

8.70 TORT CLAIMS ACT THRESHOLD FOR RECOVERY OF DAMAGES FOR PAIN AND SUFFERING (3/10)

NOTE TO JUDGE

When the plaintiff's negligence claim arises against a government entity, the Torts Claims Act, *N.J.S.A. 59:1-1 to 12-3*, governs the claim. The Act provides specific exceptions to the doctrine of sovereign immunity. Except when the Act specifically imposes liability, public entities remain immune from negligence suits. *N.J.S.A. 59:1-2*. Accordingly, the Tort Claims Act must be strictly construed to permit lawsuits only where specifically delineated.

Subsection (d) of *N.J.S.A. 59:9-2* sets forth a threshold for non-economic damages that a plaintiff must surmount to sustain a claim for pain and suffering. Note: The failure to reach the objective monetary and descriptive threshold set forth in *N.J.S.A. 59:9-2* does not bar all causes of action, but merely bars recovery for pain and suffering.

The section of the Act, in pertinent part and with added emphasis, reads as follows (as amended P.L. 2000, c. 126, § 32, effective September 21, 2000):

No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided however that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$3,600. (Prior to September 21, 2000, any cause of action that arose involving the threshold required medical treatment expenses in excess of \$1,000.)

The courts have held that the plaintiff could prove future expenses to meet the monetary threshold.¹

¹ *Reale v. Tp. of Wayne*, 132 *N.J. Super.* 100 (L.Div. 1975).

It must also be noted that, if the plaintiff has not met the monetary threshold, but the plaintiff sustained permanent injury or disfigurement, he or she may still recover economic damages for his/her permanent injury. *See, Peterson v. Edison Tp. Bd. of Ed.*, 137 N.J. Super. 566 (App. Div. 1975); *Rocco v. NJ Transit Rail Operations*, 330 N.J. Super. 320 (App. Div. 2000).

GENERAL INSTRUCTION

A. Introduction

To recover damages for pain and suffering [*as I have previously defined that measure of damages*] in this case, the plaintiff must prove by a preponderance (greater weight) of the evidence that he/she sustained injury that fits into one of the following categories:

NOTE TO JUDGE

Charge the appropriate category or both, depending upon the proofs introduced in each case.

- 1) Permanent loss of bodily function, and/or
- 2) Permanent disfigurement or dismemberment

For either category the plaintiff must prove that the medical treatment expenses incurred, as a proximate cause of this condition, exceeded \$3,600 (*if the cause of*

action arose after September 21, 2000; the amount is \$1,000, if it arose before that date).

B. Permanent Loss of Bodily Function

With respect to a permanent injury the plaintiff must prove:

1) A permanent loss of bodily function [*here insert an appropriate description of body function claimed lost*].

2) The loss need not be total, but must be substantial. Mere limitation is insufficient, by that I mean the plaintiff must prove this loss by a demonstration of objective credible medical evidence of permanent injury, because damages for temporary injury are not recoverable. The proof must be both objective and credible. Objective means that the evidence must be verified by physical examination, diagnostic testing and/or observation. Credible means that the evidence is believable.

3) The plaintiff may not recover for mere subjective feelings of discomfort.

C. Disfigurement

1) The scarring, indentation and/or blemishes [*here insert an appropriate description of the scar, indentation or blemish*] must be an objectively significant disfigurement.

2) It must be more than a trifling mark discoverable on close inspection and must detract from the appearance of the person.

3) The disfigurement must be visible and not insubstantial. To summarize, to recover for pain and suffering the plaintiff must prove by a preponderance of the evidence that he/she sustained . . . (*choose appropriate category*)

a permanent loss of a bodily function **OR**

a permanent disfigurement that is substantial **OR**

a dismemberment

and has met the monetary threshold.

If you so find then you may consider all of the evidence presented by the plaintiff relating to all of his/her pain and suffering from permanent injuries, even

those injuries that do not meet the threshold, that you find were proximately caused by the negligence of the [*here identify the public entity or public employee*].^{2, 3, 4}

² See, *Hammer v. Tp. of Livingston*, 318 N.J. Super. 298 (App. Div. 1999).

³ In a case where the public entity or employee is alleged to be a joint tortfeasor with a non-public defendant, then the non-public defendant will remain exposed to liability for pain and suffering where the threshold is not met by the plaintiff against the public tortfeasor. See, *Rivera v. Gerner*, 89 N.J. 566 (1982).

⁴ When a plaintiff sues both private and public entity defendants, the jury should answer two specific interrogatories as to each defendant: (1) was this defendant negligent; (2) if so, did the negligence proximately cause plaintiff's injuries? If more than one defendant was negligent and their negligence proximately caused plaintiff's injuries, the jury has to find what percentage of the total negligence or fault is attributable to each defendant. Once the jury answers those questions, it should then determine whether or not plaintiff established a substantial permanent injury was proximately caused by a public entity defendant. Then the jury should affix damages. *Bolz v. Bolz*, 400 N.J. Super. 154 (App. Div. 2008).