# GEORGIA

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**1. In your state, what are the categories of damages that are available in tort?**

Under Georgia law, damages for a tort "may be either general or special, direct or consequential." O.C.G.A. § 51-12-1 (a). Because general damages are presumed to flow from any tortious activity, they are recoverable without proof of a specific dollar amount of damages. O.C.G.A. § 51-12-2 (a). Conversely, special damages must be proven to be recovered. O.C.G.A. § 51-12-2 (b). Georgia requires plaintiffs to specifically plead special damages; failure to do so bars recovery. O.C.G.A. § 9-11-9 (g); Tri-County Inv. Grp. v. S. States, 231 Ga. App. 632, 638 (1998)("[Plaintiff] cannot recover special damages since it failed to specifically state what special damages it sought in the complaint.").[1]

Nominal damages are available when "an injury is small or the mitigating circumstances are strong." O.C.G.A. § 51-12-4; accord United States Fid. & Guar. Co. v. Paul Assocs., 230 Ga. App. 243, 251 (1998) ("The law infers some damage from the invasion of a property right and if no evidence is given of any particular amount of loss, declares the right by awarding what it terms nominal damages.") (internal citation omitted); Peters v. Hyatt Legal Servs., 211 Ga. App. 587, 590, 440 S.E.2d 222, 225 (1993) (holding that a client states a claim for nominal damages against his former lawyer for improper representation resulting in a divorce decree to which he did not agree even if the decree was set aside).

Georgia also allows punitive damages where "it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). These are exemplary damages not designed to compensate the plaintiff, but rather punish, penalize, and/or deter the defendant. O.C.G.A. § 51-12-5.1(c).

[1] Plaintiff may amend her complaint any time before the pretrial order, however, which limits the scope of this rule. Torok v. Yost, 194 Ga. App. 94 (1989). Plus, courts have held that a defendant must first seek a motion for a more definite statement (or pursue discovery on the matter) before moving to dismiss or summarily judge a plaintiff's claims for failure to plead special damages with particularity. Cooper v. Mason, 151 Ga. App. 793, 795 (1979).

For this reason, establishing the defendant's culpable conduct is a prerequisite to recovery, and gross negligence does not qualify. Troutman v. B.C.B. Co., 209 Ga. App. 166, 168 (1993). The finder of fact must specifically find that punitive damages are appropriate before awarding such damages. O.C.G.A. § 51-12-5.1(d); Conseco Fin. Servicing Corp. v. Hill, 252 Ga. App. 774, 778 (2001).

**2. Are there any limitations or caps on recovery in tort actions?**

Georgia caps punitive damages at $250,000 for all but two categories of cases. O.C.G.A. § 51-12-5.1(g). First, Georgia allows unlimited punitive damages in a product liability action, but only one award for punitive damages may be recovered for any act or omission for the product liability cause of action for the particular defendant. O.C.G.A. § 51-12-5.1(e)(1). Seventy-five percent of this award, after deducting the cost of litigation (including reasonable attorney's fees), goes to the state treasury. O.C.G.A. § 51-12-5.1(e)(2).

Second, punitive damages are unlimited for torts committed while (a) under the influence of drugs or alcohol or (b) with the specific intent to harm. This exclusion from the cap on punitive damages applies only to the active tortfeasor. O.C.G.A. § 51-12-5.1(f). Consequently, vicarious liability does not attach when considering unlimited punitive damages. Corrugated Replacements, Inc. v. Johnson, 340 Ga. App. 364, 372 (2017) (holding that the family purpose doctrine did not apply to allow a plaintiff to pursue unlimited punitive damages against the owner of a vehicle that was driven by another person who was under the influence of alcohol).

Outside of the punitive damages context, Georgia recognizes (and, in some cases, codified) familiar common law limitations on recoveries in tort actions. Damages are not recoverable if "only the imaginary or possible result of a tortious act or if other and contingent circumstances preponderate in causing the injury." O.C.G.A. § 51-12-8; see also, O.C.G.A. §§ 51-12-9; 51-12-10. And, outside of positive and continuous torts, like fraud or assault, the plaintiff has the duty to mitigate damages "as far as is practicable by the use of ordinary care and diligence." O.C.G.A. §51-12-11.

Although general damages may be recovered without proof of any amount, Georgia courts have held that it does not follow that the jury may thus award any amount. Instead, juries must "observe the cardinal rule of law, which is that damages are given only as compensation for the injury done." Marzullo v. Jim Ellis Motors, 253 Ga. App. 706, 708, (2002); see also, O.C.G.A. §51-12-4.

Last, Georgia adheres to the "impact rule" that requires a physical contact before awarding damages for emotional distress. Ford v. Whipple, 225 Ga. App. 276, 278 (1997). To state a claim for emotional distress, the plaintiff must establish three elements: (1) physical impact to the plaintiff, (2) the physical impact

causing physical injury, and (3) the physical injury causing mental suffering and/or emotional distress. Wilson v. Allen, 272 Ga. App. 172, 174 (2005).

**3. Are attorneys' fees available in tort actions? If so, under what circumstances?**

Attorneys' fees are available in tort cases, but not as a matter of course. Georgia follows the so-called "American Rule" where parties generally pay for their own representation. Etowah Envtl. Grp., LLC v. Walsh, 333 Ga. App. 464, 473 (2015). Statutes in derogation of this common law rule are construed narrowly. Cohen v. Rogers, 341 Ga. App. 146, 156 (2017).

In Georgia, the statutes in derogation of the American Rule, which allow for attorneys' fees, tend to revolve around similar issues, such as when a defendant "asserted unwarranted claims, engaged in improper defensive tactics, acted in bad faith, has been stubbornly litigious, or has caused unnecessary trouble and expense." Williams v. Binion, 227 Ga. App. 893 (1997). Despite the ostensible similarity of various code sections that provide for attorneys' fees, the requirements and procedures vary. Id. Accordingly, we will briefly touch on the three most widely-relied upon avenues for plaintiffs to seek attorneys' fees.[2]

***O.C.G.A. § 13-6-11***

Most common, plaintiffs will include a prayer for attorneys' fees in their complaint pursuant to O.C.G.A. § 13-6-11. This section provides: "[t]he expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in *bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense*, the jury may allow them." O.C.G.A. § 13-6-11 (emphasis added).[3] One of the three triggers (bad faith, stubbornly litigious, or unnecessary trouble and expense) must apply to recover attorneys' fees. Franchise Enters., Inc. v. Ridgeway, 157 Ga. App. 458, 460 (1981). A bona fide controversy bars recovery of attorneys' fees under this section. Bayliner Marine Corp. v. Prance, 159 Ga. App. 456, 461 (1981); Mdc Blackshear v. Littell, 273 Ga. 169, 174 (2000) (noting an award of attorneys' fees is proper "when a

[2] The question and response above concerned attorneys' fees in the primary action. Note, however, attorneys' fees from a separate lawsuit may be recoverable as an item of consequential damage stemming from a tort. E.g., Marcoux v. Fields, 195 Ga. App. 573, 575 (1990); see also, Restatement (Second) of Torts, § 914 (2) ("One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action"). In this context, the fees are recoverable under general tort principles of proximate cause (and, potentially, reasonable efforts to mitigate damages) and, thus, need not qualify under any statutes discussed above.

[3] Although this code section appears in the contracts title, it nevertheless applies to torts. Jones v. Spindel, 122 Ga. App. 390 (1970). Oddly enough, the section applies *primarily* to torts. Raybestos-Manhattan, Inc. v. Friedman, 156 Ga. App. 880, 883 (1981).

plaintiff is caused unnecessary trouble and expense *above the normal trouble and expense* associated with litigation.") (emphasis added).

The amount of damages for the underlying action does not necessarily impact whether an award of attorneys' fees is appropriate. The Georgia Supreme Court has held that attorneys' fees might be appropriate even if Plaintiff was only seeking nominal damages. Tyler v. Lincoln, 272 Ga. 118, 121 (2000).

In terms of process, attorneys' fees under this code section must be requested in the complaint and are awarded by the finder of fact. Manderson & Assocs. v. Gore, 193 Ga. App. 723, 735 (1989). This code section is only available to plaintiffs. Williams, 227 Ga. App. at 893.

### *O.C.G.A. § 9-15-14*

Attorneys' fees may also be requested pursuant to O.C.G.A. § 9-15-14. The code section provides that attorneys' fees "shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position." O.C.G.A. § 9-15-14(a). Thus, unlike 13-6-11, either party may request attorneys' fees so long as the motion is made within forty-five days of the final disposition of the action. O.C.G.A. § 9-15-14(e); Hewitt v. Walker, 234 Ga. App. 78, (1998) (noting the forty five days runs from the trial court's judgment, not the end of the appellate process). Also unlike 13-6-11, the award comes from the court, not the finder of fact. O.C.G.A. § 9-15-14(f).

The statutory procedure must be strictly followed, so requesting fees in an answer rather by motion, as required, is not sufficient. Glass v. Glover, 241 Ga. App. 838, 839 (2000) (vacating an award of attorneys' fees that were requested in the defendant's answer as a counter-claim). Likewise, appellate courts have vacated an award of attorneys' fees that were not accompanied by the specific findings of fact required by the code section. Panhandle Fire Prot., Inc. v. Batson Cook Co., 288 Ga. App. 194, 199 (2007).

### *O.C.G.A. § 51-7-81*

Finally, attorneys' fees may be sought in an entirely separate abusive litigation action that follows the conclusion of the original action. O.C.G.A. §§ 51-7-81; 51-7-84(b). Before bringing such a claim, the movant must have given formal notice to the opposing party of a potential abusive litigation claim, and the recipient enjoys a complete defense to such an abusive litigation claim if he ceases/withdraws/or otherwise walks back the offending action within thirty days. O.C.G.A. §§ 51-7-84; 51-7-82.

**4. Are there any instances in tort actions when pre-judgment interest is available for recovery?**

Yes, pre-judgment interest is available in Georgia provided that the plaintiff strictly follows the applicable code section:

> Where a claimant has given written notice by registered or certified mail or statutory overnight delivery to a person against whom claim is made of a demand for an amount of unliquidated damages in a tort action and the person against whom such claim is made fails to pay such amount within 30 days from the mailing or delivering of the notice, the claimant shall be entitled to receive interest on the amount demanded if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the amount demanded. O.C.G.A. § 51-12-14 (a).

Just like the attorneys' fees discussed above, this provision abrogates the common law tradition and is accordingly construed narrowly. Resnik v. Pittman, 203 Ga. App. 835, 836 (1992) (holding that a demand under this section delivered to either the insurance company or claims representative did not qualify because neither would be "the person against whom a claim is made" as the statute contemplates); but see, Hewett v. Carter, 215 Ga. App. 429, 430 (1994) (holding that an insurance carrier was equitably estopped from arguing that the plaintiff did not strictly comply with the statute after the company directed the plaintiff to direct all correspondence to the company, and not the individual defendant).

The code section enables the defendant to remove the risk of incurring prejudgment interest as follows:

> [I]f, at any time after the 30 days and before the claimant has withdrawn his or her demand, the person against whom such claim is made gives written notice by registered or certified mail or statutory overnight delivery of an offer to pay the amount of the claimant's demand plus interest under this Code section through the date such notice is given, and such offer is not accepted by the person making the demand for unliquidated damages within 30 days from the mailing or delivering of such notice by the person against whom such claim is made, the claimant shall not be entitled to receive interest on the amount of the demand after the thirtieth day following the date on which the notice of the offer is mailed or delivered even if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the sum demanded pursuant to this Code section. O.C.G.A. § 51-12-14(a).

If plaintiff has complied with the statute and receives a sufficiently large judgment, the plaintiff submits proof to the judge, who incorporates the figure into the award—the jury does not calculate this type of prejudgment interest.

O.C.G.A. § 51-12-14(d). The interest is three percent more than the prime rate reported by the Board of Governers on statistical release H.15. O.C.G.A. § 51-12-14(c).

**5. In your state what proof is necessary to establish a right of recovery for economic damages, i.e. lost wages, medical expenses, etc.?**

Generally, damages are given as pay or compensation for the injury done, and "necessary expenses consequent upon an injury are a legitimate item in the estimate of damages." O.C.G.A. §§51-12-4; 51-12-7. All tort damages must be established with "reasonable certainty," so that the fact finder is not speculating, conjecturing, or guessing. Lester v. S. J. Alexander, 127 Ga. App. 470, 471 (1972). Neither precision nor absolute certainty, however, is required. Herr v. Withers, 237 Ga. App. 420, 421 (1999); Green v. Trevena, 142 Ga. App. 621, 624 (1977).

The reasonably certain standard applies differently to different categories of economic damages. For example, courts require the plaintiff to present more specific evidence for a claim of lost profits. Young v. Ga. Agric. Exposition Auth., 318 Ga. App. 244, 247 n.5, (2012) (collecting cases for the proposition that lost profits must be capable of "definite ascertainment"); cf.,Super Discount Markets v. Coney, 210 Ga. App. 659, 660 (1993) (noting, on the other hand, that proof of lost wages must be "reasonably certain" and not speculative). For medical expenses, the plaintiff has the burden to show that such expenses were proximately caused by the tort and that the expenses were reasonable. O.C.G.A. § 51-12-7; Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 673 (2014). Expert testimony is not required as "the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received." O.C.G.A. § 24-9-921(a) & (b).[4] Any such witness remains subject to a "sifting examination" as to the reasonableness or necessity of such expenses, but this section specifically provides that expert testimony is not required. O.C.G.A. § 24-9-921(b).

**6. Is there any distinction in your state relative to recovery for economic versus non-economic damages?**

[4] Note that this section only to applies to expenses from four types of providers:
(1) A hospital;
(2) An ambulance service;
(3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or
(4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist.
O.C.G.A. § 24-9-921(a).

Yes. As described above, special damages are treated differently than general damages. General damages, including "pain and suffering" and other non-economic damages, need not be specially pleaded and are generally left for the jury to determine. This has long been the case. Atlanta S. R. Co. v. Jacobs, 88 Ga. 647, 653 (1891) ("There is no standard but the enlightened conscience of impartial jurors."); Cent. of Ga. R.R. v. Ross, 342 Ga. App. 27, 37 (2017)(" [e]ven if the plaintiff should produce no evidence from which a jury could determine a pecuniary value for loss of his earning capacity, the courts have approved of including damages for decreased ability to labor as an element of pain and suffering to be measured by the enlightened conscience of the impartial jurors in such a case.").

Also, Georgia recognizes the "economic loss rule," which provides that "a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort. Under the economic loss rule, a plaintiff can recover in tort only those economic losses resulting from injury to his person or damage to his property; a plaintiff cannot recover economic losses associated with injury to the person or damage to the property of another." GE v. Lowe's Home Ctrs., Inc., 279 Ga. 77, 78 (2005).