

**Wyoming High School  
Mock Trial Competition  
Case Materials  
2008-2009**

***PAT DUNN***  
***V.***  
***CHRIS LEPUCK***

This is adapted from a case developed by the Law-Related Education Mock Trial Committee of the New Hampshire Bar Association for the 2006-2007 season. The Wyoming High School Mock Trial program is grateful for use of the New Hampshire materials and for the Wyoming Bar Foundation for financial support of the program.

E-mail questions about this case and competition to [wyminghsmt@gmail.com](mailto:wyminghsmt@gmail.com). Or contact WHSMT coordinators Marguerite Herman (307) 6381468 and Ian Shaw (307) 421-4933.

# TABLE OF CONTENTS

	<b>Page</b>
List of Witnesses	3
Stipulated Facts	4
Complaint	5
Answer	8
Affidavit of Pat Dunn	10
Affidavit of Chris LePuck	12
Affidavit of Lee Plante	14
Medical Report of L.O. Worsley, M.D	16
Affidavit of Terry Sawchuck	17
Deposition of Toni(y) MacDonald, M.D	19
Emergency Room Report	21
Letter to Pat Dunn	22
Letter to Attorney Friberg	23
Curriculum Vitas:	
A. O. Worsley, M.D.	24
Toni(y) MacDonald, M.D.	25
Applicable Laws and Jury Instruction	26

# List of Witnesses

## Plaintiff

Pat Dunn

L.O. Worsley, MD

Lee Plante

## Defendant

Chris LePuck

Terry Sawchuk

Toni(y) MacDonald, MD

STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

IN THE DISTRICT COURT  
TENTH JUDICIAL DISTRICT

PAT DUNN, )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
CHRIS LEPUCK, )  
 )  
Defendant )

Civil Action No. 08-CV-350

**STIPULATED FACTS**

For the purpose of this lawsuit, the parties agree to the following stipulated facts:

1. All witnesses' statements are authentic and have been sworn to by the witness and bear the witnesses' actual signature.
2. All signatures on pleadings and affidavits are authentic.
3. The medical record is stipulated to be an accurate copy of the original and bears the physician's actual signature.
4. The letter from Chris LePuck to Pat Dunn is authentic and bears the writer's actual signature.
5. The letter from Pat Dunn to Attorney Friberg is authentic and bears the writer's actual signature.
6. The parties have stipulated to the Court's jurisdiction and venue.

**DATED** this 25th day of May 2008.

*Jamie Friberg*

\_\_\_\_\_  
Jamie Friberg  
Attorney for Pat Dunn

**DATED** this 25th day of May 2008.

*Skylar Fitzgerald*

\_\_\_\_\_  
Skylar Fitzgerald  
Attorney for Chris LePuck

STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

IN THE DISTRICT COURT  
TENTH JUDICIAL DISTRICT

PAT DUNN, )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
CHRIS LEPUCK, )  
 )  
Defendant )

Civil Action No. 08-CV-350

**COMPLAINT**

The Plaintiff Pat Dunn respectfully moves that this Court enter a judgment in his/her favor and against the Defendant Chris LePuck. In support of her/his Complaint, the Plaintiff states as follows:

**I. The Parties**

1. Pat Dunn is an individual at least 18 years of age who resides at 88 North Main Street, Carter, Wyoming.
2. Chris LePuck is an individual at least 18 years of age who resides at 10 Rink Drive, Colorado Springs, Colorado.

**II. Jurisdiction and Venue**

3. This Court has jurisdiction over the matter pursuant to Wyoming Statutes.
4. Venue is proper in this Court.

**III. Facts**

5. The Plaintiff is a native of Wyoming.
6. The Plaintiff has been married for fifteen years and has twin sons, Gordie and Gump, age 12.
7. At the time of the incident, the Plaintiff was employed by WYTV, a local television station, as a sportscaster, earning \$15,000 monthly, which job she/he has held for the past ten years.

8. The Plaintiff has been playing hockey since the age of eight.
9. The Plaintiff was a member of the Carter County High School Hockey Team, and was awarded a scholarship to Northeastern University in Boston where she/he played for college hockey for four years.
10. After graduating from college, the Plaintiff played minor league hockey for two years before retiring from professional hockey and entering the business world.
11. The Plaintiff joined the Carter Chuggers, a semipro team sponsored by her/his employer, ten years ago.
12. On or about January 15, 2008, the Carter Chuggers played an exhibition hockey game against the United States Ice Hockey team at the Everett Arena in Carter, Wyoming.
13. The Defendant, Chris LePuck, was a member of the United States Olympic Ice Hockey team.
14. During the game, the Defendant struck the Plaintiff in the head with her/his hockey stick.
15. The Plaintiff lost consciousness.
16. The Plaintiff was taken by ambulance to Carter County Memorial Hospital where she/he was hospitalized for one week.
17. The Plaintiff was diagnosed with numerous injuries including, but not limited to, a fractured skull, subdural hematoma, and other physical, mental and emotional trauma.
18. Since the Plaintiff's injury, she/he has lost two weeks from work, excluding time lost for follow-up visits to doctors.
19. The Plaintiff has incurred medical expenses in the amount of \$80,000, and has no medical insurance.

### **III. Cause of Action** **-Negligence-**

20. The Defendant had a duty to use proper care in the use of her/his hockey stick and to avoid using it in such a manner as to cause injury to other persons.
21. The Defendant breached that duty during the course of that game by causing her/his hockey stick to strike the head of the Plaintiff, causing the Plaintiff to suffer numerous injuries including, but not limited to, a fractured skull, subdural hematoma, and other physical, mental and emotional trauma.

22. The Defendant was not privileged to cause such contact to the Plaintiff.

23. The Plaintiff did not consent to the contact by the Defendant.

24. As a direct and proximate cause of such contact, the Plaintiff has suffered damages within the minimum and maximum jurisdictional limits of this Court.

**-Battery -**

25. The Defendant intentionally struck the Plaintiff directly with a hockey stick, causing the Plaintiff to suffer numerous injuries including, but not limited to, a fractured skull, subdural hematoma, and other physical, mental and emotional trauma.

26. The Defendant was not privileged to cause such contact to the Plaintiff.

27. The Plaintiff did not consent to the contact by the Defendant.

28. As a direct and proximate cause of such contact, the Plaintiff has suffered damages within the minimum and maximum jurisdictional limits of this Court.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court:

- A. Enter judgment in her/his favor; and
- B. Grant all other relief deemed equitable and just.

**DATED** this 22nd day of May 2008.

*Jamie Friberg*  
\_\_\_\_\_  
Jamie Friberg  
11 Goalie Way  
Carter, Wyoming 80123  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I certify the foregoing pleading was served on this 22nd day of May 2008.

*Jamie Friberg*  
\_\_\_\_\_  
Jamie Friberg

STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

IN THE DISTRICT COURT  
TENTH JUDICIAL DISTRICT

PAT DUNN, )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
CHRIS LEPUCK, )  
 )  
Defendant )

Civil Action No. 08-CV-350

**ANSWER**

**COMES NOW** the the Defendant, Chris LePuck, by and through his attorney, Skylar Fitzgerald, and hereby submits the following answer to Plaintiff’s Complaint:

1-13. Admitted.

14. Denied.

15-16. Admitted.

17-19. Denied.

20-28. These statements are legal conclusions. The Defendant does not have to answer these statements.

**Affirmative Defenses**

1. The Defendant did not cause the Plaintiff’s current medical condition.
2. The Defendant was engaging in self-defense.
3. The Plaintiff consented to the contact by the Defendant.
4. The Plaintiff assumed the risk.
5. The Plaintiff was comparatively negligent.



6. The Defendant is not liable under the doctrine of “instinctive action.”

WHEREFORE, the Defendant respectfully requests that this Honorable Court:

- A. Enter judgment in her/his favor;
- B. Deny the Plaintiff judgment; and
- C. Grant all other relief deemed equitable and just.

DATED this 10th day of June 2008.

*Skylar Fitzgerald*

---

Skylar Fitzgerald  
Small Lawfirm LLP  
101 Main Street  
Rock Bluffs, Wyoming 80008

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Answer was served by hand on the attorney for the Pat  
Dunn.

Date: June 10, 2008 *Skylar Fitzgerald*

---

Skylar Fitzgerald

STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

IN THE DISTRICT COURT  
  
TENTH JUDICIAL DISTRICT

PAT DUNN, )  
 )  
Plaintiff )  
 )  
vs. )  
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CHRIS LEPUCK, )  
 )  
Defendant )

Civil Action No. 08-CV-350

**AFFIDAVIT OF PAT DUNN**

I, Pat Dunn, hereby state, under oath, as follows:

I currently reside at 88 North Main Street in Carter, Wyoming. I was born on March 4, 1968, in Casper, Wyoming. At the time of the incident, I was employed by KWTW as a sports-caster. I earn \$15,000 monthly. I am married and have twin boys, Gordie and Gump, age 12.

I was educated in the Carter school system and graduated from Carter County High School in 1986. I played hockey for the high school and was good enough to get a scholarship to Noretheastern University in Boston, where I played for four years. I played minor league hockey for two years before retiring from professional hockey and entering the business world. I joined the Carter Chuggers, a semipro team sponsored by my employer, ten years ago.

I haven't worn a helmet since I played in college. Our semipro league doesn't have a rule requiring helmets so I don't wear one. I think they're uncomfortable and that you can't see as well. It cuts down your peripheral vision. I know that some people think it's foolish not to wear one but I'm a good skater and I've never banged my head on the ice. Nobody said anything to me on the night of the game about helmets.

On January 15, 2008, I was playing defenseman in a game against the Olympic team at the Everett Arena in Carter. In the second period, I was skating on the right side when I saw this hot

shot player flying down on my side of the ice. She/he was really steaming. I tried to catch up with her/him and in skating towards her/him, I accidentally got my stick tangled in her/his skates. She/he went down in a heap. I was waiting a whistle, expecting a penalty, when all of a sudden, I get my feet pulled out from under me. The other player deliberately tripped me. Well, you can't let another player take advantage of you like that; otherwise everyone in the league will push you around. Without thinking, I punched her/him in the mouth. I saw her/him raise her/his stick and the next thing I know I was in Carter County Memorial Hospital and they told me I'd been knocked unconscious.

I had to stay in the hospital for one week and lost all that time from work without pay. The worst part is that I now owe \$80,000 in medical expenses to cover the treatment I received from this accident because I don't have medical insurance. I can't pay the medical bills and am afraid that I might need to declare bankruptcy and lose my home.

Anyone who plays hockey knows that tempers flare and people fight. But what Chris LePuck did to me was over the top and uncalled for.

Although I hit my head before, I felt completely better before being hit by LePuck on January 15, 2008.

*Pat Dunn*

---

Pat Dunn

STATE OF WYOMING  
COUNTY OF CARTER

Subscribed and sworn to, before me, the undersigned officer, by Pat Dunn on this 30th day of June, 2008.

*Jane Williamson*

Notary Public / Justice of the Peace

STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

IN THE DISTRICT COURT  
  
TENTH JUDICIAL DISTRICT

PAT DUNN, )  
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Plaintiff )  
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CHRIS LEPUCK, )  
 )  
Defendant )

Civil Action No. 08-CV-350

**AFFIDAVIT OF CHRIS LePUCK**

I, Chris LePuck, hereby state, under oath, as follows:

I live in Colorado Springs, Colorado. I was born on May 31, 1985, in Manitowoc, Wisconsin. I began playing hockey when I was six years old as a Mini-Mite, progressed through the levels of youth hockey and eventually played for Manitowoc High School where I was the captain of the team. I was named to the All-State team in my senior year, which was the year we won the State Championship. I went to the University of Wisconsin in Madison on a hockey scholarship and played left wing on the hockey team for four years. I was chosen to play for the United States Olympic Ice Hockey team in 2005. After my college graduation I concentrated full-time on training for the 2010 winter Olympics.

The Olympic team has been touring around the United States and the world both raising money and gaining experience. The other aspect to this series of games is that it will determine who makes the final cut for the team. Currently, there are twenty-five players on the team but only eighteen will make the trip to Vancouver, Canada.

On January 15, 2008, we were on our tour through the Western U.S. when we played in Carter, Wyoming. We played against a semi-pro team that night. In the second period I was on the ice skating down the left side trying to angle in for a pass from center when I was tripped by Pat

Dunn, a defenseman. I had never met Dunn before. Dunn had deliberately tripped me with her/his stick as I was getting around her/him. I could see that the referee and the linesmen had not seen the trip. While lying on the ice, I reached out with my stick and pulled Dunn's feet out from under her/him. When I got up I found that Dunn was already standing up. Pat came right at me and punched me in the face with her/his hockey glove on. Pat hit me so hard that my helmet came right off. A hockey glove is a big, heavy padded glove and it felt like she/he broke my jaw. I thought that Pat was going to come at me again and I instinctively swung my stick at her/him. I realized after I hit her/him that my stick had hit her/him in the head and that she/he was bleeding. I knew she/he wasn't wearing a helmet, but I did not know why not. I didn't mean to hurt her/him, but I felt that I had to protect myself. Before she/he lost consciousness, I knelt down beside Pat and she/he said, "I can't believe that yours is the last face I'm going to see on this rink. You jerk – if you got out of my way in the first place, I wouldn't be lying here now."

Aside from being arrested in 2003 for larceny when, on a dare, I stole an opposing team's mascot's medallion- which I didn't know at the time was worth \$25,000-I never have gotten into trouble before.

**Chris LePuck**

Chris LePuck

STATE OF WYOMING  
COUNTY OF CARTER

Subscribed and sworn to, before me, the undersigned officer, by Chris LePuck on this 30th day of June 2008.

**Jane Williamson**

Notary Public / Justice of the Peace

STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

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TENTH JUDICIAL DISTRICT

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Plaintiff )  
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CHRIS LEPUCK, )  
 )  
Defendant )

Civil Action No. 08-CV-350

**AFFIDAVIT OF LEE PLANTE**

I, Lee Plante hereby state, under oath, as follows:

I was officiating the exhibition game between the U.S. Olympic Ice Hockey Team and the Carter Chuggers on January 15, 2008, in Carter, Wyoming. As head referee, I am responsible for the calling of the game both on my part and the other two officials assisting me. I have been officiating hockey games for the past thirteen years; the last six in the National Collegiate Athletic Association.

During the second period of the game, a stick fight broke out between Chris LePuck of the Olympic team and Pat Dunn of the Chuggers. The Olympic players claim that Dunn tripped LePuck away from the play. This I did not see. The first thing I saw happening between the two was Dunn throwing a punch at LePuck. It really amounted to a minor retaliation. If Dunn wanted to hurt her/him, she/he would have dropped her/his gloves and started punching with her/his bare fists. Hockey gloves are like boxing gloves. They offer protection to the hands. They are very well padded. There was no need for LePuck to resort to her/his stick. It was uncalled for. As I raised my hand to charge Dunn with a penalty for roughing, LePuck retaliated and hit Dunn over the head with her/his stick.

In my opinion, LePuck's use of the stick was extreme, but Dunn had punched her/him with a gloved hand. Both acts are against the rules of hockey. The game was played under rules in effect for the NCAA.

After Dunn was removed from the ice, I gave the Chuggers a minor penalty for roughing and LePuck a major penalty for fighting plus a game misconduct for using her/his stick in a fight. This incident is now being investigated by the U.S. Olympic Committee.

***Lee Plante***

---

Lee Plante

STATE OF WYOMING  
COUNTY OF CARTER

Subscribed and sworn to, before me, the undersigned officer, by Lee Plante on this 20th<sup>h</sup> day of June, 2008.

***Jane Williamson***

---

Notary Public / Justice of the Peace

**L.O. Worsley, MD  
29 Pleasant Street  
Carter, WY 80124**

June 15, 2008

Jamie Friberg  
Attorneys at Law  
11 Goalie Way  
Carter, Wyoming 80123

Re: Pat Dunn  
Date of Birth: 3/4/68  
Social Security: 000-11-2222  
Date of Injury: 1/15/08

Dear Attorney Friberg,

I enjoyed our recent game of golf, and am writing this letter in reply to your request for information concerning my examination of your client and my patient, Pat Dunn.

I have examined Pat Dunn today and have reviewed both the low density CAT Scan and x-rays that were taken at Carter County Memorial Hospital on January 15, 2008. I note that the x-rays revealed that Pat suffered a fracture of the left front area of the skull. I also reviewed the CAT Scan, which read as abnormal and revealed the presence of a subdural hematoma. The hematoma was caused by the blow to Pat's skull. Further, the CAT Scan revealed the presence of acute blood, which would be caused by a recent injury to the skull.

Pat has damage to the frontal lobe. Pat could suffer some loss of memory as a result of the damage to the frontal lobe. At this stage, it is too early to tell what the full extent of Pat's injuries will be.

I am a board-certified neurologist in the State of Wyoming. I graduated from Harvard Medical School in 1981 and did my residency at Natrona County Memorial Hospital in Casper, Wyoming. I began my practice in Carter in 1987. I have been qualified as an expert in more than a hundred cases involving neck and head injuries.

If I can be of any further assistance in this, or any other matter, please don't hesitate to call. As always, my hourly rate for depositions or testimony in court is \$650.00, with a minimum retainer of \$10,000.00.

I look forward to working with your office again.

Sincerely,

***Lorne(a) Worsley, MD***  
\_\_\_\_\_  
Lorne(a) Worsley, M.D.



STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

IN THE DISTRICT COURT  
TENTH JUDICIAL DISTRICT

PAT DUNN, )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
CHRIS LEPUCK, )  
 )  
Defendant )

Civil Action No. 08-CV-350

**AFFIDAVIT OF TERRY SAWCHUK**

I, Terry Sawchuk hereby state, under oath, as follows:

I am the head coach of the United States Olympic Ice Hockey Team. It is my job to conduct practices, organize training and game strategy, decide who is to be included on the roster, set up a scouting network and supervise the team during each game. I have been associated with the game of hockey as a player, scout, and coach for twenty-five years.

Although I do not know Pat personally, I know Pat by reputation. Pat has a reputation of being an aggressive hockey player, and of instigating fights.

On January 15, 2008, the Olympic team was playing an exhibition game with the Carter Chuggers at the Everett Arena in Carter, Wyoming. We had set up this game as part of our training in preparation for the 2010 Winter Olympics. The game also served as a fund raiser in part for the team and for some local charity. I was performing my duties as head coach in the bench area the second period when the altercation occurred. Chris LePuck, in my opinion, was an excellent hockey prospect who probably could have played for this team in the Olympics. Since this incident we have had to drop Chris from the roster. There was a question as to whether Chris could have made the team this year because of her/his inexperience, so I was giving her/him a regular shift on the ice to get a good look at her/him before making a final decision regarding her/his status with the club.

Chris was skating on left wing when Pat Dunn tripped her/him. Since Chris was not carrying the puck, the referee probably didn't call the penalty just to keep the play going. I saw Chris reach out with her/his stick to try and get back on her/his feet. It looked to me like she/he accidentally tripped Dunn. Dunn then hauled off and hit Chris with her/his gloved hand. Hockey players are never supposed to hit with a gloved hand. It's almost like using brass knuckles. Also, in Olympic hockey there's no fighting like there is in professional hockey. There, fighting is part of the game. Our players are not used to fights so they don't have the experience. This is Dunn's fault for instigating the fight.

***Terry Sawchuk***

---

Terry Sawchuck

STATE OF WYOMING  
COUNTY OF CARTER

Subscribed and sworn to, before me, the undersigned officer, by Terry Sawchuk on this 20th day of June 2008.

***Jane Williamson***

---

Notary Public / Justice of the Peace

STATE OF WYOMING )  
 )ss.  
COUNTY OF CARTER )

IN THE DISTRICT COURT  
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PAT DUNN, )  
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Civil Action No. 08-CV-350

**EXCERPT FROM DEPOSITION OF TONI(Y) MACDONALD**

Q. Would you state your full name please.

A. Toni (Tony) MacDonald.

Q. What is your education and work experience?

A. I earned a Bachelor of Science degree in Biology from Franklin and Marshall College in 1982, a Medical Degree from the University of Texas in 1988. I served as a resident and fellow at Denver General Hospital from 1988 to 1992. I am currently practicing medicine at Denver General Hospital and am a part-time medical professor at the Colorado University School of Medicine.

Q. Do you have any area of specialty?

A. I am board-certified in neurology, with an emphasis in the brain.

Q. You have been asked here to give your expert opinion concerning the injury sustained by Pat Dunn on the night of January 15, 2008. Is that correct?

A. Yes.

Q. Do you have an opinion concerning the injury in question?

A. Yes. I do.

Q. What is your opinion?

A. Ms./Mr. Dunn's injury is pre-existing.

Q. Please elaborate.

A. During my examination of Ms./Mr. Dunn, I asked her/him if she/he ever sustained an injury to her/his head prior to the January 15, 2008, injury.

Q. What did she/he say?

A. That when she/he was ten years old, she/he fell off a bicycle and cut her/his head on a rock.

Q. Doctor, have you had a chance to review Ms./Mr. Dunn's medical records from her/his fall from the bike?

A. Yes I have.

Q. What treatment, if any did Ms./Mr. Dunn receive for the head injury?

A. Pat lost consciousness and was brought to the hospital by ambulance. There, Pat was examined, and diagnosed with a large contusion on the left front part of the head. Pat regained consciousness after 10 minutes, received 20 sutures and released one week later.

Q. Doctor MacDonald, have you had a chance to review Ms./Mr. Dunn's medical records from the injury she/he sustained when struck by the hockey stick?

A. Yes, I have.

Q. What is Mr. Dunn's current medical condition with respect to her/his head?

A. There is blood on Pat's brain. There is medical evidence that, at some time in the past, Pat sustained a hair-line fracture of the left frontal skull as well as a subdural hematoma, and that Pat has fully recovered from that injury. Also, the medical evidence shows that Pat has fully recovered from the accident on January 15, 2008. In other words, Pat has sustained no permanent injury from the January 15, 2008, accident.

Q. Doctor MacDonald, do you have any opinion as to the cause of Pat's head injury?

A. Yes. In my opinion, Pat's laceration on the skull was due to a fall on the ice, but the laceration was the only injury that occurred to Pat on January 15, 2008. Pat's current injury is attributable to the fall she/he sustained from the bike. According to the medical evidence, the hair-line fracture of the left front area of the skull as well as a subdural hematoma was caused by the bike accident which occurred many years ago, and not by the January 15, 2008, injury.

Q. What do you base your opinion upon?

A. I have read all medical records from this case, including the CAT scan taken at Hampshire Hospital, which revealed that the fracture had calcified and the presence of a subdural hygroma, or old blood, which would only come from an old injury. If the hematoma were from a recent injury, then the CAT scan would have shown what is called, "acute blood."

**CARTER COUNTY MEMORIAL HOSPITAL  
83 FREEDOM DRIVE  
CARTER, WYOMING  
PH: (307) 271-5555  
FAX: (307) 271-5550**

**EMERGENCY ROOM REPORT  
RECORD OF ADMITTANCE**

**Date:** January 15, 2008

**Patient Name:** Pat Dunn

**Date of Birth:** 3/4/68

**Social Security:** 000-11-2222

**Treating Physician:** Erin Jones, M.D.

**Treatment:** X-rays of skull; Low density CAT Scan of skull; 20 sutures to left front area of skull. The patient will be admitted for observation. Pain medications. Bed rest.

**Diagnosis:** Hair-line fracture of the left front area of the skull. Subdural hematoma.

**Prognosis:** Unknown.

**Other Remarks:** The patient was admitted by ambulance and was unconscious at the time of admittance. The patient was playing ice hockey after reportedly being hit in the left side of the forehead with a hockey stick. The patient regained consciousness before admittance, evidently being unconscious for a total of 10 minutes. The patient appeared lucid in light of her/head injury. The left frontal area of the skull was lacerated. The x-rays revealed a hair-line skull fracture; the CT scan revealed subdural fluid collection.

February 21, 2008

Pat Dunn  
North Main Street  
Carter, Wyoming 80124

Dear Pat,

I have heard through the grapevine that you can't afford to pay the medical bills from your injury on the ice. That's too bad.

As you may know, I am the new spokesperson for Ice Beer Company and am making a lot of money from tv commercials. I have some extra dough and can send it to you to pay your doctor's bills, if you want. Just give me a call and let me know.

Hockey Forever,

***Chris LePuck***

---

Chris LePuck

June 10, 2008

Jamie Friberg  
Attorneys at Law  
11 Goalie Way  
Carter, Wyo. 80123

Dear Attorney Friberg:

Thanks so much for taking my case. I have complete confidence in you. As you know, I have a lot of medical bills to pay for since my injury in January of 2008. Also, my head has been bothering me a lot. I had headaches before the accident because of my bike injury as a child, but nothing like I have now.

Thanks again.

Your client,

*Pat Dunn*

Pat Dunn

**L. O. WORSLEY, M.D.  
259 PLEASANT STREET  
CARTER, WYOMING 80124**

EDUCATION

1972 – 1974 YALE UNIVERSITY

B.S., Biology

1977 – 1977 HARVARD SCHOOL OF PUBLIC HEALTH

M.S., Public Health

1979 – 1981 HARVARD MEDICAL SCHOOL

M.D.

RESIDENCY

1982 – 1989 Natrona County Memorial Hospital

Casper, Wyoming

*Neurology*

BOARD CERTIFICATION

American Board Psychiatry & Neurology

*Lifetime*



# TONI (TONY) MAC DONALD

Denver General Hospital  
55 Fruit Street  
Denver, CO 80012

## EDUCATION

1982 Franklin and Marshall College  
B.S., Biology  
1988 University of Texas Medical School  
M.D.

## RESIDENCY

1988 – 1991 Denver General Hospital  
Neurology

## FELLOWSHIP

1992 Denver General Hospital

## BOARD CERTIFICATION

American Board Psychiatry & Neurology

## SPECIALTY

Neurology

## TEACHING

Colorado University School of Medicine, Adjunct

# Applicable Laws / Jury Instructions

## **Negligence Defined**

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances. This is the standard of care that all persons are expected to live up to. If a person fails to live up to that standard, the person is said to be negligent. Negligence may consist of either doing something that a reasonably careful person would not do under the same or similar circumstances or failing to do something that a reasonably careful person would do under the same or similar circumstances. Failure to exercise due care amounts to legal fault if you find it caused or contributed to cause the injury or damage suffered by the plaintiff.

## **Foreseeability**

A person is not responsible for the consequences of his/her act unless the risk of the injury sustained is reasonably foreseeable. The exact occurrence or the precise injuries need not to be foreseen, but the results of an act must not be merely possible, but probable. In terms of foreseeability, we are talking about reasonable foreseeability and not some sort of prophetic vision as to what might conceivably happen.

## **Instinctive Action**

If the person is faced with a situation, created through no fault of his/her own, which leaves him/her absolutely no time for thought, so that he/she must act instinctively or by pure reflex, he/she may not be held liable for his/her actions.

## **Last Clear Chance**

Contributory fault on the part of the plaintiff will not affect his right to recover if you find that the evidence establishes that it is more likely than not that:

1. The plaintiff placed himself or herself in a situation of peril from which he/she was physically unable to remove herself or himself or able to move but ignorant of his/her peril;
2. The defendant saw or should have seen the plaintiff and realized or should have realized the peril; and
3. Thereafter, the defendant could have avoided the accident by using ordinary care.

## **Comparative Fault**

This case has been tried under the law of comparative fault. Under this law, you may find that the plaintiff's injuries were the result of the legal fault of the defendant, the legal fault of the plaintiff, or to some degree the legal fault of each of them.

Under this law, a plaintiff who is more than fifty percent (50%) legally at fault for an accident cannot recover damages arising out of the accident. To the extent that a plaintiff is fifty percent (50%) or less legally at fault, he/she can recover damages but only in proportion to the amount of legal fault attributable to the defendant.

Every person has the obligation to exercise due care; no party is entitled to presume that other persons will exercise due care and thereby absolve the party from his/her own duty of due care toward himself/herself or his/her own safety.

With respect to the plaintiff's claim of legal fault against the defendant, the plaintiff has the burden of proof. If you find legal fault on the part of the defendant, you should go on to determine whether the plaintiff was himself/herself also legally at fault. In this latter claim, the defendant has the burden of proof.

**507:7-d Comparative Fault.** – Contributory fault shall not bar recovery in an action by any plaintiff or plaintiff's legal representative, to recover damages in tort for death, personal injury or property damage, if such fault was not greater than the fault of the defendant, or the defendants in the aggregate if recovery is allowed against more than one defendant, but the damages awarded shall be diminished in proportion to the amount of fault attributed to the plaintiff by general verdict. The burden of proof as to the existence or amount of fault attributable to a party shall rest upon the party making such allegation.

## Rules of Evidence

See WYOMING HIGH SCHOOL MOCK TRIAL RULES 2008-2009. (Be sure you are using the current season's rules.)

## Cases

*This problem case was written by the New Hampshire Bar for high school mock trial competition in that state, and it has been adapted for use in Wyoming. The following two cases were included with the original problem case as background and so are provided here:*

### **Breagy v. Stark, 138 N.H. 479 (1994) .1**

This case involved an automobile accident. The accident occurred on a rainy day and the road was wet when the Stark, the defendant, made a left-hand turn across two lanes of oncoming traffic. The defendant came toward Breagy, the plaintiff's car and Breagy applied his brakes. Breagy lost control of his car and hit a third car. He was injured and sued the defendant.

The plaintiff asked the Trial Court to instruct the jury on the "sudden emergency doctrine." The Trial Court denied the plaintiff's request. The plaintiff appealed to the New Hampshire Supreme Court. The New Hampshire Supreme Court affirmed the Trial Court's ruling because the plaintiff's proposed jury instructions did not accurately reflect the law on the sudden emergency doctrine and because the plaintiff, acting as a reasonable driver, should have anticipated the emergency situation that he faced. The Supreme Court then clarified the law on the sudden emergency doctrine as follows:

Under the sudden emergency doctrine, liability may be avoided only if sufficient evidence exists to support a finding that: (1) a sudden and unforeseen emergency situation actually existed; (2) the situation was not created by the negligence of the person seeking the instruction; and (3) the person seeking application of the doctrine had alternative courses of action available and chose, if not the wisest course of action, one which a reasonably prudent person under such circumstances might have taken.

The Supreme Court further noted that one who creates or contributes to an emergency situation may not subsequently seek to use it as a shield to liability and that a person cannot benefit from the sudden emergency doctrine if his negligence created or contributed to the emergency situation.

**Allen v. Dover, 148 N.H. 407 (2002)** .Carol Allen, the plaintiff, was injured while playing recreational softball after an errantly thrown softball hit her in the head as she was running to first base. The organizers of the game did not recommend, require or provide helmets for players. The plaintiff was not wearing a

helmet at the time of the accident and she sustained severe head and brain injuries as a result of being hit by the ball. Among others, the plaintiff sued the player who threw the errant ball.

The defendants asked the Trial Court to dismiss the lawsuit against them, arguing that the plaintiff assumed the risk of being injured by a softball when she chose to participate in the softball game. The Trial Court agreed with the defendants and dismissed the lawsuit on the basis that the defendants' alleged conduct involved the ordinary risks of injury inherent in playing recreational softball.

The plaintiff appealed to the New Hampshire Supreme Court. The New Hampshire Supreme Court noted that the assumption of risk doctrine is a defense to a claim of negligence and it applies when a plaintiff voluntarily and reasonably enters into some relation with a defendant, which the plaintiff reasonably knows involves certain obvious risks such that a defendant has no duty to protect the plaintiff against injury caused by those risks.

On the issue of whether the defendant player was negligent, the New Hampshire Supreme Court rejected the plaintiff's argument that the shortstop had a duty not to make an errant throw when fielding the ball. The Court noted that "[p]articipants in an adult recreational slow-pitch softball game have a duty to not create an unreasonable risk of injury. When fielding the ball, therefore, a fielder has a duty to not act unreasonably. In other words, the fielder has a duty to not act in a manner outside the range of the ordinary activity involved in playing softball." A fielder, however, does not have a duty to make only accurate throws. Because reasonable fielders commonly make errant throws, being injured by an errant throw is a common risk inherent in and arising out of a softball game. A fielder therefore cannot be held liable for errant throws that reasonably flow from participation."

--End of WHSMT Case 2008-2009--