

## **CHAPTER 32-03.2 FAULT, DAMAGES, AND PAYMENTS**

### **32-03.2-01. Definition.**

As used in this chapter, "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to tort liability or dram shop liability. The term also includes strict liability for product defect, breach of warranty, negligence or assumption of risk, misuse of a product for which the defendant otherwise would be liable, and failure to exercise reasonable care to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

### **32-03.2-02. Modified comparative fault.**

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

#### **32-03.2-02.1. Automobile accident damage liability.**

Notwithstanding section 32-03.2-02, in an action by any person to recover direct and indirect damages for injury to property, the damages may not be diminished in proportion to the amount of contributing fault attributable to the person recovering, or otherwise, if:

1. The person seeking damages is seeking property damages resulting from a motor vehicle accident in which two persons are at fault;
2. The person seeking damages is seeking to recover direct physical property damages of not more than five thousand dollars and indirect physical property damages not to exceed one thousand dollars; and
3. The percentage of fault of the person against whom recovery is sought is over fifty percent.

This section applies regardless as to whether the person seeking direct and indirect damages for injury to property also seeks damages for personal injury, however, damages for personal injury are not available under this section.

#### **32-03.2-03. Pure comparative fault - Product liability actions.**

Repealed by S.L. 1993, ch. 324, § 5.

#### **32-03.2-04. Economic and noneconomic damages for wrongful death or injury to person.**

In any civil action for damages for wrongful death or injury to a person and whether arising out of breach of contract or tort, damages may be awarded by the trier of fact as follows:

1. Compensation for economic damages, which are damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings

and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses.

2. Compensation for noneconomic damages, which are damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damage.

#### **32-03.2-05. Separate finding on damages.**

In awarding compensation for damages to any party, the trier of fact shall make separate findings which must specify:

1. The amount of compensation for past economic damages.
2. The amount of compensation for future economic damages.
3. The amount of compensation for noneconomic damages.

#### **32-03.2-06. Reduction for collateral source payments.**

After an award of economic damages, the party responsible for the payment thereof is entitled to and may apply to the court for a reduction of the economic damages to the extent that the economic losses presented to the trier of fact are covered by payment from a collateral source. A "collateral source" payment is any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages, but does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages.

#### **32-03.2-07. Pleading of damages.**

Any pleading for damages for death or injury to a person may pray for economic and noneconomic damages separately. Any prayer for noneconomic damages of less than fifty thousand dollars or for economic damages may be for a specific dollar amount. Any prayer for noneconomic damages for fifty thousand dollars or more must be stated generally as "a reasonable sum but not less than fifty thousand dollars".

#### **32-03.2-08. Review of reasonableness of economic damages.**

In addition to any other remedy provided by law and after a jury award of economic damages, any party responsible for the payment of any part thereof may request a review of the reasonableness of the award by the court as follows:

1. Awards in excess of two hundred fifty thousand dollars before reduction for contributory fault and collateral source payments are subject to review for reasonableness under this chapter.
2. The burden is on the moving party to establish that the amount of economic damage awarded was not reasonable in that it does not bear a reasonable relation to the economic damage incurred and to be incurred as proven by the party recovering the award.
3. If the court finds that the jury award of economic damages is unreasonable, the court shall reduce the award to reasonable economic damages.

#### **32-03.2-09. Periodic payments for continuing custodial care.**

If an injured party claims future economic damages for continuing institutional or custodial care that will be required for a period of more than two years, at the discretion of the court any party may request the trier of fact to make a special finding of the total amount awarded for this care, separate from other future economic damages, and if a separate award is made, any party may make periodic payments for this care in an amount approved by the court, provided payment of the total award for this care is adequately secured. The adequacy of the periodic payments within the limit of the total award will be subject to review by the court from time to time, and upon the death of the injured person the obligation to provide for further continuing care shall terminate.

### **32-03.2-10. Nondisclosure of reduction for collateral source payments.**

The jury may not be informed of the potential for the reduction of economic damages because of payments from collateral sources.

### **32-03.2-11. When court or jury may give exemplary damages.**

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.
2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded.
3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.
4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.
5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:
  - a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
  - b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and
  - c. Any of the following factors as to which evidence is presented:
    - (1) The defendant's awareness of and any concealment of the conduct;
    - (2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and
    - (3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.
6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with:
  - a. Federal statutes existing at the time the product was produced;
  - b. Administrative regulations existing at the time the product was produced that were adopted by an agency of the federal government which had responsibility to

- regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or
- c. Premarket approval or certification by an agency of the federal government.
7. The defense in subsection 6 does not apply if the plaintiff proves by clear and convincing evidence that the product manufacturer or product seller:
    - a. Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or
    - b. Made an illegal payment to an official of the federal agency for the purpose of securing approval of the product.
  8. Exemplary damages may be awarded against a principal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true:
    - a. The principal or a managerial agent authorized the doing and manner of the act;
    - b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent;
    - c. The agent was employed in a managerial capacity and was acting in the scope of employment; or
    - d. The principal or managerial agent ratified or approved the doing and manner of the act.
  9. In a civil action involving a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver under the motion procedures provided in subsection 1 if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years immediately preceding the accident has been convicted for violation of section 39-08-01 and who was operating or in physical control of a motor vehicle:
    - a. With an alcohol concentration of at least eight one-hundredths of one percent by weight;
    - b. Under the influence of a controlled substance unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver;
    - c. Under the influence of alcohol and refused to take a test required under chapter 39-20; or
    - d. Under the influence of a volatile chemical as listed in section 19-03.1-22.1.At the trial in an action in which the trier of fact will consider an award of exemplary damages, evidence that the driver has been convicted of violating section 39-08-01 or an equivalent statute or ordinance is admissible into evidence.

### **32-03.2-12. Post-trial review.**

Motions for periodic payments, reductions of awards for contributory fault and collateral source payments, for review of the reasonableness of an award, and for setting the amount of exemplary damages, must be made to the judge who presided over the trial of the action, unless the judge is unable to act, in which case, the motion must be presented to a judge designated by the presiding judge of the district in which the trial was held. The motion must be made within ten days of the jury verdict, or order of the court, and if so made, judgment may not be entered until the motion has been ruled on.