AMERICAN ASSOCIATION FOR JUSTICE

2008 NATIONAL STUDENT TRIAL ADVOCACY COMPETITION

OFFICIAL RULES

And

FACT PATTERN

Endowed by Baldwin & Baldwin, L.L.P.
Important Dates

Requests for fact pattern clarification due: January 3, 2008
Answers to requests for fact pattern clarification by: January 31, 2008
Final list of students on team(s) due: February 8, 2008
Students must be members of AAJ by: February 8, 2008
Regional competitions: March 7 - 9, 2008
Final competition: April 4 – 6, 2008, West Palm Beach, FL

The competition fact pattern is copyrighted by the American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America, and may not be used for purposes other than its intended use without the express written consent of AAJ.

AAJ’s 2008 Fact Pattern is authored by James B. Lees of Charlestown, West Virginia.

Please note!
All information regarding the 2008 National Mock Trial Competition is also available on AAJ’s Web site, at www.justice.org, and will be updated frequently.

All questions and correspondence should be addressed to:

Nathalie Etori, AAJ Membership
Gina Spear, AAJ Membership
American Association for Justice
1050 31st Street, N.W.
Washington, D.C. 20007
nathalie.etori@justice.org
gina.spear@justice.org
202-965-3500 or 800-424-2725
Fax: 202-625-7084
GENERAL INFORMATION

One of AAJ's goals is to inspire excellence in trial advocacy through training and education for both law students and practicing attorneys. One way AAJ accomplishes this goal is by sponsoring a national student mock trial competition. This is an exceptional opportunity for law students to develop and practice their trial advocacy skills before distinguished members of the bar and bench.

Because the purpose of this competition is to give law students the opportunity to develop their trial skills, the actual merits of the plaintiff's case and the defendant’s case presented are irrelevant to this purpose. **The competition is not to be decided on the merits of the plaintiff's or defendant's case.**

Requests for Clarification
Any requests for clarification about the rules or fact pattern must be made in writing and received no later than January 3, 2008 to Nathalie Etori, AAJ Membership, at the address on page 1. **Each school is limited to asking no more than five (5) questions.** Questions will be distributed by January 31, 2008.

Rule Violations and Filing of Complaints
A violation of any of the rules governing the National Student Trial Advocacy Competition shall subject the violators to penalty or disqualification.

If a team has a dispute, the team coach should bring the problem/complaint to the regional coordinator's attention immediately. The regional coordinator will review the complaint and make a ruling which shall be binding for the respective rounds of competition. Decisions regarding any or all aspects of the competition will be made in keeping with the rules and objectives of the program.

A team may file a formal complaint with AAJ by putting in writing the nature of the complaint and the surrounding circumstances. All complaints should be sent to Nathalie Etori at the address on page 1. Complaints must be submitted in writing no later than seven (7) days following the last day of the competition. Complaints will be brought to AAJ's Law Schools Committee for consideration and final resolution.

LAW SCHOOL & STUDENT ELIGIBILITY

The competition is open to all law schools nationwide. A law school may enter up to two teams. Each team shall be comprised of four law students. A school's selection method of its trial team(s) is left for the school to determine. However, for a student to be eligible, he or she must be enrolled for a J.D. degree and be a student member of AAJ.

Students who graduate in December 2007, are eligible to participate only if the competition counts toward their credits for graduation and they will not be admitted to practice prior to March 2008.
Each student participant must be an AAJ student member by February 8, 2008, in order to participate.

REGISTRATION PROCEDURES

Refund Policy
Requests for a refund of a school's registration fee were due in writing before November 26, 2007. It is inevitable that a few teams drop out of the competition in the months leading up to the regionals. Teams placed on the waiting list because the competition is full will be contacted for participation in the order that their registrations were received. Teams on the waiting list will also be issued a refund check if it is determined that the team will not be competing. Schools that registered two teams, but are only able to enter one team because the competition is full, will receive a refund of the registration fee for the second team.

AAJ Student Membership
Student team members must be AAJ members by February 8, 2008, in order to participate. Please call AAJ's member hotline at 800-424-2727 to determine whether students on the team are current members and that their memberships will be active at the time of the competition. AAJ Student membership dues are $15. To become a member or to renew a membership, you may complete an application online at http://www.justice.org/lawstudents or call AAJ's member hotline at 800-424-2727 and join over the phone. Students should indicate that they are Student Trial Advocacy Competition participants.

Student and Coach Registration
AAJ needs to receive the names of the participating students and coach for each team. Each team must complete a team registration form and return it to AAJ by February 8, 2008. Please be sure to include the complete mailing address, date of birth and graduation date for each student on the team registration form. This information is required to process the team registration.

Student Substitution Policy
Substitution of team members after February 8, 2008, is not permitted except in the case of personal emergencies. Requests for substitution after the February 8, 2008, deadline must be made in writing with an explanation of why the substitution is needed and sent to Nathalie Etori at AAJ for consideration.

REGIONAL AND FINAL COMPETITION ASSIGNMENTS

Entering teams will be assigned to one of fourteen regional competitions based on geographical convenience to the extent possible. Teams from the same law school will be assigned to the same region. If a school's second team is waitlisted, there is no guarantee that second team will be sent to the same region as the first team. Teams will be notified of any date changes when regional assignments are made.
A coach or an advisor must accompany each team to the regional and the final competitions. This does not have to be the same person for both the regional and the final competition. A coach or an advisor cannot be a competing student.

The winning team from each regional competition will advance to the National Final Competition in West Palm Beach, FL, April 4-6, 2008. One team from each region will be declared the Regional Winner.

Travel expenses for the regional and final competitions are the responsibility of the participants. Teams competing in past competitions have obtained funds from law school deans and alumni associations, members of the local legal community, state and local trial associations, and AAJ law school chapters.

**COMPETITION FORMAT**

There will be no trial brief writing competition. Each team will consist of four law students. Two students will be advocates and two students will play the witnesses for their side in each round. Advocates and witnesses may change their roles from round to round but roles must remain consistent throughout each individual trial.

**In the regional competitions:**
- each team will compete in three qualifying rounds
- the top four teams from the qualifying rounds will advance to a single elimination semi-final round
- the top two teams from the semi-final round will compete to determine which one team will advance to the National Finals

**In the final competition:**
- each team will compete in three qualifying rounds
- the top eight teams from the qualifying rounds will advance to a single elimination quarter-final round
- the top four teams from the quarter-final round will advance to a single elimination semi-final round
- the top two teams from the semi-final round will advance to a single elimination final round

**Regional Team Pairings in Qualifying Rounds**
Pairing of teams in the qualifying rounds will be at random and conducted during the coaches' meeting prior to each competition. Each team will represent both plaintiff and defendant in the first two rounds. No two teams shall compete against each other more than once in the qualifying rounds. Teams from the same school will not compete against each other during any of the rounds of the regional competition or in the qualifying rounds of the national final competitions.

**Team Rankings in All Other Rounds**
In the semi-final round, the first ranked team will meet the fourth-ranked team, and the second-ranked team will meet the third-ranked team.
Regional semi-final round (Normal pairings: 1 v. 4; 2 v. 3)

Situation 1: Teams ranked 1 and 4 are from the same school
New pairings: 1 v. 3; 2 v. 4

Situation 2: Teams ranked 2 and 3 are from the same school
New pairings: 1 v. 3; 2 v. 4

The ranking of teams to determine the semi-finalists and finalists will be determined by the following factors (in this order):
1. Win/Loss record
2. Number of winning votes
3. Number of total points awarded to the team

If there is an odd number of teams competing at a regional competition, one team in each round will receive a "bye" chosen by lot. For ranking purposes, a bye will count as a win with 3 winning votes and the points will be determined by averaging the points from the team's other two qualifying rounds.

NATIONAL FINALS: Quarter-final round (Normal pairings: 1 v. 8; 2 v. 7; 3 v. 6; 4 v. 5)

Situation 1: Teams ranked 1 and 8 are from the same school
New pairings: 1 v. 7; 2 v. 8; 3 v. 6; 4 v. 5

Situation 2: Teams ranked 2 and 7 are from the same school
New pairings: 1 v. 7; 2 v. 8; 3 v. 6; 4 v. 5

Situation 3: Teams ranked 3 and 6 are from the same school
New pairings: 1 v. 8; 2 v. 7; 3 v. 5; 4 v. 6

Situation 4: Teams ranked 4 and 5 are from the same school
New pairings: 1 v. 8; 2 v. 7; 3 v. 5; 4 v. 6

Semi-final round (Normal pairings: 1 v. 4; 2 v. 3)

Situation 1: Teams ranked 1 and 4 are from the same school
New pairings: 1 v. 3; 2 v. 4

Situation 2: Teams ranked 2 and 3 are from the same school
New pairings: 1 v. 3; 2 v. 4

If teams from the same school are matched to compete based on rank in the semi-final and final rounds of a regional competition, regional hosts will re-pair teams according to the following scenarios:

Determination of Team Representation
If the four national and regional semi-final teams have already met in the qualifying rounds, they will represent different sides from the previous confrontation. If they have not yet met, each
team will take the side they represented only once in qualifying rounds. If matched teams represented the same side only once, the winner of a coin toss will choose sides.

The national finals semi-final teams will represent a different side than in the quarter-final round. If matched teams represented the same side in the quarter-final round, the winner of a coin toss will choose sides. The two national final teams will represent a different side than in the semi-final round. If matched teams represented the same side in the semi-final round, the winner of a coin toss will choose sides.

THE TRIAL

The competition involves the trial of a civil lawsuit. The same fact pattern will be provided to all participants for use in both the regional and final competitions.

The Federal Rules of Evidence (FRE) and Federal Rules of Civil Procedure shall control. Only these rules, and the law provided in the fact pattern, shall be used in argument. Specifically, no statutory, regulatory, or case law shall be cited except for what is provided in the fact pattern. Students may argue the comments or advisory notes to the Federal Rules of Evidence but may not cite the cases contained therein. No written briefs or motions, trial notebooks, or other written materials should be presented to the court.

No pretrial motions of any kind are allowed. Directed verdict arguments and objections are allowed.

The trial will consist of the following phases by each team in this order:
- Opening Statement
- Direct examination of lay witness and re-direct examination (if any):
- Cross-examination of lay witnesses (no re-cross-examination)
- Direct examination of expert witness and re-direct examination (if any):
- Cross-examination of expert witness (no re-cross-examination)
- Summation

Order of witnesses is as follows:
1. Colin/Edward Ward, plaintiff
2. Dr. Curall Eton, plaintiff’s expert
3. Dr. W.F. Bark, defendant
4. Dr. Wesson Smith, defendant’s expert

*If the role of “Colin Ward” is played by a female, teams may opt to change the name of “Ellen Ward” to “Edward Ward”. If this is the case, “Edward Ward” will then become the lawful husband, and “Colin Ward” the lawful wife.

Team members acting as advocates must participate in three of the six phases of the trial. Opening statement and summation may not be done by the same person. Each team must be prepared to argue both sides of the case. Pairing in the qualifying rounds will be at random, with each team representing both plaintiff and defendant at least once in the three rounds.
Except in the final round, the courtrooms will be off-limits to all team members, coaches, friends, and family members who are not associated with either team competing, unless their team has already been eliminated from the competition. There is to be no coaching of the team by anyone during a round, including any recesses or breaks. If a team is found to be violating this rule, the regional coordinator may choose to disqualify the team from the remainder of the competition.

Teams may videotape their trials only during the competition, so long as no additional lighting is employed, and it does not interfere with the trial. Further, all participants of the round must agree including, but not limited to, the presiding and scoring judges, the competing students and the coordinator.

Since this matter is bifurcated, and the jury will only consider the issues of liability, there will be no evidence presented on the issues of damages. There are no third party actions pending.

**Timing of the trial**
- Each team will have 80 minutes to complete its argument.
- The time limit will be strictly enforced, although it is not necessary that all time allotted be used.
- There will be no time limits for specific aspects of the trial.
- Time on cross-examination is charged against the team conducting the cross-examination.
- Time will be stopped for objections and responses to objections.
- Performance at trial will be evaluated by a panel of judges and/or attorneys, one of whom will preside over the trial as Judge, making rulings as necessary, and the remainder (up to three) of whom will act as the jury.

**Facts outside the Record**
Teams must confine their presentation to the facts given in the fact pattern and inferences which may reasonably be drawn therefrom ("the Record") and any matters judicially noticeable under Rule 201 of the Federal Rules of Evidence. An "inference" is **not** any fact you might wish to be true; rather, it is a fact that is **likely** to be true, given the other facts in the case. Except during closing argument, no objection shall be made that the opposing team is "going outside the Record," and any breach of the rule shall be addressed instead by means of impeachment. Witnesses must admit, if asked, and if true, that the facts they have testified to are not in their deposition or otherwise in the record. Witnesses may not qualify this admission in a misleading way by saying, for example, that they were not asked about these facts during their deposition, or that the facts were contained in some other portion of the deposition, which was omitted from the record. The answer should simply be: "No, I did not say that in my deposition." The judges will be instructed concerning the significance of this form of impeachment in the mock trial context, and they are likely to account for **unfair** additions to the record (i.e., inferences which may not reasonably be drawn from the record or matters not judicially noticeable under FRE Rule 201) in their scoring of the witness' team.
WITNESSES

Every effort has been made to make the parties and witnesses to this case gender neutral. In some instances the language would have been too awkward. You may use either sex or the appropriate pronouns for any witness.
Assume that all the witnesses have seen the exhibits and depositions. Witnesses know only the facts contained in the background information, exhibits and depositions. Assume all depositions are signed and sworn. The same attorney conducting direct examination of a witness shall also conduct any redirect examination. Witnesses may not be re-called.

"The Rule" of sequestration of witnesses will not be invoked during any trial.

JURY INSTRUCTIONS

Assume that the instructions provided in the fact pattern are the only instructions to be given and are not subject to motion or modification. They are the only statements of the applicable substantive law. No additional instructions may be tendered. There is no need to number the jury instructions as they do not need to be referred to by number.

EXHIBITS

The use of demonstrative evidence is limited to that which is provided in the fact pattern. Participants are free to enlarge any diagram, statement, exhibit or portion of the fact pattern, only if substantially identical.

Counsel and witnesses may draw or make simple charts and drawings in court for the purpose of illustrating the direct or cross-examination of argument. They may not be prepared in advance. However, no demonstrative evidence outside the given facts may be "created" for the purpose of this competition. Participants should clear all demonstrative evidence with the regional coordinator at the coaches’ meeting preceding the rounds of competition.

All exhibits are authentic and genuine, and assume that they have been authenticated for trial purposes. All medical records are deemed certified copies.

SCORING CRITERIA

Performance at trial will be evaluated by a jury made up of a panel of three judges and/or attorneys. Each member of the jury may award up to five points in each phase of trial for both the plaintiff and defendant. A sample score sheet is attached for your review.

In the event a jury member awards the same number of points to the plaintiff and defendant, he/she will award one point to either plaintiff or defendant for effectiveness of objections and/or overall case presentation in order to break the tie. Judges have been instructed not to score teams on the merits of the case.
The ranking of teams to determine the quarter-finalists after the qualifying rounds will be determined by the following factors (in this order):

1. Win/Loss record after three rounds
2. Number of winning votes after three rounds
3. Number of total points awarded to the team after three rounds

After the rankings for the semi-final round in the regional and the quarter-final round in the final are determined, cumulative scores will be disregarded in determining rankings of subsequent rounds. Only the scores of the subsequent round will be used to determine rankings.

If there are an odd number of teams competing at a regional competition, one team in each round will receive a "bye" chosen by lot. For ranking purposes, a bye will count as a win with 3 winning votes and the points will be determined by averaging the points from the team's other two qualifying rounds.

The following criteria for scoring trial performances are set forth to assist both judges and student advocates. Judges are not limited to these criteria and may consider other aspects of strategy, technique, etc., which they view as important.

**OPENING STATEMENT**

*Did Counsel...*

1. Generally confine statement to an outline of the evidence that would be presented?
2. Clearly present counsel's theory of the case?
3. Persuasively present counsel's theory of the case?
4. Personalize self and client?
5. Allow opposing attorney to make argument during opening statement?
6. Make unnecessary objections?

**EXAMINATION OF WITNESSES**

*Did Counsel...*

1. Ask questions that generated a minimum of valid objections?
2. Make/fail to make objections with tactical or substantial merit?
3. Respond appropriately to objections made?
4. Know the rules of evidence and express that knowledge clearly?
5. Develop rapport with the witness?
6. Maintain appropriate general attitude and demeanor?
7. Address court and others appropriately?
8. Demonstrate awareness of ethical considerations?

*Did direct examiner...*

9. Unnecessarily use leading questions?
10. Develop testimony in an interesting and coherent fashion?
11. Follow up on witness' answers?
12. Present the witness in the most favorable light?

*Did cross-examiner...*

13. Appropriately use leading questions?
14. Control witness?
15. Follow up on answers and elicit helpful testimony?
16. Use impeachment opportunities?

CLOSING ARGUMENT
Did Counsel...
1. Present a cohesive theory of the case pulling all the positive arguments together?
2. Deal effectively with the weakness in his or her own case?
3. Make an argument that was persuasive?
4. Have an effective style of presentation?
5. Utilize the law effectively in the argument?
6. Inappropriately interrupt the argument of the opposing counsel?
7. Properly confine rebuttal to rebuttal matters?
8. Effectively counter the opponent's speech in rebuttal

Judges Shortage
For each match, there must be three votes from judges. In the event that there are not three actual judges in a particular match, one or two "ghost" judges will be used to score the round. The vote of one or two ghost judges is determined by calculating the average of the other judges in the session. In the event that there is only one actual judge for a particular session, the score to use for the two absent judges will be the actual score of the judge that is present.
AMERICAN ASSOCIATION FOR JUSTICE

Mission

The Mission of the American Association for Justice is to promote a fair and effective justice system — and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms, even when taking on the most powerful interests.
About Trial Lawyers

Trial lawyers ensure access to the civil justice system for the powerless in America—working families, individual workers, and consumers who often lack the resources to take their grievances to court.

Trial lawyers play a valuable role in protecting the rights of American families. They champion the cause of those who deserve redress for injury to person or property; they promote the public good through their efforts to secure safer products, a safe workplace, a clean environment and quality health care; they uphold the rule of law and protect the rights of the accused; and they preserve the constitutional right to trial by jury and seek justice for all.

Some of the types of cases our attorneys handle include:

- A child paralyzed after being struck by a drunk driver;
- A young woman unable to have children because of a medical mistake;
- A person denied a promotion due to racial discrimination;
- An elderly man injured in a nursing home; and
- A community whose water was made toxic by a local manufacturer.

About the American Association for Justice

As the world's largest trial bar, AAJ promotes justice and fairness for injured persons, safeguards victims' rights—particularly the right to trial by jury—and strengthens the civil justice system through education and disclosure of information critical to public health and safety. With more than 45,000 members worldwide, and a network of U.S. and Canadian affiliates involved in diverse areas of trial advocacy, AAJ provides lawyers with the information and professional assistance needed to serve clients successfully and protect the democratic values inherent in the civil justice system.

AAJ Law Student Benefits

Mentor Program — You'll be paired with an experienced trial lawyer who will share valuable guidance.

Student Newsletters—You'll receive From Classroom to Courtroom, the AAJ Law Student newsletter that brings you professional advice as well as news about upcoming law student events.

Student Chapters—A Network of Your Own—Chapter programs concentrate on areas of law that most interest your group. AAJ works closely with the chapters, providing lecturers and program ideas.

Law School Ambassador Program—AAJ member “ambassadors” give talks at various law schools to give students a true view of what it's really like to be a trial lawyer.
You’ll receive a Free Legal Seminar Audio recording When You Join — Take your choice from a comprehensive list of legal topics.

Law Student Information Web Page — With www.justice.org/lawstudents, you can conduct research and participate in the AAJ Law Student list server.

AAJ’s Authoritative Legal Publications—Stay up-to-date with your free subscriptions to TRIAL, AAJ’s award-winning monthly magazine, and Law Reporter, a case-reference journal.

AAJ’s Annual Student Mock Trial Competition — You’ll be eligible for AAJ’s annual Student Mock Trial Competition, the nation’s premier mock trial competition.

Network with Top Trial Lawyers—AAJ’s Annual and Winter Conventions cover every aspect of trial law—all at an 85% discount for Law Student members.

Scholarships—AAJ offers several scholarships to Law Student Members.

**How to Join**
The yearly dues are only $15. Call AAJ at 800-424-2725 ext. 611 or visit www.justice.org/lawstudents.
AAJ MEMBERSHIP APPLICATION

AAJ member Benefits
If you’re not an AAJ student member, join now for only $15 and enjoy all these benefits:

- Award-winning legal publications to keep you up to date — TRIAL, AAJ’s magazine, and From Classroom to Courtroom, AAJ’s law student newsletter
- Mentor programs — pair you with an experienced trial lawyer to share advice and guidance
- AAJ conventions — provide networking and educational opportunities
- www.justice.org — participate in active legal forums and access AAJ’s resources on the Internet
- Trial lawyer seminars — law students may attend open seminars for free
- Student Trial Advocacy Competition — participate in the nation’s premier mock trial competition
- Scholarships — AAJ offers several for law students
- Law School Ambassador Program — AAJ member “ambassadors” give talks at various law schools to give students a true view of what it’s really like to be a trial lawyer
- AAJ Membership directory on CD, for networking, finding a mentor, etc.

Please print or type

Name ____________________________

Address __________________________

City/State/ZIP _______________________

Home Telephone _____________________

Law School Name ____________________

Work Telephone _______________________

Fax ________________________________

E-mail ______________________________

Date of Birth _________________________

Expected Graduation Date ____________

Payment Information:
A check is enclosed (payable to AAJ) for $15

Charge $15 to my:

___ MasterCard  ___ Visa  ___ American Express

Card # _____________________________

Date ______________________________

Name (if different on card) ____________

Signature __________________________

Dues cover 12 full months of membership and include one-year member subscriptions of TRIAL magazine ($40) and Law Reporter ($75). Membership dues paid to the American Association for Justice (AAJ) are not tax deductible as charitable contributions for income tax purposes. However, dues may be tax deductible as ordinary and necessary business dues and expenses subject to restrictions imposed as a result of AAJ’s lobbying activities. AAJ estimates that the portion of dues and other similar amounts that it expects to receive that are allocable to AAJ’s lobbying expenditures in 2006 is 20%. Accordingly, 20% of your 2007 payment to AAJ may not be deducted as ordinary and necessary business expenses.

To join AAJ:
Mail this form to: AAJ Membership, P.O. Box 3717
Washington, DC 20027-0217
or Fax with credit card information to: 202-298-6849

Questions? Call 800-424-2725, ext. 593

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2008 AAJ STAC FACT PATTERN
IN THE CIRCUIT COURT OF WASHINGTON COUNTY, NEW COLUMBIA

Colin Ward, Administrator of the
Estate of Ellen Ward, Deceased:

Plaintiff

v.

W.F. Bark, M.D.

Defendant

CASE NO: W-NC-07-110

COMPLAINT

1. Colin Ward, a resident and citizen of Washington County, New Columbia, is the duly appointed Administrator of the Estate of Ellen Ward, deceased, having been so appointed on March 23, 2006 by the County Commission of Washington County, NC.

2. W.F. Bark, MD, is a resident and citizen of Washington County, NC, and is a physician licensed by the State of New Columbia.

3. The acts complained of herein occurred in Washington County, New Columbia. The amount in controversy exceeds the jurisdictional limit for jury trials in New Columbia.

4. Ellen Ward was born on January 14, 1960 and was the lawful wife of Colin Ward, having been married on April 28, 1987.

5. In and about July 23, 2003 Ellen Ward visited the offices of defendant W.F. Bark, MD, a family physician lawfully practicing medicine in Washington County, New Columbia. The purpose of the office visit was to have the defendant examine a lump on the left breast of Ellen Ward.

6. On said date the defendant examined Ellen Ward and diagnosed the lump as “fatty tissue”. The defendant sent Ellen Ward for a mammogram and later reported to Ms. Ward that her mammogram test results were “normal”. Ellen Ward then did not see the defendant for approximately one year thereafter.

7. On or about June 30, 2004 Ellen Ward returned to the offices of the defendant in response to a letter from the defendant to schedule a yearly mammogram.
8. On said date the defendant examined Ellen Ward and determined that the original lump on the left breast of Ellen Ward was now larger. The defendant referred Ellen Ward to a surgeon for further evaluation.

9. On or about July 2, 2004 underwent a biopsy procedure which confirmed cancer of the left breast, Stage IV, with metastasis to the spine.


11. This action is commenced pursuant to 16 New Columbia Code Section 18-43 entitled “Wrongful Death Proceedings”.

COUNT I
NEGLIGENCE

12. Paragraphs 1-11 are incorporated by reference herein as if fully set forth herein.

13. On or about July 23, 2003 and thereafter the defendant W.F. Bark MD was negligent in and among other matters:

a) he failed to refer Ellen Bark to a surgeon for further evaluation;
b) he failed to order a biopsy of the lump in the left breast of Ellen Ward;
c) he failed to diagnose cancer in the left breast of Ellen Ward;
d) he failed to properly follow-up with Ellen Ward;
e) for such other matters that may become apparent in the discovery of this case.

14. As a direct and proximate result of the aforesaid negligence of the defendant Ellen Ward died. Alternatively as a direct and proximate result of the aforesaid negligence of the defendant Ellen Ward was deprived of a substantial chance of living.

15. As a further direct and proximate result of the aforesaid negligence Colin Ward and his two children have suffered and will continue to suffer funeral costs and expenses; loss of the income of Ellen Ward; loss of the love, companionship, and society of a loving wife and mother; and any and all other such damages as permitted by the law of the State of New Columbia.
WHEREFORE plaintiff demands judgment of the defendant in an amount to be determined by a jury, together with prejudgment and post judgment interest and costs. 
PLAINTIFF DEMANDS A TRIAL BY JURY.

Colin Ward  
Legal Administrator of the  
Estate of Ellen Ward  

By Counsel:
IN THE CIRCUIT COURT OF WASHINGTON COUNTY, NEW COLUMBIA

Colin Ward, Administrator of the
Estate of Ellen Ward, deceased;

Plaintiff

v.

W.F. Bark MD

Defendant

CASE NO: W-NC-07-110

ANSWER

Now comes the defendant W.F. Bark, MD, by counsel, and hereby fully and completely answers the Complaint filed against him in this matter as follows:

1. Admitted.

2. Admitted.

3. Defendant is without knowledge as to the allegations of paragraph Three of the Complaint and therefore denies the same.

4. Defendant is without knowledge as to the allegations of paragraph Four of the Complaint and therefore denies the same.

5. Admitted.

6. The defendant admits he sent Ellen Ward for a mammogram and that Ms. Ward did not return to his office until June of 2004. The remainder of paragraph Six of the Complaint is denied.

7. The defendant admits Ms. Ward visited his offices on June 30, 2004. The defendant is without knowledge as to the remainder of paragraph Seven of the Complaint and therefore denies the same.

8. The defendant admits he examined Ms. Ward on June 30, 2004 and that he referred Ms. Ward to a local surgeon. The remainder of paragraph Eight of the Complaint is denied.

10. The defendant admits Ellen Ward died on February 22, 2006. The defendant is without knowledge as to the remainder of paragraph Ten and therefore denies the same.

11. Paragraph Eleven of the Complaint is a legal conclusion to which no response is required.

12. No response is required to paragraph Twelve of the Complaint.


15. Denied.

Having fully answered each and every allegation of the Complaint, the defendant now sets forth the following AFFIRMATIVE DEFENSES:

COMPARATIVE NEGLIGENCE

The death of Ellen Ward was caused in whole or in part by the negligence of Ellen Ward and/or her husband Colin Ward.

WHEREFORE the defendant requests this matter be dismissed with prejudice and that the defendant be awarded his costs, expenses, and legal fees incurred in the defense of this matter.

W.F. Bark MD

By Counsel:
Deposition of Ellen Ward (now deceased)

Taken at the home of Ellen Ward on December 6, 2005
Present: Counsel for Plaintiff; Counsel for Defendant
Stenographic Deposition Only: Deponent would not consent to video.

Summary of Examination by Counsel for Plaintiff

My name is Ellen Ward. I am 45 years old. I was born on January 14, 1960 right here in Washington County. My Dad worked as an underground coal miner and my Mom was a stay-at-home Mom with me and my two sisters. I had a pretty normal childhood, and I graduated from Weirton High in 1978 near the middle of my class.

After High School I took some secretarial courses at the local community college, and from 1979 through my marriage to Colin in 1987 I worked at various secretarial jobs around the county. Colin and I knew each other in High School but we really didn’t start dating until about 1985. He asked me to go to the Drive Inn movie on the pretext that they were about to tear it down and we needed to see a “piece of history” of the county before it disappeared.

We were married on April 28, 1987 at the Weirton Presbyterian Church. After that, it was all the fairly normal American story. Robert was born in 1990 and I became a stay-at-home Mom. Maggie came along three years later, and my life consisted of running the kids here and there: school stuff, doctor appointments, sports, and all that kind of stuff.

I was always pretty healthy, and I generally only saw a doctor when I needed one. Colin did not always have health insurance. Depending upon the year and the job, and money always was tight. Generally if something was wrong I either treated it myself or stopped by the local Urgent Care.

I had heard about Dr. Bark from a friend who had known his Dad, so when I found the lump I thought I would try him. I read a lot of magazines and a lot of them recommend doing self breast exams. So I tried to do them, and somewhere during the spring or summer of 2003 I thought I felt something in my left breast. I didn’t tell Colin because I didn’t want to alarm him, and honestly I thought at first it was probably an ingrown hair or something. But when it didn’t go away I thought I would go see a doctor and get it checked.

I made an appointment and went to see Dr. Bark in late July of 2003. He seemed real nice, and he examined me with a nurse in the room. I remember him telling me that he was sure it was just fatty tissue but that he wanted me to get a mammogram just to make sure. I was obviously relieved and he gave me a prescription or a card or something to take over to the hospital to get the mammogram. I think I went that afternoon.

Anyway I hadn’t heard anything for a week so I called Dr. Bark’s office. A lady told me to hold on, that she would look it up. She came back on the line and told me that my test was normal. I thanked her, and obviously I was pretty happy. After that I just went on about my life. By that time I was delivering Meals on Wheels for a local food cupboard, and I think I was earning about $7,000 a year.

About a year later I received a letter from Dr. Bark’s office telling me it was time for my yearly mammogram. I called his office, made an appointment, and went in to see him.
When we first talked I told him the lump was still there and that it was somewhat bigger than before. He seemed concerned and began to look through my chart. When he examined me he got real concerned and asked me how long the lump had been there. I reminded him it had been there a year ago and that I really didn’t worry about it getting a little bigger since it was only fatty tissue. He told me I needed to go see a surgeon to get it checked. That was the last time I ever saw Dr. Bark.

Q: What did the surgeon tell you?

A: After the biopsy, he told me it was cancer and that it had spread. He told me I needed to see an oncologist. Since then my life has been one constant battle: two surgeries, chemo, radiation, and more chemo….it never ended.

Q: And now…?

A: And now I’m done. There’s nothing more I can do. I just don’t want to be in pain, but I also don’t want to miss whatever time I have left to talk with my children and my husband, and….. (Witness begins crying and a break takes place).

**Examination by Defense Counsel**

Q: Ms. Ward, I am truly sorry about your condition, but I do need to ask you just a few questions. Isn’t it true that back on your first visit to Dr. Bark he specifically told you to come back to his office in one week?

A: I don’t remember that. He told me to go get a mammogram and I did.

Q: If his office notes state: “patient to return in one week”, do you have any reason to dispute that?

A: I don’t remember him telling me to come back. If he told me to come back, I would. He told me to get a mammogram. I did. I called, they said it was normal, and I quit worrying about the lump.

Q: During the next almost 12 months you had to notice that the lump was growing, did you not?

A: I don’t know when I noticed, but sure, at some point I probably did notice. But it was fatty tissue, so I didn’t worry.

Q: Did it ever occur to you to come back in a month or two and have Dr. Bark re-check the lump?

A: No.
DEPOSITION OF COLIN WARD,
HUSBAND/ADMINISTRATOR

Mr. Ward married Ellen Ward in 1987. They had known each other in high school but did not begin dating until years after completing high school. Colin married Ellen on April 28, 1987 in her home town Presbyterian Church. They have two children; Robert, now 17, and Maggie, now 15. Mr. Ward is currently the service manager of the local G.M. dealership.

At the time of Ellen’s death, Robert was in the 11th grade and Maggie was in the 9th grade. Both children are healthy and both plan on attending college. Colin had called an attorney sometime in July or August of 2005 when it became apparent that Ellen’s cancer was not going to get better. The lawsuit was actually filed in November of 2005 while Ellen was still alive, and the attorneys had arranged to have Ellen deposed in December in order to “preserve her testimony”. After Ellen died Colin went to the courthouse at the request of the attorneys and was appointed Administrator of Ellen’s estate, as Ellen refused to prepare a Will before she died.

Colin and Ellen had separated for about one year in the mid to late 1990s. They had contemplated divorce but later reconciled. Colin describes the marriage as “solid” at the time of Ellen’s death.

Colin states that Ellen had told him in 2003 that she had gone to a doctor for a lump in her breast, but that the tests had come back normal. She had seemed very relieved.

He remembers her going back to the same doctor the following year and having to get a biopsy. That is when the diagnosis of cancer was made. Colin denies noticing anything wrong with Ellen’s breast prior to the diagnosis of cancer.

He continued to work during her treatment for cancer from July 2004 through her death in February of 2006, as the family needed the income. He said the treatments and her subsequent death were extremely hard on the children. He also states that Ellen was in a tremendous amount of pain the last few months of her life and constantly battled the need for pain medicine versus her wanting to stay awake and alert so that she could spend as much quality time as possible with her children.

Colin believes his wife certainly would have had a biopsy in July of 2003 if she had been told one was necessary. He does not believe she was ever told to have a biopsy at that time.

Colin states Ellen had been a housewife most of their married life, but in recent years had started to work for Meals-on-Wheels, a local charity. He believes she received some income from that job but that it was less than $10,000 per year.
Colin firmly believes Ellen would be alive today if Dr. Bark had done a proper job in July of 2003.

By Counsel for the Defendant:

Q: Did Ellen go see any doctors between July of 2003 and late June of 2004 for any reason?

A: Not that I know of.

Q: Did your wife complain of not feeling well during that time period?

A: She complained that she was very tired all the time, but she was running around doing stuff for the kids, and she also thought maybe she was starting that change in life stuff that women go through. But she never dreamed she had cancer, I'm sure.

Q: Do you have any idea as to why your wife did not follow Dr. Bark's instructions to return to see him in one week?

A: I'm sure it was because she was told by somebody that her tests were normal. I don't know who she called or the details of any of that, but I do remember her telling me that her tests came back normal. My wife would not make something like that up. Somebody had to have told her that her tests were normal. And if you're told that your tests are normal, why would you spend more money to go back and see a doctor?
DEPOSITION OF DR. MHA'TMA MUTRA,
TREATING PHYSICIAN

Dr. Mutra is the local oncologist who treated Ms. Ward from diagnosis through her
death in February of 2006. Dr. Mutra states that Ms. Ward had Stage IV cancer in early
July of 2004. The cancer in her left breast had attached to her chest wall and
metastasized. A bone scan was positive for cancer in her spine.

Ms. Ward underwent three months of chemotherapy, followed by radiation
therapy. She then underwent a radical mastectomy of her breast. Following the surgery
additional chemotherapy and radiation treatments were instituted, but by November of
2005 Ms. Ward was informed that further treatments would not be successful and in all
likelihood only prolong the pain. Ms. Ward was a compliant patient who agreed to
undergo all recommended treatment.

Ms. Ward died on February 22, 2006 from complications resulting from breast
cancer.
DEPOSITION OF PLAINTIFF’S EXPERT
DR. CURALL ETON, ONCOLOGIST

Dr. Curall Eton is the plaintiff's expert witness. He is a board-certified oncologist at Johns Hopkins. Dr. Eton is also board certified in obstetrics and gynecology and family practice. He did a two year internship in family practice at Memorial Hospital of the South and a four year residency in obstetrics and gynecology at South's Best Hospital. His three year fellowship was in oncology at MD Anderson. His clinical practice includes care and treatment of breast cancer victims (about 10 percent of his clinical practice).

Dr. Eton opines that Ms. Ward had Stage III cancer on July 23, 2003 during her first visit to Dr. Bark. Dr. Eton opines that the standard of practice for a family practitioner requires a biopsy to be ordered/performed when a 4.5 centimeter by 1 centimeter lump is palpated by the physician during exam. Dr. Eton opines that, based on the records of Dr. Bark, no biopsy was ordered for this patient, nor was a biopsy discussed with this patient. The failure to inform the patient of the need for the biopsy and to order a biopsy was a deviation from the appropriate standard of care. Dr. Eton concedes that if Dr. Bark fully informed the patient of the need for a biopsy and tried to order a biopsy for his patient, and Ms. Ward refused the procedure, Dr. Bark would have fulfilled his obligation.

Dr. Eton opines the failure to procure a biopsy caused an 11-month delay in the diagnosis of the cancer. On July 23, 2003 Ms. Ward had a 40 percent +/- 10 percent chance of survival beyond 5 years. On July 2, 2004, at the time of diagnosis, her chance of survival was less than 5 percent.

In forming his opinions Dr. Eton reviewed all pertinent medical records relating to the care and treatment of Ellen Ward as well as the deposition of Ellen Ward. After forming his opinions but before giving his deposition Dr. Eton also reviewed the deposition of Dr. Bark. None of Dr. Eton’s opinions changed as a result of reading the deposition of Dr. Bark. All of Dr. Eton’s opinions are held to a reasonable degree of medical certainty.

By Counsel for the Defendant:

Q: Was it appropriate for Dr. Bark to order a mammogram for this patient?

A: Yes, but ordering a mammogram and nothing else was not sufficient in this case.

Q: In reviewing Dr. Bark’s deposition did you note that his standard practice in these cases is to discuss a biopsy with his patients?

A: Yes, but he has no independent recollection of having done so with Ms. Ward and his notes do not reflect such a conversation. If it is not in the notes, the general rule is that it did not happen.
Q: If the patient refuses to come back to her physician, for any reason, then the appropriate standard of care does not require a physician to track down a patient and force the patient to undergo further testing, does it?

A: No

Q: Finally doctor, isn't it true that when Ellen Ward first came to see Dr. Bark there was already as high as 50% chance that she would die from cancer no matter what Dr. Bark or any other physician did?

A: My opinion is that in July of 2003 Ms. Ward had a 40% chance of survival with a plus or minus 10%, meaning that her chance of survival at that time ranged from 30% to 50%.
DEPOSITION OF PLAINTIFF'S EXPERT
DREW ELBY, ECONOMIST

Drew Elby is a C.P.A. He states he has received the tax returns for the Wards for 2000, 2001, 2002, and 2003. They show income for Ms. Ward as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>From</th>
<th>Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>Meals-on-Wheels</td>
<td>$7,200</td>
</tr>
<tr>
<td>2001</td>
<td></td>
<td>$6,800</td>
</tr>
<tr>
<td>2002</td>
<td></td>
<td>$7,500</td>
</tr>
<tr>
<td>2003</td>
<td></td>
<td>$4,800</td>
</tr>
</tbody>
</table>

Mr. Elby opines that based on her age and her 4-year work history, it is probable that Ms. Ward would have worked until age 65. The present value of her lost future income is $137,500.
Deposition of W.F. Bark MD
Taken on September 23, 2007

Summary of testimony

I am 37 years old, having been born and raised right here in Washington County. I am a duly licensed physician and I maintain a family practice right here in town. I graduated from New Columbia Medical School in 1998 and began practicing with my father in his family practice here in town in 2000. When Dad retired in 2001 I took over the practice and have been practicing on my own ever since.

After high school I did some college, then did a stint in the United States Army and served in the first Gulf War. I guess that got me interested in medicine, so when I returned from the war I finished college and enrolled in medical school. I’m married to Amy and we have three children, all girls. I have never been sued for malpractice before this lawsuit.

I did not know Ellen Ward before she came to see me in July of 2003. I do not really remember her visit so I need to rely on my office notes. Based on these notes its pretty clear she had a complaint of a small lump or nodule on the underside of her left breast. With a nurse present I palpated the lump and, according to my notes, I believe the lump measured 4.5 centimeters by 1 centimeter. Ms. Ward seemed to be in relatively good health, and her history did not reveal anything out of the ordinary.

It was my initial opinion at the time that the lumpy was probably nothing serious, but I first wanted to have a mammogram done. Generally my practice when it comes to lumps of this nature is to have a mammogram, then meet with the patient and in almost all cases recommend further evaluation by way of at least a needle biopsy. Generally my practice with diseases like cancer is to rule them out by some definitive test.

According to my notes I instructed Ms. Ward to go over to the hospital and have the mammogram, then come back to see me in one week. At that time I would have gone over the mammogram report and referred her to someone to do a biopsy, probably a needle biopsy, to definitely rule out cancer. While my notes do not reflect this it is my practice in these situations to always discuss the need for some type of biopsy with the patient, and I’m sure I did so with Ms. Ward although I have no independent recollection of our conversations. But then according to my notes she never returned to the office, and I honestly had no idea what happened to her until she appeared on my schedule about one year later.

When I examined her in June of 2004 I was really concerned when I was the size of the lump. At that time it was probably at least 8 centimeters by 2 centimeters if not more, and it appeared somewhat reddish. I really couldn’t believe this woman would have waited almost a year to come back and see me. I immediately sent her over to the hospital to a surgeon for a biopsy, and obviously the results were not good.
I read in the paper she had died and I sent a card to her family expressing my condolences. Obviously I feel terrible about her death. But I do not feel in any way responsible for her death. She needed to come back and see me, and she did not. I probably assumed she had gone to see another doctor. At some point the patient must accept some responsibility for their own health care.

By Plaintiff’s Counsel

Q: Your office did receive back the written mammogram report on Ms. Ward, correct?

A: Yes

Q: The report basically stated that the mammogram was inclusive, correct?

A: Let me look......yes.

Q: When Ms. Ward called in to your office she was told that the report was normal, isn’t that true?

A: No. She certainly did not talk to me. If she had called in and asked, my receptionist may have read the report results to her, but I have asked my receptionist and she has no memory of doing so. But in any event I told Ms. Ward to come back and see me, and she did not.

Q: When it became obvious that she did not come back in a week, why didn’t you just pick up the phone and call her?

A: It is not my place to solicit patients. If she chose not to come back, I have no idea if she chose to see another doctor or not. I do not call patients and beg them to come see me.

Q: Even though you now claim you knew she needed a biopsy, you didn’t call her?

A: Correct.

Q: Doctor, isn’t it true you made a diagnosis of fatty tissue with respect to Ellen’s lump and you had no intention of ever sending her for any further evaluation?

A: No that is not true.
DEPOSITION OF DEFENDANT'S EXPERT
DR. WESSON SMITH, ONCOLOGIST

Dr. Smith states that Ms. Ward had Stage III cancer on July 23, 2003. He estimates her 5-year survival rate on that date, with prompt diagnosis and treatment, at 30 percent. On July 2, 2004 Ms. Ward had Stage IV cancer, metastasized to her spine and internal organs. Her 5-year survival rate on that date was 10 percent.

Dr. Smith opines that Dr. Bark met the standard of care on July 23, 2003. Dr. Smith opines that the ordering of a mammogram for a patient who presents with a lump in a breast and is a first time patient is perfectly appropriate. He further opines that the mammogram could possibly give the physician a better overall picture of the breast and help in an eventual diagnosis.

Dr. Smith opines that a mammogram in this situation is in and of itself not sufficient however and that given the size of the lump upon presentation some type of biopsy would need to follow the mammogram test. Dr. Smith opines that it is perfectly proper to delay ordering a biopsy for one to two weeks until the preliminary tests are performed, particularly when the patient is a new patient and you are building a rapport. A one to two week delay in performing a biopsy would not adversely affect the patient.

Dr. Smith opines that the failure of the patient to return to the office as directed by Dr. Bark is the cause of the delay in diagnosis in this case. Simply stated the standard of care does not require a biopsy to be performed on the first presentation of the patient to the physician, so long as a biopsy is ordered within the next several weeks. The failure however of this patient to return to Dr. Bark is the reason why the patient did not receive a biopsy in July of 2003, as a physician cannot order a biopsy on a patient who no longer seeks treatment with the physician. Dr. Smith further opines that the standard of care does not require a physician to “track down” a former patient for the purpose of imposing further treatment or testing upon the patient.

By Counsel for the Plaintiff:

Q: The standard of care for a family physician that is presented with a patient with a lump on her breast like the lump that was on the breast of Ms. Ward is to refer the patient for a biopsy, isn’t that true?
A: The standard of care is to attempt to diagnose and treat the patient. As part of the diagnosis process a biopsy should have eventually been performed on Ms. Ward, probably within 2-3 weeks of her initial presentation to Dr. Bark. Dr. Bark has clearly stated his intention was to refer her for a biopsy when she returned. She did not return. You cannot do anything for a patient who ceases to be your patient.

Q: But Ms. Ward never ceased to be Dr. Bark’s patient, did she?

A: She did not return in one week as directed by Dr. Bark. His instructions to return are in his notes. They are clear and unambiguous instructions. If the patient had any problems in understanding those instructions she should have spoken directly to Dr. Bark and not a receptionist as she claimed. Additionally she had a lump on her breast which continued to grow after she saw Dr. Bark. At what point does the light bulb go on and one says, “Gee, I better go get this checked”.

Q: The mammogram performed on Ms. Ward was not normal, was it Doctor?

A: The results were basically meaningless. Normal/not normal……those are irrelevant terms when it comes to this report. The test did not show anything, but not because there was nothing there to show.

Q: Isn’t it true Doctor that all Dr. Bark needed to do in this case was to pick up the telephone, call his patient when she did not return in one week, and tell her, “Hey, you need to get back in here so we can do a biopsy!” If he had only done that Doctor Ellen Ward would probably be alive today, isn’t that true?

A: First counsel that is two questions. In a perfect world it would be grand if physicians took the place of our mothers. In the real world they do not, and patients must accept some responsibility for their own health care. And second, I have no idea whether Ellen Ward would or would not be alive today. Even back in July of 2003 there was a 70% chance that no matter what any doctor did Ellen Ward was going to die.
DATE 7-23-03  

PATIENT Ellen Ward

HISTORY: Generally good health. O'smoker. 44 yrs old.  
Lump in L breast. 6m had breast cancer.

PHYSICAL EXAM: 163 lbs. BP 142/72

HEENT - Normal

NECK - Supple, Ömases

LUNGS - Clear to auscultation

HEART - NSR

BREAST - Nipple bilaterally, Lner mass extending from  
3 o'clock position on L breast to axilla. Approx 5.5cm x 1.5cm  
No axillary lymphadenopathy

ABD - Soft low-tender

EXT. ng. edema or cyanosis

OTHER -

IMPRESSION: Lump L Breast

PLAN:

Schedule mammography, CBC panel one month.  
T3/T4 thyroid function, urinalysis.

Rtn to clinic one wk

7-1-04 - Letter sent regarding due for mammography screening.
BILATERAL MAMMOGRAMS:

Caudal and lateral views were obtained of both breasts using low dose, film-screen, grid technique. The skin, nipples and subcutaneous tissues are normal. There is extreme density of both breasts with advanced fibrocystic disease. The breasts are not well suited for mammography. A discreet density, however, is not present nor are there clusters of micro calcifications. There is a single benign calcification on the right. There are axillary nodes bilaterally.

IMPRESSION: ADVANCED MAMMARY DYSPLASIA.

H. SMITH, M.D./st

CAUTION: Information contained herein is confidential in nature and may not be disclosed to any individual or entity without the express permission of the patient or attending physician.
Exam of Ellen Ward
(June 30, 2004)

- 157 lbs.
- BP 144/86
- Recheck breast mass and back pain.
- Left breast mass 8+ cm. Some ulceration of nipple.
- Consult Dr. Roddin (surgeon) for biopsy.
- Return to clinic one week.
BILLS AND SPECIALS

Ellen Ward

A. Mhatma Mutra, M.D. $18,035.00
B. Suma Cancer Center $16,245.87
C. Weirton Memorial Hospital $25,106.35
D. W.F. Bark, M.D. (Bark Family Practice Center) $105.00

TOTAL $59,492.22
FUNERAL BILL

Smith Funeral Home

Funeral Services for Ellen Ward $ 4,200.00

TOTAL $ 4,200.00
1. Negligence is the failure by a physician to use that reasonable standard of care for a physician in the same or similar circumstances.

2. In order for a plaintiff to recover he/she must prove that the negligence was a proximate cause of the injury or death. An act or omission is a proximate cause when it is a substantial contributing factor which results in the injury or death or if the negligence causes the loss of a substantial chance of survival. The question of whether the loss of a chance is or is not substantial is a question for the jury to determine.

3. In an action brought pursuant to the New Columbia Wrongful Death Statute damages are limited to the following.

   a) Loss of the love, companionship, and society of the deceased to the survivors. In this case the survivors as defined by law are the husband and the two children.

   b) Loss of past, present, and future income as a result of the negligence.

   c) Medical bills and expenses incurred as a result of the negligence.

   d) Funeral expenses.