
# STATE OF RHODE ISLAND COMPENDIUM OF LAW

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## PRE-SUIT AND INITIAL CONSIDERATIONS

### Pre-Suit Notice Requirements/Prerequisites to Suit

In the following situations a plaintiff must generally give notice or a written presentment of a claim to the defendant within a certain time period as a pre-requisite to filing suit.

A) **Notice of injury on highway or bridge:** Claimant must file notice with the town within sixty (60) days of an injury, or else precluded from recovery. R.I. GEN. LAWS § 45-15-9(a) (2012).

B) **Claim or demand against municipality:** A person with a claim or demand of money against a town must present to the town council of that town an account of that person's claim, debt, damages, or demand, and how incurred or contracted; if just satisfaction is not made upon that person within forty days after the presentment, the person may commence suit against the town treasurer. R.I. GEN. LAWS § 45-15-5 (2012).

C) **Workers' compensation benefits:** No proceedings for compensation for an injury under the Workers' Compensation Act may be brought unless a notice of the injury has been given to the employer within thirty (30) days after the occurrence or manifestation of injury. R.I. GEN. LAWS § 28-33-30 (2012).

D) **Breach of warranty:** Buyer must provide notice within a reasonable time to seller of an alleged defect in a breach of warranty claim. R.I. GEN. LAWS § 6A-2-605 (2012).

E) **Default by lessor:** If a lessee discovers a default by lessor after acceptance of goods, the lessee must notify the lessor of such default with a reasonable time after the lessee's discovery of the default, or else will be barred from any remedy for the default. R.I. GEN. LAWS § 6A-2.1-516(a)(3) (2012).

F) **Administrative Procedures Act:** An aggrieved person must exhaust all administrative remedies available to her before she may seek judicial review. R.I. GEN. LAWS § 42-35-15 (2012).

### Relationship to the Federal Rules of Civil Procedure

In Rhode Island, the Superior Court Rules of Civil Procedure are substantially similar, although not identical, to the Federal Rules of Civil Procedure. *Compare* SUPER. R. CIV. P. 1 *et seq. with* FED. R. CIV. P. 1 *et seq.*; *see also Gliottone v. Ethier*, 870 A.2d 1022, 1025 (R.I. 2005) ("[O]ur Superior Court Rules [of Civil Procedure] are patterned after the federal rules.").

**Description of the Organization of the State Court System**

A) **How judges come to serve on the bench:** The governor of Rhode Island fills a vacancy of any court's judge by nominating a person from a list submitted by an independent nonpartisan judicial nominating commission. By and with the advice and consent of the state senate, the governor then appoints that person to the court where the vacancy occurs. The appointment of a person to the Rhode Island Supreme Court also entails the advice and consent of the state house of representatives, known as the "grand committee." *See* R.I. CONST. art. 10, § 4.

B) **Names of courts:** Rhode Island's highest court, the Rhode Island Supreme Court, is the only court of appeals in Rhode Island and has general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein. R.I. GEN. LAWS § 8-1-2 (2012). The Superior Court has jurisdiction over all suits in equity, and where the amount in controversy exceeds $10,000; it also has concurrent jurisdiction with the District Court over all matters between $5,000 and $10,000. R.I. GEN. LAWS §§ 8-2-13, -14 (2012). Rhode Island also has a Family Court in all counties (R.I. GEN. LAWS § 8-10-3 (2012)), a District Court with six divisions state-wide (included within the District Court is a Housing Court and Small Claims Court) (R.I. GEN. LAWS § 8-8-2 (2012)), a Traffic Tribunal (R.I. GEN. LAWS § 8-8.2-1 (2012)), and a Workers' Compensation Court (R.I. GEN. LAWS § 28-30-1 (2012)). Each city or town in Rhode Island has its own Probate Court. R.I. GEN. LAWS § 8-9-9 (2012).

C) **Alternative Dispute Resolution:**

1) **Arbitration:** All civil actions filed in Superior Court in which a claim for monetary relief does not exceed $100,000 are subject to court-annexed arbitration, with certain exceptions (*e.g.*, class actions, substantial claims for injunctive relief, and family law, probate, and landlord tenant issues, among others). SUPER. CT. R. ARB. 1(a). The court may submit any other civil action to arbitration pursuant to agreement by the parties. SUPER. CT. R. ARB. 1(b). Arbitrators are paid for their services at a minimum rate of $300.00 per case. SUPER. CT. R. ARB. 2(c).

2) **Mediation:** It is the "policy of the courts of Rhode Island (and courts in general) to encourage the amicable settlement of disputes, by mediation or otherwise." *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 186 (R.I. 2008). Mediation is a voluntary, non-binding dispute resolution method involving a neutral third-party who tries to help the disputing parties reach a mutually agreeable solution. The Supreme Court has implemented an Appellate Mediation Program to govern civil appeals. Its purpose is to afford a meaningful opportunity to the parties in all eligible civil appeals to achieve a resolution of their disputes in a timely manner as early in the appellate process as is feasible. SUP. CT. R. APP. P. PROVISIONAL ORDER A, As Amended, at A(1) (July 26, 2004). All civil cases that have been appealed from a trial court are eligible for

participation in the program, with certain exceptions. SUP. CT. R. APP. P. PROVISIONAL ORDER A, As Amended, at A(2).

3) **Settlement week:** The Rhode Island Superior Court, as administered through the Superior Court Arbitration Office, organizes and conducts an annual "Settlement Week", held in Providence County in December each year during which civil cases may be resolved through mutually agreed-upon mediation. The annual "Settlement Week" is administered during the latter weeks of December as ordered by the Presiding Justice with notice to the Bar.

**Service of Summons**

A) The summons and complaint must be served together. SUPER. R. CIV. P. 4(e). The summons must contain the following requirements: bear the signature of the clerk, be under the seal of the court, identify the court and parties, be directed to the defendant, state the name and address of the plaintiff's attorney (or plaintiff if unrepresented), state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a default judgment against the defendant. SUPER. R. CIV. P. 4(a). Service of process must be made by a sheriff or the sheriff's deputy, within the sheriff's county, by a duly authorized constable, or by any person not a party who is at least eighteen years of age. SUPER. R. CIV. P. 4(c). Service of process must be made within 120 days after the commencement of the action, or else the court may *sua sponte* dismiss the action without prejudice. SUPER. R. CIV. P. 4(l).

B) **Upon person:** By delivering a copy of the summons and complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with a person of suitable age and discretion, or by delivering a copy of the same to an agent authorized by appointment or by law to receive service of process. SUPER. R. CIV. P. 4(e)(1).

C) **Upon public corporation:** By delivering a copy of the summons and complaint to any officer, director, or manager of the corporation. SUPER. R. CIV. P. 4(e)(5).

D) **Upon private corporation:** By delivering a copy of the summons or complaint to an officer, a managing or general agent, or by leaving a copy of the same at an office of the corporation with a person employed therein, or by delivering a copy of the same to an agent authorized by appointment or by law to receive service of process. SUPER. R. CIV. P. 4(e)(3).

E) **Waiver:** A defendant may waive service of a summons. SUPER. R. CIV. P. 4(d)(1). To avoid unnecessary costs of serving the summons, the plaintiff may notify the defendant of the commencement of the action and request that defendant waive service of a summons. The notice and request must be in writing and addressed to the defendant, via first-class mail or similar, accompanied with a copy of the complaint, explain the consequences of compliance and failure to comply, and allow the

defendant reasonable time to return the waiver (thirty days from when the request was sent, or sixty days if the defendant is outside the U.S.). SUPER. R. CIV. P. 4(d)(2). When the plaintiff files a waiver of service with the court, the action shall proceed as if a summons and complaint had been served at the time of filing the waiver, and proof of service is not required. SUPER. R. CIV. P. 4(d)(4).

F) **Other service issues**

1) **Upon guardian or conservator:** By serving copies of the summons and complaint upon such guardian or conservator and upon the incompetent person in the same manner as upon an individual. SUPER. R. CIV. P. 4(d)(2).

2) **Upon state:** By delivering a copy of the summons and complaint to the attorney general or an assistant attorney general. SUPER. R. CIV. P. 4(d)(4).

3) **Attachment and trustee process:** The writ of attachment is in the same form as the summons. *See* SUPER. R. CIV. P. 4(m)(2). The writ of attachment must be submitted to the court upon a motion for its issuance, which motion is granted only upon a showing that there is a probability of a judgment being rendered in favor of plaintiff and there is a need for furnishing the plaintiff security in the amount sought for satisfaction of such judgment, together with interest and costs. Security may be required in connection with issuance. SUPER. R. CIV. P. 4(m)(3). To serve the writ of attachment, the plaintiff's counsel must deliver to the officer making service a copy of the proposed writ with a copy of the motion for its issuance and notice of hearing thereof. When the summons and complaint are served upon defendant under Super. R. Civ. P. 4(d)-(i), the defendant must also be served with a copy of the proposed writ and motion for its issuance. SUPER. R. CIV. P. 4(m)(4).

**Statutes of Limitations**

A) **Construction:** Two (2) years for action against contractor's bond, unless longer period is provided in bond. R.I. GEN. LAWS § 37-12-5 (2012). Ten (10) years for actions against contractors, engineers, or architects based on design. R.I. GEN. LAWS § 9-1-29 (2012).

B) **Contract:** Ten (10) years for breach of contract claims. R.I. GEN. LAWS § 9-1-13 (2012); *see also Desjarlais v. USAA Ins. Co.*, 824 A.2d 1272, 1276 (R.I. 2003). Four (4) years for claims of breach of contract for sale of goods. R.I. GEN. LAWS § 6A-2-725 (2012).

C) **Contribution:** Action for contribution by joint tortfeasor must be commenced within one (1) year of first payment made by a joint tortfeasor which has discharged

common liability or which is more than his pro rata share thereof. R.I. GEN. LAWS § 10-6-4 (2012).

D) **Employment:** Two (2) years to file complaint by Human Rights Commission to eliminate unlawful employment practice. R.I. GEN. LAWS § 28-5-18 (2012). Two (2) years for Workers' Compensation claims. R.I. GEN. LAWS § 28-35-57 (2012).

E) **Fraud:** Ten (10) years for fraud, deceit, and/or misrepresentation. *See* R.I. GEN. LAWS § 9-1-13(a) (2012); *Bourdon's, Inc. v. Ecin Industries, Inc.*, 704 A.2d 747, 753 (R.I. 1997).

F) **Governmental entities:** One (1) year against state on highway and public works contracts, or to confirm arbitrator's award in public works arbitration. R.I. GEN. LAWS §§ 37-13.1-1, 37-16-17 (2012). Three (3) years for suits against state, political subdivision, city or town. R.I. GEN. LAWS § 9-1-25 (2012). Three (3) years against towns for injury or damage arising out of maintenance of highways, causeways, or bridges, with sixty (60) days' notice after incident. R.I. GEN. LAWS § 45-15-9 (2012).

G) **Improvements to realty:** A plaintiff shall not bring any action in tort to recover damages (including arbitration proceedings) against any constructor of improvements to real property on account of any deficiency of design, planning, supervision, or observation of construction or construction of any improvements or in the materials furnished for the improvements for injury to real or personal property arising out of such deficiency, for injury to the person or wrongful death arising out of such deficiency, or for contribution for damages sustained on account of any injury mentioned above. R.I. GEN. LAWS § 9-1-29 (2012).

H) **Indemnity:** One (1) year against insurer to enforce repairer's lien of motor vehicle lessor's lien, accrues at time of payment to insured. R.I. GEN. LAWS §§ 9-3-11, 9-3-14 (2012). Three (3) years for claims against insurers on accident and sickness insurance policies. R.I. GEN. LAWS § 27-18-3 (2012).

I) **Personal injury:** Three (3) years for personal injury claims under strict liability, implied warranty or negligence theory. R.I. GEN. LAWS § 9-1-14(b) (2012); *Pirri v. Toledo Scale Corp.*, 619 A.2d 429, 430-31 (R.I. 1993).

J) **Professional liability:** Three (3) years for medical, legal, veterinarian, accounting, insurance or real estate agent or broker malpractice, unless injuries or damages not discoverable with exercise of reasonable diligence. R.I. GEN. LAWS § 9-1-14.1 (2012). Three (3) years for claims of legal malpractice. R.I. GEN. LAWS § 9-1-14.3 (2012).

K) **Property Damage:** Ten (10) years, which does not begin to run before the time of the injury or damage. *See* R.I. GEN. LAWS § 9-1-13 (2012); *Romano v. Westinghouse Elec. Co.*, 336 A.2d 555, 560 (R.I. 1975).

L) **Survival:** Action may be commenced either by or against executor or administrator of decedent within one (1) year after death of party. R.I. GEN. LAWS § 9-1-21 (2012).

M) **Tolling:** If any person, against whom a Rhode Island resident has a cause of action, is outside the state when a cause of action accrues or leaves the state during the period of limitations, and does not leave property within state that can be attached, then action may be commenced within period of limitation after his return. R.I. GEN. LAWS § 9-1-18 (2012). Fraudulent concealment by actual misrepresentation of a cause of action tolls running of statute of limitation and such cause of action is deemed to accrue at time its existence is first discovered. R.I. GEN. LAWS § 9-1-20 (2012). Rhode Island also has a tolling statute which tolls the statute of limitations on personal injury actions that accrue to minors until the minor turns eighteen; for those with an "unsound mind" until the disability is removed; or for those outside the limits of the United States until their return. R.I. GEN. LAWS § 9-1-19 (2012).

N) **Wrongful Death:** Three (3) years for wrongful death. R.I. GEN. LAWS §§ 10-7-2, 10-7-7 (2012).

O) **Libel and Slander:** One (1) year after the words are spoken. R.I. GEN. LAWS § 9-1-14(a) (2012).

**Statute of Repose**

A) A statute of repose is a statutory period after which an action cannot be brought in court, even if it expires before the plaintiff suffers an injury. BLACK'S LAW DICTIONARY 1327 (Deluxe 8th ed. 2004).

B) **Statutes of Repose in Rhode Island:**

1) Any action for breach of warranty arising out of an alleged design, inspection, testing, or manufacturing defect, or any other alleged defect of whatsoever kind or nature in a product, must be commenced within ten (10) years after the date the product was first purchased for use or consumption. R.I. GEN. LAWS § 6A-2-725(5) (2012).

2) *See* "Improvements to Realty," *supra*.

3) All claims against a decedent's estate must be filed before the estate is distributed. R.I. GEN. LAWS § 33-11-5 (2012); *Sheehan v. Richardson*, 315 B.R. 226, 235 (D. R.I. 2004).

**Venue Rules**

A) Rhode Island Superior Court has four counties: Providence and Bristol County (generally known as Providence County), Kent County, Newport County, and Washington County.

B) Rhode Island District Court has four divisions: Second Division (City of Newport and the towns of Jamestown, Little Compton, Middletown, Portsmouth, and Tiverton); Third Division (City of Warwick and the city of Cranston and the towns of Coventry, East Greenwich, Foster, Glocester, Johnston, Lincoln, North Kingstown, North Providence, North Smithfield, Scituate, Smithfield, West Greenwich and West Warwick); Fourth Division (Towns of Charlestown, Exeter, Hopkinton, Narragansett, New Shoreham, Richmond, South Kingstown, and Westerly); and Sixth Division (Cities of Central Falls, East Providence, Providence, Pawtucket, Woonsocket and the towns of Barrington, Bristol, Burrillville, Cumberland and Warren). R.I. GEN. LAWS § 8-8-2 (2012).

C) All actions involving realty or real estate must be brought in the court for the county in which the land lies for Superior Court, or in the division for which the land lies for District Court. R.I. GEN. LAWS § 9-4-2 (2012).

D) All other actions and suits must be brought in the county for Superior Court actions or division for District Court actions in which some one of the plaintiffs or defendants dwells; or in the county for Superior Court actions or division for District Court actions in which the defendant or some one of the defendants shall be found. R.I. GEN. LAWS § 9-4-3 (2012). If none of the plaintiffs or defendants dwell in Rhode Island, the action may be brought in any county, if in Superior Court, or any division, if in District Court. *Id.*

## NEGLIGENCE

### Comparative Fault/Contributory Negligence

A) **Contributory negligence:** The Rhode Island Legislature abolished the affirmative defense of contributory negligence in 1971 and replaced it with comparative negligence. R.I. GEN. LAWS § 9-20-4 (2012); *Kay v. Menard*, 754 A.2d 760, 768 (R.I. 2000).

B) **Comparative fault:** Rhode Island recognizes comparative negligence, and not comparative fault. R.I. GEN. LAWS § 9-20-4 (2012); *see also Calise v. Hidden Valley Condo. Ass'n, Inc.*, 773 A.2d 834, 837-38 (R.I. 2001).

C) **Comparative negligence:** Comparative negligence in Rhode Island refers only to a comparison of the fault of plaintiff with that of defendant, and does not necessarily result in a simple division of damages; instead, it operates to reduce the recoverable damages in proportion to the total fault of the plaintiff as compared with the total fault of the defendant. R.I. GEN. LAWS § 9-20-4 (2012); *Kay v. Menard*, 754 A.2d 760 (R.I. 2000). Comparative negligence is applicable only when negligence of both plaintiff and defendant is first established. *Calise v. Hidden Valley Condo. Ass'n, Inc.*, 773 A.2d 834 (R.I. 2001).

D) **Burden of proof:** Because defendant raises the claim that plaintiff was also negligent in a comparative negligence situation, defendant has the burden of proving plaintiff's negligence. *See Crum v. Horowitz*, 896 A.2d 736 (R.I. 2006).

E) **Applicability:** Comparative negligence applies to all actions brought for personal injury, including strict liability and breach of implied warranty, as well as negligence actions. R.I. GEN. LAWS § 9-20-4 (2012); *Fiske v. MacGregor, Div. of Brunswick*, 464 A.2d 719, 729 (R.I. 1983). However, comparative negligence does not apply in actions that involve pecuniary damages resulting from misrepresentation. *Estate of Braswell by Braswell v. People's Credit Union*, 602 A.2d 510, 512 (R.I. 1992).

F) **Assumption of the Risk:** A plaintiff is barred from recovering from a negligent defendant if plaintiff knew of the existence of the danger posed by defendant's conduct, appreciated and understood its significance or unreasonable character, and then voluntarily exposed herself to that danger at the time of the incident. If the facts of a case justify the application of the doctrine, it operates to relieve or reduce a defendant of liability for creating a risk of harm to plaintiff. The burden is on defendant to prove by a preponderance of the evidence that plaintiff assumed the risk of her injuries. *See Hennessey v. Pine*, 694 A.2d 691, 699-701 (R.I. 1997); *Drew v. Wall*, 495 A.2d 229, 231 (R.I. 1985); *Rickey v. Boden*, 421 A.2d 539, 543 (R.I. 1980); *Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d 329, 332-33 (R.I. 1977); *see also Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 3 (1st Cir. 1994).

**Exclusive Remedy – Worker's Compensation Protections**

A) The Rhode Island Workers' Compensation Act, contained in R.I. GEN. LAWS Title 28 Chapters 29-38, applies to any and all employees who are injured or hired in the State of Rhode Island. R.I. GEN. LAWS § 28-29-1.3 (2012).

1) **Injury:** An "injury" means and refers to personal injury to an employee arising out of and in the course of his or her employment, connected and referable to the employment. R.I. Gen. Laws § 28-29-2(7) (2012). "Personal injury" includes any injury or disease which arises out of and in the course of the employment, which causes incapacity for work and thereby impairs the ability of the employee for earning wages. *Shoren v. U.S. Rubber Co.*, 140 A.2d 768, 770-71 (R.I. 1958).

2) **Employee:** Whether a workers' compensation claimant is an "employee" is a mixed question of fact and law. *Davies v. Stillman White Foundry Co.*, 163 A.2d 44, 46 (R.I. 1960). A showing that an employer possesses fully the power to exercise control over an employee's performance of his duties (whether by contract or otherwise) is determinative of the existence of an employment relationship. *Croce v. Whiting Milk Co.*, 228 A.2d 574, 577 (R.I. 1967).

B) **Applicability:** The Workers' Compensation Act applies to all employers employing four or more employees in the same business or in and about the same establishment. Domestic servants, farmers, farm labor and employers of less than four employees are exempt from the Workers' Compensation Act, but upon filing of a written statement, exempt employers may voluntarily elect to become subject to the Act. R.I. GEN. LAWS §§ 28-29-7, 8 (2012).

C) **Burdens:** Under Rhode Island law, all employers are chargeable with knowledge of the exclusive remedy provision under the Workers' Compensation Act. R.I. GEN. LAWS § 28-29-20 (2012); *A & B Const., Inc. v. Atlas Roofing & Skylight Co.*, 867 F. Supp. 100, 109 (D. R.I. 1994).

D) **Exclusivity:** When an employee suffers an injury under the Workers' Compensation Act, such benefits are the exclusive remedy for any loss or harm allegedly caused by the injured employee's employer or employer's directors, officers, agents, or employees; however, the employee may seek further recovery from an entity that has not been granted immunity. R.I. GEN. LAWS § 28-29-20 (2012); *Sorenson v. Colibri Corp.*, 650 A.2d 125, 128 (R.I. 1994).

1) **Intentional actions:** The Workers' Compensation Act provides the exclusive remedy for work-related injuries, even if the injury-causing conduct of the alleged tortfeasor was intentional. *Nassa v. Hook-SupeRx, Inc.*, 790 A.2d 368, 372 (R.I. 2002).

2) **Exceptions to exclusivity:** The Workers' Compensation Act exclusivity provision does not bar independent statutory claims created by Rhode Island Fair Employment Practices Act (R.I. GEN. LAWS § 28-5-1 *et seq.* (2012)), Rhode Island Civil Rights Act (R.I. GEN. LAWS § 42-112-1 *et seq.* (2012)), Rhode Island Constitution, Rhode Island Civil Rights of People with Disabilities Statute (R.I. GEN. LAWS § 42-87-1 *et seq.* (2012); *see also Folan v. State/Dept. of Children, Youth & Families*, 723 A.2d 287 (R.I. 1999)), or work-related defamation claims (*Nassa v. Hook-SupeRx, Inc.*, 790 A.2d 368 (R.I. 2002)).

E) **Inapplicable defenses:** It is not a defense under the Workers' Compensation Act that: (1) the employee was negligent; (2) the injury was caused by the negligence of a fellow employee; (3) the employee assumed the risk of the injury. R.I. GEN. LAWS § 28-29-3 (2012).

**Indemnification**

A) **Indemnification:** Indemnity is preserved by statute in Rhode Island. *See* R.I. GEN. LAWS § 10-6-9 (2012). Although the right to indemnity is often contractual in nature, it can also be based upon equitable principles. *Wilson v. Krasnoff*, 560 A.2d 335, 341 (R.I. 1989). Indemnity arises when one person is exposed to liability by the wrongful act of another in which he did not join, such that he will be liable for the whole outlay and not

just a pro rata share. *Hawkins v. Gadoury*, 713 A.2d 799, 803 (R.I. 1998). To prove indemnification in Rhode Island, the prospective indemnitee must prove three elements: (1) the party seeking indemnity must be a third party; (2) the prospective indemnitor must also be liable to the third party; and (3) as between the prospective indemnitee and indemnitor, the obligation ought to be discharged by the indemnitor. *R & R Assocs. v. City of Providence Water Supply Bd.*, 724 A.2d 432, 434 (R.I. 1999).

B) **Uniform Contribution Among Tortfeasors Act:** A plaintiff may recover 100% of her damages from a joint tortfeasor who has contributed to the injury in any degree. The joint tortfeasor may then seek contribution pursuant to the Uniform Contribution Among Tortfeasors Act either by a separate action or by impleading the fellow joint tortfeasor under third-party practice. *See* R.I. GEN. LAWS § 10-6-1 *et seq.* (2012); *see also Calise v. Hidden Valley Condo. Ass'n, Inc.*, 773 A.2d 834 (R.I. 2001).

**Joint and Several Liability**

"Joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. R.I. GEN. LAWS § 10-6-2 (2012). In other words, joint tortfeasors share all common liability. Any joint tortfeasor may be severally liable for the whole amount of a plaintiff's damages. *See generally Hawkins v. Gadoury*, 713 A.2d 799, 802-03 (R.I. 1998).

**Strict Liability**

A) **Ultrahazardous activity:** Strict liability attaches when a plaintiff's injuries are proximately caused by some ultrahazardous or abnormally dangerous activity of the defendant, but not when they are caused by ultrahazardous or abnormally dangerous materials. *Splendorio v. Bilray Demolition Co., Inc.*, 682 A.2d 461, 466 (R.I. 1996); RESTATEMENT (SECOND) OF TORTS § 520 (1977).

1) An analysis of whether an activity is ultrahazardous or abnormally dangerous requires a consideration of the following factors, taken as a whole: (1) existence of a high degree of risk of some harm to the person, land, or chattels of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk by exercise of due care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes. *Splendorio v. Bilray Demolition Co., Inc.*, 682 A.2d 461, 466 (R.I. 1996); RESTATEMENT (SECOND) OF TORTS § 520 (1977).

B) **Products liability:** Under a theory of strict liability in Rhode Island, a defendant is liable to a plaintiff where that plaintiff has been injured by the defendant's defective and unreasonably dangerous product. It is immaterial whether defendant exercised due care in making that product. The principal questions are whether the product was in a defective and unreasonably dangerous condition at the time it left the defendant's

hands, and whether that defective condition caused the injury to the plaintiff. *Ritter v. Narragansett Electric Co.*, 283 A.2d 255 (R.I. 1971); RESTATEMENT (SECOND) OF TORTS § 402A (1977).

1) **"Unreasonably dangerous":** A defect in the product presented a strong likelihood of injury to a consumer who is unaware of the danger in utilizing the product in a normal manner. *See Raimbault v. Takeuchi Mfg. (U.S.), Ltd.*, 772 A.2d 1056 (R.I. 2001).

2) **"Defect":** A feature or condition of the product which makes the product unsafe for its intended use. *See Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 779 (R.I. 1988).

3) **Standard:** To recovery under a strict liability theory in Rhode Island, plaintiff must prove that: (1) defendant was engaged in the business of manufacturing, selling, or leasing the product at issue; (2) defendant manufactured, sold, or leased the product, which was in a defective condition and was unreasonably dangerous to a user or consumer; (3) the product was expected to and did reach the plaintiff user/consumer without substantial change from the time it was manufactured; (4) plaintiff user/consumer was using the product in a way that it was intended to be used; and (5) the defective condition of the product proximately caused plaintiff's injuries. *Raimbault v. Takeuchi Mfg. (U.S.), Ltd.*, 772 A.2d 1056 (R.I. 2001); *Ritter v. Narragansett Electric Co.*, 283 A.2d 255 (R.I. 1971).

C) **Learned Intermediary:** Rhode Island does not recognize a specific "learned intermediary" rule. However, a seller of goods manufactured by another has a duty to warn purchasers of dangerous defects in the product if the seller knows or has reason to know that the product poses a danger to a user or consumer of the product. Incident to this duty to warn is a duty to acquire knowledge about the product through reasonably adequate inspections and tests. *Scittarelli v. Providence Gas Co.*, 415 A.2d 1040 (R.I. 1980); *Ritter v. Narragansett Electric Co.*, 283 A.2d 255 (R.I. 1971).

**Willful and Wanton Conduct**

A) Willful and wanton conduct is committed with an intentional or reckless disregard for the safety of others, such as failing to exercise ordinary care to prevent a known danger or to discover a danger. BLACK'S LAW DICTIONARY 1020 (Deluxe 8th ed. 2004). Willful or wanton conduct is also described as" highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." *State v. McAssey*, 432 A.2d 683 (R.I. 1981) (quoting PROSSER, TORTS § 34 at 185 (4th ed. 1971)).

B) Rhode Island does not recognize an independent tort for willful and wanton conduct. *See generally Zoubra v. N.Y., N.H. & H.R. Co.*, 150 A.2d 643 (R.I. 1959).

# DISCOVERY

## Electronic Discovery Rules

Although a generally recognized discovery obligation, there is no specific or express Rhode Island rule mandating the production of electronic discovery. Pursuant to Rule 34 of the Superior Court Rules of Civil Procedure, however, the scope of production at section (a) identifies "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form" are subject to discovery. *See* SUPER. R. CIV. P. 34(a). However, the amended federal court rules, to which Rhode Island's rules are highly analogous, states as discoverable "any designated documents or electronically stored information…stored in any medium from which information can be obtained." FED. R. CIV. P. 34(a)(1)(A).

## Expert Witnesses

A) Discovery regarding expert witnesses is governed by Superior Court Rule of Civil Procedure 26(b)(4).

B) **Forms of disclosure:** A party may require the other party, through interrogatories, to identify any experts who are expected to testify and state the substance of the facts and opinions of the expert's testimony with a summary of the grounds for each opinion. A party must file a motion to depose the opposing expert or obtain expert discovery by any other means. SUPER. R. CIV. P. 26(b)(4)(A).

C) **Qualified immunity:** Under SUPER. R. CIV. P. 26(b)(4)(B), a qualified immunity applies to facts and opinions of an expert who was retained by a party in anticipation of litigation or preparation for trial but who is not expected to testify. This Rule curtails the ability of a party to obtain facts and opinions held by an expert who has been retained in anticipation of litigation but will not testify. However, the "facts and known privileges" held by a nontestifying expert may be discovered upon a showing of "exceptional circumstances." SUPER. R. CIV. P. 26(b)(4)(B); *R.I. Depositors Econ. Prot. Corp. v. Mapleroot Dev. Corp.*, 715 A.2d 1260, 1264 (R.I. 1998).

D) **Fees and expenses:** Unless manifest injustice would result, the party seeking discovery must pay the expert a reasonable fee for time spent in responding to discovery. SUPER. R. CIV. P. 26(b)(4)(C).

## Non Party Discovery

A) **Subpoenas:** Under SUPER. R. CIV. P. 45(a), a subpoena requires a person to appear at a deposition, hearing, or trial to give testimony; or to produce documents or tangible things; or to permit inspection of particular premises.

1) A subpoena may be served by a sheriff, deputy sheriff, constable, or any other person who is not a party and is over eighteen years of age. Service

is made by personally delivering a copy of the subpoena to the witness anywhere within the state, and that witness must be tendered the fees for one day's attendance and mileage. SUPER. R. CIV. P. 45(b).

2) A subpoena duces tecum may be issued to compel production of books, papers, documents or tangible things at a specified place and time or at a deposition, hearing, or trial. SUPER. R. CIV. P. 45(a).

3) Rule 45 authorizes issuance of subpoenas to nonparties to secure their testimony at a deposition; a notice of deposition alone is insufficient. SUPER. R. CIV. P. 45(a); *Carroccio v. DeRobbio*, 274 A.2d 424, 425-26 (R.I. 1971).

4) The party responsible for issuing and serving a subpoena shall take reasonable steps to avoid imposing undue burden or expense on the subject person. SUPER. R. CIV. P. 45(c).

5) Confidential health care communications and/or records shall not be subject to compulsory legal process in any type of judicial proceeding, and a patient and his or her authorized representative has a right to refuse to disclose, and to prevent a witness from disclosing, his or her confidential health care communications in any judicial proceeding. R.I. GEN. LAWS § 5-37.3-6(a) (2012). Qualified privilege as to medical records does not apply when (1) an individual introduces his or her physical or mental condition into litigation; (2) an individual, after being informed that such communications will not be privileged, communicates with a psychiatrist in the course of a court ordered psychiatric examination; (3) it is shown that an individual's physical or mental condition is in imminent serious danger; (4) an individual brings action against an insurance carrier or a carrier against insured and has demonstrated that the confidential health care information is relevant and material; and (5) when issue is raised as to ingestion of intoxicating liquor and/or other like control substance where it is shown that the confidential health information is relevant. R.I. GEN. LAWS § 5-37.3-6 (2012).

A health care provider or custodian of health care information may disclose confidential health care information in a judicial proceeding if the disclosure is pursuant to a subpoena and the provider or custodian is provided with written certification by the party issuing the subpoena that twenty days has passed since the individuals whose records are sought received notice of the subpoena and has not objected. R.I. GEN. LAWS § 5-37.3-6.1(a)(1), (2) (2012). A subpoena issued for confidential health care information subject to challenge is outlined in R.I. GEN. LAWS § 5-37.3-6.1 (2012).

**Privileges**

A) **Attorney-client:** Under common law, the attorney-client privilege shields from disclosure the confidential communications between a client and his or her attorney. *See generally Wartell v. Novograd*, 137 A. 776, 778 (R.I. 1927).

B) **Statements:** Three elements must be present to assert an attorney-client privilege: (1) both parties must contemplate that the attorney-client exists or will exist; (2) the advice must be sought by the client from the attorney in his capacity as legal advisor; and (3) the communication between the attorney and client must be identified as confidential. *Long v. Women & Infant Hosp. of R.I.*, No. C.A. PC/03-0589, C.A. PC/05-4465, 2006 WL 2666198, at *2 (R.I. Super. Sept. 11, 2006). Confidential and protected statements pursuant to the attorney-client privilege are subject to waiver as articulated in Article V, Rule 1.6(b)(2) of the Rhode Island Supreme Court Rules of Professional Conduct, which renders the attorney-client privilege inapplicable when a lawyer attempts to establish a claim or defense on behalf of the lawyer in a controversy between lawyer and client.

C) **Work Product:** An item is privileged under work product if, in light of the nature of the document or tangible materials and the facts of the case, the document can be said to have been prepared or obtained because of the prospect of litigation, by or for an adverse party or its agent. SUPER. R. CIV. P. 26(b)(3); *Cabral v. Arruda*, 556 A.2d 47, 49 (R.I. 1989). When a party withholds information as work product, the party must expressly state as such, and must describe the nature of the things not produced or disclosed that, without revealing protected information, will enable other parties to assess the applicability of the privilege or protection. SUPER. R. CIV. P. 26(b)(5). However, a party may obtain such privileged work product material through discovery only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. SUPER. R. CIV. P. 26(b)(3).

D) **Self critical analysis:** Although a self-critical analysis privilege is recognized in certain jurisdictions, an organization or entity's internal reports and/or critical analysis, including investigations, are not deemed privileged. Advocates of this privilege assert that subjecting such analysis to discovery would discourage organizational approval. To date, the self-critical analysis privilege has not been recognized in Rhode Island as Rhode Island has consistently declared (1) "that privileges, in general, are not favored by the law and therefore should be strictly construed," *Moretti v. Lowe*, 592 A.2d 855, 857 (R.I. 1991); and (2) that privileges, by their nature, create limitations on the legal process that must be viewed with skepticism because they attempt to shut out the light on the ascertainment of truth. *Pastore v. Samson*, 900 A.2d 1067, 1078 (R.I. 2006). Based on this philosophy the Rhode Island judiciary has not adopted a self-critical analysis privilege.

E) **Husband-wife:** In all civil actions, husband or wife of either party is a competent witness. However, neither may give testimony tending to incriminate the other or disclose communications made by one to the other during their marriage, except in matters of divorce, their respective property rights, and in criminal proceedings for pandering. R.I. GEN. LAWS §§ 11-34.1-9, 9-17-13 (2012).

F) **Physician-patient:** Rhode Island does not recognize a physician-patient privilege. *Remington v. R.I. Co.*, 93 A. 33, 33 (R.I. 1915); *Banigan v. Banigan*, 59 A. 313, 314 (R.I. 1904). However, there is a limited privilege for communications to and information obtained by health care providers. R.I. GEN. LAWS §§ 5-37.3-4, 9-17-24 (2012).

G) **Church:** No clergyman or priest is competent to testify concerning confession made to him without consent of the confessor; and no minister, priest, or rabbi may testify to confidential communication, entrusted to him in his professional capacity and necessary and proper to enable him to discharge functions of his office in the usual course, without consent of the communicant. R.I. GEN. LAWS § 9-17-23 (2012).

H) **News:** There is a qualified privilege to newsmen for nondisclosure of confidential information. R.I. GEN. LAWS §§ 9-19.1-1, -3 (2012).

### Requests to Admit

Under Rule 36 of the Superior Court Rules of Civil Procedure, a party may serve upon another party a written request for admission of the truth of any matters within the scope of Rule 26(b), relating to statements or opinions of fact or of application of law to fact, or to the genuineness of a document. Each request should be separately set forth. A request is considered admitted unless the responding party provides a written answer or objection (and provides a reason) to each request within thirty days after service of the request, and is signed by the responding party. SUPER. R. CIV. P. 36(a).

## EVIDENCE, PROOFS & TRIAL ISSUES

### Accident Reconstruction

Expert testimony, such as from an accident reconstruction expert, may be directly relevant to the issue of causation in negligence cases. *See Allen v. State*, 420 A.2d 70, 72 (R.I. 1980). A witness who is qualified as an expert by knowledge, skill, experience, training, or education regarding accident reconstruction may testify in the form of fact or opinion, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. R.I. R. EVID. 702; *Allen v. State*, 420 A.2d 70, 72 (R.I. 1980) (holding it was error to exclude expert testimony by accident reconstruction expert where issues were the cause of decedent's fatal injuries).

### Appeal

A) **From Superior Court:** In civil or criminal actions, appeals to the Rhode Island Supreme Court must be made within twenty (20) days from entry of judgment by filing a notice of appeal. SUP. CT. R. APP. P. 3, 4; R.I. GEN. LAWS § 9-24-1 (2012). Upon showing of excusable neglect, trial court may extend time to appeal up to thirty (30) days. *Millman v. Millman*, 723 A.2d 1118, 1119 (R.I. 1999).

B) **From District Court:** In civil actions, a claim of appeal must be made in writing and costs paid within two (2) days after judgment. R.I. GEN. LAWS § 9-12-10 (2012). Appeal to Superior Court receives a trial *de novo*, but a jury trial is waived if not claimed in Superior Court. R.I. GEN. LAWS § 9-11-7 (2012). Plaintiff in small claims proceeding waives right of appeal. R.I. GEN. LAWS § 10-16-14 (2012). If decision, decree, order, or judgment is appealable, Superior Court may allow appeal upon petition within ninety (90) days of entry of decision if aggrieved party fails to claim appeal for accident, mistake, unforeseen cause or excusable neglect. R.I. GEN. LAWS § 9-21-6 (2012).

C) **From Probate Courts:** Appeals may be taken from any probate court to Superior Court by claiming an appeal filed within twenty (20) days after decree is entered; and by filing in Superior Court reasons of appeal, together with certified copy of claim of appeal and of probate proceedings appealed within thirty (30) days after decree is entered. R.I. GEN. LAWS § 33-23-1 (2012).

**Biomechanical Testimony**

Before testimony from a biomechanical engineer may be admitted at trial, the proponent of the evidence must prove the methods of study utilized by the engineer are both generally accepted and reliable. Rhode Island has not expressly adopted the "reliability" test in the United States Supreme Court's *Daubert v. Merrell Dow Pharm., Inc.*, but has used its principles as guidance. *Owens v. Silvia*, 838 A.2d 881, 890-91 (R.I. 2003). The trial justice may admit expert testimony as evidence only if it goes to (1) scientific knowledge that (2) will assist the trier of fact. *See id.*; *see also* R.I. R. EVID. 702.

**Collateral Source Rule**

The collateral source rule, under common law, prevents defendants in tort actions from reducing their liability with evidence of payments made to injured parties by independent, third-party sources, such as insurance companies. *Esposito v. O'Hair*, 886 A.2d 1197 (R.I. 2005). The underlying rationale is that it is better for the windfall to go to the injured party rather than to the wrongdoer. *Id.*

**Convictions**

A) Evidence of a prior conviction is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove

that defendant feared imminent bodily harm and that the fear was reasonable. R.I. R. EVID. 404(b).

B) Evidence that a witness has been convicted of a crime may be admitted for purposes of attacking the credibility of the witness, if elicited from the witness or established by public record. R.I. R. EVID. 609(a). Evidence of a conviction is not admissible if the court determines that its prejudicial effect substantially outweighs the probative value of the conviction. Further, if more than ten (10) years has elapsed since the later of the witness' date of conviction or release for that conviction, or if the conviction is a misdemeanor not involving dishonesty or false statement, then the court will hear an offer of proof *in limine* so that the adverse party may contest the use of such convictions. R.I. R. EVID. 609(b).

**Day in the Life Videos**

A "day-in-the-life video" is a form of demonstrative evidence/exhibit prepared by counsel in an effort to assist the court/jury to better understand verbal testimony and/or demonstrate other components and/or elements of a case. A day-in-the-life video is subject to the same rules of admissibility required of other demonstrative evidence/exhibits such as photographs, charts, drawings and/or models. Subject to rules of evidence and/or prejudice, permission to allow a jury in a civil action to view demonstrative items rests in the sound discretion of the trial justice and her actions will not be interfered with except on showing of clear abuse of discretion. *Martin v. Estrella*, 266 A.2d 41 (R.I. 1970).

**Dead Man's Statute**

When an original party to a contract or cause of action is dead, the other party involved may be called to testify as a witness by his opponent, but shall not be permitted to testify upon his own offer, unless merely a nominal party, or unless the contract in issue was originally made with a person who is living and competent to testify. *See, e.g., Clapp v. Hull*, 29 A. 687, 687-88 (R.I. 1894).

**Medical Bills**

A) Medical bills are admissible under the business records exception to the hearsay rule to show the measure of damages sustained. R.I. R. EVID. 803(6); *Ouellette v. Carde*, 612 A.2d 687, 691-92 (R.I. 1992).

B) Admissibility of medical bills under the business records exception to the hearsay rule to show damages is not sufficient to satisfy Rhode Island's statute requiring medical affidavits in order to use medical records as proof of proximate cause of plaintiff's injury. R.I. GEN. LAWS § 9-19-27 (2012); *Ouellette v. Carde*, 612 A.2d 687, 691-92 (R.I. 1992).

**Offers of Judgment**

A party defending against any claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued, at any time more than ten days before trial begins. SUPER. R. CIV. P. 68(a). The party defending against a claim may pay into court by depositing with the clerk an amount of money on account of what is claimed, or by way of compensation or amends, and plead that the defending party is no longer indebted to any greater amount to the party making the claim, or that the party making the claim has not suffered greater damages. SUPER. R. CIV. P. 68(b). The party making the claim may (1) accept the tender and have judgment for the party's costs, (2) reject the tender, or (3) accept the tender as part payment only and proceed with the action on the sole issue of the amount of damages. *Id.*

**Offers of Proof**

Under Rule 103(a)(3) of the Rhode Island Rules of Evidence, error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. However, if the nature of the evidence offered by plaintiff clearly establishes its relevance and competence or lack thereof, then an offer of proof is not necessary. *Sheeley v. Mem'l Hosp.*, 710 A.2d 161, 164 (R.I. 1998).

**Prior Accidents**

Evidence of prior accidents alone does not establish negligence. *Quinn v. Stedman*, 146 A. 618, 620 (R.I. 1929).

**Relationship to the Federal Rules of Evidence**

The Rhode Island Rules of Evidence were intended to track the Federal Rules of Evidence and the rules utilize identical language in most, but not all, instances. *Compare* R.I. R. EVID. 100 *et seq. with* FED. R. EVID. 101 *et seq.*; *see also State v. Tobin*, 602 A.2d 528, 531 (R.I. 1992). For example, evidence of subsequent remedial measures is admissible in Rhode Island, but not under the federal rules. R.I. R. EVID. 407; *see also Kurczy v. St. Joseph Veterans Ass'n*, 820 A.2d 929 (R.I. 2003).

**Seat Belt and Helmet Use Admissibility**

A) **Seat belt use:** Failure to wear a safety belt is not considered as negligence or contributory or comparative negligence, nor is the failure to wear a seat belt admissible as evidence at trial in any civil action. R.I. GEN. LAWS § 31-22-22(a)(2) (2012).

B) **Helmet use:** Failure to wear a helmet is not considered contributory or comparative negligence, nor is the failure to wear a helmet admissible as evidence at trial in any civil action. R.I. GEN. LAWS § 31-19-2.1 (2012).

**Spoliation**

Under the doctrine of spoliation, the destruction of relevant evidence by a litigating party may give rise to an inference that the destroyed evidence was unfavorable to that party. *See Mead v. Papa Razzi Rest.*, 840 A.2d 1103, 1108 (R.I. 2004).

**Subsequent Remedial Measures**

When measures are taken after an event, which if taken previously would have made the event less likely to occur, evidence of the subsequent measures is admissible. R.I. R. EVID. 407.

**Use of Photographs**

A) **Admissibility:** Photographs are admissible as long as they are "relevant"— which means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. R.I. R. EVID. 401. Photographs may be inadmissible, although relevant, if their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. R.I. R. EVID. 403. For example, if relevant photographs or other visual images are offered solely to inflame the passions of the jury then the evidence should be excluded. *See State v. O'Brien*, 774 A.2d 89, 107 (R.I. 2001).

B) **Best evidence rule:** To prove the content of a photograph, the original photograph is required unless provided otherwise by the R.I. Rules of Evidence or statute. A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original. Contents of a photograph may be proved by the testimony or deposition of the party against whom offered or by the party's written admission. R.I. R. EVID. 1002-1003, 1007.

C) **Criminal cases:** Upon written request by defendant, the State must produce in discovery all photographs (among other tangible things) intended for use by the State as evidence at the trial. SUPER. R. CRIM. P. 16(a)(4).

## DAMAGES

**Caps on Damages**

A) **Limitations on damages:** Damages for a tort action against the State of Rhode Island or political subdivision thereof, or cities, towns or fire districts in Rhode Island, may not exceed $100,000. R.I. GEN. LAWS §§ 9-31-2, 3 (2012).

B) **Damages in excess of limitation:** The general assembly may, by special act, authorize tort actions against cities, towns and fire districts of Rhode Island in particular cases where the amount of damages to be recovered exceeds $100,000. R.I. GEN. LAWS § 9-31-4 (2012).

**Calculation of Damages**

A) **Tort actions:** Damages are defined as that amount of money that will compensate an injured party for the harm or loss she has sustained. The rationale behind compensatory damages is to restore a person to the position she was in prior to the harm or loss. Thus, compensatory damages means the amount of money which will replace, as near as possible, the loss or harm caused to a person. When assessing damages, the trier of fact may only assess damages that will fairly and reasonably compensate plaintiff insofar as the same may be computed in money. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *see also Proffitt v. Ricci*, 463 A.2d 514, 518-19 (R.I. 1983).

B) **Contract actions:** A plaintiff may recover the value of the bargain that was originally contemplated by the parties when they entered into the contract. The amount of damages awarded should put plaintiff in the same position she would have been had the breach not occurred. The rationale is to place the innocent party in the position she would have been in if the contract was fully performed. *See Nat'l Chain Co. v. Campbell*, 487 A.2d 132, 135 (R.I. 1985); *Alterio v. Biltmore Constr. Corp.*, 377 A.2d 237 (R.I. 1977); *George v. George F. Berkander, Inc.*, 169 A.2d 370 (R.I. 1961).

**Available Items of Personal Injury Damages**

A) **Past medical bills:** A plaintiff may recover the reasonable expenses of her medical care, treatment, and attendance as an element of damages. In awarding damages for medical expenses, the medical costs claimed by the plaintiff must be reasonable, and those costs must necessarily be incurred in providing care, treatment and medical attendance. *See Markham v. Cross Transp., Inc.*, 376 A.2d 1359 (R.I. 1977); *Oresman v. G.D. Searle & Co.*, 388 F. Supp. 1175, 1184 (D.R.I. 1975).

B) **Future medical bills:** A plaintiff may recover future expenses of medical care and treatment that are made necessary by the original injury she sustained. However, plaintiff may not recover medical expenses that are contingent, speculative, or merely possible—rather, plaintiff must show there is such a degree of probability that there is a reasonable certainty she will incur those future expenses. Although future medical expenses do not have to be established with mathematical exactness, only expert testimony regarding probable cost of the future medical expenses can support such an award. *See Shepardson v. Consol. Med. Equip.*, 714 A.2d 1181, 1184 (R.I. 1998); *Markham v. Cross Transp., Inc.*, 376 A.2d 1359 (R.I. 1977); *Pescatore v. MacIntosh*, 319 A.2d 21, 26-27 (R.I. 1974); *Labree v. Major*, 306 A.2d 808, 819-20 (R.I. 1973); *Tilley v. Mather*, 124 A.2d 872, 874 (R.I. 1956); *MacGregor v. R.I. Co.*, 60 A. 761, 762-63 (1905).

C) **Hedonic damages:** Hedonic damages are damages that attempt to compensate for the loss of the pleasure of being alive. BLACK'S LAW DICTIONARY 417 (Deluxe 8th ed. 2004). Such damages are not allowed in Rhode Island.

D) **Loss of chance and increased risk of harm:** The loss of chance and increased risk of harm doctrine permits recovery of damages for an injury suffered by a patient whose medical providers negligently deprived the patient of a chance for a better outcome. *See Mandros v. Prescod*, 948 A.2d 304, 310 (R.I. 2008).

E) **Disfigurement:** Disfigurement, such as a scar or loss of limb, is compensable in damages as an aspect of bodily injury and impairment. Plaintiff may also recover for the mental suffering arising from the consciousness of a facial or bodily scar. *Arlan v. Cervini*, 478 A.2d 976, 980 (R.I. 1984). There must be a direct relationship between the injury suffered and the mental anguish that results. *Perrotti v. Gonicberg*, 877 A.2d 631, 639 (R.I. 2005). An award of damages for mental suffering associated with disfigurement is not precluded by a permanent scar, which is partially or temporarily concealable by clothing, cosmetic surgery, or ordinary makeup by itself. *Arlan*, 478 A.2d at 980.

F) **Loss of normal life:** A person who suffers damages because of another's tortious acts may recover any and all losses caused by the tortfeasor's conduct, including in certain circumstances, loss of enjoyment of life or reduced life expectancy. *Vallinoto v. DiSandro*, 688 A.2d 830, 849 (R.I. 1997).

G) **Disability:** Plaintiff may recover for the bodily injury she sustained as a proximate result of the accident and for any impairment or disability that resulted from those bodily injuries. The trier of fact, considering the totality of the circumstances, may factor the type of physical injuries plaintiff sustained, the extent and severity of those injuries, whether the injuries are permanent or temporary, the length of time and nature of medical care required, the degree to which the impairment has affected or will affect plaintiff's day to day functioning, among other factors. *See generally Dilone v. Anchor Class Container Corp.*, 755 A.2d 818 (R.I. 2000).

H) **Past pain and suffering:** There is no particular rule of thumb regarding damages for past pain and suffering. Unless the jury award shocks the conscience, damages awarded for past pain and suffering will be upheld. Factors that may be considered include, but are not limited to, the type of injuries plaintiff sustained; the extent and severity of those injuries; the length of time plaintiff sought and received medical treatment; the nature of the medical treatment plaintiff received; whether the plaintiff's injury was temporary or permanent; the plaintiff's testimony in describing the nature or intensity of her pain; or medical records, trial exhibits, or other witness testimony. *See Proffitt v. Ricci*, 463 A.2d 514, 518-19 (R.I. 1983); *Hayhurst v. LaFlamme*, 441 A.2d 544, 547-49 (R.I. 1982); *Bruno v. Caianiello*, 404 A.2d 62, 65 (R.I. 1979); *Worsley v. Corcelli*, 377 A.2d 215, 217-18 (R.I. 1977); *see also* RHODE ISLAND BAR ASSOCIATION, MODEL CIVIL JURY INSTRUCTIONS FOR RHODE ISLAND 172 (2003).

I) **Future pain and suffering:** Plaintiff may recover for future pain and suffering by proving she is reasonably certain to experience future pain and suffering—not simply speculation or the possibility thereof. *See Markham v. Cross Transp., Inc.*, 376 A.2d 1259 (R.I. 1977); *Pescatore v. MacIntosh*, 319 A.2d 21, 26-28 (R.I. 1974); *Labree v. Major*, 306 A.2d 808, 819-20 (R.I. 1973). Although medical evidence is most often presented, expert testimony is not always required to prove future pain and suffering. *See MacGregor v. R.I. Co.*, 60 A. 761, 762-63 (R.I. 1905).

J) **Loss of society**

1) A married person may recover damages for loss of consortium caused by tortious injury to his or her spouse. R.I. GEN. LAWS § 9-1-41(a) (2012).

2) An unemancipated minor may recover damages for the loss of parental society and companionship caused by tortious injury to his or her parent. R.I. GEN. LAWS § 9-1-41(b) (2012).

3) Parents are entitled to recover damages for the loss of their unemancipated minor child's society or companionship caused by tortious injury to the minor. R.I. GEN. LAWS § 9-1-41(c) (2012).

K) **Lost income, wages, earnings:** A plaintiff may recover for the amount of income, wages, or earnings she was reasonably certain to have earned if she had not been injured. *Jackson v. Choquette & Co.*, 80 A.2d 172, 175 (R.I. 1951). A plaintiff may also recover for impairment to her future earning capacity, whether previously employed or not. *D'Andrea v. Sears, Roebuck & Co.*, 287 A.2d 629, 634 (R.I. 1972). Further, if plaintiff's injuries are reasonably certain to be permanent, the plaintiff's work-life expectancy in assessing damages may be taken into account by considering the tables of working life published by the U.S. Dept. of Labor, Bureau of Vital Statistics. R.I. GEN. LAWS § 9-19-38 (2012); *see also MacGregor v. R.I. Co.*, 60 A. 761, 762-63 (R.I. 1905).

**Lost Opportunity Doctrine**

A plaintiff may recover lost profits where plaintiff's business has been interrupted. Plaintiff must prove the amount of her lost revenues as well as the cost and expenses involved in generating that revenue. The lost profits need not be proven with mathematical certainty, but only that plaintiff is reasonably certain to make the net profits she claims to have lost as a result of the defendant's conduct. Lost profits may be proven by showing the past history of a successful and profitable business operation. In cases involving loss of business contracts, lost profits are calculated by demonstrating the dollar value of the contract that was lost and the profit margin the business or corporation would have obtained from that contract. *See Long v. Atl. PBS, Inc.*, 681 A.2d 249, 252 (R.I. 1996); *Troutbrook Farm, Inc. v. DeWitt*, 611 A.2d 820, 824 (R.I. 1992); *Abbey Med./Abbey Rents, Inc. v. Mignacca*, 471 A.2d 189, 195 (R.I. 1984); *Smith Dev. Corp. v. Bilow Enters., Inc.*, 308 A.2d 477, 482-83 (R.I. 1973).

**Mitigation**

In Rhode Island, a party claiming injury has a duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages. This affirmative defense is also called the "doctrine of avoidable consequences." An injured party may not recover damages that the party could have avoided without undue risk, burden, or humiliation. In other words, an injured party cannot sit idly by and allow further damages to accumulate. While the injured party does not incur liability for not mitigating damages, she is instead prohibited from recovering damages that she could have reasonably avoided. The burden is on the non-aggrieved party to prove that the injured party failed to adequately mitigate her damages. *See McFarland v. Brier*, 769 A.2d 605, 610 (R.I. 2005); *Bibby's Refrigeration, Heating & Air Conditioning, Inc. v. Salisbury*, 603 A.2d 726, 729 (R.I. 1992).

**Punitive Damages**

A) **Standard:** A party seeking punitive damages must produce "evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounts to criminality that should be punished." *Fenwick v. Oberman*, 847 A.2d 852, 854 (R.I. 2004).

B) **When may be brought:** Punitive damages may be awarded in torts involving malice, wantonness, willfulness, or bad faith, such as criminal conversion (*Hargraves v. Ballou*, 131 A. 643, 646 (R.I. 1926)), false imprisonment (*Sherman v. McDermott*, 329 A.2d 195, 197 (R.I. 1974)), assault (*Id.*), battery (*Id.*), libel and slander (*Marley v. Providence Journal Co.*, 134 A.2d 180, 183 (R.I. 1957)), or when non-prevailing party's claims were frivolous or were brought with an intent to harass the other party (*Palazzo v. Alves*, 944 A.2d 144, 151 (R.I. 2008)).

C) **Caps:** There is no monetary limitation on punitive damages in Rhode Island. Nevertheless, a trial justice may set aside a punitive damages award if the award is clearly excessive or shocks the conscience. The trier of fact may consider a defendant's wealth in determining the appropriate amount of punitive damages. In addition, the amount of punitive damages awarded must reasonably relate to: (1) the character and degree of defendant's wrongful conduct; (2) the amount of compensatory damages awarded; (3) the impact of the punitive damages on third parties; and (4) the severity of any civil penalties which the state government could impose on defendant for his wrongdoing. *See Palmisano v. Toth*, 624 A.2d 314, 318-19 (R.I. 1993); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Pac. Mut. Life Ins. Co. v. Haship*, 499 U.S. 1 (1991); *Emery-Waterhouse Co. v. R.I. Hosp. Trust Nat'l Bank*, 757 F.2d 399 (1st Cir. 1985).

**Recovery and Pre and Post Judgment Interest**

A) **Pre-judgment interest:** In most civil actions, pre-judgment interest is calculated at a rate of 12% per annum thereon from the date the cause of action accrued. R.I. GEN. LAWS § 9-21-10(a) (2012).

B) **Post-judgment interest:** Post-judgment interest is calculated at a rate of 12% per annum and accrues from both the principal amount of the judgment and the pre-judgment interest entered therein. R.I. GEN. LAWS § 9-21-10(a) (2012).

C) **Inapplicability:** Pre and post judgment interest does not apply to personal injury or wrongful death in medical malpractice cases. Instead, an interest at a rate of 12% per annum accrues from the date of the written notice of the claimant to the medical insurer or medical provider itself, or from the filing of the civil action, whichever is first. R.I. GEN. LAWS § 9-21-10(b) (2012).

D) In 1994, the Rhode Island General Assembly amended R.I. GEN. LAWS §§ 37-6-29 and 37-6-32 with regard to land condemnations to provide for pre and post judgment interest on condominium awards at the applicable 52-week treasury bill rate. *Ankner v. Napolitano*, 764 A.2d 712, 713 (R.I. 2001).

**Recovery of Attorneys Fees**

A) **American Rule:** Rhode Island follows the "American Rule," which requires each litigant to pay its own attorneys' fees absent statutory authority or contractual liability. *Moore v. Ballard*, 914 A.2d 487, 490 (R.I. 2007).

B) Attorneys' fees may be awarded, when statutorily or contractually authorized, at the sound discretion of the judge. *Mullowney v. Masopust*, 943 A.2d 1029, 1035 (R.I. 2008). For example, attorneys' fees may be awarded when the non-prevailing litigant has acted unreasonably, in bad faith, or brought unnecessarily litigation upon the prevailing party. *Id.*; *see also* R.I. GEN. LAWS § 9-1-45(1) (2012) (authorizing award of attorneys' fees to the prevailing party in action "arising from a breach of contract" when the trial justice "[f]inds that there was a complete absence of a justiciable issue of either law of fact raised by the losing party").

**Settlement involving minors**

A parent cannot compromise or release a minor child's cause of action without statutory authority. *Julian v. Zayre Corp.*, 388 A.2d 813, 815 (R.I. 1978). Rhode Island gives authority to a parent or guardian to release the claims of a minor child, where the amount of such release does not exceed $10,000 in value. R.I. GEN. LAWS § 33-15.1-1 (2012).

**Taxation of costs**

Costs are allowed as a matter of course to the prevailing party as provided by statute and the Superior Court Rules of Civil Procedure, unless the court specifically directs otherwise. The

clerk may tax costs upon ten (10) days' notice by the prevailing party. A copy of the bill of costs, specifying the items in detail, and a copy of any supporting affidavits shall be served with the notice. If no objection is filed, the clerk must tax the costs in accordance with the law; if an objection is filed, the court will hear the objection. SUPER. R. CIV. P. 54(d).

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**