

MALCOLM V. UTOPIA ZOO – CASE ADDENDUM (11/15/10)

This case addendum is to be considered part of the applicable law portion of the case materials. It will be incorporated into the case materials as pages 7a and 7b.

APPLICABLE LAW

Comparative Negligence — Liability

Once it has been found that more than one party has established his/her burden of proof as to negligence, a comparison must then be made of the negligence of those parties. The total amount of negligence is 100%. The comparison of negligence should reflect the total percentage of negligence attributed to each party with respect to the happening of the event(s) at issue. A comparison of negligence is made only if the negligence of more than one party proximately caused the event at issue. If plaintiff's apportioned percentage of negligence exceeds that of defendant, there is no recovery for plaintiff.

Sample jury instruction:

[*Name of defendant*] claims that [*name of plaintiff*]'s harm was caused in whole or in part by [*name of plaintiff*]'s own negligence. To succeed on this claim, [*name of defendant*] must prove both of the following: 1. That [*name of plaintiff*] was negligent; and 2. That [*name of plaintiff*]'s negligence was a substantial factor in causing [*his/her*] harm.

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of plaintiff*]'s responsibility. The court will calculate the actual reduction. If the negligence of [*name of plaintiff*] exceeds that of defendant, [*name of plaintiff*] will recover nothing.

Sample application of Comparative Negligence: A jury finds both defendant and plaintiff were negligent and the negligence of both contributed to plaintiff's harm. The jury then determines what percentage of negligence should be applied to the plaintiff and to the defendant. If they find plaintiff's negligence to be 40% and defendant's to be 60%, then the court will reduce any award of damages to the plaintiff by 40%. If a jury finds the defendant to be 100% negligent in causing harm to plaintiff, there is no reduction to plaintiff's damages. If a jury finds the plaintiff's contributing negligence to be 51% or greater, the plaintiff gets nothing.

AVAILABLE CASE LAW

Leland v. Yellow Cab Co. (1995) The Court concluded that the "all-or-nothing" rule of contributory negligence should be abandoned in favor of a rule that assesses liability in proportion to fault. "Contributory negligence" is defined as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the plaintiff's harm." A claimant's negligence contributing causally to his own injury may be considered now not as a bar to his recovery, but merely as a factor to be considered in measuring the amount thereof. The defendant has the burden of proving contributory negligence

Smith v. Theime (1996) In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or the plaintiff's decedent does not bar a recovery if that negligence was not greater than the negligence of the parties to the action against whom recovery is sought.