

TYPES OF DAMAGES IN AN INJURY SUIT

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The types of damages that are available in a personal injury claim can vary slightly, depending on the situation and the injury to the victim. In general, however, the different types of personal injury damages can be broken into a few different categories. Damages in a personal injury case are compensation for a plaintiff that is intended to "make the plaintiff whole." Usually, it is stated that the purpose of damages is to, as much as possible, put the injured victim back into the position he or she would have been in if he had not suffered the injury as a result of the defendant's negligence or intentionally bad actions.

Of course, sometimes it is really hard to make the plaintiff whole, since the defendant cannot go back in time and undo or take away pain and suffering that have been endured. Financial compensation is the only option here, so the plaintiff is paid money to try to "make up" for the suffering.

A. General vs. Special Damages

1. General Damages: The consequences of a major accident are not necessarily financial or even physical. Depending on the injury sustained, the following general damages for losses may be recovered:

- Emotional and physical pain
- Loss of a loved one's companionship
- Punitive damages (meant to penalize especially negligent or reckless actions)

Before you pursue a personal injury claim, you need a clear understanding of your client's rights and the damages for which they may be eligible.

2. Special Damages: Special damages are awarded to repay the injured person for financial losses suffered. The following expenses may be recovered:

- Past and ongoing medical bills. If the plaintiff must undergo testing or treatment, or if the plaintiff must receive medical care of any type, such as hospital stays, nursing home stays, or physical therapy, the defendant must pay for the costs of the medical bills. This can become quite expensive, especially in cases in which a plaintiff has become permanently disabled and is in need of adaptive devices or lifelong nursing care. The medical portion of damages should include every expense that the plaintiff has had to pay out over the course of receiving treatment at the time when the case is settled or when the jury awards damages and should also factor in what the future costs will be to the plaintiff. It is very important to note, however, that sometimes plaintiffs must turn some or all of this money over to their health insurer or Medicaid, if the health insurer or Medicaid has been paying the bills prior to a settlement or damage award. Sometimes, a lien is actually placed on the expected value of a future damage award either by insurers or health care providers to ensure payment is made when the defendant pays out for these medical costs.
- Property repairs
- Lost income due to missed work or reduced earning capacity

Special damages are related to tangible losses. In contrast, general damages tend to cover more abstract losses.

B. Past and Future Physical and/or Emotional Pain and Suffering

This is among the most difficult thing to calculate, as it is almost impossible to put a price on the pain someone has endured. The tendency of juries to award large damages for pain and suffering, especially when it comes to highly visible or gruesome injuries, is one thing that makes insurance companies inclined to settle a case. When a

case does settle, insurance companies will often employ techniques like a "pain multiplier" in order to try to arrive at a fair and reasonable number for pain and suffering damages. This involves multiplying actual financial losses (medical bills and lost wages) times a number that the insurer deems appropriate (usually, between 1 1/2 and 5).

Sometimes, an accident or injury has emotional ramifications on a plaintiff. This is especially true if the accident was especially upsetting or if the plaintiff watched someone he or she loved also become injured or killed in the accident. Emotional distress usually must be proven by psychiatric records, and things like a diagnosis of post traumatic stress disorder can add to the amount of compensation awarded for emotional distress.

C. Loss of Companionship/Consortium

This is an action brought by a family member of an individual who has been killed or who has been altered in a dramatic way by the accident or injury. For example, someone whose spouse was rendered brain damaged and unable to function at all might have a case for loss of companionship. This compensates the family member for the loss of the relationship of the victim. Loss of consortium can also be a case brought by a spouse if he or she loses the ability to have a sexual relationship with the victim as a result of the defendant's actions.

Consortium represents the marital partners' interest in the continuance of the marital relationship as it existed at its inception. *Buckley v. National Freight, Inc.*, 90 N.Y.2d, 210 (1997). There is no definite rule by which to measure recovery for loss of services and society can be stated; the matter is addressed to the sound discretion of the jury.

Under settled New York law, because consortium represents each marital partner's interest in the continuance of the marital relationship as it existed at the inception of the marriage, a loss of consortium cause of action by the spouse of an injured person does not lie if the alleged tortious conduct and resultant injuries occur

prior to the marriage. *Anderson v. Eli Lilly & Co.*, 79 N.Y.2d 97 (1991); *Lesocovich v. 180 Madison Avenue*, 15 A.D.2d 963 (2nd Dep't 1984).

Recover in a derivative action is limited to the period between the accident and the separation where husband and wife separated after the accident. *Dooley v. Skodnek*, 138 A.D.2d 102 (1988).

D. Disfigurement

An injury is disfiguring if it alters for the worse plaintiff's natural appearance, and a disfigurement is significant if a reasonable person viewing plaintiff's face in its altered state would regard the condition as unattractive, objectionable, or as the subject of pity or scorn. McKinney's Insurance Law §§ 671, subd. 4, 673, subd. 1.

Although no New York case has discussed or defined the meaning of a "significant disfiguring" injury in connection with a no-fault case, the word disfigurement is used in our State's Workers' Compensation Law (§ 15, subd. 3, par. t(1) wherein it is provided that the "board may award proper and equitable compensation for serious facial and head disfigurement"). As used in the context of a claim for workers' compensation benefits, the term "disfigurement" has been defined as "that which impairs or injures the beauty, symmetry, or appearance of a person; that which renders unsightly, misshapen, or imperfect, or deforms in some manner", *Mitchum v. Inman Mills*, 209 S.C. 307, 40 S.E.2d 38, (in accord, *Arkin v. Industrial Commission of Colorado*, 145 Colo. 463, 358 P.2d 879, 884; *Bowen v. Chiquola Manufacturing Co.*, 238 S.C. 322, 120 S.E.2d 99, 102; *Dombrowski v. Fafnir Bearing Co.*, 148 Conn. 87, 167 A.2d 458, 459, 461).

While the words, "significant disfigurement", are abstract, they have through daily use acquired a meaning that conveys to any interested person a sufficiently accurate concept. (*Kovacs v. Cooper*, 336 U.S. 77, 79 [69 S.Ct. 448, 449, 93 L.Ed. 513]), *Montgomery v. Daniels*, 38 N.Y.2d 41, 58, 378 N.Y.S.2d 1, 340 N.E.2d 444. Thus, refining the case law definition of the word "disfigurement" as used in the workers' compensation cases, cited supra, "an injury is disfiguring (under the 'no-fault' law) if it alters for the worse the plaintiff's natural appearance. A disfigurement is significant if a

reasonable person viewing the plaintiff's (face) in its altered state would regard the condition as unattractive, objectionable, or as the subject of pity or scorn", 1 PJI § 2:88B, supplement, p. 93.

E. Loss or Impairment of Mental or Physical Capacity

Damages for mental suffering or anguish can be recovered by a person who has sustained a physical injury. This recovery is part of the total award for pain and suffering; it should not be submitted to a jury as a separate category of damages.

The plaintiff's mental suffering can manifest itself in many ways, including fright, shock and nervousness following the incident, humiliation resulting from effects of the injury, and concern about one's health following the injury. In cases in which there has been substantial disfigurement or scarring, the plaintiff may be left with feelings of humiliation, embarrassment, insecurity and worry. Such feelings are readily understandable and can enhance the size of the damages award. Loss of enjoyment of life's pleasures may also be considered an aspect of the mental suffering endured by a plaintiff following an injury.

The question of recovery for emotional disturbance without physical injury has long troubled the courts of this state. *Fusco v. General Motors Corp.*, 126 Misc.2d 998, 485 N.Y.S.2d 431 (Co.Ct., N.Y. County, 1984). The interplay between the difficulty of proof in such circumstances, the perception of an ability or aptness to feign emotional distress, and public policy considerations limiting the imposition of liability has given rise to a serious and prolonged debate over the propriety of such relief. *Fusco v. General Motors Corp.*, 126 Misc.2d 998, 485 N.Y.S.2d 431 (Co.Ct., N.Y. County, 1984).

It was not until 1961 that the rule prohibiting recovery for emotional injuries resulting only from fright negligently incurred, *Salandy v. Bryk*, 864 N.Y.S.2d 46 (2d Dep't. 2008), was abrogated by a divided Court of Appeals. *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961). Until then, the Court had applied the physical injury rule of *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, which had been slightly relaxed by the rule of *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931), holding that a jury could award damages for emotional distress directly resulting from a

physical impact such as a motor vehicle collision which did not result in a physical injury to the plaintiff.

The circumstances under which recovery may be sought for purely emotional harm are essentially limited to three situations. In the first situation, there is a "special duty" owed to the plaintiff which is breached, but there has been no threat to the plaintiff's safety or fear of personal harm. In the second situation, there is a breach of duty of care to the plaintiff, which results in the plaintiff being unreasonably placed in fear of physical harm. *Lancellotti v. Howard*, 155 A.D.2d 588, 547 N.Y.S.2d 654 (2d Dep't 1989). As an example of the limitations of this rule, the New York courts have consistently held that absent independent physical injuries, endangerment to her health or fear of harm, a woman may not recover for emotional and psychological harm as a result of a stillborn birth. *Tebbutt v. Virostek*, 65 N.Y.2d 931, 493 N.Y.S.2d 1010, 483 N.E.2d 1142 (1985); *Creed*, 600 N.Y.S.2d 151, citing *Friedman v. Meyer*, 90 A.D.2d 511, 454 N.Y.S.2d 909 (2d Dep't 1982); *Wittrock v. Maimonides Med. Ctr.*, 119 A.D.2d 747, 501 N.Y.S.2d 764 (2d Dep't 1986); *Farago v. Shulman*, 104 A.D.2d 965, 480 N.Y.S.2d 758 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 763, 492 N.Y.S.2d 32, 481 N.E.2d 572 (1985). A cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff, which either endangered the plaintiff's physical safety or caused the plaintiff fear for her own physical safety. *Lancellotti v. Howard*, 155 A.D.2d 588, 547 N.Y.S.2d 654 (2d Dep't 1989). In the third situation, the plaintiff suffers emotional injury by witnessing an injury to an immediate family member while in the zone of danger created by the defendants.

Note: In 2004, *Tebbutt v. Virostek*, was overruled, by the Court of Appeals in *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 777 N.Y.S.2d 416, 809 N.E.2d 645 (2004), which held that an expectant mother can recover damages for emotional distress, even in the absence of an independent injury, if medical malpractice results in miscarriage or stillbirth. This holding was based on the Court's conclusion that a medical caregiver owes a duty to the mother as well as the fetus, by virtue of her status as a patient.

F. Loss of Enjoyment of Life

Loss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of the person's life before the injury, and to experience the pleasures of life.

Damages for the loss of the pleasures or the enjoyment of life, often called hedonic damages, are frequently an important aspect of a recovery for pain and suffering. Although some jurisdictions regard this as a separate element of damages, the New York courts have consistently held that the claim for loss of enjoyment of life must be considered as part of the overall claim for pain and suffering. *Nussbaum v. Gibstein*, 73 N.Y.2d 912, 539 N.Y.S.2d 289, 536 N.E.2d 618 (1989); *McDougald v. Garber*, 73 N.Y.2d 246, 538 N.Y.S.2d 937, 536 N.E.2d 372 (1989); *Pallotta v. West Bend Co.*, 166 A.D.2d 637, 561 N.Y.S.2d 66 (2d Dep't 1990); *Venable v. New York City Transit Authority*, 165 A.D.2d 871, 560 N.Y.S.2d 341 (2d Dep't 1990); *Grandinetti v. Rose*, 155 A.D.2d 378, 548 N.Y.S.2d 8 (1st Dep't 1989).

In terms of calculating a proper award, this aspect of damages stands on less certain ground than an award for pecuniary damages. *Grandinetti v. Rose*, 155 A.D.2d 378, 548 N.Y.S.2d 8 (1st Dep't 1989). An economic loss can be measured by more concrete standards and can be compensated in kind by an economic gain. By contrast, recovery for noneconomic losses such as pain and suffering and the loss of enjoyment of life rests on a legal fiction that money damages can compensate for a victim's injury. The law accepts this fiction knowing that, although money will neither ease the pain nor restore the victim's abilities, this is as close as the law can come to right the wrong. The monetary award provides a measure of solace to the victim for the condition created. Damages can be awarded to compensate a victim for loss of pleasures of life, as part of the award for pain and suffering, only if there is cognitive awareness of the loss. When a person's injuries preclude any awareness of the loss, the law holds that a damage award fails to serve its compensatory purpose. Crudely put, an award of money damages to a person who is unaware of his or her injuries has no meaning or utility to the injured person from an objective point of view. The award to such a person cannot provide any consolation. Therefore, cognitive awareness is a prerequisite to recover for the loss of enjoyment of life. If deterrence was a stronger purpose served

by tort law, the law would permit recovery for loss of the pleasures of life as a loss to society of a functioning, productive and mentally cognizant and capable person. It would recognize the value to society of such a person and eliminate the cruel result of the present law that it is cheaper to injure a person catastrophically and eliminate all of their ability to function and enjoy life than to simply injure a person and leave them capable of functioning cognitively.

G. Loss of Opportunity – see H below

H. Loss of Income, Earnings Capacity and Future Fringe Benefits

A plaintiff is entitled to be reimbursed for any earnings lost as a result of the injuries caused by a defendant together with the loss of any future earnings. An award for loss of income cannot be speculative and the award must be calculated from the number of days that the plaintiff was disabled from working by the injuries and that amount that the jury finds the plaintiff would have earned if they were not disabled.

An award made for the reduction of plaintiff's earning capacity in the future should be determined on the basis of plaintiff's earnings before the accident, the condition of plaintiff's health, prospects for advancement and the probabilities with respect to future earnings before the accident, the extent to which you find that those prospects or probabilities have been reduced by the injuries, the length of time that you find plaintiff would reasonably be expected to work had they not been injured, the nature and hazards of plaintiff's employment and other circumstances that would affect plaintiff's earning capacity.

It is the plaintiff's burden to establish his or her own loss of actual past earnings, for example, by submitting tax returns and/or other relevant documentation. *Papa v. New York*, 194 A.D.2d 527 (1993). In calculating lost earnings, the jury may consider the value of fringe benefits, as well as increases in earnings resulting from promotions that plaintiff would logically have received. *Paz v. New York*, 185 A.D.2d 793. If fringe benefits are to be considered, there must be evidence as to the nature and value of such benefits. *Toscarelli v. Purdy*, 217 A.D.2d 815 (1995). An award may include

recovery for diminution of pension benefits if established with reasonable certainty based on plaintiff's earning ability both before and after the accident. *Lamot v. Gondek*, 163 A.D.2d 678 (1990).

These damages should also include payment for any work that a plaintiff had to miss because of the injury or because of treatment for the injury. If a plaintiff was able to take vacation days or sick time, he or she still should be compensated for the loss of those days. If a plaintiff has been made permanently unable to work due to the injury, then the lost wages that he or she would have made over the course of a lifetime may be required to be paid by a defendant. The same is true if a plaintiff has been disabled in some way that will reduce his or her future ability to earn, even if it hasn't taken away that ability entirely.

I. Punitive Damages

In addition to awarding damages to compensate the plaintiff for injuries, a jury can award damages if they find that the acts of the defendant causing the injury complained of was wanton, reckless and malicious. The purpose of punitive damages is to punish the defendants for their wanton, reckless and malicious acts. The punitive damages are designed to discourage the defendant and others from acting in a similar way in the future. Normally, when punitive damages are allowed, they are limited to cases in which the defendant did something beyond just merely exhibiting a lack of care (negligence). For example, a driver who just made a negligent mistake and caused an accident might not be assessed punitive damages, but a drunk driver or a person engaging in reckless street racing might.

An act is wanton and reckless when it is done in such a way and under such circumstances as to show conscious indifference and utter disregard of its effect upon the safety and rights of others. An act is malicious when it is done deliberately with knowledge of plaintiff's rights, and with the intent to interfere with those rights.

Punitive damages cannot be recovered by a spouse in a derivative action. Spouse's or parent's right to recover punitive damages in connection with recovery of

damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to the child.

J. Damages in Fatality Cases

Wrongful death lawsuits are brought by the family members of victims who have been killed as a result of an accident or injury caused through negligence or intentional bad acts. Wrongful death damages cover the lifetime of wages lost as a result of the victim's death. Funeral costs, among other expenses, are also included. A family member must have standing to bring a wrongful death action, though. Spouses are allowed to bring such an action in every state, and parents can bring an action on behalf of minor children. There are varying rules as to whether parents can sue for wrongful death for adult children, as well as regarding whether siblings, cousins, adult children or other more "distant" relatives can sue for wrongful death.

Where the interval between injury and death is relatively brief, the amount, if any, awarded for the decedent's conscious pain and suffering depends upon such factors as degree of consciousness, severity of pain, apprehension of impending death, and duration of suffering. *Jones v. Simeone*, 112 A.D.2d 772 (1985).

A jury may not be instructed to consider, and may not award, damages for loss of enjoyment of life separately from damages for pain and suffering. *McDougald et al. v. Garber*, 73 N.Y.2d 246 (1989).