

ILLINOIS

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

In Illinois, there are two primary categories of damages: compensatory damages and punitive/exemplary damages. Compensatory damages are the sum of economic and non-economic losses. Economic losses include all damages which are tangible, such as past and future medical expenses, loss of income or other wages, or other property loss. Non-economic losses are intangible and include pain and suffering, aggravation of a pre-existing ailment or condition, disability or loss of a normal life, disfigurement, increased risk of harm, loss of consortium, loss of society, and emotional damages. *See* IPJI 30.01; *see also* 735 ILCS 5/2-1115.2 (enacted by P.A. 89-7, which has been held unconstitutional for capping damages in a separate provision).

Punitive damages are intended to punish the defendant and discourage similar conduct. These are only available where actual damages have been awarded, and may be awarded if “justice and the public good require it.” IPJI 35.00. *See Morrow v. L.A. Goldschmidt Associates, Inc.*, 126 Ill. App. 3d 1089 (1984). Punitive damages may be awarded when the tortious conduct is committed with fraud, actual malice, deliberate violence or oppression or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. *See Loitz v. Remington Arms Co.*, 138 Ill.2d 404 (1990).

Punitive damages should not go beyond deterrence and create a windfall for the plaintiff. The Supreme Court’s single digit ratio rule announced in *State Farm v. Campbell* cautioned that punitive damages which exceed compensatory awards in excess of a single digit ratio (greater than 9:1) to a significant degree may not satisfy due process. *See* 538 U.S. 408 (2003). However, Illinois courts have exceeded the single digit ratio in the past where the tortious conduct was significantly reprehensible. *See Leyshon v. Diehl Controls of North America*, 407 Ill.App.3d 1 (2010); *see also, Mathias v. Accor Economy Lodging*, 347 F.3d 672

(7th Cir. 2003) (applying Illinois law, affirmed award of punitives thirty-seven times the total compensatory award).

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

The Illinois Supreme Court declared tort reform efforts, including statutory caps on damages, unconstitutional. *See Best v. Taylor Machineworks Co.*, 179 Ill.2d 367 (Ill. 1997); *Lebron v. Gottlieb Memorial Hospital*, 237 Ill.2d 217 (Ill. 2010). A few exceptions exist. Claims against the State for damages sounding in tort cannot exceed the sum of \$100,000.00 to or for the benefit of any claimant. 705 ILCS § 505/8(d). This limit does not apply to awards arising out of a State employee's operation of a vehicle owned, leased or controlled by the State. *Id.* The Illinois' Worker's Compensation statute is another exception; it provides the exclusive remedy for injured workers against their employer. 820 ILCS 305/5(a). Employees are precluded from bringing any civil action against their employers, and generally, may not sue co-employees. *Id.*; *Oakes v. Gaines*, 107 Ill.App.3d 212 (1982); *Rylander v. Chicago S. L. R. Co.*, 17 Ill. 2d 618 (Ill. 1959). Additionally, plaintiffs suing under a strict liability theory may not recover pure economic losses. *See Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 89 (Ill. 1982).

Although tort damages are not capped, Illinois recognizes affirmative defenses that may act to limit or completely bar recovery. Under Illinois' modified comparative fault statute, a plaintiff is barred from recovering where the fact finder determines he/she is 51% or more at fault for the alleged injuries. 735 ILCS § 5/2-1116(c). Alternatively, if the plaintiff is 50% or less at fault, then the damages will be reduced pro-rata by plaintiff's percentage of fault.

Assumption of risk is a traditional tort defense, which bars recovery in cases where there is express assumption of risk. *See* IPJI 13.01. 13.02. Express assumption of risk is available where plaintiff and defendant explicitly agreed, in advance, that defendant owes no legal duty to plaintiff and therefore, that plaintiff cannot recover for the injuries caused either by inherent risks or dangers created by the defendant's negligence. IPJI 13.01.

Plaintiff's damages are also limited by his/her failure to mitigate damages. An injured person must exercise ordinary care to obtain medical treatment; thus, damages proximately caused by a failure to exercise such care cannot be recovered. IPJI 33.01. Similarly, a person whose business or property was damaged must exercise ordinary care to minimize existing damages and to prevent further damage; thus, damages proximately caused by a failure to exercise such care cannot be recovered. IPJI 33.02.

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

Parties to a lawsuit in Illinois can recover attorneys' fees if a statute or an agreement between the parties provides for such relief. *Ardt v. State*, 292 Ill. App. 3d 1059, 1063 (1st Dist. 1997). There are a variety of fee shifting provisions in both federal and state statutes which may allow for the "prevailing party" to recover costs, or for the successful plaintiff to recover costs. Most statutes leave fee shifting to the discretion of the court. Generally, civil rights statutes allow the "prevailing party" to recover attorneys' fees. *See, e.g.*, 42 U.S.C.S. §§ 1981, 1982, 1983, 1985, 1986; 740 ILCS 23/5(c). Another example is the Magnuson-Moss Warranty Act, which provides that a plaintiff who wins their case may be awarded reasonable attorneys' fees. *See* 15 U.S.C. § 2310(d)(2).

Illinois statutes also permit recovery of attorneys' fees in certain circumstances. The Illinois Consumer Fraud and Deceptive Business Practices Act provides that the prevailing party may recover reasonable attorneys' fees. 815 ILCS 505/10(a)(c). Under the Illinois Antitrust Act, attorneys' fees may be awarded to injured plaintiffs. 740 ILCS 10/7(2). The Nursing Home Care Act allows for the recovery of attorneys' fees in wrongful death actions where the wrongful death claim is "intertwined" with a survival action pursued under the act. 210 ILCS 45/3-602; *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 231 (1st Dist. 1996).

See also, Assistance Animal Damages Act, 740 ILCS 13/10(e) (prevailing plaintiff); Cannabis & Controlled Substances Tort Claims Act, 740 ILCS 20/6(d) (prevailing party); Gender Violence Act, 740 ILCS 82/15 (prevailing plaintiff); Insurance Claims Fraud Prevention Act, 740 ILCS 92/25(e), (j), and 740 ILCS 92/40; Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/15 (prevailing plaintiffs); Illinois Whistleblower Act, 740 ILCS 174/30 (prevailing plaintiff); Drug or Alcohol Impaired Minor Responsibility Act, 740 ILCS 58/10(3), (4) (prevailing plaintiff).

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

As general rule, prejudgment interest is recoverable only through agreement of the parties or by statute. *Kouzoukas v. Retirement Bd. Of Policemen's Annuity and Benefit Fund of City of Chicago*, 234 Ill.2d 446, 474 (Ill. 2009). An exception to this rule are suits brought in equity. *Id.* In such cases, a court may be justified in awarding interest based on equitable grounds. *Id.*

For example, in circumstances where a defendant obtained funds by a tortious act or by fraud and the conversion was concealed, pre-judgment interest can be obtained, *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156 ¶¶ 95 & 96 (collecting cases). In cases of conversion of funds, pre-judgment interest can be obtained if there is an unreasonable and vexatious delay of payment, *Kelrick v. Koplín*, 73 Ill.App.2d 63, 70 (1st Dist. 1966), or where the damages are liquidated and easily ascertainable, *Wilson v. Cherry*, 244 Ill.App.3d 632, 639 (4th Dist.

1993). Finally, in circumstances where there is a breach of fiduciary duty, pre-judgment interest is available as a means to force the fiduciary to account for profits gained from the injured parties funds. *Progressive Land Developers, Inc. v. Exchange Nat. Bank of Chicago*, 266 Ill.App.3d 934, 945 (1st Dist. 1994).

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

An award of damages seeks to compensate for all aspects of damage wrongfully inflicted and the fairness of compensation for said damages must be determined under the circumstances of each suit. *Doe by and through Doe v. Montessori School of Lake Forest*, 287 Ill.App.3d 289, 300 (2d Dist. 1997). The amount of damages is primarily a question of fact for jury determination and will not be disturbed unless it is clear that all reasonable fact finders would agree that the amount was excessive. *Horton v. City of Ottawa*, 40 Ill. App.3d 544, 551 (3d Dist. 1976).

In regard to past and future lost wages, medical expenses, etc., the party who seeks damages has the burden not only to establish that said damages were sustained, but also to establish a reasonable basis for computation of those damages. *Perfection Corp. v. Lochinvar Corp.*, 349 Ill.App.3d 738, 744 (1st Dist. 2004); see e.g. *Richardson v. Chapman*, 175 Ill.2d 98, 112 (Ill. 1997) (noting that the trier of fact is permitted leeway in awarding compensation for future medical costs when the evidence supports the notion that the same are likely to arise in the future even if future medical expenses are not specifically itemized in the testimony); *Patel v. Brown Machine Co.*, 264 Ill.App.3d 1039, 1061 (1st Dist. 1994) (holding that in regard to future wage loss, impairment of earning capacity does not require the use of expert testimony and is calculated by deducting the amount the plaintiff is capable of earning after the injury from the amount the plaintiff was capable of earning prior to the injury); *Barreto v. City of Waukegan*, 133 Ill.App.3d 119, 130 (2nd Dist. 1985) (holding that in order to recover past medical costs a plaintiff must show that they became liable at one point to pay a sum certain amount for medical services and that the charges were reasonable for the services they received); *Casey v. Baseden*, 131 Ill.App.3d 716, 722 (5th Dist. 1985) (holding that for, past lost earnings, all the law requires is that the plaintiff present evidence which will establish, with a fair degree of probability, a basis for the assessment of said damages).

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

Illinois law, in awarding damages, is designed to compensate for all injuries suffered including pain, suffering, anguish, and intangible losses, including any other facets of nonfinancial losses, *Doe by and through Doe v. Montessori School of Lake Forest*, 287 Ill.App.3d 289, 300 (2d Dist. 1997) (citing Ill. Const., ART. I,

§ 12 (1970)), as well as financial losses, *Perfection Corp. v. Lochinvar Corp.*, 349 Ill.App.3d 738, 744 (1st Dist. 2004).

Under the Illinois' Code of Civil Procedure:

- (a) "Economic loss" means all pecuniary harm for which damages are recoverable.
- (b) "Non-economic loss" means loss of consortium and all nonpecuniary harm for which damages are recoverable, including, without limitation, damages for pain and suffering, inconvenience, disfigurement, and physical impairment.

735 ILCS 5/2-1702.

At common law, however, sole "economic losses" are not recoverable in tort actions and instead can only be recovered under a contract theory. *In re Chicago Flood Litigation*, 176 Ill.2d 179, 198 (Ill. 1997) (describing the "economic loss rule") (citing *In re Illinois Bell Switching Station Litigation*, 161 Ill.2d 233 (Ill. 1994)). "Economic loss" has been defined as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property." *Sorkin v. Blackman, Kallick & Co., Ltd.*, 184 Ill.App.3d 873, 877 (1st Dist. 1989) (internal quotes and cites omitted). The three exceptions to the "economic loss rule" include circumstances: (1) where the plaintiff sustained *personal injury or property damage* resulting from a sudden or dangerous occurrence; (2) where the damages are proximately caused by fraud; and (3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions. *Id.* (citing *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69 (Ill. 1982)).