

8.11 DAMAGES CHARGES — GENERAL

B. DUTY TO MITIGATE DAMAGES BY MEDICAL AND SURGICAL TREATMENT (Adopted 12/96; Revised 10/00)

If you decide that the plaintiff is entitled to damages for his/her injuries, you should then determine whether any of plaintiff's injuries could have been avoided or alleviated by plaintiff's exercise of reasonable care to protect his/her own health.

It is a general rule that a plaintiff injured by another's negligence (or other wrongdoing) has a duty to exercise reasonable care to seek and submit to medical and surgical treatment in order to affect a cure and minimize damages. Failure or refusal to do so bars recovery for consequences which could have been avoided by the exercise of such care. In other words, damages that could have been prevented by the plaintiff's exercising reasonable care are not the responsibility of the defendant.

In this case, the defendant has introduced evidence by which he/she/it seeks to reduce or avoid responsibility for plaintiff's injuries. The defendant must prove by a preponderance of the evidence that after its negligence occurred, the plaintiff acted unreasonably by either failing to seek or to submit to medical treatment in order to avoid further injury.

Of course, the plaintiff need not take unreasonable risks, nor take any risk to life, even slight, nor undergo great pain or other suffering to reduce injury inflicted by another. However, a refusal to follow surgical advice may be unreasonable if, for

example, plaintiff refuses an operation which offers a reasonable prospect of restoration or relief and poses no danger to life or health.

A defendant is liable only for that portion of the injuries attributable to the defendant's negligence. If you find that the plaintiff did not act reasonably to avoid or to alleviate injury, you shall assess in terms of percentages the degree to which the injuries were the result of the plaintiff's own unreasonable failure to minimize or to avoid further injury.

Cases:

Ostrowski v. Azzara, 111 N.J. 429, 445 (1988); *Brazil v. United States*, 484 F. Supp. 986, 992 (N.D. Ala. 1979), plaintiff's fault contributed to cause 55% of his total damages. He recovers only 45%. *Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc.*, 53 N.J. 157 (1969), a defendant bears the burden of proving the causal link between a plaintiff's unreasonable conduct and the extent of damages.

Budden v. Goldstein, 43 N.J. Super. 340 (App. Div. 1957) held that a refusal to undergo an operation is "not unreasonable and therefore unjustifiable in the legal sense, unless it is free from danger to life and health and extraordinary suffering, and, according to the best medical or surgical opinion, offers a reasonable prospect of restoration or relief from the disability." *Budden*, at 350. *Accord, Albert v. Monarch Federal Savings and Loan Assoc.*, 327 N. J. Super. 462 (App. Div. 2000).

Compare, Comparative Negligence Act, N.J.S.A. 2A:15-5.1. *See, for example, Tobia v. Cooper Hospital University Medical Center*, 136 N.J. 335, 341-342 (1994):

In a long series of cases, we have held that when a tortfeasor's duty includes exercise of reasonable care to prevent a party from engaging in self-damaging conduct, contributory negligence is barred as a defense. ... "As one writer * * * has said, '[o]nce it is established that the

defendant has a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct." *Green v. Sterling Estruder*, 95 N.J. 263 at 272 (quoting Patricia Marshall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. Rev. 1065, 1088 (1973)).

Sample Jury Interrogatory
Avoidable Consequence¹

1. Did plaintiff contribute to his/her injury by failing to return to the doctor's office or otherwise failing to follow his/her doctor's advice?

Yes _____ No _____
(5 out of 6)

If yes, answer Question No. 2; if no, cease deliberations.

2. Set forth in terms of percentages that aspect of the plaintiff's whole injury that occurred as a result of plaintiff's failure to follow [doctor's] advice.

_____ %
(5 out of 6)

¹ This question is answered only if the jury awards damages and should follow the damages question on the verdict sheet. Any verdict to the plaintiff is reduced by the percentage stated in No. 2.