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COURSE DESCRIPTION AND STATEMENT OF LEARNING OBJECTIVES

OKLAHOMA TORT DAMAGES

This course is designed to provide information to the non-resident insurance claims personnel concerning those damages which are legally recoverable in tort actions under Oklahoma law. It covers those general topics of damage both to personal injuries and property which claims handlers will regularly encounter in handling insurance claims involving Oklahoma residents or occurring within the State of Oklahoma.

It is the goal of Pierce Couch Hendrickson Baysinger & Green, L.L.P., that upon completion of the Oklahoma Tort Damages course, the attendee will:

1. Have a better understanding of those damages available in personal injury and property damage tort litigation in the State of Oklahoma;

2. Be able to understand the requirements and restrictions on tort damages for personal injury and property damage under Oklahoma law; and

3. Be better able to respond, timely and effectively, to the needs of their insured and/or claimants within the State of Oklahoma or relating to claims arising within the State of Oklahoma.
OKLAHOMA TORT DAMAGES

2.1 Citation

23 O.S. §§ 3, 4, 5, 61

General

When someone is found through a trial to have wrongfully caused injury to another person, damages are awarded from the wrongdoer as monetary compensation to the injured person. 23 O.S. §3.

The injury is referred to in the statutes as “detriment” and is defined as “loss or harm”. 23 O.S. §4.

The statutory provision that an injured party is to be compensated for “all” detriment—that is, all loss or harm—that is proximately caused by another means that an injured party is to be placed in as near a position as possible to that in which he would have been, but for the injury. Brennen v. Aston, 2003 OK 91 at ¶8, 84 P.3d 99, 101; 23 O.S. §61. The damages may include future detriment that is reasonably certain to result, as well as past detriment. St. Louis-San Francisco Ry. Co. v. McBride, 1961 OK 222 at ¶12, 376 P.2d 214, 219; 23 O.S. §§4, 5.

The measure of damages is for the breach of an obligation not arising from contract, except where otherwise expressly provided by law is the amount which will compensate for all the detriment proximately caused by the breach, whether it could have been anticipated or not.

The elements of damages are both economic, such as medical expenses and lost income, and non-economic, such as pain and suffering, and emotional distress. Such elements are often referred to as “theories for recovery”, or “claims”.

Recovery under the Worker’s Compensation Act is no standard by which to measure recovery in a personal injury action. Many elements, such as pain and suffering, are
considered for damages for personal injuries that are not included in workers' compensation awards. *All Am. Bus Lines v. Saxon*, 1946 OK 199, 172 P.2d 424. The various elements are discussed below.

**Some General Rules**

The issue of damages in a personal injury action is left to the jury after hearing all the evidence. *Strubhart v. Perry Memorial Hosp. Trust Authority*, 1995 OK 10 at ¶18, 903 P.2d 263, 270-271. “There can be no absolute standard to measure such damages, and a *wide latitude of discretion is necessarily left to the good sense and discretion of the jury which fixes the award.*” *Carraco Oil Co. v. Morhain*, 1963 OK 88 at ¶0, 380 P.2d 957, 960-961 (citation omitted) (emphasis added).

“A verdict of a jury cannot be set aside as excessive unless it strikes mankind, at first blush, as beyond all measure unreasonable and outrageous and such as manifestly shows it was actuated by passion, prejudice, partiality or corruption.” *Strubhart* at ¶18, 903 P.2d 263, 270-271. When the trial judge in good conscience believes that a verdict is excessive, the judge may direct a remittitur (reduction) and order a new trial if the remittitur is not agreed to by plaintiff. *Wells v. Max T. Morgan Co.*, 1951 OK 256 at ¶¶ 0 and 12, 236 P.2d 488, 490.

An appellate court has no right to place a limitation on the amount of a jury verdict unless it is convinced that the amount bear no relation whatsoever to the evidence. *Currens v. Hampton*, 1997 OK 58 at ¶10, 939 P.2d 1138, 1141. Even when a damages award appears inconsistent with a finding in regard to liability, the award will be affirmed if there is a theory under which the damages could be supported. *DeCorte v. Robinson*, 1998 OK 87 at ¶9, 969 P.2d 358.

**Collateral Source Rule**

Traditionally, a wrongdoer who commits a tort is liable for the whole loss caused by his actions. If the injured party receives


However, the legislature in 2003 modified this rule in regard to medical liability cases. See 63 O.S. §1-1708.1D, which allows evidence of payment of medical bills unless the court finds that such payments are subject to subrogation or other right of recovery.

### 2.2 PERSONAL INJURIES

**Citation**

OUJI 4.1, 4.2

**Adult:**

An adult may recover:

- A. [His/Her] physical pain and suffering, past and future;
- B. [His/Her] mental pain and suffering, past and future;
- C. [His/Her] age;
- D. [His/Her] physical condition immediately before and after the accident;
- E. The nature and extent of [his/her] injuries;
- F. Whether the injuries are permanent;
- G. The physical impairment;
- H. The disfigurement;
- I. Loss of [earnings/time];
- J. Impairment of earning capacity;
K. The reasonable expenses of the necessary medical care, treatment, and services, past and future.

**Minor Child:**

A minor child may recover:

A. [His/Her] physical pain and suffering, past and future;
B. [His/Her] mental pain and suffering, past and future;
C. [His/Her] age;
D. [His/Her] physical condition immediately before and after the accident;
E. The nature and extent of [his/her] injuries;
F. Whether the injuries are permanent;
G. The physical impairment;
H. The disfigurement;
I. The impairment of earning capacity after reaching the age of eighteen years;
J. The reasonable expenses of necessary medical care, treatment and services required after reaching the age of eighteen years.

**Consortium Claims**

**Citation**

OUJI 4.5, 4.6, 4.7, 4.8

**Loss of Spousal Consortium**

A spouse may receive damages for injury to a spouse in an amount of money which will reasonably and fairly compensate [him/her] for the value of the loss of consortium [he/she] is reasonably certain to sustain in the future.

**Parental Consortium**

A child may sue for the loss of parental consortium as a result of injury to the parent. Parental consortium is defined as the love, care, companionship and guidance given by a parent to a minor child. Elements include (a) parent is entitled to recover damages from a defendant for his injuries, (b) parent’s injuries are permanent, (c) plaintiff was a minor or incapacitated dependent child of the parent at the time the parent sustained injuries, (d) as a result of the injuries sustained by the parent, the minor child sustained a loss of parental consortium.
Aggravation of Pre-Existing Condition

Citation

OUJI 4.10

General

A person who has a condition or disability at the time of an injury is entitled to recover damages for any aggravation of such pre-existing condition or disability directly caused by the injury. This is true even if the person's condition or disability made him more susceptible to the possibility of injury than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

When a pre-existing condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation.

The “caps” in Medical Liability (malpractice) Cases

The Oklahoma Legislature in 2004 enacted a “hard cap” of $300,000 on noneconomic damages in medical liability cases not covered by a cap statute enacted in 2003. 63 O.S. §1-1708.1F-1(A).

However, the “hard cap” does not apply if the verdict is equal to at least one and one-half times the defendant's settlement offer, or if the judge and at least nine of the jurors make certain findings.

In 2003 a cap of $300,000 on noneconomic damages was enacted for cases involving services for pregnancy, labor and delivery, and emergency care. The cap is not contingent on the amount of the settlement offer. However, the 2003 cap does not apply if the judge finds by clear and convincing evidence, before sending the case to the jury, that the defendant committed negligence. 63 O.S. §1-1708.1F.

Neither cap statute applies in wrongful death actions.
The 2004 legislation defines noneconomic damages as “only mental pain and suffering, inconvenience, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.” 63 O.S. §1-1708.1F-1(C). The amount of the cap is to be adjusted annually for positive increases in the cost of living. 63 O.S. §1-1708.1F-1(B). A similar provision is not included in the 2003 statute.

2.3 DAMAGE TO PERSONAL PROPERTY

**Citation**

OUJI 4.12, 4.13, 4.14, 4.15

**Personal Property**

If a plaintiff has personal property damage which is not repairable but has a market value, they are entitled to recover the fair market value of the property if it is totally destroyed or the difference between the fair market value of the property immediately after if it has a remaining salvage value.

**Personal Property**

**No Market Value**

For personal property that has no value that is damaged, plaintiff may recover the amount of money, which will reasonably and fairly compensate [him/her] for the destruction and loss of the property that has no market value. The amount to be given is the amount that is reasonable value the jury determines the property to have had immediately before its destruction considering the nature and condition of the property and the purpose for which it was adapted. The law does now allow consideration of any sentimental or fanciful value.

**Loss of Use of Personal Property**

If plaintiff has some personal property that is damaged that must be repaired that [he/she] is required to replace that property during the repair period, [he/she] is entitled to recover the reasonable cost of repairing the property plus depreciation which means the difference between the fair market value of the property before it is injured and the market value after...
repairs have been made plus the reasonable cost of renting similar property during the time reasonably required to make necessary repairs of the injury caused by the defendant.

Loss of Use of Commercial/Personal Property

If plaintiff has commercial property that is damaged, [he/she] is entitled to loss of profits, which [he/she] would have received had [he/she] been in possession of the property or the cost of renting a comparable substitute.

2.4 WRONGFUL DEATH

Citation

Plaintiff may sue to recover damages for the death of decedent. In determining the amount of damages [he/she] is entitled to recover, the jury may consider the following items:

A. The loss of financial support of contributions of money to the husband/wife, children and parents of the decedent;
B. The grief of the surviving husband/wife;
C. The loss of the society, services, companionship, and marriage relationship of the husband/wife;
D. The grief of the children and parents of the decedent;
E. The loss of companionship and parental care, training, guidance, or education that would have been forthcoming from the decedent to the children, and the loss of companionship of the decedent by the children;
F. The loss of the companionship of [name of decedent] by [his/her] parents;
G. The medical and burial expenses.

You must fix the amount of money, which will reasonably and fairly compensate for those above-named elements of damage, which were directly caused by the negligence/wrongful conduct of the defendant.

Citation

OUJI 8.2
**Minor Child**

Plaintiff may sue to recover damages for the death of the decedent minor child. The following items may be considered in determining the amount of damages plaintiff is entitled to recover:

A. The medical and burial expenses;
B. Loss by the parents of anticipated services and support;
C. Loss by the parents of companionship and love of the child;
D. Destruction of the parent-child relationship;
E. Loss of monies expended by the parents or the guardian, in the support, maintenance and education of the decedent;

The award must reasonably and fairly compensate for those above-named elements of damage, which was directly caused by the negligence/wrongful conduct of the defendant.

2.5 MITIGATION OF DAMAGES

**General**

There is a common law duty for an injured party to exercise ordinary care to mitigate their damages. The victim may not stand idly by and permit preventable loss to increase; [he/she] had a duty to use all reasonable means to arrest the loss. *Tulsa Municipal Airport Trust v. National Gypsum Co.*, 551 P.2d 304 (Okla.Civ.App. 1976). In the case of personal injuries, the injured party must take ordinary care to obtain proper treatment. *Booth Tank Co. v. Symes*, 1964 OK 160, 394 P.2d 493.

2.6 HEDONIC DAMAGES

**Case Law**

Anderson v. Hale, 2002 WL 32026151 (W.D. Okla.).

**General**

Hedonic damages lawsuits arise when a plaintiff seeks compensation for the "loss of the enjoyment of life." Oklahoma does not recognize hedonic damages as a subject of recovery separate from (or even to be expressed separately from) those elements of...
damages, which are set forth under Oklahoma law either by statute or common law.

2.7 INTEREST

Citation
12 O.S. §727.1, effective November 1, 2009

General
For purposes of computing postjudgment interest as authorized by this section, interest shall be the prime rate, as listed in the first edition of the Wall Street Journal published for each calendar year and as certified to the Administrative Director of the Courts by the State Treasurer on the first regular business day following publication in January of each year, plus two percent. For purposes of computing prejudgment interest as authorized by this section, interest shall be determined using a rate equal to the average United States Treasury Bill rate of the preceding calendar year as certified to the Administrative Director of the Courts by the State Treasurer on the first regular business day in January of each year. The interest rate for computation of prejudgment interest shall begin with the rate prescribed above which is in effect for the calendar year in which the suit resulting in the judgment is commenced.

Prejudgment Interest
The interest rate for computation of prejudgment interest shall begin with the rate prescribed above from the date which is twenty-four months after the suit resulting in the judgment was commenced to the earlier of the date the verdict is accepted as expressly stated in the judgment.

No prejudgment interest shall begin to accrue until twenty-four months after the suit resulting in the judgment was commenced. The interest rate for computation of prejudgment interest shall begin with the rate described above which is in effect twenty-four months after the suit resulting in the judgment was commenced.

Beginning on January 1 of the next succeeding calendar year until the end of that calendar year, or until the date the judgment is filed,
whichever first occurs, and for each succeeding calendar year thereafter, the prejudgment interest rate shall be the rate in effect for judgments rendered during each calendar year.

After the computation of all prejudgment interest has been completed, the total amount of prejudgment interest shall be added to the amount of the judgment rendered pursuant to the resulting judgment shall become the amount upon which post-judgment interest is computed.

### Post-Judgment Interest

The court in rendering judgment shall add interest on the verdict from the date the suit resulting in the judgment was commenced to the earlier of the date the verdict is accepted by the trial court as expressly stated in the judgment, or the date the judgment is filed with the court clerk.

### Insurance

If an insurance company decides to vigorously defend the case and try it before a jury and post-judgment interest is incurred which, when combined with the adverse verdict, exceeds policy limits, then an insurance company in that position is liable to pay the prejudgment interest in excess of any policy limits. This same logic should apply for post trial interest in that if an insurance carrier makes the decision to appeal in the event of an adverse verdict, as opposed to paying the verdict, the company will have to bear the consequences of that decision and would owe post-judgment interest in excess of policy limits. *McDonald v. Schreiner*, 2001 OK 58, 28 P.3d 574.

### PUNITIVE DAMAGES

#### Citation

23 O.S. §9.1

#### General

General factors to be considered:

A. Where defendant is guilty of reckless disregard for the rights of others or insurer recklessly disregarded its duty to deal fairly and in good faith, the amount
is limited to $100,000 or the amount of actual damages, whichever is greater.

B. If the defendant or insurer acted intentionally and with malice, the jury may award $500,000 or twice the amount of actual damages or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff, whichever is greatest.

C. If the defendant or insurer acted intentionally and with malice and the judge finds beyond a reasonable doubt that the defendant or insurer engaged in conduct life threatening to humans, the jury may award any amount.

The burden of proof for punitive damages is clear and convincing evidence.

**Insurability of Punitive Damages**

An insurer may not indemnify the insured for punitive damages awarded against the insured unless awarded for the acts of one for whom the insured is legally responsible under the doctrine of *respondeat superior*. Where punitive are awarded on a negligence and not gross negligence theory against the employer, the employer may shift the burden to the insurer. *Dayton-Hudson Corp. v. American Mutual Liab. Ins. Co.*, 1980 OK 193, 621 P.2d 1155.

2.9 **ATTORNEY’S FEES**

**Citation**

12 O.S. §936 et. seq.

**General**

Attorneys fees are recoverable as follows:

- to the prevailing party in any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise (12 O.S. §936);

- to the prevailing party in any civil action to enforce payment of or to collect upon a check, draft or similar bill of exchange drawn on a
bank or otherwise, payment upon which said instrument has been refused because of insufficient funds or no account, upon proof during the trial that prior to the filing of the petition in the action demand for payment of the check, draft or similar bill of exchange had been made upon the defendant by registered or certified mail not less than ten (10) days prior to the filing of such suit (12 O.S. §937);

to prevailing plaintiff in any civil action to recover damages for the negligent or willful injury to property and other incidental costs related to such action (12 O.S. §940);

to a plaintiff if verdict for Plaintiff is more than offered by Defendant in an Offer of Judgment or to Defendant if verdict for Plaintiff is less than Defendant’s Offer of Judgment (12 O.S. §940).