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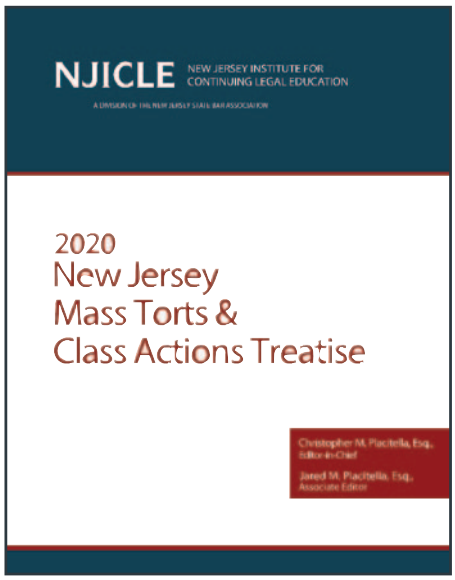
NEW JERSEY MASS TORTS AND CLASS ACTIONS TREATISE



New Jersey Mass Torts and Class Actions (2020) - 2 Volume Treatise

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About the Treatise:

Multicounty Litigation are those personal injury claims involving a large number of claimants linked to a single product. More often than not, lengthy litigation is followed by a large recovery. Currently, New Jersey recognizes several Mass Tort and Non-Mass Tort Centrally Managed cases that are handled by the Multicounty Litigation Section. This updated treatise addresses the substance and procedure in multicounty litigation cases.

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NORBERTO A. GARCIA

A Focus on Community, Connection and Lawyer Well-Being

Editor's note: Norberto A. Garcia was installed as the 128th president of the New Jersey State Bar Association at the Annual Meeting and Convention on May 14 in Atlantic City. This is an excerpt from his installation speech. It has been edited for brevity and clarity.

I cannot fully express what this opportunity means to me, my family and my colleagues. Though I'm at the top of the bill, this night is not about me—it is about our extraordinary legal community in New Jersey and the great institution that represents it—the New Jersey State Bar Association.

As your 128th president, I am proud to be the first who was born outside the United States. I'm an immigrant. I came here as a young child with my family. Whenever I think I'm having a bad day or facing a setback, I think about what my parents must have felt when they left Cuba—the only country they had ever known—to bring their young children to a place where they didn't know the language or the culture, and had to start life completely anew, leaving behind everything. The courage, the fear, the anxiety that must have taken hold. I am grateful every day for their sacrifice to give me and my sister a better life.

I'm thankful that of all the places in the world we could have landed, we ended up—after a shortcut in Madrid and Jackson Heights, Queens—in the wonderful state of New Jersey. I was blessed to grow up in Hudson County, where I still work, a wonderfully diverse place that no doubt shaped the path that brought me here.

As for my theme or project for the upcoming year, here's what I bring to the table. I have practiced at a big firm with deep resources—where you can push a button to issue a check or retain an expert. I was also a solo practitioner for five years, knowing that every decision, every expense, every paycheck rested squarely on my shoulders. That contrast matters. It grounds how I view the challenges facing our members. Too often there's an assumption that lawyers have unlimited time, money and support. We all know that's not the case. I want everyone to know that as we consider rule changes, legislation and court decisions, I will keep a clear focus on their real-world impact and on the day-to-day practice and well-being of lawyers.

I love being a lawyer because I love dealing with people. Before COVID, the practice was different. Depositions, arbitrations, motions, conferences and seminars were mostly in person. That is the space where I learned to be a lawyer.

We all read the *New Jersey Law Journal* on Mondays—Suits and Deals, On the Move, the ethics decisions.

That world may not fully return, and that shared space may be diminished, but the need for connection and community in this profession remains as important as ever.

I want the New Jersey State Bar Association to occupy that space—to present lawyers with the opportunity to get together, communicate and mentor one another. We should expand opportunities for seasoned attorneys to engage and for newer lawyers to find guidance and support. And we should continue to leverage our listservs, CommunityNet and daily alerts to keep our members informed and connected to what's happening across the profession.

We will continue our strong partnership with the many county and affinity bar associations in the state, serving as a connecting entity and the center of gravity that binds the legal community in New Jersey together.

I look forward to working with all of you in the year ahead to strengthen that role and to build on everything we have already accomplished together.

Thank you for this opportunity and thank you for your trust. I won't take it for granted. ■

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FROM THE SPECIAL EDITOR

Injury, Liability and Recovery in New Jersey

By Brian R. Lehrer

In the movie *Philadelphia*, Denzel Washington plays a personal injury lawyer. An injured client who walked into a clearly marked hole on a city street asks him if he has a case for his injuries. The lawyer responds, "Yes, you have a case," and directs him to his staff to sign up with the firm.

Personal injury law has always been—sometimes justifiably—cloaked in an aura of unseriousness. Yet, like many things in life, personal injury can be funny until it is not. Crashes, fall-downs and recreational injuries can facture lives and families as much as bones. Personal injury law is a necessary counter to irresponsible acts performed by individuals, entities or government. It is certainly no accident that torts is a core class in the first year of law school.

This issue of *New Jersey Lawyer* is dedicated to personal injury law. Contributions cover a range of issues from property owner liability, to sexual abuse, to issues raised by insurance in rideshares.

Kristine Y. Pegno starts off the issue with a discussion of property owner liability and when that "non-delegable" duty may in fact be delegable. The tragedy of sexual abuse of children by members of religious orders and youth-serving institutions is a scourge that courts and legislatures have addressed in a particularly aggressive manner.

Georgia D. Reid informs us why New Jersey has emerged as a national hub for sexual abuse trials which have resulted in substantial verdicts for the aggrieved plaintiff. Of particular relevance to these types of cases, abuse victims obviously suffer from extensive psychological trauma. Evan J. Lide provides an appropriate segue with an article on the admissibility of raw test data from psychological and neuropsychological evaluations.

Pursuing claims against public entities involves multiple minefields. In addition to general problems of proving notice and a legally recoverable injury, plaintiffs are required to file a notice of claim form within 90 days of the "accrual" of the claim. Sarah K. Delahant discusses issues surrounding the accrual of claims and circumstances which may give rise to the relaxation of the obligatory 90-day period to file a claim.

BRIAN R. LEHRER *is with the law firm of Brandon J. Broderick, LLC.*

The other end of the spectrum is the thousand points of private enterprise – the gig economy. New Jersey has mandated that rideshare companies provide generous insurance benefits to passengers who are injured in rideshare vehicles. Understandably, both Uber and Lyft have tried to reduce these mandatory insurance requirements. Annabelle Steinhacker and Jeffrey A. Rizika author an article discussing the rideshare statute and the efforts of Uber and Lyft to lower the mandatory insurance limits. The issue concludes with an article by your editor addressing the standard for making a claim for an injury suffered while playing a recreational sport.

It is not clear whatever happened to that initial plaintiff who walked into Denzel Washington's office, as the next client was Tom Hanks with the discrimination claim that underpins the movie. However, New Jersey lawyers faced with similar circumstances will know what notices of claim to file and what avenues of recovery to pursue after reading this issue of *New Jersey Lawyer*. ■

PRACTICE TIPS

VIEW FROM THE BENCH

Two Paths to a Second Chance for Veterans

By The Hon. Edward M. Neafsey, JSC (Ret.)

Every judicial career comes to an end at some point. Some retired judges return to the bench on recall service, and others join the ranks of mediators. Many of the state's best mediators are retired state or federal judges. After 30 years of employment with the state of New Jersey that culminated in serving seven and one-half years as a Superior Court judge, I felt it was time to retire. Having spent more than six years on the criminal bench, mediation was not a good fit for me.

Fortunately, two programs opened that allowed me to give back to the state in a volunteer capacity, while tapping into my background and experience: first, as a mentor in New Jersey's Veterans Diversion Program; and second, as a member of the state's Clemency Advisory Board. Both programs will be discussed in the article with an eye on providing guidance for practitioners.

Veterans Diversion Program

In 2017, the New Jersey Legislature created the statewide Veterans Diversion Program for veterans suffering a mental illness or condition who were charged with non-violent crimes. Unlike Recovery Court, which the Judiciary administers on a unified basis, VDP is implemented under the discretion of the 21 county prosecutors. This results in elements of variation throughout the state.

Nevertheless, in representing a veteran facing charges in Superior Court, an attorney should begin by collecting the veteran's Department of Veterans Affairs (VA), psychiatric, and/or counseling records. These records are crucial to an attorney's successful advocacy for the veteran's admission into the program. Moreover, even if a veteran is not admitted for some reason or deemed ineligible because the charge involves a second-degree crime, the records can help your client gain admission into the Pre-Trial Intervention Program or, in some counties, the new Mental Health Diversion Court Program. *N.J.S.A.* 2C:43-26 sets forth the grounds for eligibility into VDP.

VDP's goal is to defer prosecution and divert veterans, who are charged with third- and fourth-degree offenses and have a mental illness or condition related to the crime(s), from the criminal justice system into appropriate case management and mental health services. About 20% of veterans suffer from some form of post-traumatic stress disorder (PTSD), and about half of all veterans in jail have some type of mental disorder. While our nation does a good job of treating soldiers' physical wounds, it has not always responded as effectively to their psychological scars. Hence, the need for New Jersey's program.

A veteran accepted into VDP must sign a written agreement with the prosecutor that sets the terms and conditions for the veteran's recovery. Therefore, the veteran must be amenable to participate in services and remain in compliance. As the veteran's attorney, you can provide valuable input into the language of the agreement. Once a veteran successfully completes the program, the prosecutor will move to dismiss the case.

As a trained VDP mentor, my role was to provide support and encouragement to the veteran. In Atlantic County's VDP, I appeared before the Criminal Presiding Judge every month and reported on how the veteran was doing in terms of taking medication, keeping counseling and treatment appointments, working, and getting along with family members. The court also heard about the veteran's behavior from the VA justice outreach officer. Afterward, the court directly addressed the veteran on their progress in the program. VDP in Atlantic County operated in a similar fashion to the state's Recovery Court—an optimal way to operate in my opinion.

For the veteran, the program was not always a straight path or a smooth journey. In one case a veteran briefly entered a psychiatric hospital for intensive treatment; in another a veteran

returned to a VA in-patient behavioral treatment center. Both veterans went on to successfully complete VDP. As counsel, you should monitor your client's behavior and reach out for additional assistance if needed. In this way, you can ensure that no veteran will be left behind.

Executive Clemency

In 2024, Gov. Phil Murphy signed Executive Order No. 362, which established a Clemency Advisory Board (CAB) to advise him on applications for executive clemency. CAB's role was limited to making recommendations. Except for cases involving impeachment or treason, the New Jersey Constitution (Article V, Section 2, Paragraph 1) gives the governor unilateral and unchallengeable authority to grant pardons and commutations. A pardon wipes an individual's criminal record clean and restores their rights, while a commutation reduces the length or severity of a sentence.

On Nov. 11, 2025 (Veterans Day), Murphy granted pardons to 11 veterans. Seven suffered from PTSD or a mental illness at the time they committed their crime(s), and many of the convictions were related to alcohol or substance abuse. The governor recognized the sacrifices these veterans made to serve our nation and acknowledged that granting a pardon was a restorative gift for the veteran, his family, and the whole of society.

Two cases involved first-degree crimes, which caused me to not recommend clemency. I felt the seriousness of the charge and the need to deter were extremely important. A majority of CAB members felt otherwise, which moved the applications forward for the governor's determination. The governor made the final decision on all clemency actions.

A general list of pardon factors includes the following:

- the seriousness of the offense and need for deterrence
- the extent of the wrongdoing and the attendant circumstances
- the level of the harm caused or the amount of violence inflicted
- the criminal record and history
- the positions of the prosecutor and victims
- the applicant's reputation in the community and character references
- expressions of remorse and acceptance of responsibility
- the reason for seeking a pardon
- the passage of time since the sentence was completed
- post-conviction rehabilitation, demonstrated good conduct, and/or acts of atonement
- the interests of justice including the rehabilitative goals of the criminal justice system
- any other relevant factual material

The weight given to any specific factor in my decision-making process varied on a case-by-case basis. To make a compelling case, an attorney should frame a client's application for a pardon based upon factors that are supported by strong evidence.

Due to the flurry and quality of pardons and commutations issued by Murphy mere hours prior to the end of his term, it is hard for me to envision the same type of CAB program being adopted by Gov. Mikie Sherrill's administration. Still, her administration will implement a clemency program at some point. This will require you to consider the factors listed herein, if a client seeks a pardon.

VDP offers veterans a second chance at the front end of the criminal justice system, while clemency provides a second chance at the back end. Both programs give veterans a second chance for a hopeful and dignified future.

Judge Edward M. Neafsey served as a Judge Advocate General Captain in Texas and Germany during peacetime. He was awarded an Army Commendation Medal for his military service. He was a member of the New Jersey State Bar Association Board of Trustees, Chair of the Military Law and Veterans Affairs Section, and Chair of the Criminal Law Section.

WORKING WELL

Mindful and Nutritious Eating in the Workplace

By Lori A. Buza and Katie Ann Insinga
KSBranigan Law

Promoting mindful and nutritious eating in the workplace is essential to creating not only greater individual health, but also a happier and less stressful work environment. Indeed, being mindful of not only *what* you eat but also *how* you eat impacts gut health, an important marker of overall well-being. We often forget about our eating habits at work because we are too "busy" to spend appropriate thought and time on the right food choices.

A healthy diet includes fruits, vegetables (particularly dark, leafy greens), legumes (i.e., beans), lean meat or other good protein sources, and whole grains (i.e., whole wheat and brown rice). It's important to include foods that are rich in fiber, which passes through the gut to feed and grow microbes. On the other hand, a diet high in processed, fatty and/or sugary foods work against growing the helpful microbes in your gut. Trillions of microbes (i.e., bacteria, and fungi) live in your gut; not only do they help digest food, but research has found that they may play a part in healthy aging and longevity. Without these helpful microbes, numerous studies indicate an increased risk for developing several diseases including heart disease and diabetes.

Lifestyle factors also influence gut health and overall well-being—this includes our actual eating habits—such as *when and how we eat.* Many people eat while doing something else, such as watching TV, scrolling on their phone, or working at their desk. Mindful eating, however, involves recognizing hunger and satiety cues, being fully present while eating, and paying attention to the senses while eating. Mindful eating aids in digestion, because when you sit down, without distractions, you are also more likely to chew your food thoroughly, which is an important starting point in the digestive process. Being fully present during your meals may reduce overeating since you are more likely to understand your body's satiety signals and prevent digestive discomfort as well as fend off longer-term health issues such as obesity.

Practicing mindful eating can significantly enhance not only gut health but also mental health. Mindful eating can reduce stress and anxiety by allowing for a moment to relax and de-stress, taking some deep breaths and enjoying the food at hand without feeling rushed. It can enhance emotional regulation because when you pay attention to your body's hunger cues and fullness signals, you in turn become more connected to your actual needs. Mindful eating helps to prevent emotional eating and encourage healthier coping mechanisms, especially in times of stress, such as a busy day at the office. It may also improve mood and satisfaction as it encourages appreciation for the aromas, flavors, and textures of the food we are eating, leading to greater satisfaction during meals. Savoring the food you eat can boost mood and help one to recharge during the workday.

Mindful eating of nutritious foods can help to support strong gut health, mental health, overall well-being and longevity.

Tips for more nutritious, mindful eating at work and during work-related events:

- Set an uninterrupted time each day for lunch and/or healthy snacks (e.g. fresh fruits/veggies).
- Plan or pack lunches ahead of time by either meal prepping or picking out a restaurant near work that has healthy options on their menu.
- Plan work food events to include healthier options—such as gluten-free, plant-based, and alcohol-free options.
- Put your phone and laptop away while eating.
- Be sure to sit down while eating and not be multi-tasking at the same time.
- Appreciate and respect colleagues who practice nutritious and mindful eating to change the work culture for the better.
- Get creative while planning work events so that food is not always involved. For example—plan a networking walk, golf outing, pickleball, or creative activities such as painting.

WRITER'S CORNER

Know Your Audience

By Veronica J. Finkelstein
Litigative Consultant, U.S. Attorney's Office, Eastern District of Pennsylvania

When you write a brief, you don't send it off into the vacuum of space. As lawyers, we all know that our writing has a specific audience. Most of the time, we think of the presiding judge as that audience. After all, it is the judge's name at the bottom of the proposed order and the judge who will question us at oral argument. But the reality is that legal writing has more than one audience.

The most effective legal writers understand that every document they draft is read through multiple lenses, each with its own expectations, pressures, and interpretive habits. Whether you are writing a motion, a brief, a memo, or an email, you are not just communicating legal ideas. You are managing relationships, reputations, and realities.

Let's dispense with the myth of the neutral reader. There is no such creature. Every reader brings cognitive biases, emotional bandwidth, and institutional constraints to the page. The trick is not to write generically. The trick is to write strategically, with each audience in mind. Here are five audiences you should always consider, whether you are drafting for court, for counsel, or for the client who is quietly watching from the wings.

1. The Judge

The judge is your primary audience in most litigation writing, but not your only one. Judges are busy, skeptical, and allergic to clutter. They want clarity, structure, and brevity above all else. They want to know what you want, why you are entitled to it, and how the law supports it, without having to dig. Your job is to make the judge's job easier. That means front-loading your strongest arguments, using clean transitions, and avoiding

rhetorical flourishes that distract from substance. Judges read with purpose, not pleasure. Effective writing respects that purpose.

But do not forget that judges are also human. They respond to fairness, restraint, and professionalism. They notice when you concede a weak point rather than overstate it. They appreciate when you cite authority accurately and avoid hyperbole. Writing for a judge means balancing precision with persuasion, never sacrificing one for the other.

2. The Law Clerk

If the judge is the decision-maker, the clerk is often the gatekeeper. Clerks are the ones who read your brief first, annotate it, summarize it, and sometimes draft the initial draft of the judge's opinion. They are young, smart, and overworked. They are trained to spot logical gaps, procedural missteps, and evidentiary weaknesses. They are also trained to appreciate good writing, especially writing that respects their time.

When you write for the clerk, you are writing for someone who will dissect your argument before the judge even sees it. That means your citations must be impeccable, your record references must be accurate, and your reasoning must be airtight. Clerks love to be educated as they reason, because that means less research they must do on their own. Win the clerk, and you are halfway to winning the judge.

3. Opposing Counsel

Yes, opposing counsel is your adversary. But opposing counsel is also your audience. Opposing counsel reads your writing not just to respond, but to assess your credibility, your strategy, and your tone. Opposing counsel is looking for overreach, for inconsistency, for anything counsel can use to undermine your position. But opposing counsel is also looking for signals. These include signals about whether you are a reasonable person, whether you are bluffing, whether you are open to resolution.

Writing with opposing counsel in mind means being firm but fair. It means avoiding gratuitous jabs and focusing on the merits. It means signaling strength without arrogance. Remember that your writing may be quoted back to you in court, in mediation, or in settlement negotiations. Make sure it reflects the advocate you want to be.

4. The Client

Even if your client never reads your brief, your client is still your audience. After all, your client is the reason you are writing. Your client is the one whose interests you are protecting, whose story you are telling, and whose trust you are earning. Clients want to know that you understand their case, that you are fighting for them, and that you are doing so with integrity.

Writing with the client in mind means being transparent, respectful, and strategic. It means avoiding jargon when communicating directly and explaining your choices when necessary. It means remembering that every document you file becomes part of the public record and part of your client's legacy. Whether your client is a corporation, an individual, or a government agency, your writing should reflect their values and their voice.

5. The Future Reader

This final audience is the one most lawyers forget. The final audience can include the appellate judge, the journalist, the historian, and the law student. Legal writing lives longer than you think. It gets cited, archived, dissected, and sometimes weaponized. Writing for the future means writing with care. It means avoiding shortcuts, documenting your reasoning, and preserving the integrity of your argument.

It also means thinking about how your writing might be read out of context. Will it still make sense? Will it still sound professional? Will it still reflect the truth? The future reader may not know the facts, the players, or the stakes, but that reader will know how you wrote. Make sure that reader sese a lawyer who was thoughtful, principled, and precise.

Legal writing is not just about what you say. It is about who you say it to. The best advocates write with all five audiences in mind, balancing clarity with complexity, persuasion with professionalism, and strategy with sincerity. Because in the end, your words do not just argue. They represent. ■

Limitations of a Commercial Property Owner's Liability

When is the Non-Delegable Duty in Fact Delegable

KRISTINE Y. PEGNO *is Of Counsel at Wilson Elser in Madison, NJ. She is a seasoned civil litigator who focuses on the defense of general liability claims, including premises and product liability matters, as well as commercial litigation. She represents clients throughout all phases of litigation, providing strategic counsel to help resolve complex legal challenges and achieve business goals. After starting her career in Big Law, Kristine taught law for nearly a decade before returning to private practice, focusing on employment law issues while representing public school districts and other public employers before joining Wilson Elser.*

By Kristine Y. Pegno

"A commercial property owner has a non-delegable duty." That is an oft-repeated phrase among lawyers who handle premises liability cases in New Jersey. However, what is sometimes overlooked is that the so-called "non-delegable duty" is not absolute and that, on occasion, that duty may in fact be delegated or otherwise limited.

While a commercial property owner may have a so-called "non-delegable duty" to exercise reasonable care for the safety of persons using its premises,[1] the parameters of that non-delegable duty are less clear cut. The question we evaluate here is whether and to what extent the mere ownership of property imposes a duty on the commercial property owner for injuries sustained by a person while on those premises. What are the limitations of that non-delegable duty? And when is the non-delegable duty in fact delegable?

Historically, the extent of the duty owed by a property owner was determined by the classification of the plaintiff entering the property, whether as business invitee, licensee, or trespasser.

The Duty Owed

"The fundamental elements of a negligence claim are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, injury to the plaintiff proximately caused by the breach, and damages."[2] Thus, the first element that the plaintiff must prove in a negligence case is whether they are owed a duty of care by the defendant.

Historically, the extent of the duty owed by a property owner was determined by the classification of the plaintiff entering the property, whether as business invitee, licensee, or trespasser.[3] In *Hopkins v. Fox & Lazo Realtors*,[4] the court moved away from the traditional common law classifications that were largely defined by the relationship between the parties.[5] Instead, the court relied on an assessment of fairness and policy, for purpose of imposition of a duty, that involves "identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution."[6] In short, the *Hopkins* court concluded that "[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy."[7] We submit that the exceptions or limitations to the non-delegable duty are borne out of that abiding sense of basic fairness under the circumstances.

Trespassers

While the *Hopkins* court moved away from the traditional classifications in favor of an analysis based on fairness, there are still times when the traditional classifications apply to limit a property owner's duty, such as with the duty of care owed to a trespasser. In the 2025 opinion in *Zografos v. Est. of Votra*,[8] the Appellate Division revisited the extent to which a property owner owes a duty of care to a trespasser. While the plaintiff argued that the court should apply a *Hopkins* analysis, the court pointed out that such an analysis is "only necessary insofar as 'the status of the plaintiff, vis-à-vis a landowner, does not fall into one of the pre-determined categories…' under common law—invitee, licensee, or trespasser."[9] As the plaintiff in *Zografos* had received no invitation or approval to enter the property, the court determined him to be a trespasser.[10] Accordingly, the court found that the duty owed to the plaintiff was "relatively slight," owing only "a duty to refrain from willfully injuring plaintiff—as is the standard under common law."[11] The court affirmed the lower court's order granting summary judgment.[12]

Delegation of a Duty under Triple Net Lease

One scenario in which a commercial property owner may be able to actually delegate its duty to maintain and repair the property is under the terms of a lease agreement, particularly one involving a triple net lease.[13] The New Jersey Supreme Court has made clear that when the landlord has delegated the duty to maintain the leased premises to the tenant who is in exclusive possession of the property, the landlord owes its tenant's invitees no duty to maintain or repair the property.[14]

In evaluating imposition of a legal duty on a landlord under terms of a triple net lease, the court in *Shields v. Ramslee Motors*[15] considered the four factors set forth in *Hopkins* and reasoned that "[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy."[16] The *Shields* court considered the control over the subject premises to be a significant factor in determining which entity owed a duty of care to the plaintiff.[17] In that regard, the court stated as follows:

> Fairness precludes the landlord's liability for plaintiff's injuries—just as our application of the classic control-based liability analysis specific to the landlord-tenant context dictates that, in fairness, the entity with control over the property is the entity that should be held responsible. We decline to hold the landlord responsible for property over which it had relinquished control.[18]

In *Shields*, the plaintiff slipped and fell on ice and snow on the property's driveway. While responsibility for snow removal was not specifically identified in the lease, the court concluded that snow removal fell within the duty to repair and maintain the property.[19] The court held that, in circumstances in which the terms of the lease were clear, such as in *Shields* where the "parties agreed to place that responsibility solely on the tenant," the landlord was relieved of liability.[20]

The decision in *Shields* is consistent with the earlier decision in *McBride v. Port*

A property owner's duty to a pedestrian who slips and falls on ice or snow presents some unique issues due to the transient nature of the weather. The first question is whether the fall occurred during the course of, or immediately following, a winter weather precipitation event.

Auth. of N.Y. & N.J.[21] In *McBride*, the court rejected the plaintiff's argument that a commercial landlord should be held liable to its tenant's employee simply because it reserved the right to enter the leased premises to perform repairs.[22] The Appellate Division held that, where the tenant was in exclusive possession of the property and the terms of the lease unquestionably placed responsibility for maintenance and repair solely on the tenant, "there is no landlord liability in such circumstances."[23]

In *Underhill v. Borough of Caldwell*,[24] the plaintiff slipped and fell on ice on a driveway leading to a municipal parking lot leased by individual owners to the borough.[25] The court found that "the lease explicitly delegates to the Borough the exclusive responsibility to remove snow and ice from the premises."[26] After analyzing the *Hopkins* factors and the decision in the *Shields* case, the court noted that the *Shields* court made no distinction between public or private status of the tenant, but rather that "the entity with control over the property is the entity that should be held responsible."[27] The court found the lease agreement "sufficiently and expressly delegated snow and ice removal duties" to the tenant borough,[28] and concluded that summary judgment was properly granted to the property owners.[29]

More recently in *McCauley v. Am. Prop. Mgmt. Group*,[30] the court found that an oral lease agreement existed by which the tenant paid rent and utilities and was responsible for maintenance and repair of the property.[31] The court held that, as a commercial landlord, "Defendant did not owe plaintiff a duty of care, having ceded its tenant…the maintenance and repair responsibilities."[32] Accordingly, where a commercial landlord has relinquished control of the property to its tenant, and where the lease places all responsibility for maintenance and repair on the tenant, the landlord may be able to successfully delegate its duty to maintain the premises to its tenant. Thus, even an oral lease agreement provided a sufficient delegation in that case.

It appears clear that an owner of commercial property may, in fact, be able to delegate its responsibilities for maintenance and repair, including responsibility for snow removal, to its tenant. Of course, the terms of the lease agreement between the parties are pivotal to the question of the delegation of duty.

Ongoing Storm Doctrine and Delegation of Snow Removal

A property owner's duty to a pedestrian who slips and falls on ice or snow presents some unique issues due to the transient nature of the weather. The first question is whether the fall occurred during the course of, or immediately following, a winter weather precipitation event.

In *Pareja v. Princeton Int'l Properties*,[33] the New Jersey Supreme Court adopted the "ongoing storm rule," holding that "absent unusual circumstances, a commercial landowner's duty to remove snow and ice hazards arises not during the storm, but rather within a reasonable time after the storm." The court articulated that "[t]he premise of the rule is that it is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while the precipitation is ongoing."[34] The court identified two exceptions to the rule. First, "commercial landowners may be liable if their actions increase the risk to pedestrians and invitees on their property…where the defendant's conduct 'exacerbate[s] and increase[s] the risk' of injury to the plaintiff."[35] Second, a commercial landowner may be liable where it failed to remove or reduce a pre-existing risk on the premises, including an accumulation of snow or ice from a previous storm that had since concluded.[36]

In the recent case of *Weidlich v. 313-319 First St. Condo Ass'n*,[37] the dispute centered on the possible application of the exceptions to the ongoing storm rule. In *Weidlich*, the plaintiff argued that the first of the above-referenced exceptions to the ongoing storm rule should apply, claiming that the defendants' conduct increased the risk to plaintiff by: (1) failing to address the deterioration of the steps allowing water and ice to infiltrate; (2) "using the wrong paint during a recent paint job which made the steps, in plaintiff's opinion, 'sleeker' and 'rougher in the rain to navigate or when they're wet.'"[38] The court rejected the first argument because the plaintiff admitted that he slipped on the landing, not the steps.[39] As to the second argument, the court concluded that the "[p]laintiff's lay opinion alone was insufficient to establish a

genuine issue of fact as to whether [the] paint job caused or contributed to an unreasonably dangerous condition."[40] As such, the court held that the "defendants had no duty to remove ice from the property until the storm ended."[41]

While the *Pareja* decision held that the owner did not have duty to remove snow and ice during the storm, it did not set forth how much time thereafter was a reasonable period in which such removal was required. In *Hanna v. Woodland Cmty. Ass'n*,[42] the Appellate Division sought to address the question of what is a "reasonable time after the storm." The *Hanna* case involved a slip and fall in the parking lot of a condominium complex. The court noted first that condominium associations are held to the same premises liability standards as commercial landowners.[43] The court noted that "[t]he 'Sisyphean' task of removing snow while it is still snowing is just as burdensome to condominium owners as it is to other commercial landowners."[44] In *Hanna*, the plaintiff fell within an hour after the snow stopped. While the court declined to reach a definition of "reasonable time" for purposes of the ongoing storm rule, the court did conclude that "an hour after a seven-inch snowstorm has fallen on a 75-acre commercial property is not a reasonable time to have completed all snow removal activities."[45]

The ongoing storm rule applies not just to a commercial landowner's duty but also the duty of its snow and ice removal contractor. In *Sarro v. Vonage Holdings Corp.*,[46] the owner had entered a services agreement with a property management company, which in turn subcontracted with a contractor to provide snow and ice removal services.[47] The plaintiff did not oppose the summary judgment motions of the owner and property management company, opposing only the motion of the snow removal contractor.[48] There was no dispute that the plaintiff fell during an ongoing storm.[49] The court held that when the ongoing storm rule applies, as set forth in *Pareja*, the "*Hopkins* factors do not come into play."[50] Therefore, the court held that the snow removal contractor "owed no duty to plaintiff to do anything during the storm other than to avoid increasing the inherent risk of danger over and above natural conditions that existed."[51] Thus, the limitations provided by the ongoing storm rule are applicable both to the property owner and the entity to which the owner had contracted for snow removal.

Actual or Constructive Notice Requirement

Another limitation to a commercial property owner's liability is the requirement for notice of the alleged defect or dangerous condition, which is to say "if the owner had actual or constructive knowledge of the dangerous condition that caused the accident."[52] Constructive notice may be found "when the condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.'"[53]

It is well established that "[t]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'"[54] Rather, a plaintiff is required to prove that the defendant "had actual or constructive knowledge of the dangerous condition that caused the accident."[55] Courts have stated that "[t]he absence of such notice is fatal to plaintiff's claims of premises liability."[56] While notice of the condition is generally part of a plaintiff's *prima facie* premises liability case, we consider it here as another limitation to the property owner's duty. Recent unpublished decisions have further addressed the question of notice. In *Winston v. 7-Eleven, Inc.*,[57] the plaintiff alleged that she slipped and tripped at the defendant's convenience store on what she claimed was an unidentified "large object" on the floor.[58] The plaintiff claimed that, directly after her fall, a store employee grabbed the object and "ran it out of the building."[59] On appeal, the court affirmed the lower court's order dismissing her complaint because the "plaintiff failed to produce any evidence demonstrating defendant had actual or constructive notice of the condition that allegedly caused her to trip on the date of the incident.[60]

In *Soiro v. Fam. Dollar*,[61] the plaintiff alleged that she slipped and fell on a clothes hanger on the floor of the defendant's store.[62] The appellate court affirmed the order granting summary judgment to the defendant, finding that "there was no evidence defendant had constructive knowledge the hanger was on the floor 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.'"[63]

These recent cases remind us that the burden of proof requires a plaintiff to prove all the elements of a negligence cause of action even against a commercial property owner. The "non-delegable duty" is not a substitute for that *prima facie* proof.

Conclusion

There are, in fact, situations in which a commercial property owner may be found responsible for injuries occurring on the premises because the duty owed is non-delegable. Nonetheless, it is important to note that there are limitations or exceptions to that duty. In so doing, we may find that the "non-delegable duty" is not quite so "non-delegable" after all. ■

Endnotes

1. *See, e.g.*, *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425, 439 (1959); *Mayer v. Fairlawn Jewish Center*, 38 N.J. 549, 555 (1962); *De Los Santos v. Saddlehill, Inc.*, 211 N.J. Super. 253, 261 (App. Div. 1986).

2. *Shields v. Ramslee Motors*, 240 N.J. 479, 487 (2020) (*quoting Robinson v. Vivirito*, 217 N.J. 199, 208 (2014)). *Accord Townsend v. Pierre*, 221 N.J. 36, 51 (2015); *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 594 (2013); *Weinberg v. Dinger*, 106 N.J. 469, 484 (1987).
3. *See Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 433 (1993) (*citing Snyder v. I. Jay Realty*, 30 N.J. 303 (1959)).
4. 132 N.J. 426 (1993).
5. *Id.* at 438.
6. *Id.* at 439 (*citing Goldberg v. Housing Auth.*, 38 *N.J.* 578, 583 (1962)).
7. *Id.*
8. 2025 N.J. Super. Unpub. LEXIS 2645 (Dec. 26, 2025).
9. *Id.* at *9 (*citing Rowe v. Mazel Thirty, LLC*, 209 N.J. 35, 44 (2012)).
10. *Id.* at *9.
11. *Id.* at *10.
12. *Id.* at *15.
13. "A 'triple net' lease is a lease in which a commercial tenant is responsible for 'maintaining the premises and for paying all utilities, taxes and other charges associated with the property.'" *Ayala v. West First Roselle, LLC*, 2012 N.J. Super. Unpub. LEXIS 2026, *5 (App. Div. 2012) (*citing N.J. Indus. Props. v. Y.C. & V.L., Inc.*, 100 N.J. 432, 434 (1985)).
14. *See Shields v. Ramslee Motors*, 240 N.J. 479 (2020). *See also McBride v. Port Auth. of N.Y. & N.J.*, 295 N.J. Super. 521 (1996).
15. 240 N.J. 479 (2020).
16. *Id.* at 492 (*quoting Hopkins*, *supra,* 132 N.J. at 439).
17. *Shields*, *supra*, 240 N.J. at 491 (*citing J.H. v. R&M Tagliareni, LLC*, 239 N.J. 198, 218 (2019)).
18. *Shields*, *supra*, 240 N.J. at 494.
19. *Id.* at 489.
20. *Id.* at 488.
21. 295 N.J. Super. 521 (App. Div. 1996).
22. *Id.* at 525.
23. *Id.* at 522.
24. 463 N.J. Super. 548 (App. Div.), *certif. den.*, 44 N.J. 164 (2020).
25. *Id.* at 551–52.
26. *Id.* at 551.
27. *Id.* at 559 (*citing Shields*, *supra*, 240 N.J. at 494).
28. *Id.* at 559 (*citing Geringer v. Hartz Mountain Dev't Corp.*, 388 N.J. Super. 392, 400–01 (App. Div. 2006 ("holding…that a commercial landlord owed no duty to repair or maintain interior stairway within the leased premises on which tenant's employee slipped and fell because tenant agreed to undertake all repairs in the lease agreement"), *certif. den.*, 190 N.J. 254 (2007)).
29. *Id.* at 562 (*citing Shields v. Ramslee Motors,* 240 N.J. 479 (2020).
30. 2023 N.J. Super. Unpub. LEXIS 899 (App. Div. 2023).
31. *Id.* at *7.
32. *Id.* at *10.
33. 246 N.J. 546 (2021).
34. *Id.*
35. *Id.* at 559 (*quoting Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717–18 (R.I. 1999)).
36. *Id.*
37. 2025 N.J. Super. Unpub. LEXIS 1366 (App. Div. July 22, 2025).
38. *Id.* at *8–9. The plaintiff also argued that the handrails were affixed too far from the pedestrian pathway, although plaintiff's expert provided no support for that conclusion. *Id.*
39. *Id.* at *11–12.
40. *Id.* at *17.
41. *Id.* at *18.
42. 2022 N.J. Super. Unpub. LEXIS 2180 (App. Div. Nov. 17, 2022).
43. *Id.* at *8.
44. *Id.* at *9 (*citing Pareja*, *supra*, 246 N.J. at 553) (the court declined to impose a higher burden on condominium owners).
45. *Id.* at *10.
46. 2023 N.J. Super. Unpub. LEXIS 408 (App. Div. Mar. 20, 2023), *certif. den.*, 255 N.J. 518 (2023).
47. *Id.* at *2.
48. *Id.* at *5.
49. *Id.* at *6.
50. *Id.* at *14.
51. *Id.* at *14–15.
52. *Jeter v. Sam's Club*, 250 N.J. 240, 251 (2022).
53. *Id.* (*citing Troupe v. Burlington Coat Factory Warehouse Corp.*, 443 N.J. Super. 596, 602 (App. Div. 2016) (*quoting Parmenter v. Jarvis Drug Stores, Inc.*, 48 N.J. Super. 507, 510 (App. Div. 1957))).
54. *Arroyo v. Durling Realty, LLC*, 433 N.J. Super. 238, 243 (App. Div. 2013) (*quoting Sims v. City of Newark*, 244 N.J. Super. 32, 42 (Law Div.1990)).
55. *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 563 (2003).
56. *Arroyo*, *supra*, 244 N.J. Super. at 42 (*citing Nisivoccia*, *supra*, 175 N.J. at 563; *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 291 (1984)).
57. 2025 N.J. Super. Unpub. LEXIS 1705 (App. Div. Sept. 18, 2025).
58. *Id.* at *1–3.
59. *Id.* at *3–4.
60. *Id.* at *6–7.
61. 2025 N.J. Super. Unpub. LEXIS 2504 (App. Div. Dec. 3, 2025).
62. *Id.* at *1.
63. *Id.* at *6 (*quoting Troupe v. Burlington Coat Factory Warehouse Corp.*, 443 N.J. Super. 596, 602 (App. Div. 2016)).

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Why New Jersey Has Become a Preferred Venue for Mass Sexual Abuse Claims

Statutory, Procedural, and Strategic Factors Driving Forum Selection

By Georgia D. Reid

Few corners of New Jersey civil practice have transformed as quickly or decisively as mass sexual abuse litigation. Once confined to narrow procedural lanes, these cases now dominate court dockets, drawing plaintiffs from across the country to pursue claims against religious, educational, healthcare, and youth-serving institutions.

This shift is no accident. It reflects a powerful mix of legislative reform, plaintiff-friendly procedures, and deliberate forum selection. The result: New Jersey has emerged as a national hub for high-stakes abuse litigation, sometimes resulting in multi-million-dollar verdicts.

So why here? And how can practitioners navigate a legal landscape where the rules are evolving, the scrutiny is intense, and the consequences are profound?

Legislative Reform: The Foundation of Forum Preference

The principal catalyst for New Jersey's emergence as a preferred forum was the Legislature's enactment of sweeping reforms in 2019. Through P.L. 2019, c.120, the Legislature added three related provisions to Title 2A of the New Jersey Statutes that dramatically expanded access to civil remedies for sexual abuse. Most significantly, N.J.S.A. 2A:14-2a extended the statute of limitations for civil actions arising from sexual assault or other sexual crimes, permitting claims to be filed until the later of the victim's 55th birthday or seven years from reasonable discovery of the injury. In addition, N.J.S.A. 2A:14-2b created a temporary two-year "look-back" window—running from Dec. 1, 2019, through Nov. 30, 2021—during which survivors could revive claims that had previously expired. This revival provision reopened thousands of historic claims and led to a surge of filings that flooded the courts, while N.J.S.A. 2A:14-2c established the act's Dec. 1, 2019, effective date and governed its implementation.

High-profile litigation across the state reflects the impact of these legislative reforms. Well-known cases involved actions against the Dioceses of Camden and Metuchen and against institutions such as Seton Hall University. Furthermore, the appellate decision *W.S. v. Hildreth*, which upheld the revival statute's constitutionality, demonstrates the durability of the reforms.[1] This stability has encouraged sustained institutional litigation and significant investment by plaintiffs' counsel. In October 2025, in the case *T.M. v. Order of St. Benedict of New Jersey Inc.*, a Morris County jury awarded $5 million to a former student who sued over alleged sexual abuse by a Benedictine monk while attending The Delbarton School, a Catholic all-boys prep school in Morris Township.[2] The abuse allegedly occurred in the 1970s. In a 6–1 ruling on March 11, 2026, the New Jersey Supreme Court ruled that schools can face vicarious liability for sexual abuse committed by staff, even off school grounds, following the 2019 Child Victims Act (CVA).[3] The Court determined that the law removed civil immunity for public entities regarding sexual misconduct, allowing suits to proceed if the school empowered the abuser.[4]

The amendments further reinforced institutional liability by preserving claims against entities that failed to protect minors or vulnerable individuals.[5] By emphasizing negligent supervision and systemic misconduct, the Legislature expanded accountability beyond individual perpetrators and triggered a surge of lawsuits against institutions.

Neighboring states have taken narrower paths. For example, New York opened temporary lookback windows under the Child Victims Act and Adult Survivors Act, but those windows have closed. Pennsylvania and Delaware adopted more restrictive revival provisions and continue to face constitutional and political resistance. Connecticut expanded limitation periods but stopped short of offering comparable retroactive relief.

Procedural Infrastructure for Complex Abuse Litigation

New Jersey's procedural framework plays a decisive role in supporting mass litigation. Courts actively manage coordinated dockets involving overlapping defendants and decades-old institutional records, demonstrating both the capacity and commitment to handle complex, high-stakes cases. Through centralized supervision, broad discovery, disciplined case control, and integrated ADR, the judiciary has built a predictable and durable system for resolving mass abuse claims.

Trial courts routinely centralize related matters for coordinated supervision, reducing inconsistent rulings and promoting uniform administration.[6] Discovery rules further enhance New Jersey's suitability as a forum. Rule 4:10-2(a) permits broad access to relevant, nonprivileged material, enabling plaintiffs to obtain institutional records critical to historic claims. Courts consistently construe discovery liberally in order to promote fact finding and, ultimately, truth-seeking.[7]

Because many sex-abuse cases involve decades-old conduct, documentary evidence often substitutes for unavailable witnesses. Courts will apply proportionality principles under Rule 4:10-2(g) to balance burden and necessity.

Judicial case control remains another defining feature of our courts. Under Rule 4:25-1, trial courts issue tailored management orders that structure complex

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litigation from the outset. Courts commonly implement phased discovery, structured expert disclosures, and standardized motion schedules to limit delay and promote substantive resolution. Judges also enforce discovery obligations through meaningful sanctions, discouraging obstruction and reinforcing transparency.[8]

Finally, New Jersey's integrated ADR system supports efficient resolution, with mediation frequently embedded in case management plans to facilitate settlement.

Substantive Law Supporting Institutional Accountability

New Jersey's substantive tort law contributes significantly to its forum status for mass sex abuse claims. Long-standing doctrines governing institutional negligence, combined with survivor-sensitive tolling principles, provide plaintiffs with robust legal pathways to recovery.

Courts recognize broad causes of action for negligent supervision, retention, and training. Institutions face liability when they knew or should have known of an individual's propensity for harm.[9] In abuse cases, evidence of prior complaints, transfers, or internal investigations often establishes foreseeability and breach.

Liability is not limited to direct supervision but extends to systemic failures in policy and oversight.[10] This expansive conception of duty aligns with the institutional nature of mass abuse claims.

New Jersey courts also recognize that abuse may cause long-term harm that manifests years later. Courts routinely admit expert testimony regarding trauma and delayed symptom development.[11] The discovery rule reinforces this approach by delaying accrual until plaintiffs discover, or reasonably should discover, both the injury and its cause.[12] New Jersey courts have long acknowledged that trauma and coercion may delay this realization.[13]

Comparative fault principles and joint liability also influence settlement dynamics.[14] Primary institutional defendants remain jointly liable for economic damages when primarily responsible, and courts may award punitive damages in cases involving deliberate concealment.[15]

Strategic Considerations for Plaintiff and Defense Counsel

Plaintiffs' Counsel

New Jersey's legal framework creates major opportunities for plaintiffs' attorneys—but it also raises the stakes. Mass abuse litigation demands heavy upfront investment in case screening, historical investigation, and trauma-informed advocacy. Lawyers must rigorously assess jurisdiction, venue, and choice-of-law issues, especially for out-of-state clients.

Given the flood of institutional records and frequent privilege fights, strong discovery management is critical. Strategic coordination with co-counsel and early insurance coverage analysis can significantly increase settlement leverage. Throughout the process, attorneys must uphold strict ethical standards, prioritizing clear client communication and full transparency in aggregate settlements.

Defense Counsel

Defense attorneys face a different kind of pressure, and they must move fast. Early evaluation of institutional exposure, immediate document preservation, and early planning for extensive electronic and archival document review, including on-site visits to document warehouses to scan and preserve legacy records, are nonnegotiable. Delayed internal investigations only hand opponents a strategic edge.

Well-crafted jurisdictional defenses, choice-of-law analysis, and constitutional arguments remain powerful tools when available. After the pleading stage, during discovery, the savvy and ethical defense lawyer balances confidentiality with courts' expectations of cooperation.

Finally, insurance coverage fights must be addressed from day one. Effective settlement planning demands close coordination with insurers and institutional leaders to control financial fallout and reputational damage.

Shared Responsibilities

Despite these divergent strategic imperatives, both sides operate in an unusually sensitive litigation arena—one shaped by deep personal harm and public scrutiny. Attorneys should remain professional and ethically rigorous as always. Effective advocacy requires more than technical skill; it calls for emotional intelligence and genuine respect for the broader social impact of these cases.

Conclusion

New Jersey's emergence as a leading forum for mass sexual abuse litigation reflects deliberate legislative reform, adaptable procedural mechanisms, and substantive doctrines aligned with the realities of institutional misconduct. For practitioners, this trend underscores the importance of mastering revival statute jurisprudence, institutional discovery, coverage litigation, and coordinated case management, while remaining attentive to the profound personal harm experienced by survivors and the responsibility of the legal system to provide meaningful, dignified access to justice. For the judiciary, it highlights the ongoing challenge of balancing survivor access, due process, and docket efficiency. As abuse litigation continues to evolve nationwide, New Jersey's experience offers a developing model for addressing historic wrongdoing in a manner that honors survivors' experiences, promotes institutional

accountability, and preserves procedural integrity and public confidence in the justice system. ■

Endnotes

1. 470 N.J. Super. 57, 268 A.3d 1038 (App. Div. 2021) (affirmed 2023).
2. morristowngreen.com/2025/10/08/jury-awards-5m-to-delbarton-grad-who-accused-monk-of-1976-sexual-abuse
3. N.J.S.A. 59:2-1.3(a)(1)
4. The decision consolidated four cases (including *Hornor v. Upper Freehold Regional* and *Simpkins v. South Orange-Maplewood*) involving teacher abuse of students.
5. N.J.S.A. 2A:14-2a(b).
6. R. 4:38-1; R. 4:5B-1.
7. See *Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 535 (1997).
8. R. 4:23-2. See also *Abtrax Pharms., Inc. v. Elkins-Sinn, Inc.*, 139 N.J. 499, 514 (1995).
9. See *Di Cosala v. Kay*, 91 N.J. 159, 173–74 (1982).
10. See *Hardwicke v. American Boychoir School,* 188 N.J. 69, 102–03 (2006).
11. See *Kemp ex rel. Wright v. State*, 174 N.J. 412, 429–30 (2002).
12. See *Lopez v. Swyer,* 62 N.J. 267, 272 (1973).
13. See *R.L. v. Voytac,* 199 N.J. 285, 305–06 (2009).
14. N.J.S.A. 2A:15-5.3(a).
15. N.J.S.A. 2A:15-5.9 to -5.17.

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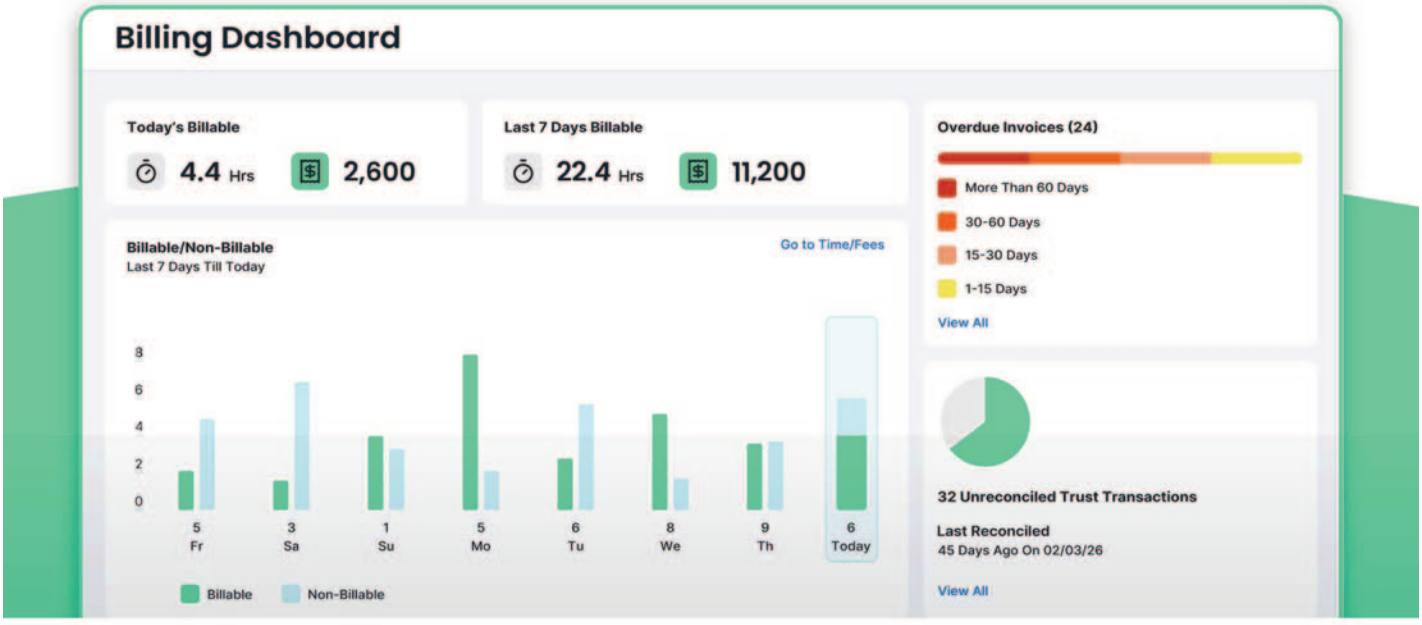

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DISCOVERING THE TRUTH

Why Plaintiffs Need Raw Neuropsychological Test Data

By Evan J. Lide

From the plaintiff's perspective, raw test data from psychological and neuropsychological evaluations is not a luxury; it is the evidentiary foundation that allows counsel to test, and often to expose, the defense expert's work product. When that data is withheld or restricted to a defense-favored "gatekeeper," the litigation process is distorted in ways that undermine accuracy, fairness, and ultimately the jury's truth-finding function.

This article addresses that dispute from the standpoint of New Jersey plaintiffs' counsel, using recent motion practice and illustrative neuropsychological reviews of defense examiners as practical examples of why access to raw data is essential and how defense arguments can be effectively answered.[1]

I. Why Raw Data Matters

Neuropsychological opinions rise or fall on the integrity of the underlying data: the examinee's actual responses, scoring sheets, and protocols. Reports are filtered narratives; raw data is where errors, omissions, and bias are actually found.

From a plaintiff's standpoint, access to raw data is indispensable for several reasons:

A. It is the true basis of the opinion

New Jersey discovery rules permit a party to obtain the "substance of the facts and opinions" to which the opposing expert is expected to testify, and "a summary of the grounds for each opinion." In the neuropsychological context, the "grounds" are not simply the polished report. They include:

- The test protocols and score sheets
- The plaintiff's verbatim responses and performance
- Any examiner notes concerning behavior, effort, or symptomatic complaints during testing

Without that material, it is impossible to know whether the expert's description of scores, symptom validity testing, or behavioral observations is faithful to what actually occurred in the examination room.

B. Reports often do not match the data

Experienced brain-injury litigators know that reports are not neutral summaries. They are advocacy documents, consciously or unconsciously shaded toward the party who hired the expert. Leading neuropsychological commentators have long recognized that:

- Errors in scoring and interpretation are common
- Reports may omit low scores or relabel impaired performances as "borderline" or "mild," and
- The only way to detect these maneuvers is to obtain the expert's complete file and re-score the data

If counsel is limited to the four corners of the defense report, these discrepancies remain invisible. Cross-examination devolves into a battle of adjectives instead of a grounded challenge to the expert's methods.

C. Cross-examination without raw data is illusory

Meaningful cross-examination of a neuropsychologist requires more than asking whether the plaintiff "tried hard" or whether "the tests were valid." It requires the ability to confront the expert with specifics:

- Which subtests were impaired, and by how much?
- Were standard scoring rules followed, or were "judgment calls" consistently made in one direction?
- Were there unreported scores in the impaired range that undercut the expert's reassuring summary?

Without access to raw data, plaintiff's counsel cannot show the jury the actual questions missed, the true percentile scores, or the ways in which interpretation deviated from published manuals. The jury hears only the expert's conclusion that performance was "within normal limits," with no way to verify whether that characterization is justified.

II. Ethical Codes vs. Discovery Obligations

Defense neuropsychologists typically justify withholding raw data by invoking professional ethics and test security. The argument runs roughly as follows: test publishers and ethical codes require that raw data be kept out of the hands of nonpsychologists to preserve test integrity and prevent coaching or misuse.

That argument is overstated on its own terms and, more importantly, cannot override New Jersey's discovery rules.

A. What the ethics actually say

The American Psychological Association's Ethics Code draws a clear distinction between "test data" and "test materials."[2] Test data includes raw and scaled scores, client responses to items or stimuli, and psychologists' notes and recordings concerning the client's behavior during testing. Test materials, by con-

trast, are the manuals, instruments, protocols, and test questions themselves.

The ethics provisions allow release of test data to the client or to "other persons identified in the release," and in the absence of a release, require production "as required by law or court order."[3] Forensic psychology guidelines likewise recognize that documentation reasonably related to expressed opinions—including raw data and drafts—is subject to legal process.[4] In short, the profession's own standards anticipate that courts will compel production of test data when litigation demands it.

B. No 'ethics privilege' in civil discovery

New Jersey has broad discovery rules and recognizes no "ethics privilege" that allows a psychologist to unilaterally trump Rule 4:10-2.[5] Trial-level practice in this state has required neuropsychologists to produce raw test data, subject to reasonable protections. Courts in other jurisdictions confronted with identical disputes have made the same point explicitly: while courts "acknowledge and appreciate" ethical principles, those principles must yield to the rules governing discovery.[6] These decisions treat ethical concerns for test security as a factor to be addressed by protective orders—not as a basis to withhold the data altogether.

III. Defense Arguments and Plaintiff Responses

Despite the legal and ethical framework favoring production, defense counsel and experts tend to repeat several themes when resisting raw-data discovery. Each can be answered directly.

A. 'Test security' and 'coaching' concerns

Defense experts warn that releasing raw data to lawyers or plaintiffs will expose proprietary test materials, allow future examinees to be coached, and erode the validity of widely used instruments. There are several plaintiff-side responses:

1. **Protective orders work.** Courts handle sensitive material all the time—trade secrets, proprietary software, confidential medical records—through confidentiality agreements and orders that restrict use to the litigation, limit disclosure to counsel and experts, and require sealing or in camera review if the data must be filed. That same toolbox is available for neuropsychological data.
2. **The material is far from secret.** Many commonly used tests and manuals can be found in research libraries, through inter-library loan, or in commercially available texts. Test content is described extensively in the scientific literature. The idea that a single plaintiff's counsel, working under a protective order, will meaningfully threaten national test validity is not persuasive.
3. **Ethics defer to law.** As noted above, the APA explicitly contemplates court-ordered release of data; it does not empower psychologists to ignore subpoenas or discovery orders.

Contemporary neuropsychological literature also undermines the notion that withholding raw data from plaintiffs' counsel is necessary to prevent coaching. Surveys summarized by Boone and colleagues document that some attorneys openly acknowledge coaching clients in advance of psychological and neuropsychological testing, and that such coaching can threaten test validity if it involves item-level content or strategy.[7] But Boone et al. conclude that the proper response is to safeguard test materials and item content—not to insulate defense experts from scrutiny by blocking access to the data and work product that courts require for meaningful cross-examination.[8]

The practical compromise, adopted by multiple courts, is to compel production

> Without access to raw data, plaintiff's counsel cannot show the jury the actual questions missed, the true percentile scores, or the ways in which interpretation deviated from published manuals.

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From the plaintiff's perspective, the fair and practical approach is direct production to counsel (subject to a protective order), with the understanding that counsel will share the data with consulting or testifying experts as needed.

of raw data subject to a robust confidentiality order. That solution respects both the plaintiff's need for discovery and the profession's desire to limit uncontrolled dissemination.

B. 'Only a licensed neuropsychologist can see the data'

Another common defense position is that raw data may be shared only with another licensed neuropsychologist, not with counsel. This position is problematic on multiple levels.

First, New Jersey discovery practice is party-centered. It is the litigant and counsel who are entitled to discover the facts and data considered by the opposing expert. Narrowing access to a single professional category (neuropsychologists) effectively creates a quasi-privilege that the rules do not recognize.

Second, routing all data through a "gatekeeper" expert imposes a forced-expert model on plaintiffs. Many plaintiffs intend to rely primarily on treating providers, supplemented by counsel's own experience with brain-injury litigation. Requiring an additional retained neuropsychologist solely to serve as a conduit for raw data adds cost and delay, and may be strategically unsound if that expert will not ultimately testify.

Third, trial courts elsewhere have expressly criticized the notion that forwarding data only to another expert solves the problem. Without direct access to the manuals, scoring, and data, counsel cannot prepare for or conduct a thorough cross-examination of the defense expert on issues such as malingering, effort, and subtle scoring choices.

From the plaintiff's perspective, the fair and practical approach is direct production to counsel (subject to a protective order), with the understanding that counsel will share the data with consulting or testifying experts as needed.

C. 'Plaintiff can rely on their own experts'

Defense counsel sometimes argue that any prejudice is cured because the plaintiff can have their own expert repeat testing or otherwise respond. That sidesteps the core issue. Plaintiffs are not seeking raw data merely to build affirmative cases; they need it to test and impeach the defense expert's methodology and conclusions.

Repeat testing may be clinically inappropriate due to practice effects, symptom exacerbation, or the practical burden on a brain-injured plaintiff. More fundamentally, no amount of independent testing will reveal:

- Whether the defense expert miscored a particular subtest
- Whether low scores were omitted from the report, or
- Whether interpretive "judgment calls" consistently favored the defense narrative

Those questions can only be answered by looking at the defense expert's own data.

IV. What Happens When Plaintiffs Get the Data: A Case Study

In a separate case involving a plaintiff with cognitive complaints following a fall, a reviewing neuropsychologist was asked to analyze the raw test data underlying a defense neuropsychologist's report.

The analysis, based entirely on that raw data and the medical records, revealed multiple categories of concern:

A. Systematic scoring and interpretation errors

Rescoring the defense expert's protocols using the publishers' manuals, and having them blind-scored by colleagues, the reviewer found that:

- Scores the defense expert placed in the "average" range were, under standardized norms, in the low or clearly impaired percentiles
- Subtests central to the plaintiff's occupational functioning (such as processing speed and language tasks) were understated or reframed in ways that minimized their impact, and
- When there was room for subjective interpretation, decisions consistently favored higher, more reassuring scores

These were not random errors that might be expected in any human scoring; they were systematic and directionally consistent. Without raw data, none of this would have been detectable.

B. Selective use and mischaracterization of the medical record

The reviewing expert also documented how the defense expert's report:

- Highlighted tangential treatment records (for example, chiropractic vis-

its) while omitting contemporaneous notes diagnosing concussion, vestibulo-oculomotor dysfunction, vision problems, and ongoing headaches
- Downplayed the plaintiff's reduction from full-time to part-time work and the persistence of symptoms well beyond six months, and
- Recast specific, medically documented complaints (such as moderate-to-severe headaches and balance problems) into vague, easily minimized descriptions

Again, the ability to juxtapose the raw test data with the complete medical record was essential to exposing this pattern.

C. Data-handling and ethical irregularities

Finally, the reviewer identified irregularities in how the defense expert handled test materials and data, including:

- Use of photocopied and cobbled-together test forms in apparent violation of publishers' copyright agreements
- Failure to identify the examinee on original protocols, creating uncertainty about which data belonged to which client, and
- Incomplete production of raw data, requiring repeated requests to obtain missing pages

These issues go directly to reliability and professional credibility. They would have remained completely hidden had raw data not been produced and scrutinized.

Taken together, such analyses underscore why plaintiffs' counsel cannot simply accept the defense expert's summarized conclusions. Access to raw data allows plaintiffs both to verify and, where necessary, to dismantle a polished but misleading narrative.

V. Practice Pointers for New Jersey Plaintiffs' Counsel

New Jersey does not yet have a reported appellate decision squarely resolving raw-data discoverability in civil neuropsychological exams, but *DiFiore*'s recognition of the inherently adversarial nature of defense medical exams and the plaintiff's need for meaningful oversight strongly supports broad discovery of the facts and data considered by defense examiners.[9] Nonetheless, trial-level orders, persuasive authority from other jurisdictions, and the structure of our discovery rules give plaintiffs' attorneys a workable roadmap.

A. Address raw data at the DME stage

When a defense medical or neuropsychological examination is first noticed, plaintiffs' counsel should:

- Put the defense on written notice that raw data, scoring sheets, and complete test protocols will be produced
- Identify any observer and recording arrangements, and
- Request a proposed protocol and confidentiality agreement that explicitly provides for direct transmission of raw data to plaintiff's counsel within a defined time after testing

Embedding these expectations from the outset normalizes the idea that raw data is part of the standard DME package, not an extraordinary request.

B. Use tailored confidentiality agreements

A thoughtfully drafted confidentiality agreement can neutralize most test-security concerns. Typical provisions include:

- Defining "Confidential Information" to include raw data, protocols, and related materials
- Restricting use of the data to the pending litigation
- Limiting disclosure to counsel, retained experts, necessary support staff, and the court
- Providing procedures for filing such materials under seal or for in camera review, and
- Requiring return or destruction of the data at the conclusion of the case, with written confirmation

In one recent New Jersey matter, a plaintiff's proposed agreement required the examining neuropsychologist to supply raw data directly to plaintiff's counsel within 72 hours of the examination, subject to standard confidentiality terms. That sort of language both protects the material and ensures timely, direct access.

C. Anchor your motion practice in rules and precedent

If the defense expert or insurer refuses to produce raw data, plaintiffs should be prepared to move promptly for a protective or compelling order, grounding their argument in:

- New Jersey's broad discovery standard and the specific requirement to disclose the "facts and data considered" by testifying experts
- The APA Ethics Code and forensic guidelines, which explicitly defer to law and court orders regarding test data, and
- A line of persuasive cases from other jurisdictions compelling production of raw neuropsychological data, often subject to confidentiality protections

Counsel should also be prepared to request appropriate remedies—up to and including preclusion—if a defense expert insists on testifying while withholding the foundation of their opinions.

D. Insist on direct production to counsel

Finally, plaintiffs should resist the "neuropsychologist-only" compromise.

Direct production to counsel, under a protective order, respects the attorney's central role in case preparation and allows counsel to:

- Review the data personally, especially where counsel has developed deep experience in brain-injury litigation;
- Decide strategically when and how to involve consulting or testifying experts; and
- Prepare focused cross-examination that integrates raw scores, medical records, and functional evidence.

Forcing all raw data through a professional gatekeeper may be convenient for the defense, but it is not consistent with our discovery rules and it is not necessary to protect legitimate professional interests.

VI. New Jersey Supreme Court Guidance: *DiFiore v. Pezic*

Although there is still no reported New Jersey decision squarely deciding the discoverability of raw neuropsychological data in civil cases, the Supreme Court's opinion in *Kathleen DiFiore v. Tomo Pezic* provides powerful guidance for plaintiffs' counsel.[10] In *DiFiore*, the Court held that defense medical exams are inherently adversarial and rejected a host of defense-oriented restrictions, placing on defendants the burden to show why an unobtrusive recording or neutral third-party observer should not be permitted in a particular case.[11]

The Court emphasized that plaintiffs have a legitimate need for tools that allow them to test what actually happened during a defense medical exam and that defense concerns about "test security," "coaching," or examiner discomfort are not, standing alone, sufficient to bar mechanisms that preserve an accurate record.[12] That reasoning fits hand-in-glove with the argument for raw-data production: if New Jersey recognizes that plaintiffs need transparency into what occurred in the exam room, it follows that they must also have access to the underlying data that forms the basis of the defense expert's opinions, subject to reasonable protective orders rather than categorical withholding.[13]

VII. Conclusion

The dispute over discoverability of raw data from psychological and neuropsychological evaluations is not merely an esoteric clash between ethics codes and civil procedure. It is, in practice, a contest over who controls the story of the brain-injured plaintiff.

From the plaintiff's side, securing that data—through careful defense medical exam conditions, well-drafted confidentiality agreements, and focused motion practice—is essential to exposing distortions, correcting misinterpretations, and giving the jury a full and accurate picture of the plaintiff's cognitive and emotional injuries.

As the case study in Section IV demonstrates, once plaintiffs obtain the raw data, the defense narrative often looks very different. Scores that were described as "mild" turn out to be clearly impaired. Symptoms that were downplayed prove to be well-documented and persistent. Methodological shortcuts and ethical lapses, invisible in the glossy report, become unavoidable. That is precisely why plaintiffs must insist that raw data is discoverable, produced directly to counsel, and subject only to reasonable safeguards—not to unilateral veto by the examining expert.

For New Jersey practitioners, the lesson is straightforward: treat raw neuropsychological data as central, not peripheral, discovery. Build your defense medical exam protocols, confidentiality orders, and motion practice around that premise, and use the data you obtain to restore balance to a field long dominated by defense-controlled experts. ■

Endnotes

1. The author has relied on recent motion practice in New Jersey superior courts and on published guidance from neuropsychologists regarding the necessity of access to raw test data in litigation contexts.
2. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* § 9.04 (Release of Test Data) (2017).
3. *Id.*
4. American Psychological Association, *Specialty Guidelines for Forensic Psychology* § 10.08 (2d ed. 2013) (requiring that documentation regarding expert's work product be preserved and made available as required by law or court order).
5. N.J. R. Civ. Prac. 4:10-2 (scope of discovery).
6. *See, e.g.*, cases cited in discussion of discovery protections in state and federal appellate decisions addressing expert discovery; the principle that procedural rules governing discovery cannot be overridden by professional ethics codes acting unilaterally.
7. K. B. Boone et al., *Attorney Demands for Protected Psychological Test Information: Is Access Necessary for Cross-Examination or Does It Lead to Misinformation? An Interorganizational Position Paper*, 38 Clinical Neuropsychology 1 (2024), doi.org/10.1080/13854046.2024.2323222.
8. *Id.*
9. *Kathleen DiFiore v. Tomo Pezic,* 272 N.J. 1 (A-58/59/60-21) (2023).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

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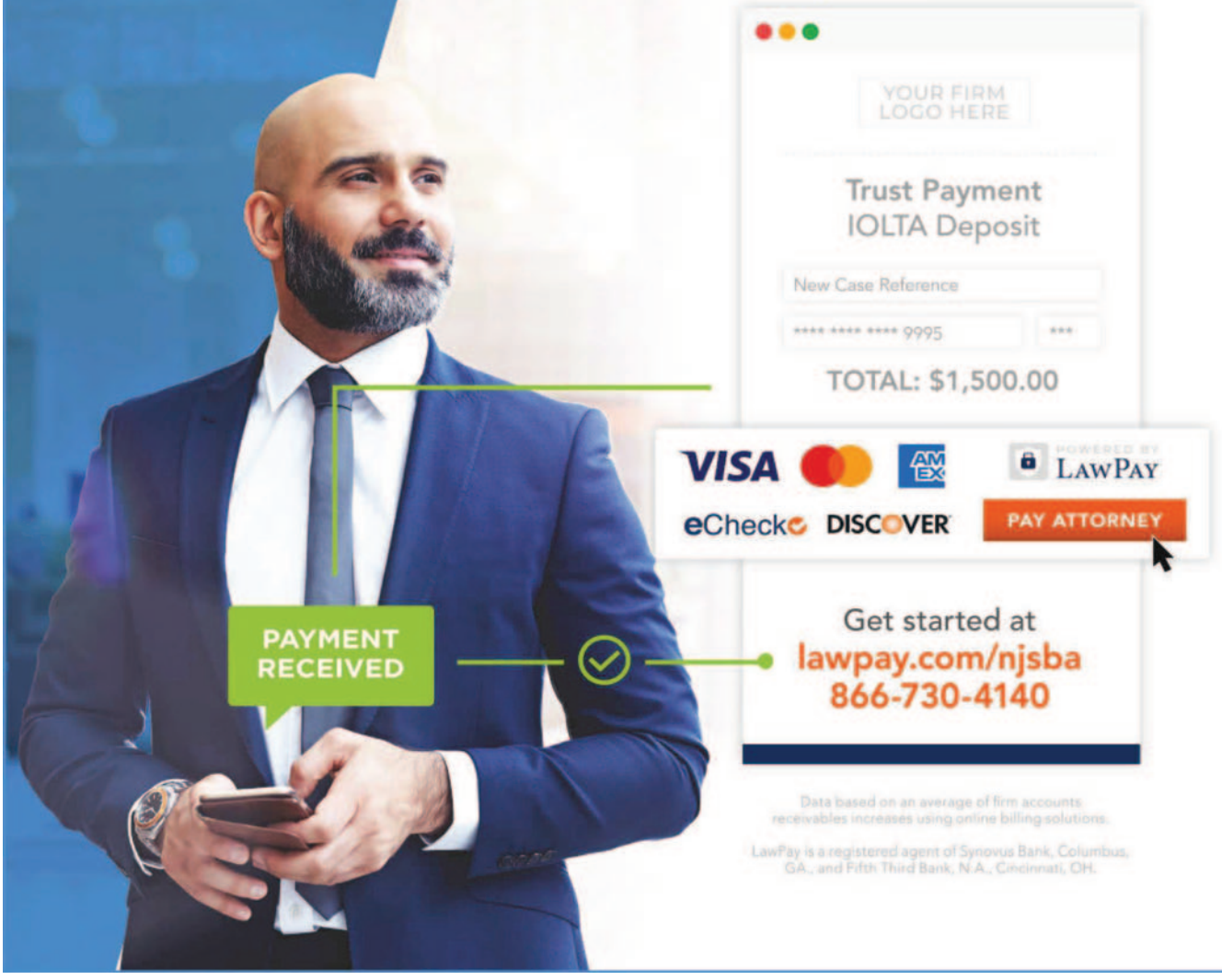

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It Depends

An Analysis of the Timeliness of Tort Claims Notices

By Sarah K. Delahant

Tort claims litigation can be one of the most challenging areas of law for both plaintiff and defense counsel. The pitfalls are apparent from the inception of claim through disposition. Nearly every claim against a public entity is subject to some form of immunity. However, one of the most challenging parts of handling a tort claim case is apparent from the start. When does a tort claim accrue? In what instances is the tort claim notice period relaxed?

The Basics

Most practitioners know that the Tort Claims Act requires that a notice of tort claim be filed within 90 days from the date of injury[1] in order to maintain a claim against a public entity. As a prerequisite to suit against public entities and employees, the TCA requires presentation of the claim in accordance with its notice provisions.[2] The notice must provide "[t]he date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and "[a] general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim."[3] "[T]he notice [requirements are] triggered by the occurrence of injury and [notice] must be filed in order for a complaint to be lodged against the public entity."[4]

Importantly, tort claim notices do not require specificity. They require only a general outline of damages and the connection to the public entity.

A claimant who fails to file the appropriate notice of claim with the public entity within 90 days of accrual of the claim is barred from recovery against a public entity[5] unless they file a motion seeking leave to file a late notice of claim within one year of the accrual date. To prevail on such a motion, the claimant must establish extraordinary circumstances which prevented timely filing of the notice of claim and demonstrate that no prejudice befell the public entity due to the delayed notice.[6] This is established through affidavits based upon personal knowledge demonstrating sufficient reasons (i.e., extraordinary circumstances) for claimant's failure to file notice within the statutory time period. However, if a claimant fails to give notice within the 90-day period and does not file a motion seeking to file a late notice of tort claim within one year of the accrual date, the trial court lacks authority to relieve claimant of the notice obligations.[7]

[I]f a claimant fails to give notice within the 90-day period and does not file a motion seeking to file a late notice of tort claim within one year of the accrual date, the trial court lacks authority to relieve claimant of the notice obligations.

The issue of late notice of claim was recently addressed by the Appellate Division in *Conzentino v. Rutgers*.[8] In *Conzentino*, the plaintiff was injured during a fall on the Rutgers University campus on Sept. 12, 2022. A Notice of Public Incident was filed with Rutgers University on Sept. 27, 2022. A notice of tort claim was filed on Feb. 8, 2023, well beyond the 90-day notice period. The plaintiff filed a complaint in the law division on Feb. 9, 2023. The defendants moved to dismiss the plaintiff's complaint for failure to comply with *N.J.S.A.* 59:8-8. The plaintiff cross-moved seeking leave to file a late notice of tort claim. The trial court granted the plaintiff's motion permitting the claim to proceed. However, on appeal as of right, the Appellate Division reversed, finding no extraordinary circumstances as the plaintiff failed to include a certification setting forth the circumstances that prevented a timely notice of claim. The university's internal "Notice of Public Incident" was deemed insufficient notice to Rutgers University to comply with the TCA. This case highlights the importance of not only timely notice, but also notice which meets the statutory criteria.

When discussing a timely notice of tort claim, attorney inattentiveness or inadequate medical proof does not qualify as extraordinary circumstances.[9] Waiting to determine whether claimant's injury will qualify for recovery under that damages provision of the TCA will not toll the notice period or provide a basis for extraordinary circumstances.[10]

In a December 2025 unpublished decision, the Appellate Division upheld the trial court's grant of defendants' motion to dismiss for failure to file a timely notice of claim. In *Senape v. South Amboy Public Schools,*[11] the plaintiff alleged that on Jan. 4, 2024, she learned of an inappropriate disclosure of personal information resulting in damages. The plaintiff did not file a notice of tort claim until April 3, 2024. On Nov. 11, 2024, the plaintiff sought leave of the court to file a late notice of claim, citing the emotional effect of the disclosure; an interceding motor vehicle accident; and that fact

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that the plaintiff's housing was displaced between the disclosure and untimely filing. The Appellate Division upheld the trial court's denial, noting that there was insufficient evidence that the severity of the plaintiff's medical condition or housing issues were such that she was prevented from timely seeking redress.[12]

Similarly, in *Okiogah v. New Jersey Transit,*[13] the Appellate Division affirmed the trial court's denial of a motion seeking leave to file late notice of claim. In *Okiogah*, the plaintiff was a pedestrian struck by a New Jersey Transit bus. The plaintiff was discharged from the hospital after the 90-day notice period expired. Despite this, the Appellate Division upheld the trial court's denial of the plaintiff's motion seeking leave to file a late notice of claim on the basis that the plaintiff was able to communicate with his girlfriend and counsel while in the hospital and he had no cognitive injuries.

Extraordinary circumstances are determined on a case-by-case basis. However, in the event a motion seeking leave to file a late notice of claim is necessary, the movant will need affidavits setting forth in detail not only the circumstances surrounding the delayed notice, but also how those circumstances prevented the timely filing of a notice of tort claim. Without both elements, the court will have a difficult time finding extraordinary circumstances sufficient to warrant a late notice of claim.

The Fine Print

In filing a notice of tort claim a practitioner must be aware of the accrual date of the claim and the identity of all public entities potentially responsible for the injury. In most instances the accrual date of the tort will be clear, such as the date of an auto accident or the date of a trip and fall. In other instances, the accrual date is not easily identifiable, as with an environmental exposure claim or a medical malpractice claim. Most often the identity of the appropriate public entity is apparent, as well. However, in other instances, even the involvement of a public entity in a tort may be obscured. In those instances, a practitioner may have available a secondary argument that the notice period should be tolled based upon the discovery rule.

[I]n the event a motion seeking leave to file a late notice of claim is necessary, the movant will need affidavits setting forth in detail not only the circumstances surrounding the delayed notice, but also how those circumstances prevented the timely filing of a notice of tort claim.

It is these gray areas of accrual date and public entity identification which generate the majority of Appellate Division cases each year.

The case of *Lowe v. Zarghami*[14] is instructive as to several tort claim notice pitfalls. *Lowe* arises out of a medical malpractice claim wherein the plaintiff alleged injury due to metal surgical clips left inside of her body. The plaintiff initially filed suit against the surgeon but did not file a notice of tort claim. The surgeon moved for summary judgment on the basis that he was a public employee, employed by the University of Medicine and Dentistry. However, the surgery took place at a private hospital.[15] The Supreme Court held that the surgeon qualified as a public employee,[16] but that the plaintiff's notice of tort claim was not untimely as the surgeon's identity as a public employee was obscured.

In *Lowe*, the surgery at issue occurred on Sept. 26, 1994. The metal clips were removed in December 1994. After the initial removal of the clips, Dr. Faramarz Zarghami assured the plaintiff that the metal clips would not cause any problems. The plaintiff had a series of additional medical conditions related to the failure to remove metal clips and was treated through August 1995. On July 19, 1996, the plaintiff filed a late notice of tort claim. In doing so, the plaintiff noted the accrual date as August 1995, based upon the additional treatment after the metal clip removal.

The plaintiff filed a malpractice suit against Zarghami on Feb. 8, 1996. On April 19, 1996, Zarghami filed a motion to dismiss the plaintiff's complaint based upon the failure to timely file a notice of claim. In granting Zarghami's motion to dismiss, the trial court determined that Zarghami qualified as state employee and the accrual date of plaintiff's claim was December 1994, when the metal clips were removed. Thus, the claim against Zarghami failed as the plaintiff failed to seek leave to file a late notice of tort claim within one year of the accrual date.

The Appellate Division overruled the trial court, holding that Zarghami was not a state employee and thus was not entitled to a notice of tort claim. In so holding, the Appellate Division did not reach the question of whether extraordi-

nary circumstances were present to permit the late notice of claim.

In determining that the plaintiff's claim against Zarghami was not barred by the notice provisions of the TCA, the court recognized that the notice provisions of TCA were not intended as a "trap for the unwary."[17] In finding that extraordinary circumstances existed, the court noted that the plaintiff contacted an attorney as soon as she found out about the potential malpractice and timely filed a malpractice claim. Moreover, the plaintiff had no reason to suspect that Zarghami was a public employee. Moreover, a late notice of claim would not prejudice Zarghami as he was required to keep the plaintiff's medical records well beyond the TCA notice period.[18]

Of course, best practice is to file the notice of tort claim as soon as possible, naming any and all potentially responsible public entities and public employees. However, when determining the accrual date, practitioners must bear in mind that the term "accrual" under the TCA is defined the same as in the public sector.[19] Thus, a claim under the TCA accrues on the date the injury is sustained, provided the plaintiff is aware both of the injury and of the involvement of a public entity or employee.[20]

In certain instances, the discovery rule may provide relief from the strict notice requirements of the TCA. The discovery rule "tolls the statute until the victim discovers both the injury and the facts suggesting that a third party may be responsible."[21] Thus, the discovery rule can be used as a tool to determine the accrual date. While generally applicable in the context of the TCA, claimants often conflate the discovery rule with exceptional circumstances.

For example, the plaintiff in *Beauchamp v. Amedio*[22] attempted to use the discovery rule to toll the notice period. *Beauchamp* arises out of an auto accident wherein the plaintiff's vehicle was struck by a New Jersey Transit bus. The plaintiff did not file a timely notice of claim as there were doubts as to whether she would be able to vault the TCA injury threshold. In seeking leave to file a late notice of claim, the plaintiff unsuccessfully argued that the discovery rule should apply, tolling the 90-day TCA notice period until after she received positive MRI findings. The Court rejected this argument, noting that the plaintiff was aware that she was injured in a car accident with a New Jersey Transit bus on the date of the accident. The late discovery as to the significance of her injuries did not toll the running of the 90-day period.[23]

Practitioners must be vigilant in identifying the accrual date and all potentially responsible public entities, while also understanding the limited circumstances in which the discovery rule may toll the notice period.

In a situation where the accrual date is clear, a practitioner seeking leave to file a late notice of claim might be wise to focus efforts on establishing the circumstances surrounding the delayed notice and how those circumstances prevented the timely filing of a notice of tort claim. Quibbling over an accrual date if the accrual date is at all apparent is unlikely to carry the day.

Practice Point—Claims Under the Child Victims Act

There is one discrete circumstance in which the notice requirements of the TCA do not apply, in claims arising out of the Child Victims Act. Prior to the 2019 passing of the CVA, TCA provided absolute protection against any intentional torts or criminal actions of public employees and provided a wide array of procedural and substantive immunities. However, most of the immunities, procedures, and defenses have been removed from the TCA by way of the amendments to the CVA. Specifically, the TCA has been modified by the CVA to explicitly remove any procedural requirements relating to claims that arise out of a sexual assault by a public employee. Therefore, the TCA notice requirements do not apply to claims asserted under the CVA.[24]

In conclusion, the timeliness and sufficiency of tort claim notices under the TCA present significant challenges for both plaintiffs and defense counsel. Strict adherence to the 90-day notice requirement is essential, as courts rarely find extraordinary circumstances sufficient to excuse late filings, and procedural missteps can be fatal to a claim. Practitioners must be vigilant in identifying the accrual date and all potentially responsible public entities, while also understanding the limited circumstances in which the discovery rule may toll the notice period. Notably, claims arising under the Child Victims Act are exempt from these procedural requirements, reflecting legislative intent to remove barriers for survivors of sexual abuse. Ultimately, best practice dictates prompt and comprehensive notice to

preserve a claimant's rights and avoid the many pitfalls that can arise in tort claims litigation against public entities. ■

Endnotes

1. *N.J.S.A.* 59:8-8
2. *N.J.S.A.* 59:8-3
3. *N.J.S.A.* 59:8–4(c) and (d).
4. *Beauchamp v. Amedio*, 164 N.J. 111, 121 (2000)
5. *N.J.S.A.* 59:8-8(a)
6. *N.J.S.A.* 59:8-9
7. *Pilonero v. Twp. of Old Bridge*, 236 N.J. Super. 529, 532 (App. Div. 1989)
8. 2025WL1873109 (App. Div. July 9, 2025)
9. *D.D. v. University of Medicine & Dentistry of New Jersey*, 213 N.J. 130 (2013)
10. *Beauchamp v. Amedio*, 164 N.J. 111 (2000)
11. 2025WL3493980 (App. Div. December 5, 2025)
12. *D.D. v. University of Medicine & Dentistry of New Jersey*, 213 N.J. at 150
13. 2025WL1583904 (App. Div. April 2, 2025))
14. *Lowe v. Zarghami*, 158 N.J. 606 (1999)
15. Plaintiff received a bill from the private hospital for various services including anesthesiology. Although Dr. Zarghami alleges that his bill was issued by UMDNJ, plaintiff claims she never saw that bill as it went directly to her insurer, thus obscuring the identity of Dr. Zarghami's employer. *Id*. at 612-613,
16. To determine whether the surgeon qualified as a public employee, the Court applied the common law control test. The control test looks to the (1) the degree of control exercised by the employer over the means of completing the work; (2) the source of workers' compensation; (3) the source of the equipment and resources; and (4) the employer's termination rights to determine whether master-servant relationship exists. *Id*. at 615-616.
17. *Id*. at 629, citing, *Murray v. Brown*, 295 N.J. Super. 360, 365 (Law Div. 1991)
18. *Lowe v. Zarghami*, 158 N.J. at 630-631.
19. *Fuller v. Rutgers, State University*, 154 N.J. Super. 420, 423 (App. Div. 1977)
20. *Beauchamp v. Amedio*, 164 N.J. 111, 119 (2000)
21. *Ayers v. Jackson Twp.*, 106 N.J. 557 (1987)
22. *Beauchamp v. Amedio*, 164 N.J. 111 (2000)
23. *Id*. at 119.
24. In 2019 the New Jersey Legislature passed SB477, known as the Child Victims Act (CVA), which modified many other laws including the TCA. "The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c.7 (C.2A:30B-2), or sexual abuse as defined in section 1 of P.L.1992, c.109 (C.2A:61B-1). N.J.S.A. 59:8-3." See also *J.H. v. Warren Hills Bd. of Educ.*, 481 N.J. Super. 536, 544 (App. Div. 2025) ("Normally, a person or entity seeking to sue a public entity must give notice of its claim ninety days "after accrual of the cause of action." N.J.S.A. 59:8-8. That notice requirement, however, was eliminated for actions at law for injury resulting from sexual assaults."). Therefore, in any matter where there is a sexual assault claim, the procedural notice requirements under the TCA no longer apply.

The $1.5 Million Question

Will Lobbying and Litigation Erode New Jersey's Rideshare Safety Standard in 2026?

By Annabelle Steinhacker and Jeffrey A. Rizika

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With the rise of the gig economy, New Jersey has seen its roads and highways fill with rideshare vehicles. Uber and Lyft, among other lesser-known providers, offer our communities new avenues of conveyance, providing lifelines to those living in public transportation deserts. With increased rideshare traffic also came questions of liability and insurance coverage as New Jersey grappled with inconsistencies among the patchwork of municipal ordinances governing the burgeoning industry. As a result, in 2017, the New Jersey Legislature passed the Transportation Network Company Safety and Regulatory Act.[1]

In a flurry of new filings, rideshare companies attempt to circumvent New Jersey's mandatory minimums by raising purported jurisdictional issues. Specifically, Uber and Lyft argue that any ride that originates or ends outside of New Jersey, or involves a vehicle registered outside of the state, does not constitute a rideshare vehicle and is, therefore, not subject to the TNCSRA.

New Jersey was among a limited number of states which recognized the importance of including substantial insurance coverage in the TNCSRA. Notably, while New Jersey requires personal car insurance policies to have a minimum of $35,000 for uninsured and underinsured coverage for policies that are written as of Jan. 1, 2026,[2] the act mandates that rideshare companies provide a significantly higher $1.5 million in aggregate UM/UIM coverage. For passengers or drivers seriously injured in automobile accidents involving a rideshare vehicle, this mandatory minimum offers significant protection to compensate riders and drivers who sustain serious personal injuries.

In response, a legal trend has recently emerged among the various rideshare companies and their insurers. In a flurry of new filings, rideshare companies attempt to circumvent New Jersey's mandatory minimums by raising purported jurisdictional issues. Specifically, Uber and Lyft argue that any ride that originates or ends outside of New Jersey, or involves a vehicle registered outside of the state, does not constitute a rideshare vehicle and is, therefore, not subject to the TNCSRA. In other words, if a ride begins in Manhattan and ends in Newark or begins in Cherry Hill and ends at the Philadelphia International Airport, or involves a vehicle registered in New York City, carriers argue that the $1.5 million insurance mandate is inapplicable. They claim that the laws of neighboring states, which maintain significantly lower insurance coverage requirements, should apply instead. This interpretation, however, is fallacious, and our courts are mostly rejecting it.

The TNCSRA provides clear language indicating its regulatory scope. The act includes several key interlocking definitions under N.J.S.A. 39:5H-2. A "Transportation Network Company" is broadly defined as any entity that is "registered as a business in the State" or that "operates in this State" to connect riders and drivers via a digital network. Further the mandate for $1.5 million in UM/UIM coverage applies during a "prearranged ride," a period that begins the moment a driver accepts a request through the digital network, continues throughout the duration of the transport, and only concludes when the last rider exits the vehicle. By explicitly including trips that "operate" in New Jersey, and by stating that the mandatory insurance minimums apply whenever a driver is "providing a prearranged ride," the regulatory framework signals that origin or destination of the prearranged ride are not pertinent to the analysis of the TNCSRA regulations. Instead, if a prearranged ride results in a motor vehicle accident while "operating in the state," the state's stringent safety and insurance requirements are triggered.

Further, the registration of the TNC vehicle does not impact whether the TNCSRA applies to regulate the rideshare. Pursuant to N.J.S.A. 39:5H-2, a "personal vehicle" is any vehicle a rideshare driver is authorized to use regardless of whether it was "owned, leased, or otherwise authorized for use."

Some carriers assert that if the vehicle is owned by a corporation or is defined by an out-of-state municipality as a taxicab, it does not constitute a "personal vehicle" subject to the TNCSRA. This argument, however, fails to comport with the plain language of the act. The TNCSRA ensures that fleet vehicles, such as NYC taxi cabs owned by corporations, are regulated as rideshare vehicles when used for app-based trips through a specific legal reclassification. The broad definition of a "personal vehicle" encompasses corporate-owned vehicles that a driver is authorized to operate. While the act generally excludes traditional taxi and for-hire services, it explicitly states that a vehicle "shall not be considered" a taxi or for-hire vehicle while the driver is providing a "prearranged ride." This functional distinction means that when an NYC taxi driver accepts a ride through a digital network (like the Uber or Lyft apps), the vehicle's status as a "taxi" is legally suspended for the duration of that ride—at least while on roads in the state of New Jersey. Consequently, the vehicle becomes a "personal vehicle" under the act, making the TNC—and its $1.5 million UM/UIM coverage mandate—the primary authority regardless of the

vehicle's corporate ownership or its out-of-state livery registration.

While our courts sort through the motions seeking to thwart the insurance minimums contained within our TNCSRA, rideshare companies have recently increased their lobbying efforts in Trenton in an effort to lower the mandatory coverage limits. Legislative Bill S4898 attempted to scale back the $1.5 million in UM/UIM coverage to a mere $35,000 (this bill did not get to the Senate for a vote before the recent 2025 legislative session expired). Rideshare advocacy groups claim that, for every rideshare dollar spent, $.15 goes toward covering the cost of the insurance mandate.[3] These claims have not been independently validated, and they must be considered in the context of the success of the rideshare industry like Uber's total global revenue for 2025 which is presently estimated at nearly $50 billion dollars.[4]

It is important to note that, while the TNCSRA suggests a deep concern on the part of our legislators to protect the citizens of New Jersey, the rideshare industry has had significant success with its lobbying efforts elsewhere. For example, in 2023, through the strong lobbying efforts of the rideshare industry, Georgia reduced the transportation network company minimum for UM/UIM coverage from $1 million to $100,000 per person/$300,000 per accident, a 90% reduction in coverage.[5] In 2024, Virginia reduced the transportation network company minimum for UM/UIM coverage from $1 million to $30,000 per person/$60,000 per accident, a 97% reduction in coverage.[6] Most recently, California required transportation network companies to maintain $1 million in UM/UIM benefits until January 2025 when the coverage limit was reduced to $60,000.[7] The rideshare companies' lobbying efforts are not only directed to reduce coverage for victims of motor vehicle collisions, but they are also waging a comprehensive tort reform campaign in other states to cap attorney's fees in auto accident cases, which would make it very difficult for injured victims to find representation. In other states, significant efforts are being pushed by the rideshare lobbyists to pass sweeping tort reform that eliminates vicarious liability and restricts medical damages.

The coming year will determine whether New Jersey maintains its $1.5 million floor for UM/UIM benefits for the riding public. Whether through the courts or the Legislature, the outcome will affect every driver on our roads. While the rideshare industry's early years were often characterized as a balance between innovation and consumer safety, the current push to lower insurance minimums in New Jersey appears driven less by a desire for technological progress and more by a strategic effort to decrease corporate liability at the expense of the riding public. New Jersey is at a crossroads and will have to determine whether to bend to the will of transportation network companies or maintain the safety net it has in place for its citizens. ■

Endnotes

1. N.J.S.A. 39:5H-1, *et seq*.
2. N.J.S.A. 17:28-1.1(a)(1)
3. See Letter from Chamber of Progress to N.J. Gen. Assemb. & State S. regarding Support for A6147/S4898 (Dec. 11, 2025)(on file with author).
4. Uber Technologies, Inc. "Uber Announces Results for Third Quarter 2025." *Uber Investor Relations*, 4 Nov. 2025, investor.uber.com/news-events/news/press-release-details/2025/Uber-Announces-Results-for-Third-Quarter-2025/default.aspx.
5. Georgia House Bill HB 529 (GA Code Sec 33-1-24).
6. Virginia Senate Bill SB 1216 (Va Code Ann Sec 46.2.2099.52).
7. California Senate Bill 371 (Chapter 314, Statutes of 2025).

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Reckless Abandon

Court Standard In Sports Injuries

By Brian R. Lehrer

It is no exaggeration that competitive sports plays a vital role in our society. However, competitive sports come with risks which include minor or serious injuries. Incidents which cause minor or serious injuries often lead to lawsuits.

This article will examine the balance New Jersey courts have come to in addressing lawsuits for injuries arising out of sporting activities, while maintaining an encouragement of vigorous competition.

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The general standard for tort actions in New Jersey is negligence. Negligence is defined as the failure to use that degree of care, precaution and vigilance which a reasonably prudent person would use under the same or similar circumstances.[1] However, confronted with a case where a plaintiff was injured in a pickup softball game, the New Jersey Supreme Court determined that the duty of care applicable to participants in informal recreational sports is to avoid the infliction of injury caused by reckless or intentional conduct.[2]

In *Crawn*, the plaintiff was playing catcher in a pickup softball game. He was injured when the defendant, John Campo, attempting to score from second base, collided with the plaintiff at home plate. The plaintiff suffered a torn knee ligament and sued Campo alleging that Campo was liable because his conduct had either been negligent, reckless or intentional resulting in the injuries.

Ultimately, the case reached the Supreme Court on the issue of what standard—negligence or something more—should be applied to the claim. The Supreme Court determined that the duty of care applicable in recreational sports is to avoid the infliction of injury caused by reckless or intentional conduct.

Crucially, the Supreme Court held that expert testimony is not necessary to proceed with such a claim. However, the Court noted that the opinion of an expert can be admitted if it pertains to a subject that is beyond the understanding of the average person of ordinary experience, education and knowledge.

The Court held that considerations of public policy and notions of fairness do not impel a protection of sports activity in the form of a broad tort immunity. It noted that a societal interest is served by encouraging the vigorous participation in sports activity but that interest does not itself demand that wrongful conduct by participants that results in injury to others should be totally removed from the law of torts. Ultimately, the Court settled on a recklessness standard as the appropriate one to apply in the sports context. The Court believed that the heightened standard will more likely result in affixing liability for conduct that is clearly unreasonable and unacceptable from the perspective of those engaged in the sport yet leaving free from the supervision of the law the risk-laden conduct that is inherent in sports and more often than not assumed to be part of the game.

The recklessness standard is not limited to contact sports. In *Schick v. Ferolito*, the New Jersey Supreme Court extended the reckless standard to a game of golf.[3]

In *Schick*, two pairs of golfers met at the tenth hole of the East Orange golf course and agreed to play the rest of the course as a foursome. At the sixteenth hole, an errant ball hit off the tee by the defendant struck plaintiff in the right eye causing personal injuries. According to the plaintiff, Jeffrey Schick, defendant Ferolito hit an unannounced and unexpected second tee shot, or mulligan, after all members of the foursome had teed off. The Appellate Division held that the recklessness standard was inappropriate because it should be limited to rough and tumble sports, where anticipated risks are an inherent or integral part of the game. The Supreme Court disagreed and held that the recklessness standard applies even to non-contact sports.

The *Schick* Court held that the applicability of the heightened standard of care for causes of action for personal injuries occurring in recreational sports should not depend on which sport is involved and whether it is commonly perceived as a contact or non-contact sport. The Court pointed out that the

[C]onfronted with a case where a plaintiff was injured in a pickup softball game, the New Jersey Supreme Court determined that the duty of care applicable to participants in informal recreational sports is to avoid the infliction of injury caused by reckless or intentional conduct.

standard articulated in *Crawn* was not meant to be applied in a crabbed fashion. The Court concluded that the standard is the pertinent one for assessing the duty of one sports participant to another concerning conduct on golf courses and tennis courts, as well as conduct on basketball courts and ice rinks.

New Jersey Courts have sought to obtain a balance between vigorous competitive sporting activity and a reasonable application of tort law. The *Crawn* heightened standard has been applied multiple contexts over the past 30 years to assure that every flag football game does not become a lawsuit. The Appellate Division has applied a recklessness standard in a case where a softball player sued a teammate for injuries sustained as a result of a teammate's pursuit of a fly ball during an informal intraoffice game.[4] The Appellate Division has supplied the recklessness standard where a roller skater suffered a broken leg from a collision with another skater.[5] The Appellate Division has applied the recklessness standard when a student was injured when a teacher collided with her when she went up from a rebound during a student-teacher fundraising basketball game.[6]

Thus, New Jersey Courts have made it clear that in order to recover against a coparticipant in most recreational activities, the reckless standard, rather than negligence, is the one that will be applied. A person acts recklessly when they consciously disregard a substantial and unjustifiable risk and the risk must be of such a nature and degree that considering the nature and purpose of the actor's conduct and the circumstances known to them, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in his situation.[7] It is important to note that this doctrine is not without potential limitations.

The recklessness standard is generally the governing one; there are instances where a defendant has an obligation to increase the risks inherent in a particular sport.[8] In *Rosania*, Nicholas Rosania, brought a lawsuit against defendants claiming damages for a retinal detachment suffered during a karate test match with the black belt instructor. The plaintiff alleged that he was kicked violently in the face in violation of the defendant's own written rule that prohibited targeting the head. The jury found a no cause of action in favor of the defendant, but the Appellate Division reversed.

The Appellate Division framed the issue as whether the jury should have been charged under the heightened recklessness standard of *Crawn* or should it have been told to consider the case under less demanding standard of fault. The Court held that in this commercial setting, the jury should have been charged that defendants owed a duty to patrons of the dojo not to increase the risks inherent in the sport of karate under the rules a reasonable student would have expected to be in effect at that dojo. If it found that targeting of the head was not permitted, or even that a change in the written rule was not unambiguously communicated to Rosania, the jury should have been charged that the correct scope of duty owed by the expert instructor and the academy was one of due care commensurate with: (1) the foreseeability by the instructor of the high degree of hazard and likelihood of injury if an illegally targeted kick to the head made contact; and (2) the student's reasonable reliance upon the published dojo targeting rules. Only upon a jury finding, grounded in the record, that the plaintiff was made aware that the head was a permissible target, would the more stringent reckless or intentional conduct standard been appropriate.

Thus, there are circumstances in competitive or recreational sports when the heightened *Crawn* standard will not apply. However, generally, it would appear that those situations would be in a school-type setting where the school might be in a position to increase the risk inherent in the particular activity. Otherwise, it would appear that the *Crawn* standard is always appropriate in a lawsuit involving injuries arising out of sports or recreational activities. ■

Endnotes

1. NJ Model Jury Charge 5.10A(2)
2. *Crawn v. Campo*, 136 N.J. 494 (1994).
3. *Schick v. Ferolito*, 167 N.J. 7 (2001).
4. *Obert v. Baratta*, 321 N.J. Super. 356 (App. Div. 1999).
5. *Calhanas v. South Amboy Roller Rink*, 292 N.J. Super. 513 (App. Div. 1996).
6. *C.H. by Cummings v. Rahway Bd. of Educ.*, 459 N.J. Super. 236 (App. Div. 2018).
7. *N.J.S.A.* 2C:2-2(b)(3).
8. *Rosania v. Carmona*, 308 N.J. Super. 365 (App. Div. 1998).

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This year's event welcomed 3,125 attendees, who collectively earned more than 35,000 CLE credits through over 125 seminars, in addition to participating in numerous receptions and business meetings.

Thank you to everyone who helped make the 2026 Annual Meeting and Convention such a standout success. We look forward to seeing you next year.

Garcia Becomes President for 2026–2027

Norberto A. Garcia was sworn in as the 128th president of the NJSBA and its first foreign-born president. In his remarks, he pledged to advocate for all lawyers across the state, the practice of law, the judicial system and the rule of law.

Importance of Making Connections Focus of Opening Business Session

Ryan Jenkins, author of *Connectable*, delivered a keynote address focused on helping attorneys navigate an increasingly multi-generational profession at the Opening Business Session.

Fireside Chat Spotlights NJ Attorney General Jennifer Davenport's Path to Public Service

During a fireside chat, New Jersey Attorney General Jennifer Davenport reflected on the experiences that shaped her career, the values that guide her leadership and her priorities for keeping New Jersey safe. She spoke with former New Jersey Attorney General Christopher Porrino.

State of Judiciary Speeches

New Jersey's top two jurists—U.S. District Court Chief Judge Renée Marie Bumb and state Supreme Court Chief Justice Stuart Rabner—gave updates on the most pressing issues facing the federal and state courts at the annual States of the Judiciary session. ■

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