

TITLE 4. TORT CLAIMS (GAMING ENTERPRISE)

CHAPTER 1.

4 M.P.T.L. ch. 1 § 1

§ 1. Definitions

Unless otherwise required by the context, the following words and phrases shall be defined as follows:

a. "Mashantucket Pequot Gaming Enterprise" or "Gaming Enterprise" means the arm of the tribal government established by the Mashantucket Pequot Tribal Council to conduct the gaming operations of the Tribe, and includes its officers, agents, servants and employees.

b. "Gaming Enterprise Site" means the building or buildings in which Foxwoods Resort Casino is situated, and all parking areas and access roads appurtenant thereto and located on the Reservation of the Tribe.

c. "Claim" means a petition for an award under this Law. A claim may be filed with respect to any injury as defined in this Title.

d. "Person" means any individual, firm, partnership, corporation, limited liability company, association, or any other legal entity.

e. "Dangerous Condition" means a physical aspect of a facility or the use thereof which constitutes an unreasonable risk to human health or safety, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent acts or omissions of the Gaming Enterprise in constructing or maintaining such facility. For the purposes of this subsection, a dangerous condition should have been known to exist if it is established that the condition had existed for such a period of time and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered. A dangerous condition shall not exist solely because the design of any facility is inadequate or due to the mere existence of wind, water, ice or temperature by itself, or by the mere existence of a natural physical condition or a mode of operation. Nothing in this Section shall preclude an accumulation of water, snow, or ice from being found to constitute a dangerous condition when the Gaming Enterprise fails to use existing means available to it for the removal of such accumulation and when the Gaming Enterprise had notice of such accumulation and reasonable time to act.

f. "Injury" means death, harm to a person, or damage to or loss of property which if inflicted by another constitutes a tort under tribal law.

g. "Actual Damages" means the ascertainable loss of money or property sustained as a result of an injury after any reduction for Collateral sources.

h. "Collateral sources" means any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health, disability, medical or sickness insurance, automobile accident insurance that provides medical benefits, and

any other similar insurance benefits, except life insurance benefits, available to the claimant, whether purchased by him or by others on his behalf; or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services; (3) any voluntary or involuntary credit, adjustment or write-off applied to charges by any healthcare provider. The collateral source deduction from actual damages shall not be reduced in any way by the cost of health insurance premiums or other cost of procurement of the collateral source benefit, except for cost paid by the claimant or the claimant's immediate family on his behalf. For purposes of this law, collateral source deduction from actual damages shall not include any amount or portion of the amount for which there is a valid right of subrogation or a valid lien.

4 M.P.T.L. ch. 1 § 2

§ 2. Effective Date of Amendments

a. The amendments to this Law made pursuant to TCR101200-03 of 07 shall be applicable to claims accruing after the enactment date of the Resolution.

b. The amendments to this Law made pursuant to TCR122702-02 of 02 shall be applicable to claims pending and accruing as of the enactment date of the Resolution.

c. The amendments to this law pursuant to TCR052907-06 of 09 shall be applicable to claims accruing after May 29, 2007, the date of enactment of TCR052907-06 of 09.

d. The amendments to this law, pursuant to TCR081519-01 of 01 shall be applicable to pending claims and claims accruing on or after the enactment date of the Resolution.

4 M.P.T.L. ch. 1 § 3

§ 3. Jurisdiction over Tort Claims and Waiver of Sovereign Immunity from Suit

a. The tribal court shall have jurisdiction over tort claims against the Gaming Enterprise or arising at the Gaming Enterprise Site.

b. The Tribe hereby waives the sovereign immunity from suit of the Gaming Enterprise for actions in the tribal court founded upon a tort of the Gaming Enterprise. Nothing herein shall be construed as a waiver of the sovereign immunity from suit of the Tribe or the Gaming Enterprise in state or federal court or in any action before any state or federal agency or in any other forum or context.

c. Members of the Tribal Council remain immune from suit for actions taken within the scope of their duties and responsibilities as members of the Tribal Council.

§ 4. Awards

In any judgment under this Law against the Gaming Enterprise, the court may award damages as hereinafter provided:

- a. The court may enter an award for actual damages.
- b. For any injury resulting in death, the Court may enter an award for actual damages, but in no event shall the award be less than \$100,000.
- c. In addition to an award for actual damages, the court may enter an award for any injury resulting in permanent significant disfigurement or permanent significant scar of the face, head, or neck, or, on any other area of the body only if the resulting permanent significant disfigurement or permanent significant scar handicaps the claimant in obtaining or continuing to work. In determining an appropriate damage award for a permanent significant disfigurement or permanent significant scar, the court shall calculate such an award pursuant to 13 M.P.T.L. ch. 4, Sections 12(c) and 12(d); except that when the claimant is not employed, the court shall use the rate of \$200 per week, without deduction.
- d. In addition to an award for actual damages, the court may enter an award for
 - (1) pain and suffering or mental anguish in an amount which shall not exceed 200% of the actual damages sustained.
 - (2) for purposes of calculating pain and suffering or mental anguish, actual damages shall, not be reduced by collateral sources, provided such collateral sources include the reasonable value of expenses or losses incurred.
- e. No other award or judgment shall enter under this Law, including:
 - (1) no award based upon a rule of law imposing absolute or strict liability;
 - (2) no award for punitive or exemplary damages;
 - (3) no award based upon a claim of loss of consortium; and
 - (4) no judgment for declaratory or injunctive relief against the Gaming Enterprise.
 - (5) in causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages resulting from personal injury, wrongful death or damage to property if the negligence was less than or equal to the combined negligence of the person or persons against whom recovery is sought. Any award for damages to a

person shall be reduced in proportion to the person's contributory negligence. However the person shall recover nothing if claimant's contributory negligence is determined to be greater than fifty (50) percent.

f. In causes of action based on personal injuries resulting from the negligence of a healthcare provider no award or judgment shall exceed Five Million (\$5,000,000.00) Dollars. A "healthcare provider" is defined as any physician, dentist, pharmacist, nurse, physical therapist, clinical psychologist, clinical social worker, professional counselor or emergency medical care attendant or technician, and includes any individuals who provide substantially similar services to those provided by the individuals described above. Healthcare providers shall include anyone who assists any of the above individuals in providing the services and any employer, facility or institution either employing said individuals or engaging them as consultants, independent contractors or otherwise. The limit provided for herein shall be the maximum aggregate recovery for any injury resulting from negligence of a healthcare provider. In the event there are multiple defendants, the total judgment against all defendants combined shall not exceed the maximum provided. Nothing in this Section 4(f) shall alter the method of calculating damages as provided otherwise in this Section 4 subject to the maximum award provided herein.

g. Upon determination of liability and damages, if any, the court shall conduct a timely hearing to determine if there are any collateral sources as defined in 4 M.P.T.L. ch. 1 § 1. At the hearing, and before judgment enters, the court shall receive evidence from the parties and/or any other appropriate person concerning the amount of collateral sources which have been paid for the benefit of the claimant as of the date of the hearing. The court shall also receive evidence from the parties and/or any other appropriate person concerning any amount which has been paid by claimant or an immediate family member of claimant to secure any related collateral source benefit. Upon such determinations, the Court shall reduce the actual damages award accordingly.

4 M.P.T.L. ch. 1 § 5

§ 5. Limitation on Presentation of Claim

a. Any action under this Law must be filed within one year from the date the claim accrued. Claims brought under this Law shall be deemed to accrue on the date when the injury is sustained.

b. The defendant must present the issue of failure to file a claim as stated in Section 5(a) to the Court as an affirmative defense. Such defense shall not be considered jurisdictional in nature.

4 M.P.T.L. ch. 1 § 6

§ 6. Attachment Prohibition

Neither execution nor attachment shall issue against the Gaming Enterprise or the Tribe in any claim for injury or proceedings initiated under this Law.

§ 7. Miscellaneous

a. This Law shall govern all tort claims against the Mashantucket Pequot Gaming Enterprise or arising at the Gaming Enterprise Site. When interpreting this law, the court shall follow tribal law and precedent and may be guided by the common law of other jurisdictions.

b. All actions brought under this Law shall be tried to the court and not to a jury. No costs shall be taxed against the Gaming Enterprise.

c. When it is alleged that the liability of the Gaming Enterprise is based upon the action of an officer, agent, servant, or employee of the Gaming Enterprise acting within the scope of his or her employment there shall be no separate cause of action against said officer, agent, servant or employee, and nothing in this law shall be construed to waive the sovereign immunity of the Tribe or the Gaming Enterprise to the extent that it extends to such an individual.

d. Recovery of collateral source benefits prohibited. Unless otherwise provided by applicable law, there shall be no cause of action by an insurer or any other person or entity providing collateral source benefits as defined in 4 M.P.T.L. ch.1, Section 1 to recover the amount of any such benefits from the defendant as a result of any action for damages for personal injury or wrongful death.

LEGISLATIVE HISTORY REVISIONS TO TITLE 4 TORT CLAIMS (GAMING ENTERPRISE)

4 M.P.T.L. Leg. History

A. Background

Title 4 of the Mashantucket Pequot Tribal Laws was originally enacted in 1992 as TCR011092-01, called the "Sovereign Immunity Waiver Ordinance." In adopting that Resolution, the Tribal Council provided "reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities," as required by the Mashantucket Pequot Gaming Procedures, 56 Fed. Reg. 24996 (May 31, 1991). Since 1992, tort claims against the Gaming Enterprise have been resolved pursuant to this Law. In addition, the Gaming Enterprise has grown and the Tribal Council has enacted several other laws. In its continuous review of tribal laws and in an effort to respond to the needs of the community and address issues or ambiguities that have arisen, the Judicial Committee conducted an extensive review of the tort claims law and recommended changes to the Tribal Council.

The following is a summary of the amendments to Title 4. Tort Claims (Gaming Enterprise) and the intent of the Tribal Council in adopting these amendments.

B. Summary of Amendments

1. Jurisdiction and Waiver of Sovereign Immunity from Suit

Waiver of Sovereign Immunity From Suit.

Prior to the amendments, Title 4 contained a waiver of sovereign immunity that allowed suits against the Gaming Enterprise, an arm of the tribal

government, for three specific types of tort claims: 1. injuries proximately caused by the negligent acts or omissions of the Gaming Enterprise (including its employees); 2. injuries proximately caused by the negligent acts or omissions of tribal security officers; and 3. injuries proximately caused by the dangerous condition of the property at the Gaming Enterprise (dangerous condition being defined in the law).

The amendment to this Section aligns the waiver of sovereign immunity with the waiver in Title 12, Section 2(a), for actions "founded upon a tort." Thus, the waiver no longer is limited to claims based upon negligence. This waiver is intended to include intentional torts, but would not include so called "constitutional" torts or statutory torts. A "constitutional" tort depends upon rights guaranteed by either the U.S. Constitution or the various state constitutions. Facially, these claims would not be applicable to the Gaming Enterprise or the Tribe, since neither the U.S. Constitution nor state constitutions are applicable to the Tribe, as a sovereign predating the state and federal governments. The Tribe's Constitution does not provide for or address individual rights vis-à-vis the tribal government and, therefore, could not form the basis of the typical constitutional tort.

Nor does this waiver encompass any type of analogous claim based upon the rights recognized in the Indian Civil Rights Act, which contains similar, although not identical, restraints against tribal governmental actions regarding the civil rights of individuals. The Tribal Council intends to provide separately for claims based upon alleged violations of civil rights and thus, such claims are not within the purview of the waiver of immunity contained in this Law.

All references to or reliance upon the law of the state of Connecticut have been deleted with the intent of clarifying that the tribal court is not bound by state law in any respect. The waiver of immunity does not extend to any type of "statutory" torts defined by any other jurisdiction.

2. Jurisdiction

The amendments clarify that the tribal court has jurisdiction over tort action against the Gaming Enterprise and arising at the Gaming Enterprise site that may not involve the Gaming Enterprise as a party (i.e., private party actions).

3. Damage Awards

Prior to the amendments, Title 4 limited damage awards in several ways. In reviewing the tribal law and its implementation over the past nine years, the Council has amended the law to change some of the limitations on damages. The amendments include the following:

a. Increase awards for pain and suffering. The tribal court system has been limited in its authority to render awards for pain and suffering, in comparison to other judicial systems. Plaintiffs' attorneys generally have been critical of this limitation and the judiciary has expressed some concern in not being able to award greater damages in some cases. The tribal court system also has been complimented by those who favor tort reform and believe there should be some limits placed upon excessive awards. In addition, the claims handling and adjudication processes in the Tribal system, in large part, have worked well in resolving and paying claims quickly and without the delays found in other systems. The amendments increase the cap on damages for pain and suffering from 50% of actual damages to 100% of actual damages.

b. Minimum award in injuries resulting in death. Although there has never been a claim brought against the Gaming Enterprise involving a death, the present system may not be able to adequately compensate the family or survivors in the event of a death proximately caused by the Gaming Enterprise. The law has been amended to provide for a minimum recovery of \$100,000 in wrongful death cases which will address the potentially inadequate recovery that might result in some cases where the actual damages are negligible. In addition to the minimum award for actual damages, a litigant could seek an award for pain and suffering not to exceed a total of 100% of the actual award.

c. Damages for permanent disfigurement or scarring. Another change to the present system is to provide relief to an injured person when a plaintiff has a permanent significant disfigurement or scar on the face, neck or head, or if on any other area of the body when the person can demonstrate that it handicaps the person in obtaining or continuing to work. The amendment allows a plaintiff in this instance to receive an additional award for such disfigurement or scarring, and directs the court to calculate this award in accordance with the Tribe's Workers' Compensation Code approach, which ties the award to average weekly salary for a limited number of weeks.

d. Elimination of language which limits awards to extent covered by insurance. The amendments eliminate language limiting claims against the Gaming Enterprise to only those covered by insurance. Previously, the definitions of "Injury" and "Actual Damages" included language defining them as having to be "expressly covered by the liability insurance of the Gaming Enterprise without regard to any deductible amount contained in the insurance policy." The Gaming Enterprise has extensive insurance coverage and this particular provision has not been used to deny liability.

e. Limitation on awards as to claims against the Gaming Enterprise. The limitations on damages concern claims against the sovereign only, and do not limit awards in claims between private individuals.

4. Private Party Actions

Prior to the amendments, Title 4 did not directly address claims between private parties and to which the Gaming Enterprise was not a party. The amendments clarify that the tribal court has jurisdiction over both tort claims against the Gaming Enterprise, as well as tort claims arising on the Gaming Enterprise site. This change allows individuals to proceed in tribal court for injuries occurring at the Gaming Enterprise. In addition, this provision is intended to provide the tribal court with jurisdiction in cases where both the Gaming Enterprise and a non-tribal entity are parties and to avoid separate actions in different forums: one in tribal court against the Gaming Enterprise and one in state court against the non-tribal entity or individual.

5. Statute of Limitations

Prior to the amendments, all claims and notices of claims had to be filed within 180 days from the date the injury is sustained. The amendment lengthens the time for bringing the claim in tribal court to one year from the date of injury, while maintaining a requirement that the claimant file a notice of claim with the tribal court within 180 days of the date of the injury. This procedure is consistent with Title 12 governing tort claims against the Tribe and other tribal divisions or enterprises.

6. Other Changes/Deletions

The amendments also remove certain provisions of the original laws: the Section addressing Volunteers (Section 6); employee actions outside the scope of employment (Section 7); potential reimbursement to the Gaming Enterprise if it is determined that an employee acted in a willful and wanton manner or otherwise outside the scope of employment (Section 8); referral of matters under \$10,000 to the office of the magistrate (Section 10(d)); application of the laws of the state of Connecticut (Section 12); provision making Sections severable (Section 14); and construction provisions (Sections 15(a), 15(b), 15(c)).

These Sections have been deleted because they have not been used or are no longer relevant to the tort law in the tribal court. For instance, the office of the magistrate has never been used for the disposition of claims and referral to such an office is not possible. The reference to state law has been deleted because the tribal court and tribal law continue to develop and there is no need to direct the court to follow state law as tribal law. The amendments are effective for any claim accruing after the enactment of the amendments and shall not be applicable to either pending claims or those accruing prior to the adoption of the amendments. In addition, because of the substantial and significant changes to the tort law, and for ease of codification, the amendments will wholly replace the current law.

The Mashantucket Pequot Tribe finds that there is no resource more vital to its continued existence and integrity than its children. The Tribe recognizes that extended family relations are essential components of the tribal community. The Tribe hereby declares that it is the policy of this Nation to protect the health and welfare of children and families within the Mashantucket Pequot community, to promote the security of community, and to preserve the unity of the family by enhancing the parental capacity for good child care and development and providing a continuum of services for children and families with an emphasis, whenever possible, on prevention, early intervention, and

Historical and Statutory Notes

Derivation.

Effective January 10, 1992, TCR011092-01 enacted 4 M.P.T.L., originally called "Sovereign Immunity Waiver Ordinance"

Amendments.

Effective March 14, 2013, TCR031413-02 of 12 amended ch. 1 §4 by adding subsection (f) which imposes a limitation on damages for medical malpractice actions.

Effective August 15, 2019, TCR081519-01 of 01 amended 4 M.P.T.L., to address mode of operation and collateral sources.