceed only with caution when approaching and proceeding through an intersection controlled by a flashing amber traffic control device. This is a factor for you to consider in determining whether the driver's conduct was negligent under the circumstances.

**C. Jurors Not to Visit Accident Scene or Do Investigations
(Revised 5/07)**

Where case involves an accident:

While this case is pending, you must not visit [*the scene of the accident*] [*the place where the incident occurred*]. That area may have changed from the time of the [*accident*] [*incident*] until now.

In all cases:

While this case is pending, you are not to conduct any research or make any investigations on your own about the case. That is not your job. Your job is to decide the case based solely upon the evidence presented to all of you here in the court room.

You should not review or seek out information about the issues in the case, the parties, the attorneys or the witnesses, either in traditional formats such as newspapers, books, advertisements, television or radio broadcasts or magazines or through the internet or other computer research. You also should not attempt to communicate with others about the case, either personally or through computers, cell phone messaging, personal electronic and media devices or other forms of wireless communication. You should not go on the internet or participate in or review any websites, internet “chat rooms” or “blogs” nor should you seek out photographs or documents of any kind that in any way relate to the case.

While it may be tempting to engage in such conduct, it is very important that you refrain from doing so. This is because, as a juror, you are not to be influenced, or allow yourself to be influenced, by any information that has not been presented to you during the course of the trial. You are here to decide this case based solely on the evidence presented in this courtroom and your failure to abide by this requirement would unfairly and adversely impact the judicial process.

**I. Cell Phone, Pager and other Wireless Communication Devices
(Approved 5/04, Revised 5/07)**

If you have a cell phone, pager or other communication device, you must turn that device off while in the courtroom.

When serving on a trial, you must turn off cell phones and other communication devices and cannot use them for any purpose when in the courtroom or the jury room.

You will be given a telephone number at which you can be contacted during the trial.

Unless instructed otherwise by me, the trial judge, you can use those devices only when outside the courtroom or jury room during recesses. When you are permitted to use such devices, you must remember, as I have instructed you, you may not use them in any way to conduct your own research or make any investigations about this case on your own, or to communicate with anyone about this case.

5.20 NEGLIGENCE – AUTOMOBILE (cont.)

N. Duty Of Care: Driver Of Motor Vehicle Proceeding Through An Intersection Controlled By A Stop Sign/Flashing Red Traffic Control Device (Revised 6/07)¹

Our motor vehicle laws set forth a standard of conduct to be exercised by the driver of a motor vehicle while approaching and proceeding through an intersection controlled by a [stop sign] [flashing red traffic control device].

NOTE TO JUDGE

Use whichever of the following is appropriate based upon the configuration of the intersection:

N.J.S.A. 39:4-144 provides in pertinent part:

No driver of a vehicle . . . shall enter upon or cross an intersecting street marked with a “stop” sign unless he has first brought his vehicle . . . to a complete stop at a point within 5 feet of the nearest crosswalk or stop line marked upon the pavement at the near side of the intersecting street and shall proceed only after yielding the right of way to all traffic on the intersecting street which is so close as to constitute an immediate hazard.

N.J.S.A. 39: 4-110(a) provides:

Flashing red: The red lens when illuminated with rapid intermittent flashes shall require drivers to come to a complete stop before entering or crossing the intersection. The driver shall proceed only after yielding the right of way to all traffic on the intersecting street,

¹ See generally *Cresse v. Parsekian*, 81 N.J. Super. 536, 545-46 (App. Div. 1964), *aff'd* 43 N. J. 326 (1964); *State v. Jamerson*, 153 N.J. 318 (1998).

which traffic is so close as to constitute an immediate hazard.

The above provision requires that the motorist stop and make observations while stopped before proceeding. It also requires the motorist to continue to make observations as he or she enters and crosses the intersecting street as the circumstances at the particular intersection reasonably require. The presence of permanent or temporary obstructions to the view of the motorist, such as buildings, billboards, parked cars, crowded sidewalks, etc., does not obviate the duty of the motorist to make continual reasonable observations as he or she proceeds through the intersection, and is a factor for you to consider in determining whether the driver's conduct was negligent under the circumstances.

5.42B LIMITATION ON LAWSUIT OPTION¹ (Revised 6/07)

A. Introduction

In order to recover damages in this case, plaintiff must prove by a preponderance of the evidence that [he] [she] sustained injuries which fit into one or more of the following categories:

NOTE TO JUDGE

Charge 1, 2, 3, 4, 5, 6 or any combination of them, depending on the proofs in each case.

1. Death;
2. Dismemberment;
3. Significant disfigurement or significant scarring;
4. Displaced fracture;
5. Loss of a fetus;
6. A permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

¹ See *N.J.S.A.* 39:6A-8a. Though not numbered in the statute, the Limitation on Lawsuit Option within the Automobile Insurance Cost Reduction Act of 1998 (L.1998, c. 21 and c. 22) (“AICRA”), the categories are: (1) death; (2) dismemberment; (3) significant disfigurement or significant scarring; (4) displaced fractures; (5) loss of a fetus; (6) a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement. The effective date of this provision of AICRA is March 22, 1999. Therefore, the Limitation on Lawsuit Option shall apply to individuals who, at the time of the accident, were insured under automobile liability insurance policies issued after March 22, 1999. By way of example, if an individual was involved in a motor vehicle collision on March 23, 1999, but was still covered under a policy issued before the effective date of the statute (March 22, 1999), he or she will be subject to the verbal threshold charge applicable to L.1988, c.119 effective January 1, 1989.

If you find the injuries caused by the accident do not come within one of these categories, your verdict must be for the defendant. If you find the injuries caused by the accident do come within one of these categories, your verdict must be for the plaintiff.

B. Significant disfigurement or significant scarring (Type 3) (6/07)

In this case, the plaintiff alleges and has the burden to prove that [*he*] [*she*] suffered a significant disfigurement or significant scarring as a result of the motor vehicle accident. An injury shall be considered a significant disfigurement or significant scarring if a reasonable person would find that the disfigurement or scarring renders plaintiff's appearance unattractive, objectionable, or as the subject of pity or scorn, or that such condition individually or collectively substantially detracts from plaintiff's appearance or impairs or injures the beauty, symmetry, or appearance of the plaintiff so as to render the bearer unsightly, misshapen or imperfect deforming [*him*] [*her*] in some manner. You shall consider as factors in making this determination the appearance, coloration, existence, size and shape of plaintiff's disfigurement or scar[s] along with the characteristics of surrounding skin and the remnants of the healing process and other cosmetically important matters.

C. Permanent Injury (Type 6)

In this case, the plaintiff alleges that [*he*] [*she*] suffered a permanent injury as a result of the motor vehicle accident. An injury shall be 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.²

Plaintiff must prove this claim through objective, credible medical evidence. Objective proof means the injury must be verified by physical examination or medical testing and cannot be based solely upon the plaintiff's subjective complaints. Credible evidence is evidence you find to be believable.

² This definition of "permanent injury" is taken directly from the Automobile Insurance Cost Reduction Act of 1998 ("AICRA"), *N.J.S.A.* 39:6A-8. In *DiProspero v. Penn*, 183 *N.J.* 477 (2005), the New Jersey Supreme Court held that the Legislature did not intend to require a plaintiff with a Type 6 injury to prove a "serious or substantial impact" on his or her life in order to pierce the verbal threshold. Therefore, a plaintiff need only prove a permanent injury, as defined in the statute, to recover for non-economic damages.