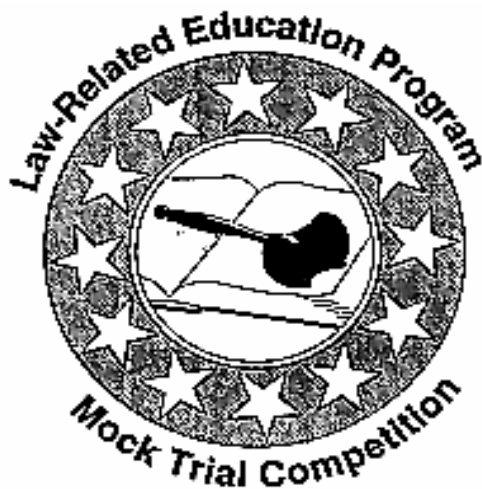


# New Hampshire Bar Association Mock Trial Competition Case Materials 2006-2007



*PAT DUNN*

*V.*

*CHRIS LEPUCK*



Developed by the Law-Related Education Mock Trial Committee. Sponsored in part by the New Hampshire Bar Association and the New Hampshire Bar Foundation. Please feel free to contact the NHBA's Law Related Education Coordinator, Robin E. Knippers at (603) 715-3259 or [reknipers@nhbar.org](mailto:reknipers@nhbar.org). Or visit our website at [www.nhbar.org/law-related-education](http://www.nhbar.org/law-related-education) for more information. We welcome your comments and suggestions at any time.



A special thanks to the following for their efforts in preparing this year's:

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This year's Mock Trial case was derived from a case originally written in the 1990's by Attorney Martin Bender.

**DISCLAIMER:** The case is a work of fiction. Names, characters, places and incidents are fictional and any resemblance to actual persons, living or dead, establishments, events, or locales is entirely coincidental.

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## List of Witnesses

### **Plaintiff**

Pat Dunn

L.O. Worsley, M.D.

Lee Plante

### **Defendant**

Chris L. LePuck

Terry Sawchuk

Toni(y) MacDonald, M.D.

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**Docket No.: #04-C-00123**

**STIPULATED FACTS**

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

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

Dated: March 3, 2006

/s/ Jamie Friberg  
Attorney for Pat Dunn

Dated: March 3, 2006

/s/ Skylar Fitzgerald,  
Attorney for Chris LePuck

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**COMPLAINT**

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

**I. The Parties**

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

**II. Jurisdiction and Venue**

3. This Court has jurisdiction over the matter pursuant to RSA 491:7.
4. Venue is proper in this Court because Pat Dunn is resident in Merrimack County. RSA 507:9.

**III. Facts**

5. The Plaintiff is a native of New Hampshire.
6. Pat has been married for fifteen years, and has twin sons, Gordie and Gump, age 12.

7. At the time of the incident, the Plaintiff was employed by WNHTV, a local television station, as a sportscaster, earning \$15,000 monthly, which job she/he has held for the past ten years.
8. Pat Dunn has been playing hockey since the age of eight.
9. The Plaintiff was a member of the Concord High School Hockey Team, and was awarded a scholarship to Northeastern University in Boston where she/he played for college hockey for four years.
10. After graduating from college, the Plaintiff played minor league hockey for two years before retiring from professional hockey and entering the business world.
11. The Plaintiff joined the Concord Chuggers, a semipro team sponsored by her/his employer, ten years ago.
12. On or about January 15, 2004, the Concord Chuggers played an exhibition hockey game against the United States Ice Hockey team at the Everett Arena in Concord, New Hampshire.
13. The Defendant, Chris LePuck, was a member of the United States Olympic Ice Hockey team.
14. During the game, the Defendant struck the Plaintiff in the head with her/his hockey stick.
15. The Plaintiff lost consciousness.
16. The Plaintiff was taken by ambulance to Hampshire Hospital where she/he was hospitalized for one week.
17. The Plaintiff was diagnosed with numerous injuries including, but not limited to, a fractured skull, subdural hematoma, and other physical, mental and emotional trauma.

18. Since the Plaintiff's injury, she/he has lost two weeks from work, excluding time lost for follow-up visits to doctors.

19. The Plaintiff has incurred medical expenses in the amount of \$80,000, and has no medical insurance.

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

20. The Defendant had a duty to use proper care in the use of her/his hockey stick and to avoid using it in such a manner as to cause injury to other persons.

21. The Defendant breached that duty during the course of that game by causing her/his hockey stick to strike the head of the Plaintiff, causing the Plaintiff to suffer numerous injuries including, but not limited to, a fractured skull, subdural hematoma, and other physical, mental and emotional trauma.

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

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

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

**-Battery -**

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

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

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

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

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court:

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

Respectfully submitted,

Pat Dunn  
By and through her/his Attorney,

/s/ Jamie Friberg  
11 Goalie Way  
Concord, NH 03110

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**Docket No.: #04-C-00123**

**ANSWER**

The Defendant, Chris LePuck (the “Defendant”) answers the Plaintiff Pat Dunn’s

Complaint as follows:

1-2. Admitted.

3-4. These statements are legal conclusions. The Defendant does not have to answer these statements.

5-13. Admitted.

14. Denied.

15-16. Admitted.

17-19. Denied.

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

**Affirmative Defenses**

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

4. The Plaintiff assumed the risk.
5. The Plaintiff was comparatively negligent.
6. The Defendant is not liable under the doctrine of “instinctive action.”

WHEREFORE, the Defendant respectfully requests that this Honorable Court:

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

Respectfully submitted,

Chris LePuck,  
by and through his/her attorneys,

SMALL LAW FIRM LLP

Date: May 22, 2004

/s/ Skylar Fitzgerald  
Skylar Fitzgerald, Esq.  
101 Main Street  
Rockville, New Hampshire

**CERTIFICATE OF SERVICE**

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

Date: May 22, 2004

/s/ Skylar Fitzgerald

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**Docket No.: #04-C-00123**

**AFFIDAVIT OF PAT DUNN**

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

I currently reside at 88 North Main Street in Concord, New Hampshire. I was born on March 4, 1966 in Nashua, New Hampshire. At the time of the incident, I was employed by WNHTV as a sportscaster. I earn \$15,000 monthly. I am married and have twin boys, Gordie and Gump, age 12.

I was educated in the Concord school system and graduated from Concord High School in 1984. I played hockey for the high school and was good enough to get a scholarship to Northeastern University in Boston where I played for four years. I played minor league hockey for two years before retiring from professional hockey and entering the business world. I joined the Concord Chuggers, a semipro team sponsored by my employer, ten years ago.

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

On January 15, 2004, I was playing defenseman in a game against the Olympic team at the Everett Arena in Concord. In the second period, I was skating on the right side when I saw this hot shot player flying down on my side of the ice. She/he was really steaming. I tried to catch up with her/him and in skating towards her/him, I accidentally got my stick tangled in her/his skates. She/he went down in a heap. I was waiting a whistle, expecting a penalty, when

all of a sudden, I get my feet pulled out from under me. The other player deliberately tripped me. Well, you can't let another player take advantage of you like that; otherwise everyone in the league will push you around. Without thinking, I punched her/him in the mouth. I saw her/him raise her/his stick and the next thing I know I was in Hampshire Hospital and they told me I'd been knocked unconscious.

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

Although I hit my head before, I felt completely better before being hit by LePuck on January 15, 2004.

/s/ Pat Dunn  
Pat Dunn

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

Subscribed and sworn to, before me, the undersigned officer, by Pat Dunn on this \_\_\_\_ day \_\_\_\_\_ of, 200 \_\_\_\_.

\_\_\_\_\_  
Notary Public / Justice of the Peace

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**Docket No.: #04-C-00123**

**AFFIDAVIT OF CHRIS LePUCK**

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

I live in Colorado Springs, Colorado. I was born on May 31, 1983 in Manitowoc, Wisconsin. I began playing hockey when I was six years old as a Mini-Mite, progressed through the levels of youth hockey and eventually played for Manitowoc High School where I was the captain of the team. I was named to the All-State team in my senior year, which was the year we won the State Championship. I went to the University of Wisconsin in Madison on a hockey scholarship and played left wing on the hockey team for four years. I was chosen to play for the United States Olympic Ice Hockey team in 2003. After my college graduation I concentrated full-time on training for the 2010 winter Olympics.

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

On January 15, 2004, we were on our tour through New England when we played in Concord, New Hampshire. We played against a semi-pro team that night. In the second period I was on the ice skating down the left side trying to angle in for a pass from center when I was tripped by Pat Dunn, a defenseman. I had never met Dunn before. Dunn had deliberately tripped me with her/his stick as I was getting around her/him. I could see that the referee and the linesmen had not seen the trip. While lying on the ice, I reached out with my stick and pulled

Dunn's feet out from under her/him. When I got up I found that Dunn was already standing up. Pat came right at me and punched me in the face with her/his hockey glove on. Pat hit me so hard that my helmet came right off. A hockey glove is a big, heavy padded glove and it felt like she/he broke my jaw. I thought that Pat was going to come at me again and I instinctively swung my stick at her/him. I realized after I hit her/him that my stick had hit her/him in the head and that she/he was bleeding. I knew she/he wasn't wearing a helmet, but I did not know why not. I didn't mean to hurt her/him, but I felt that I had to protect myself. Before she/he lost consciousness, I knelt down beside Pat and she/he said, "I can't believe that yours is the last face I'm going to see on this rink. You jerk – if you got out of my way in the first place, I wouldn't be lying here now."

Aside from being arrested in 2001 for larceny when, on a dare, I stole an opposing team's mascot's medallion- which I didn't know at the time was worth \$25,000-I never have gotten into trouble before.

/s/Chris LePuck

Chris LePuck

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

Subscribed and sworn to, before me, the undersigned officer, by Chris LePuck on this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public / Justice of the Peace

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**Docket No.: #04-C-00123**

**AFFIDAVIT OF LEE PLANTE**

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

I was officiating the exhibition game between the U.S. Olympic Ice Hockey Team and the Concord Chuggers on January 15, 2004 in Concord, New Hampshire. As head referee, I am responsible for the calling of the game both on my part and the other two officials assisting me. I have been officiating hockey games for the past thirteen years; the last six in the National Collegiate Athletic Association.

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

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

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

/s/ Lee Plante  
Lee Plante

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

Subscribed and sworn to, before me, the undersigned officer, by Lee Plante on this  
\_\_day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public / Justice of the Peace

L. O. Worsley, M.D.  
259 Pleasant Street  
Concord, New Hampshire 02910

March 22, 2004

Jamie Friberg  
Attorneys at Law  
11 Goalie Way  
Concord, N.H. 03110

Re: Pat Dunn  
Date of Birth: 3/4/66  
Social Security: 000-11-2222  
Date of Injury: 1/15/04

Dear Attorney Friberg,

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

I have examined Pat Dunn today and have reviewed both the low density CAT Scan and x-rays that were taken at Hampshire Hospital on January 15, 2004. I note that the x-rays revealed that Pat suffered a fracture of the left front area of the skull. I also reviewed the CAT Scan, which read as abnormal and revealed the presence of a subdural hematoma. The hematoma was caused by the blow to Pat's skull. Further, the CAT Scan revealed the presence of acute blood, which would be caused by a recent injury to the skull.

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

I am a board-certified neurologist in the State of New Hampshire. I graduated from Harvard Medical School in 1981 and did my residency at Mary Hitchcock Hospital in Hanover, N.H. I began my practice in Concord in 1987. I have been qualified as an expert in more than a hundred cases involving neck and head injuries.

Attorney Friberg  
March 22, 2004  
Page Two

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

I look forward to working with your office again.

Sincerely,

/s/ Lorne(a) Worsley, M.D.

Lorne(a) Worsley, M.D.

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**Docket No.: #04-C-00123**

**AFFIDAVIT OF TERRY SAWCHUK**

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

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

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

On January 15, 2004, the Olympic team was playing an exhibition game with the Concord Chuggers at the Everett Arena in Concord, New Hampshire. We had set up this game as part of our training in preparation for the 2006 Winter Olympics. The game also served as a fund raiser in part for the team and for some local charity. I was performing my duties as head coach in the bench area the second period when the altercation occurred. Chris LePuck, in my opinion, was an excellent hockey prospect who probably could have played for this team in the Olympics. Since this incident we have had to drop Chris from the roster. There was a question as to whether Chris could have made the team this year because of her/his youth and inexperience, so I was giving her/him a regular shift on the ice to get a good look at her/him before making a final decision regarding her/his status with the club.

Chris was skating on left wing when Pat Dunn tripped her/him. Since Chris was not carrying the puck, the referee probably didn't call the penalty just to keep the play going. I saw Chris reach out with her/his stick to try and get back on her/his feet. It looked to me like she/he accidentally tripped Dunn. Dunn then hauled off and hit Chris with her/his gloved hand. Hockey players are never supposed to hit with a gloved hand. It's almost like using brass knuckles. Also, in Olympic hockey there's no fighting

like there is in professional hockey. There, fighting is part of the game. Our players are not used to fights so they don't have the experience. This is Dunn's fault for instigating the fight.

/s/ Terry Sawchuck  
Terry Sawchuck

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

Subscribed and sworn to, before me, the undersigned officer, by Terry Sawchuk on this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public / Justice of the Peace

**STATE OF NEW HAMPSHIRE**

**MERRIMACK COUNTY**

**SUPERIOR COURT**

**PAT DUNN**

**v.**

**CHRIS LePUCK**

**Docket No.: #04-C-00123**

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

Q. Would you state your full name please.

A. Toni (Tony) MacDonald.

Q. What is your education and work experience?

A. I earned a Bachelor of Science degree in Biology from Franklin and Marshall College in 1980, a Medical Degree from the University of Texas in 1986. I served as a resident and fellow at Massachusetts General Hospital from 1986 to 1990. I am currently practicing medicine at Massachusetts General Hospital and am a part-time medical professor at the Boston University School of Medicine.

Q. Do you have any area of specialty?

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

Q. You have been asked here to give your expert opinion concerning the injury sustained by Pat Dunn on the night of January 15, 2004. Is that correct?

A. Yes.

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

A. Yes. I do.

Q. What is your opinion?

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

Q. Please elaborate.

A. During my examination of Ms./Mr. Dunn, I asked her/him if she/he ever sustained an injury to her/his head prior to the January 15, 2004 injury.

Q. What did she/he say?

- A. That when she/he was ten years old, she/he fell off a bicycle and cut her/his head on a rock.
- Q. Doctor, have you had a chance to review Ms./Mr. Dunn's medical records from her/his fall from the bike?
- A. Yes I have.
- Q. What treatment, if any did Ms./Mr. Dunn receive for the head injury?
- A. Pat lost consciousness and was brought to the hospital by ambulance. There, Pat was examined, and diagnosed with a large contusion on the left front part of the head. Pat regained consciousness after 10 minutes, received 20 sutures and released one week later.
- Q. Doctor MacDonald, have you had a chance to review Ms./Mr. Dunn's medical records from the injury she/he sustained when struck by the hockey stick?
- A. Yes, I have.
- Q. What is Mr. Dunn's current medical condition with respect to her/his head?
- A. There is blood on Pat's brain. There is medical evidence that, at some time in the past, Pat sustained a hair-line fracture of the left frontal skull as well as a subdural hematoma, and that Pat has fully recovered from that injury. Also, the medical evidence shows that Pat has fully recovered from the accident on January 15, 2004. In other words, Pat has sustained no permanent injury from the January 15, 2004 accident.
- Q. Doctor MacDonald, do you have any opinion as to the cause of Pat's head injury?
- A. Yes. In my opinion, Pat's laceration on the skull was due to a fall on the ice, but the laceration was the only injury that occurred to Pat on January 15, 2004. Pat's current injury is attributable to the fall she/he sustained from the bike. According to the medical evidence, the hair-line fracture of the left front area of the skull as well as a subdural hematoma was caused by the bike accident which occurred many years ago, and not by the January 15, 2004 injury.
- Q. What do you base your opinion upon?
- A. I have read all medical records from this case, including the CAT scan taken at Hampshire Hospital, which revealed that the fracture had calcified and the presence of a subdural hygroma, or old blood, which would only come from an old injury. If the hematoma were from a recent injury, then the CAT scan would have shown what is called, "acute blood."

# HAMPSHIRE HOSPITAL

83 FREEDOM DRIVE  
CONCORD, NH 03101  
PH: (603) 271-5555  
FAX: (603) 271-5550

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## EMERGENCY ROOM REPORT RECORD OF ADMITTANCE

**Date:** January 15, 2004

**Patient Name:** Pat Dunn

**Date of Birth:** 3/4/66

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

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

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

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

**Prognosis:** Unknown.

**Other Remarks:** The patient was admitted by ambulance and was unconscious at the time of admittance. The patient was playing ice hockey after reportedly being hit in the left side of the forehead with a hockey stick. The patient regained consciousness before admittance, evidently being unconscious for a total of 10 minutes. The patient appeared lucid in light of her/head injury.

The left frontal area of the skull was lacerated. The x-rays revealed a hair-line skull fracture; the CT scan revealed subdural fluid collection.

February 21, 2006

Pat Dunn  
North Main Street  
Concord, NH 03110

Dear Pat,

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

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

Hockey Forever,

/s/ Chris LePuck

Chris LePuck

June 10, 2005

Jamie Friberg  
Attorneys at Law  
11 Goalie Way  
Concord, N.H. 03110

Dear Attorney Friberg:

Thanks so much for taking my case. I have complete confidence in you. As you know, I have a lot of medical bills to pay for since my injury in January of 2004. Also, my head has been bothering me a lot. I had headaches before the accident because of my bike injury as a child, but nothing like I have now.

Thanks again.

Your client,

/s/ Pat Dunn

Pat Dunn

L. O. WORSLEY, M.D.  
259 PLEASANT STREET  
CONCORD, NH 03301

EDUCATION

- 1970 – 1974 YALE UNIVERSITY  
B.S., Biology
- 1975 – 1977 HARVARD SCHOOL OF PUBLIC HEALTH  
M.S., Public Health
- 1977 – 1981 HARVARD MEDICAL SCHOOL  
M.D.

RESIDENCY

- 1981 – 1987 MARY HITCHCOCK HOSPITAL  
Hanover, New Hampshire  
*Neurology*

BOARD CERTIFICATION

- American Board Psychiatry & Neurology  
*Lifetime*

# TONI (TONY) MAC DONALD

Massachusetts General Hospital

55 Fruit Street

Boston, MA 02114-2696

## EDUCATION

1980 Franklin and Marshall College  
B.S., Biology

1986 University of Texas Medical School  
M.D.

## RESIDENCY

1986 – 1989 Massachusetts General Hospital  
Neurology

## FELLOWSHIP

1990 Massachusetts General Hospital

## BOARD CERTIFICATION

American Board Psychiatry & Neurology

## SPECIALTY

Neurology

## TEACHING

Boston University School of Medicine, Adjunct

## **Applicable Laws / Jury Instructions**

### **Negligence Defined**

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

### **Foreseeability**

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

### **Instinctive Action**

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

### **Last Clear Chance**

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

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

## **Comparative Fault**

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

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

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

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

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

## **Rules of Evidence**

### **Rule 406. Habit; Routine Practice**

Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization, on a particular occasion, was in conformity with the habit or routine practice.

### **Rule of Evidence 409. Payment of Medical or Similar Expenses**

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

### **Rule 501. General Rule**

*There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are:*

1. *communications between husband and wife;*
2. *communications between attorney and client;*

3. *communications among grand jurors;*
4. *secrets of state; and*
5. *communications between psychiatrist and patient.*

**Rule 704. Opinion on Ultimate Issue**

(a) *opinion or inference testimony* otherwise admissible is not objectionable because it embraces an issue to be decided by the trier of fact.

(b) *In a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.*

**Rule 601. General Rule of Competency**

Every person is competent to be a witness.

**Rule 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless *the witness has personal knowledge of the matter*. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, related to opinion testimony by expert witnesses. (See Rule 2.2.)

**Rule 607. Who may Impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness.

**Rule 608. Evidence of Character and Conduct of Witness**

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence, or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be asked on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination with respect to matters related only to credibility.

**Rule 609. Impeachment by Evidence of Conviction of Crime**

*(this rule applies only to witnesses with prior convictions.)*

(a) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that a witness other than the accused has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of one year, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) **Time Limit.** Evidence of a conviction under this Rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the Court determines that the value of the conviction substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence

(c) **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible if (1) the conviction has been the subject of a pardon or other equivalent procedure based on a finding of the rehabilitation of the person convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Not applicable.

#### **Rule 611. Mode and Order of Interrogation and Presentation**

(a) **Control by Court.** The Court shall exercise reasonable control over questioning of witnesses and presenting evidence so as to:

6. make the *questioning* and presentation effective for ascertaining the truth,
7. to avoid needless *use* of time, and
8. protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross examination.** *The scope of cross examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness' statement, including all reasonable inferences that can be drawn from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.*

(c) **Leading questions.** Leading questions should not be used on direct examination of a witness (except as may be necessary to develop the witness' testimony). Ordinarily, leading questions are permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, leading questions may be used.

(d) **Redirect/Re-cross.** *After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney on re-cross, but such questions must be limited to matters raised on redirect examination and should avoid repetition.*

#### **Rule 612. Writing Used to Refresh Memory**

*If a written statement is used to refresh the memory of a witness either while or before testifying, the Court shall determine that the adverse party is entitled to have the writing produced for*

*inspection. The adverse party may cross examine the witness on the material and introduce into evidence those portions which relate to the testimony of the witness.*

### **Rule 613. Prior Statements of Witnesses**

Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate.

### **Rule 803. Hearsay Exceptions, Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical conditions. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for the purpose of medical diagnosis or treatment.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a judgment finding a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

#### **Rule 804. Hearsay Exceptions, Declarant Unavailable**

**(a) Definition of unavailability.** “Unavailability as a witness” includes situations in which the declarant -

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

**(2) Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

**(3) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

**(4) Statement of personal or family history.** (A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood,

adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

**(6) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

**Rule 805. Hearsay within Hearsay**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules. The Host State has the obligation to review Hearsay Rules and make recommendations on omissions or additions to the Hearsay Instructions.

**Breagy v. Stark, 138 N.H. 479 (1994) .<sup>1</sup>**

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

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

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

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

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

and brain injuries as a result of being hit by the ball. Among others, the plaintiff sued the player who threw the errant ball.

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

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

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

<sup>1</sup> If teachers/coaches would like full copies of the cases described below, please contact the New Hampshire Bar Association.