

INDIANA

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

There are numerous classifications of damages considered by Indiana courts, including general damages, special damages, nominal damages, compensatory damages, and punitive damages.

General damages are those that naturally result from the wrong inflicted upon an individual that the law presumes to have resulted from the injury or wrong. Special damages are those damages that actually result from an injury or wrong. Miller v. Long, 131 N.E.2d 348 (Ind. Ct. App. 1956); Weismann Motor Sales v. Allen, 19 N.E.2d 505 (Ind. Ct. App. 1939). Special damages result from an unusual state of facts and are normally added to general damages. Oldfather v. Zent, 41 N.E. 555 (Ind. Ct. App. 1895).

Nominal damages are those damages given in vindication of a breach of duty that do not result in any actual or pecuniary loss. Nominal damages are those damages that the law infers take place from a breach of an agreement or an invasion of right when no evidence is presented to establish the exact extent of damage suffered. American Fletcher Nat. Bank & Trust Co. v. Flick, 252 N.E.2d 839 (Ind. Ct. App. 1969); Brauns v. Glesige, 29 N.E. 1061 (Ind. 1892). Further, where the evidence shows with reasonable certainty the extent of actual damages suffered, a verdict for “nominal damages” is improper. Paxson v. Dean, 67 N.E. 112 (Ind. Ct. App. 1903). A trial court could award nominal damages for defamation or libel contained in the pleadings. Briggs v. Clinton County Bank & Trust Co. of Frankfort, 452 N.E.2d 989 (Ind. Ct. App. 1983).

Compensatory damages are those damages awarded to make good or to replace the loss suffered through a wrong or injury. When there is doubt as to the exact proof of damages, the uncertainty must be resolved against the wrongdoer. Indiana Tri-City Plaza Bowl, Inc. v. Glueck's Estate, 422 N.E.2d 670 (Ind. Ct. App. 1981).

Compensatory damages in tort include not only such pecuniary loss or injury in a given case as is capable of approximately accurate calculation, but also such a sum as may be supposed adequate to compensate for injury to business or profession, reputation, or social position, and for physical suffering and for mental trouble, all

of which are considered compensatory. Loparex, LLC v. MPI Release Technologies, LLC, 964 N.E.2d 806 (Ind. 2012).

Punitive damages are damages awarded to punish the wrongdoer and deter others in society from similar conduct. Punitive damages are awarded in addition to damages that compensate a plaintiff for actual injuries. *See* Ind. Code § 34-51-3. In tort actions, punitive damages may be awarded upon a showing of willful and wanton misconduct such that the defendant subjected other persons to probable injury, with an awareness of such impending danger and with heedless indifference of the consequences, or where the defendant acted maliciously, fraudulently, oppressively, or with gross negligence and the conduct was not the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other such noniniquitous human failing. Yost v. Wabash College, 3 N.E.3d 509, 523-24 (Ind. 2014).

In tort actions generally, all damages directly related to the wrong and arising without an intervening agency are recoverable. Bader v. Johnson, 732 N.E.2d 1212 (Ind. 2000). A victim's undisputed actual medical expenses are compensable under Indiana tort law. Traditional damage measures for tort claims are designed to compensate the injured person for the damage sustained by him due to the tortfeasor's actions, and to place the plaintiff in the same financial position in which he would have been had the tort not occurred, and such compensatory damages may include pecuniary losses and future losses which will result from the tortfeasor's wrong, as well as damages for bodily injury and mental anguish. Remington Freight Lines, Inc. v. Larkey, 644 N.E.2d 931 (Ind. Ct. App. 1994), as clarified on denial of reh'g, (Apr. 4, 1995).

All doubts and uncertainties as to proof of the exact measure of damages must be resolved against the party who has created the problem by his tortious act. Eden United, Inc. v. Short, 653 N.E.2d 126 (Ind. Ct. App. 1995). A damages award will be upheld on appeal if it falls within the bounds of the evidence. The jury has broad discretion in determining an award of damages, and when the evidence is conflicting, the jury is in the best position to assess the damages. If a damages award is within the scope of the evidence and can be explained on any reasonable ground, the award will not be deemed the result of improper considerations. If a damages award is so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or consideration of improper evidence, the award is excessive. Cox v. Matthews, 901 N.E.2d 14 (Ind. Ct. App. 2009).

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

Indiana subscribes to the general principle of tort law that all damages directly attributable to the wrong done are recoverable. However, there are some notable statutory damage limitations placed on punitive damages and certain causes of action.

In Indiana, a punitive damage award may not be more than the greater of three times the amount of compensatory damages awarded in the action, or \$50,000. Ind. Code § 34-51-3-4. If the trier of fact awards punitive damages that exceed the statutory limits, the court is required to reduce the punitive damage award with regard to the statutory limits. Ind. Code § 34-51-3-5.

The Indiana Tort Claims Act limits the combined aggregate liability of all government entities and of all public employees, acting within the scope of their employment and not excluded from liability under one of the statutory immunity provisions, to \$700,000 for injury to or the death of one person in any one occurrence occurring on or after January 1, 2008, and \$5 million for injury to or death of all persons in that occurrence. Ind. Code § 34-13-3-4. The court applies these statutory limitations of liability at the time of entry of a final judgment. Indiana State Highway Com'n v. Morris, 528 N.E.2d 468 (Ind. 1988). In applying these limitations to a case involving multiple plaintiffs, the key is not whether each plaintiff is a "person" under the Act but rather, whether each plaintiff's claim is separate from the claims of other plaintiffs in the action. Elkhart Community Schools v. Yoder, 696 N.E.2d 409 (Ind. Ct. App. 1998).¹

In addition to limiting the liability of a government entity, the Indiana Tort Claims Act prohibits any award of punitive damages against a government entity. Ind. Code § 34-13-3-4. An award of punitive damages against a governmental entity generally violates public policy. Marion Community School Corp. v. Marion Teachers Ass'n, 873 N.E.2d 605 (Ind. Ct. App. 2007).

Indiana doctors and hospitals are only responsible in any single medical malpractice case for \$250,000 of medical malpractice liability insurance. The Indiana Patient's Compensation Fund covers any compensation beyond \$250,000. Beginning in July 2017, Indiana raised the medical malpractice damage cap from \$1.25 million to \$1.65 million, with the first \$400,000 of any award to be paid by the healthcare provider. Ind. Code § 34-18-14. The cap will be raised again in 2019 to \$1.8 million with the first \$500,000 paid by the healthcare provider.

Indiana does not cap damage awards for the wrongful deaths of persons under twenty (20) years of age or persons between the ages of twenty (20) and twenty three (23) who are enrolled as students. However, when an unmarried adult (age 23 or above) with no dependents is the victim of a wrongful death, that person's estate cannot obtain more than \$300,000 for emotional distress, including loss of the adult persons' love and companionship, through a wrongful death lawsuit. Ind. Code § 34-23-1-2. However, reasonable attorney's fees, reasonable medical, hospital, funeral and burial expenses are recoverable over and above the \$300,000 cap. On

¹ When over one hundred people were injured by a stage collapse at the Indiana State Fair in 2011, they were limited to the \$5 million cap, so Indiana legislators chose to pass a special law to approve additional funds – another \$6 million – to compensate those victims.

the other hand, there is no maximum damage cap for a wrongful death lawsuit on behalf of a victim who is survived by a spouse or a dependent child.

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

Generally, Indiana follows the "American Rule" and each party to the litigation must pay for its own attorney fees, absent a statute or an agreement authorizing such award. Coplen v. Omni Restaurants, Inc., 636 N.E.2d 1285 (Ind. Ct. App. 1994); Holland v. Miami Systems, Inc., 624 N.E.2d 478 (Ind. Ct. App. 1993); Dale Bland Trucking, Inc. v. Kiger, 598 N.E.2d 1103 (Ind. Ct. App. 1992); Boczar v. Meridian Street Foundation, 749 N.E.2d 87 (Ind. Ct. App. 2001); Thor Electric, Inc. v. Oberle & Associates, Inc., 741 N.E.2d 373 (Ind. Ct. App. 2000). However, there are exceptions to the American Rule in Indiana.

Indiana Code § 34-52-1-1 allows the court to award attorney fees for frivolous lawsuits or frivolous defenses. The "obdurate behavior exception" to the general rule that each party to litigation pays his own attorney fees is designed to reimburse the prevailing party who has been dragged into baseless litigation and thereby subjected to great expense, and such exception comes into play only where the party knowingly files a baseless claim or fails to dismiss such a claim upon discovery of its blamelessness and the trial court determines such a filing or failure to dismiss was vexatious and abusive in extreme and blatant misuse of the judicial process. Turnpaugh v. Wolf, 482 N.E.2d 506 (Ind. Ct. App. 1985).

Attorneys can employ a "sliding scale" arrangement for attorney fees in medical malpractice cases, whereby attorney recovers no more than 15% of the amount paid to a client by the Patient Compensation Fund, pursuant to the Medical Malpractice Act (MMA), while the percentages retained by attorney from client's non-Fund recovery varies depending on client's overall recovery, so long as the overall fee paid to attorney is reasonable. In re Stephens, 867 N.E.2d 148 (Ind. 2007), overruling Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980) and In re Benjamin, 718 N.E.2d 1111 (Ind. 1999).

Attorney's fees may be awarded in wrongful death actions and inure to the exclusive benefit of the estate for the payment of these expenses. Hillebrand v. Supervised Estate of Large, 914 N.E.2d 1240 (Ind. Ct. App. 2009). Attorney's fees, probate administration costs, loss of services, and litigation costs are compensatory damages that remedy actual pecuniary losses, and therefore, these damages are recoverable under the Indiana Adult Wrongful death Statute (AWDS). Indiana Patient's Compensation Fund v. Brown, 949 N.E.2d 822 (Ind. 2011). Reasonable attorney's fees, as specifically permitted by the General Wrongful death Statute (GWDS), are included in the open-ended authorization of permissible compensatory damages under the Adult Wrongful death Statute (AWDS). McCabe v. Commissioner, Indiana Dept. of Ins., 949 N.E.2d 816 (Ind. 2011).

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

Indiana's Tort Prejudgment Interest Statute governs the award of prejudgment interest in any civil action arising out of tortious conduct. Under Indiana Code § 34-51-4-6, a prerequisite to the recovery of prejudgment interest is a settlement letter. The purpose of the settlement letter is to afford the adverse party notice of a claim and provide it with an opportunity to engage in meaningful settlement. Alsheik v. Guerrero, 979 N.E.2d 151 (Ind. 2012); Woude v. First Midwest Bank, 45 N.E.3d 847 (Ind. Ct. App. 2015).

The award of prejudgment interest is based on the deprivation of use of money or its equivalent and the theory that unless the interest is added, the plaintiff cannot be fully compensated. Wayne Tp. v. Lutheran Hosp. of Fort Wayne, Inc., 590 N.E.2d 1130 (Ind. Ct. App. 1992); Cincinnati Ins. Co. v. BACT Holdings, Inc., 723 N.E.2d 436 (Ind. Ct. App. 2000). Prejudgment interest is recoverable as additional damages to accomplish full compensation. Wayne Tp. v. Lutheran Hosp. of Fort Wayne, Inc., 590 N.E.2d 1130 (Ind. Ct. App. 1992); Crawford County Community School Corp. v. Enlow, 734 N.E.2d 685 (Ind. Ct. App. 2000). A determination of whether the prejudgment interest is allowable hinges upon whether the damages were ascertainable in accordance with the fixed rules of evidence and the accepted standards of valuation. Brane v. Roth, 590 N.E.2d 587 (Ind. Ct. App. 1992). Prejudgment interest is proper only where simple mathematical computation is required. Brane v. Roth, 590 N.E.2d 587 (Ind. Ct. App. 1992); Thor Electric, Inc. v. Oberle & Associates, Inc., 741 N.E.2d 373 (Ind. Ct. App. 2000); Lystarczyk v. Smits, 435 N.E.2d 1011 (Ind. Ct. App. 1982); Wilson v. Jenga Corp., 490 N.E.2d 375 (Ind. Ct. App. 1986); Fort Wayne Nat. Bank v. Scher, 419 N.E.2d 1308 (Ind. Ct. App. 1981).

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

Competent evidence tending to accurately show the actual or reasonable amount or the necessity of expenses incurred as a natural or proximate result of a wrong or injury is admissible under proper averments, and under this rule, competent evidence ordinarily is admissible to show the actual or reasonable amount or the necessity of medical, hospital, nursing, and similar expenses that naturally and proximately flow from the wrong or injury at issue. Thus, in an action for personal injuries it is proper to admit in evidence the checks the plaintiff gave in paying bills at a hospital. McClure v. Miller, 98 N.E.2d 498 (Ind. 1951).

In personal injury cases in which the reasonable value of medical services provided to the injured plaintiff is disputed, for purposes of a damages award, the opposing party may produce contradictory evidence to challenge the reasonableness of proffered medical bills, including expert testimony. Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009); Burge v. Teter, 808 N.E.2d 124 (Ind. Ct. App. 2004).

Indiana Evidence Rule 413 provides that statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are

admissible into evidence. Such statements are prima facie evidence that the charges are reasonable. Further, Indiana Evidence Rule 413 does not permit a party to challenge the medical necessity of medical care by questioning the medical judgment of plaintiff's medical providers in choosing to administer medical care. Sibbing v. Cave, 922 N.E.2d 594 (Ind. 2010).

Reasonable and necessary medical expenses include hospital, physician, medicine, and nursing charges, as well as other costs incidental to the medical treatment of an injury. Indianapolis Street Ry. Co. v. Ray, 78 N.E. 978 (Ind. 1906) (holding modified on other grounds by, Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991)).

Indiana recognizes that a proper element of damage is the impairment of earning capacity, which means the impairment of the ability to engage in one's vocation as distinguished from a loss of earnings. The basic measure of damages for impairment of earning capacity is the difference between the amount which the plaintiff was capable of earning before the injury and the amount which the plaintiff is capable of earning thereafter. The concept of impaired earning capacity involves more than mere proof of permanent injury and pain. There must be evidence of probative value which relates the injury to an inability to engage in one's vocation. Duchane v. Johnson, 400 N.E.2d 193 (Ind. Ct. App. 1980). Loss of earning capacity may be proven by both expert and non-expert testimony. Sony DADC U.S. Inc. v. Thompson, 56 N.E.3d 1171 (Ind. Ct. App. 2016).

To support an award of compensatory damages, facts must exist and be shown by the evidence which afford a legal basis for measuring the plaintiff's loss. To that end, the damages must be referenced to some fairly definitive standard, such as market value, established experience, or direct inference from known circumstances. Roy Bayer Trust v. Red Husky, LLC, 13 N.E.3d 415 (Ind. Ct. App. 2014).

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

Yes. As described above, in Indiana, compensatory damages may include pecuniary losses and future losses which will result from the tortfeasor's wrong, as well as damages for bodily injury and mental anguish. However, the measure for tort damages must be flexible enough to fit all circumstances and it is not necessary that a damages verdict reflect a precise mathematical certainty. Remington Freight Lines, Inc. v. Larkey, 644 N.E.2d 931 (Ind. Ct. App. 1994), as clarified on denial of reh'g, (Apr. 4, 1995).

In any civil action for damages in tort, the amount of damages given is, in the absence of any element warranting punitive damages, compensation for whatever loss or injury directly and proximately resulted from the defendant's wrongful act. Recovery may be had for any proximate consequence that can be established with

certainty, including damages for future and prospective injuries that are reasonably certain to result. Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. Ct. App. 1966).

The amount of damages recoverable for a personal injury is that amount that will compensate the plaintiff for all losses he has actually or directly sustained as a result of the injury, including pain and suffering, loss of time, medical expenses, and permanent impairment. Cleveland, C., C. & St. L. Ry. Co. v. Lynn, 177 Ind. 311, 98 N.E. 67 (1912); Louisville, N.A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N.E. 343 (1894). Additionally, a plaintiff may recover for loss of time, or time, labor, and money, or for lost earnings, income or services. Hamilton, Harris & Co. v. Larrimer, 105 N.E. 43 (Ind. 1914); Kenwood Tire Co. v. Speckman, 176 N.E. 29 (Ind. Ct. App. 1931).