

FINAL EXAM

**Instructions**

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM! While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

IMPORTANT: This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything.

DOUBLE-SPACE your answers in the bluebook.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question and, if necessary, book number, e.g., "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package. Then put it in the box at the front.

You are welcome to use abbreviations, but indicate what they are, e.g., 'Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... '!

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the Commonwealth of Arcadia, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

Each question has been assigned a point total, and the exam as a whole has a point total of **135**. Spend the amount of time on each question reflecting its relative worth.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE! Don't identify yourself.

DOUBLE SPACE!

DOUBLE SPACE!

DOUBLE SPACE!

GOOD LUCK!!!

QUESTION 1 (45 points)

On May 8, 1994, Chad Cochran, who resided in Junction City, Arcadia, was in Warrensburg, Arcadia, visiting a friend. His friend's house was located across the street from a Burger King restaurant. Sometime around 2:00 a.m., Cochran left the friend's house on foot to go to a nearby Hardee's restaurant to get something to eat. Cochran cut through the parking lot of Burger King, which was closed, in order to reach Hardee's, which was open. There was no activity inside of the Burger King restaurant, and all of the exterior lights had been turned off. After obtaining some food at Hardee's, he returned to his friend's house, again taking a short cut through the Burger King lot. Within half an hour, Cochran, decided to make a second trip to Hardee's. When he reached Hardee's the second time, Cochran discovered that he did not have his money with him. He started back through the Burger King lot once again.

On his way back to the house, Cochran decided to check to see if there was any food in the dumpster at Burger King. The dumpster was shielded on three sides by brick walls which were just short of eight feet in height. The fourth side of the dumpster enclosure was bounded by a set of wooden hinged gates. The area was dark. Cochran entered the enclosure. Cochran, who was intoxicated at the time, does not specifically remember checking the dumpster for food. He remembers "turning around and taking a hop and grabbing the top of the wall" in an attempt to climb the wall. [In a post-accident interview, Cochran was asked why he wanted to climb on top of the wall; he answered, "I don't know."] Cochran, who was about six feet tall, took a "short hop," and grabbed the top of the wall, in an effort to mount it. Cochran does not remember his actions specifically. It is not clear whether he put his feet against the wall, while suspending his weight and attempting to pull himself up. In any event, as he attempted to climb the wall, the wall collapsed, severely injuring Cochran. Cochran was able to drag himself to the street, where he flagged a passing police officer. He informed the police that he attempted to climb the wall and it fell on him. As a result of his injuries, Cochran's left thumb and left leg were amputated.

The wall was in a weakened condition at the time Cochran attempted to climb it. On April 5, 1994, a little more than a month before Cochran's accident, a trash truck driver had damaged the wall. Thereafter, there was visible evidence of damage to the structural integrity of the wall. The top portion of the wall was apparently no longer secured to the bottom part. The restaurant's manager recognized that the condition of the wall presented a potential danger. The manager and another employee pushed on the wall in an effort to determine the degree of instability. The employee felt the wall move when they pushed. The manager decided not to tear down the wall. The employees believed the wall was not safe, and took care not to stand near it when emptying trash. The employees were told not to touch the wall. The wall had not been repaired by the time Cochran attempted to climb it.

Your firm represents Burger King. Please analyze the potential claims that might be brought against your client.

QUESTION 2 (45 points)

Arnold Blackacre was a carpenter employed by DeWitt Clinton Bend, a construction contractor in Sterling, Arcadia. Bend was involved in the construction of an addition to the Faith Baptist Church in Sterling. On April 18, 1993, the date of the occurrence, Bend's crew was engaged in the erection of exterior walls and interior partitions on a concrete slab floor. The addition to the church was a prefabricated building, so the principal tasks of the construction crew at this time were

the unloading of numbered wall segments and the fastening of these wall segments to each other and to the concrete floor.

Prior to erecting the wall segments, the workers snapped chalk lines on the floor to fix the location of the exterior walls and interior partitions. The workers then fastened steel plates to the concrete floor. These plates, which the men called "angle iron," were heavy sheet metal pieces approximately 48 inches long, 3½ inches wide on the horizontal surface (the side fastened to the floor), and 1½ inches high on the vertical surface. The plates were 16 gauge steel (approximately 1/16 inch thick) and had holes drilled on the vertical surface. The plates were fixed to the floor, end to end, and the wall segments were then lowered by a crane to rest on the plates. The workmen next attached the wall segments to the plates by driving nails through the pre-drilled holes and into the wood framing of the wall segments. When the walls have been plumbed and fastened at the top, the roof can be laid and the building is complete.

Bend's crew used a stud gun to fasten the steel plates to the concrete floor. This tool is called a "powder actuated stud driver" because it uses the force of an exploding powder charge to drive a fastener (the "stud") into concrete or metal surfaces. The tool resembles a large pistol, with a pistol-type grip and trigger and a large, thick barrel. At the end of the barrel is a saucer-shaped guard assembly. In order to operate the tool, the barrel is opened, a powder load is inserted, and a fastener is placed in the barrel. The fastener can be a high-strength nail or a stud with a threaded shaft. The tool cannot be fired unless the guard at the end of the barrel is pressed against the work surface. In this configuration, the guard acts to contain any flying debris that might result from the fastener's being impelled into the work surface. This feature also prevents the tool from being used as a weapon.

The design of the tool, however, does not require that the guard be absolutely flush or that the work surface be perfectly flat. While the tool must be pressed against the work surface with several pounds' pressure, the tool may be fired while tilted a few degrees from the perpendicular. This aspect of the tool's design enables the tool to be used on uneven surfaces. When the tool is fired from a tilted position, the guard is no longer flush with the work surface, so some debris may be emitted. The amount of allowable tilt depends on the position of the guard. In its fully opened position, the guard is roughly circular in shape and is approximately 4½ inches in diameter. By loosening a thumbscrew, the shape of the guard can be altered. In its fully closed position, the guard is a rectangle 3½ inches by 4 inches. The closed position allows studs to be driven in close proximity (1 inch) to a wall or other obstruction. With the guard in the fully opened position, the maximum angle of fire (the angle by which the tool may deviate from the perpendicular and still be fired) is 5E. At this angle, the gap between the guard and the work surface is ¼ inch. With the guard in the fully closed position, the maximum angle of fire is approximately 11E, and the gap between the guard and the work surface is nearly ¾ inch.

The angle of fire and the gap between the guard and the work surface are of vital concern to Blackacre, since he maintains that he was struck in the eye by flying metal chips that escaped from beneath the guard of the stud gun. At the time of his injury, Blackacre was kneeling on the floor, snapping a chalk line. A co-worker, Leo Coble, was holding the other end of the chalk line. A third man, John McGava, was using a Speed Fastener stud driver to fasten the angle iron plates to the concrete floor. No other workmen were in the vicinity. At one point, while McGava was between 8 and 20 feet from Blackacre, Blackacre felt something enter his left eye. The injury occurred simultaneously with a loud noise, similar to the sound of a stud gun. Blackacre did not immediately tell his co-workers of the injury, but instead went to a washroom to wash his eye. Later that day, his co-workers noticed the bloodshot condition of his eye and suggested that Blackacre see

a doctor. Blackacre completed the day's work and made an appointment to see a doctor the next day. It was not until a few days after the accident that Blackacre concluded that there was a connection between the operation of the stud driver and the injury to his eye.

Several minute metal chips were removed from Blackacre's eye. The largest particle was approximately 1 millimeter long. A metallurgical analysis of these chips indicated that they in all likelihood had come from the metal plates that were being fastened to the floor. Blackacre contends that the stud gun, which was shooting hardened metal fasteners through the metal plates into the concrete floor, allowed high-velocity debris to escape from beneath the guard and penetrate his eye. An expert you have consulted concluded that, with the guard in the closed position, the tool could be fired 10E to 12E from the perpendicular and this angle produced an unacceptably large gap of nearly  $\frac{3}{4}$  inch between one side of the guard and the work surface. She further stated that, with the guard in the open position, the angle of fire and the gap are much smaller (5E and  $\frac{1}{4}$  inch, respectively), and the tool is not unsafe when so used. While it is still possible for debris to escape through the  $\frac{1}{4}$  inch gap, the expert believes this to be an acceptable risk, since it is desirable that the tool be able to operate on an uneven work surface.

There is sketchy evidence as to the actual operation of the stud gun on the day of Blackacre's injury. DeWitt Bend had completed nearly all of the stud driving on that day. When interviewed, Bend stated, "I think it was down here this way." (Bend was referring to the "rectangular position" of the guard; this is the closed position. Bend later contradicted himself on that point, stating that he could not remember the position of the guard.) John McGava in an interview has stated that, while Bend was attending to another matter, McGava "took the stud gun and whacked a couple plates in for him." Both Bend and McGava have stated that they operated the tool in the perpendicular position with the guard flush against the plates and did not see any debris emitted.

You have been asked by your employer, a firm specializing in the plaintiffs' personal injury work, to evaluate Blackacre's prospects for recovery. Assume for purposes of your analysis that the jury would assess Blackacre's damages at \$200,000.

### QUESTION 3 (45 points)

On August 10, 1996, at 10:58 p.m., the Arcadia State Police Department received notice of a vehicular accident in a residential complex in Old Bridge. Officers Thomas Collow and Robert Maher arrived at the scene at 11:04 p.m. in separate patrol cars. A group of people had congregated around the accident site. Several damaged vehicles, which appeared to have been parked at the time of impact, lined the roadway.

A white Cadillac, also damaged, was situated partially on the sidewalk and partially on a lawn. Donald Kiken was sitting at the wheel of the Cadillac with its engine running. Officer Collow approached and told Kiken that the police had arrived and that everything was under control and instructed Kiken to shut off the Cadillac's engine. Suddenly Kiken backed the vehicle off the sidewalk, striking both Collow and Maher and knocking them to the ground. Kiken continued to drive in reverse up to the top of the street. Collow pursued on foot but lost sight of the Cadillac.

The officers split up to search for Kiken. Within a few minutes, Maher located the Cadillac in the driveway of Kiken's nearby residence where Kiken had driven the car into his closed garage door. Maher approached and asked Kiken if he was all right. Kiken responded, "Yes, I'm fine. I did nothing wrong. I did nothing wrong." Maher noticed a one-eighth inch laceration on the bridge of Kiken's nose, which he presumed was caused by the motor vehicle accident. Officer Maher asked Kiken to exit the vehicle and Kiken complied.

As Kiken was exiting his vehicle, Sergeant Crowley, the Patrol Supervisor, arrived at the scene. Sergeant Crowley asked Kiken if he needed medical attention, to which Kiken responded, "No, sir." Sergeant Crowley and Officer Maher placed Kiken under arrest presumably for striking the officers with the Cadillac. As a result of the arrest, Kiken became excited and a minor struggle ensued as the police handcuffed Kiken. At 11:09 p.m. Officer Maher radioed headquarters to report that the arrest was completed. Pursuant to Sergeant Crowley's directions, Officer Maher then placed Kiken in the back seat of the patrol car.

After Kiken was placed into the patrol car, Officer Collow observed Kiken turn his body and kick the rear side windows of the patrol car. Officer Maher also observed Kiken kick the back window. Sergeant Crowley heard a "thumping" noise coming from the back seat of the patrol car but did not observe what was causing it. A nearby neighbor testified that he observed Kiken "undulating" in the back seat, "vigorously shaking" his body without uttering a sound and causing the patrol car to move back and forth.

Pursuant to Sergeant Crowley's direction, Officer Maher left the scene at 11:20 p.m. and transported Kiken to police headquarters. Upon arriving at headquarters, Lieutenant Stenger and Patrolman Nobel assisted Officer Maher in removing Kiken from the patrol car. Kiken began walking, stopped as if he was about to fall, then regained his footing and continued. After taking a few more steps with the assistance of the police officers, Kiken stepped on his own feet and collapsed. The officers removed the handcuffs and transported Kiken to the cell area. One officer administered cardiopulmonary resuscitation (CPR) and another radioed for first aid. The Cheesequake First Aid Squad received that call at 11:29 p.m. An ambulance arrived at the station at 11:36 p.m. and transported Kiken to Old Bridge Regional Hospital. Kiken died in the hospital at 12:03 a.m. of cardiac failure.

You have experts who will testify as follows:

(1) The cause of the cardiac failure was an overdose of between one and one-half and three and one-half grams of cocaine, an amount well in excess of a lethal dosage. The intake of cocaine apparently occurred through a combination of snorting and swallowing probably within an hour of death, which was the approximate time of the accident.

(2) The arresting officers should have recognized from decedent's behavior in the police car and the surrounding circumstances, that decedent was in need of medical assistance from the time of the arrest and should have summoned medical assistance immediately.

(3) The fact that decedent was involved in a motor vehicle accident and had sustained an injury to his nose indicated that he was in need of medical assistance. The undulating motions decedent made in the patrol car were probably symptoms of a seizure. Kiken would have had a 90% chance of survival if assistance had been summoned at 11:09 p.m. and if Kiken had reached the hospital by 11:35 p.m. Further, Kiken would have had a 75% chance of survival if assistance had been summoned at 11:20, when the order was given to transport decedent to police headquarters, and if Kiken had arrived at the hospital at 11:40 p.m.

You represent Kiken's widow. She'd like to know whether or not there is any prospect for recovering damages from the State.

ESTATES, POWERS AND TRUSTS LAW  
CHAPTER 17-B OF THE CONSOLIDATED LAWS  
ARTICLE 5—FAMILY RIGHTS  
PART 4. RIGHTS OF MEMBERS OF FAMILY RESULTING FROM WRONGFUL ACT,  
NEGLECT OR DEFAULT CAUSING DEATH OF DECEDENT

**§ 5-4.1. Action by personal representative for wrongful act, neglect or default causing death of decedent**

1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit.

**§ 5-4.3 Amount of recovery**

(a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded.

(b) Where the death of the decedent occurs on or after September first, nineteen hundred eighty-two, in addition to damages and expenses recoverable under paragraph (a) above, punitive damages may be awarded if such damages would have been recoverable had the decedent survived.

(c) (i) In any action in which the wrongful conduct is medical malpractice or dental malpractice, evidence shall be admissible to establish the federal, state and local personal income taxes which the decedent would have been obligated by law to pay.

(ii) In any such action tried by a jury, the court shall instruct the jury to consider the amount of federal, state and local personal income taxes which the jury finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

(iii) In any such action tried without a jury, the court shall consider the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that

the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

#### **§ 5-4.4 Distribution of damages recovered**

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, except that where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees for purposes of this section. The damages shall be distributed subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued.

(2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered.

(b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.

(c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

#### **§ 5-4.5 Non-marital children**

For the purposes of this part, a non-marital child is the distributee of his father and paternal kindred and the father and paternal kindred of a non-marital child are that child's distributees to the extent permitted by 4-1.2.

### COURT OF CLAIMS ACT ARTICLE II—JURISDICTION

#### **§ 8. Waiver of immunity from liability**

The Commonwealth of Arcadia hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter, or repeal any provision of the workmen's compensation law.

The Commonwealth of Arcadia, its political subdivisions, and employees and agents of the State, while acting in their capacity as governmental policymakers, retain sovereign immunity for any decisions based upon the exercise of discretionary judgment.

CIVIL PRACTICE LAW AND RULES  
CHAPTER EIGHT OF THE CONSOLIDATED LAWS  
ARTICLE 14—COMPARATIVE FAULT

**§ 14-11. Damages recoverable when contributory negligence or assumption of risk is established**

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

**§ 14-12. Burden of pleading; burden of proof**

Culpable conduct claimed in diminution of damages, in accordance with § 14-11, shall be an affirmative defense to be pleaded and proved by the party asserting the defense.

**§ 15-108. Release or covenant not to sue**

(a) *Effect of release of or covenant not to sue tortfeasors.* When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice rules, whichever is the greatest.

(b) *Release of tortfeasor.* A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) *Waiver of contribution.* A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

**§ 16-01. Limited liability of persons jointly liable**



1. Notwithstanding any other provision of law, when a verdict or decision in an action for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he was unable to obtain jurisdiction over such person in said action.

2. Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law.

### **§ 16-02. Application**

The limitations set forth in § 16-01 shall:

1. apply to any claim for contribution or indemnification, but shall not include:
  - (a) a claim for indemnification if, prior to the accident or occurrence on which the claim is based, the claimant and the tortfeasor had entered into a written contract in which the tortfeasor had expressly agreed to indemnify the claimant for the type of loss suffered; or
  - (b) a claim for indemnification by a public employee, including indemnification pursuant to section fifty-k of the general municipal law or section seventeen or eighteen of the public officers law.
2. not be construed to impair, alter, limit, modify, enlarge, abrogate, or restrict (i) the limitations set forth in section twenty-a of the court of claims act; (ii) any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission; (iii) any right on the part of any defendant to plead and prove an affirmative defense as to culpable conduct attributable to a claimant or decedent which is claimed by such defendant in the diminution of damages in any action; and (iv) any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior.
3. not apply to administrative proceedings.
4. not apply to claims under the workers' compensation law or to a claim against a defendant where such defendant has impleaded a third party against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law, to the extent of the equitable share of said third party.
5. [Repealed]
6. not apply to any person held liable by reason of his use, operation, or ownership of a motor vehicle or motorcycle, as those terms are defined respectively in sections three hundred eleven and one hundred twenty-five of the vehicle and traffic law.
7. not apply to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others.
8. not apply to any person held liable by reason of the applicability of article ten of the labor law.
9. not apply to any person held liable for causing claimant's injury by having unlawfully released into the environment a substance hazardous to public health, safety or the environment, a substance acutely hazardous to public health, safety or the environment or a hazardous waste, as defined in articles thirty-seven and twenty-seven of the environmental conservation law and in

violation of article seventy-one of such law; provided, however, that nothing herein shall require that the violation of said article by such person has resulted in a criminal conviction or administrative adjudication of liability.

10. not apply to any person held liable in a product liability action where the manufacturer of the product is not a party to the action and the claimant establishes by a preponderance of the evidence that jurisdiction over the manufacturer could not with due diligence be obtained and that if the manufacturer were a party to the action, liability for claimant's injury would have been imposed upon said manufacturer by reason of the doctrine of strict liability, to the extent of the equitable share of such manufacturer.

11. not apply to any parties found to have acted knowingly or intentionally, and in concert, to cause the acts or failures upon which liability is based; provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which said parties may be held liable to the claimant.

#### **Rule 4533-b. Proof of payment by joint tort-feasor**

In an action for personal injury, injury to property or for wrongful death, any proof as to payment by or settlement with another joint tort-feasor, or one claimed to be a joint tort-feasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury. The court shall deduct the proper amount, as determined pursuant to § 15-108 of the general obligations law, from the award made by the jury.

### CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 45—EVIDENCE

#### **§ 4545. Admissibility of collateral source of payment**

(a) *Action for medical, dental or podiatric malpractice.* In any action for medical, dental or podiatric malpractice where the plaintiff seeks to recover for the cost of medical care, dental care, podiatric care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance (except for life insurance), social security (except those benefits provided under title XVIII of the social security act), workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff). If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject

only to the continued payment of a premium and such other financial obligations as may be required by such agreement.

(b) *Certain actions against a public employer for personal injury and wrongful death.*

1. In any action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, where the plaintiff seeks to recover for the cost of medical care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such cost or expense was replaced or indemnified, in whole or in part, from a collateral source provided or paid for, in whole or in part, by the public employer, including but not limited to paid sick leave, medical benefits, death benefits, dependent benefits, a disability retirement allowance and social security (except those benefits provided under title XVIII of the social security act) but shall not include those collateral sources entitled by law to liens against any recovery of the plaintiff. If the court finds that any such cost or expense was replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the contributions of the injured public employee for such benefit.

2. As used in this subdivision, the term "public employer" means the state of Arcadia, a county, city, town, village or any other political subdivision of the state, any public authority operating a rapid transit, commuter railroad, omnibus, marine, airport or aviation facility, a school district or any governmental entity operating a public school, college or university and any municipal housing authority. The term "public employee" means any person holding a position by election, appointment or employment in the service of a public employer, while acting within the scope of his public employment or duties, whether or not compensated, or a volunteer expressly authorized to participate in a volunteer program sponsored by a public employer but does not include an independent contractor. The term public employee includes a former employee, his estate or judicially appointed personal representative.

3. For the purposes of this subdivision a certified report of the actuary of the appropriate public employee retirement system shall be admissible evidence of the present value of any death benefit, dependent benefit or disability retirement allowance.

4. The provisions of this subdivision shall not be construed to affect, alter or amend any provisions of the workers' compensation law or to apply to any claims under such law.

(c) *Actions for personal injury, injury to property or wrongful death.* In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance (except for life insurance), social security (except those benefits provided under title XVIII of the social security act), workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff). If the court finds that any such cost

or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement.