

MASSACHUSETTS

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

In Massachusetts tort actions, the main categories of damages available include compensatory damages, punitive damages, and multiple damages.

The default rule in Massachusetts is to award compensatory damages.

“Compensation is that amount of money that reasonably will make the injured party whole. Compensatory damages may not exceed this amount. Anything beyond that amount is a windfall.” Kattar v. Demoulas, 433 Mass. 1, 15, 739 N.E.2d 246, 258 (2000). The main components of a compensatory damages award in tort are hospital and medical expenses, impairment of earning capacity, and pain and suffering, though the fact finder is given wide discretion in determining an award. See Evans v. Lorillard Tobacco Co., 465 Mass. 411, 463, 990 N.E.2d 997, 1037 (2013).

Punitive or exemplary damages are not allowed in Massachusetts unless expressly authorized by statute. Flesner v. Tech. Commc'ns Corp., 410 Mass. 805, 813, 575 N.E.2d 1107, 1112 (1991). The purpose of punitive damages include “condemnation and deterrence.” Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 412, 995 N.E.2d 740, 754 (2013). One notable statute authorizing punitive damages in tort cases is the Massachusetts Wrongful Death Act, Mass. Gen. Laws c. 229, § 2, which allows for punitive damages where death is caused by “malicious, willful, wanton or reckless conduct . . . or by the gross negligence of the defendant.” Id.

Multiple damages are another category of damages in Massachusetts that must be expressly authorized by statute. The purpose of multiple damages is to “reflect the Legislature's displeasure with the proscribed conduct and its desire to deter such conduct and encourage vindictive lawsuits.” McGrath v. Mishara, 386 Mass. 74, 85, 434 N.E.2d 1215, 1222 (1982). Similar in rationale but different in operation from punitive damages, these statutes allow the court, at its discretion, to multiply, usually doubling or trebling an award of compensatory damages. See, e.g., Mass Gen. Laws c. 140, § 159 (trebling an award for damage caused by a

“dangerous dog”); Mass Gen. Laws c. 130, § 60 (trebling an award for damages caused by taking shellfish from a licensed shell fishing area); Mass Gen. Laws c. 242, § 7A (trebling an award of damages for damage to a agricultural area). Perhaps the most common statute allowing multiple damages is Massachusetts Consumer Protection Act, c. 93A, which often does not apply directly to a tort action, but allows for double or treble damages for unfair or deceptive practices in the handling of tort claims (see Mass Gen. Laws c. 176D, § 7, violations of which may constitute violations of c. 93A). State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520–21, 155 L. Ed. 2d 585, Prod. Liab. Rep. (CCH) P 16805, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003).

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

Yes, in certain circumstances there are statutory limitations to tort recovery in Massachusetts.

Massachusetts is a modified comparative negligence state. A negligent plaintiff is barred from recovery if the percentage of fault attributed to her/him is greater than that attributed to a defendant or defendants. Mass. Gen. Laws c. 231 § 85. Only a negligent plaintiff whose fault is found to be less than or equal to that of the defendant may recover an award, which is reduced proportionately by the percentage of fault attributed to them. Id.

The Massachusetts “tort threshold” also limits recovery in some motor vehicle accidents. A person may not recover for pain and suffering in connection with a motor vehicle accident, unless their reasonable and necessary medical expenses exceed \$2,000.00, or if the accident meets one of the enumerated exceptions provided for accidents involving (1) loss of life, (2) dismemberment, (3) permanent and serious disfigurement, (4) loss of hearing or sight, or (5) a broken bone. Mass. Gen. Laws ch. 231 § 6D.

Massachusetts also has numerous “good Samaritan” status, shielding people from liability in certain circumstances who come to the aid of others, usually not in the ordinary course of their employment. See, i.e., Mass. Gen. Laws 258C § 13 (assisting crime victims); Mass. Gen. Laws c. 71, § 55A (school employees treating sick or incapacitated students); Mass. Gen. Laws c. 112, § 12V (certain individuals rendering CPR).

Massachusetts also limits damages in cases against charitable institutions, with some exceptions, to \$20,000.00 in most tort cases, and \$100,000.00 in medical malpractice cases. Mass. Gen. Laws c. 231, § 85K. Protection under the statute depends on whether “the purpose of the organization is to benefit a select few, rather than the wider community.” Connors v. Northeast Hosp. Corp., 439 Mass. 469, 789 N.E.2d 129 (2003).

Massachusetts caps general damages in medical malpractice cases at \$500,000.00, unless there is substantial or permanent loss of bodily function, substantial disfigurement, or other special circumstances. Mass. Gen. Laws c. 231, § 60H

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

Massachusetts follows the "American rule," whereby successful litigants cannot recover attorneys' fees, unless an award is specifically authorized by statute or by contract, Waldman v. American Honda Motor Co., 413 Mass. 320, 321, 597 N.E.2d 404 (1992), though there are limited exceptions recognized, see Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 686 N.E.2d 989 (1997).

An award of attorneys' fees can be granted through contractual arrangements, see Hannon v. Original Gunite Aquatech Pools, Inc., 385 Mass. 813, 827, 434 N.E.2d 611, 619, 33 U.C.C. Rep. Serv. 840 (1982), but in tort actions, an award of attorneys' fees is most often authorized by statute. Statutes authorizing an award of attorneys' fees in tort actions include the Wrongful Death Act, Mass. Gen. Laws c. 229, § 6A; medical malpractice actions brought under Mass. Gen. Laws c. 231, § 60B; and sanctions against an attorney or firm under Mass. R. Civ. P. 11(a). The most common statute authorizing an award of attorneys' fees is likely the Massachusetts Consumer Protection Act, Mass. Gen. Laws c. 93A, §§ 9(4), 11, which often comes into play regarding claims handling practices of insurance companies, claims handling agencies, or self-insured entities.

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

Yes. Massachusetts law provides pre-judgment interest on judgments for personal injury or property damage, at a rate of 12%, interest "per annum from the date of commencement of the action." Mass. Gen. Laws ch. 231, § 6B.

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

Lost Earning Capacity –

In Massachusetts, an injured person may be compensated for impairment of his capacity to work and earn money, both in the past and in the future. Solimene v. B. Grauel & Co., K.G., 399 Mass. 790, 804, 507 N.E.2d 662, 671 (1987). Lost wages are not element of damages, but evidence of wages are admissible on the issue. Casillo v. Worcester Area Transp. Co., 2001 Mass. App. Div. 113 (Dist. Ct. 2001)(citing Mitchell v. Walton Lunch Company, 305 Mass. 76, 78, 25 N.E.2d 151 (1939)). "Evidence of wages, salary, or other income derived from personal

services, and not interwoven with business profits, earned before and after an injury was sustained, for the purpose of comparison, is admissible in proof of diminished earning power.” Hendler v. Coffey, 278 Mass. 339, 342, 179 N.E. 801, 803 (1932). However, “such a comparison is not essential to proof-and and if shown is not necessarily conclusive-but all relevant facts are to be considered.” Cross v. Sharaffa, 281 Mass. 329, 331, 183 N.E. 838, 839 (1933).

“The process of ascertaining the amount of compensation to be awarded for impairment of the capacity to work requires, first, the determination of the extent to which such capacity has been diminished and, second, the fixing of the amount of money which will compensate for the determined extent of impairment.” Timmons v. Massachusetts Bay Transp. Auth., 412 Mass. 646, 652, 591 N.E.2d 667, 671 (1992)(quoting Shea v. Rettie, 287 Mass. 454, 456, 192 N.E. 44 (1934)). “[T]he assessment of damages for such impairment rests largely upon the common knowledge of the jury or other fact finding tribunal, sometimes with little aid from evidence. But in the assessment of damages for impairment of earning capacity, all relevant facts are to be considered, and helpful evidence is admissible although it does not furnish any mathematical evaluation of the impairment.” Leave v. Boston Elevated Ry. Co., 306 Mass. 391, 396, 28 N.E.2d 483, 486 (1940) (internal citations omitted).

However, although not required, expert testimony can be elicited from various experts regarding the diminution of a plaintiff’s future earning capacity. (see, e.g., Leave v. Boston Elevated Ry. Co., 306, Mass. 391, 394-96, 28 N.E.2d 483, 486 (1940)(vocational expert); Turcotte v. DeWitt, 332 Mass. 160, 163-64, 124 N.E.2d 241, 244 (1955)(actuary).

Medical Expenses -

The most common and efficient proof used to establish medical expenses are records and bills that are certified under Mass. Gen Laws c. 233, §§ 79 and 79G. Section 79 “provides that ‘[r]ecords kept by hospitals, dispensaries, clinics, and sanatoria under section seventy of chapter one hundred and eleven shall be admissible ... so far as such records relate to ... treatment and medical history’” if they are “‘certified by the affidavit of the person in custody thereof to be a true and complete record,’ delivered to the clerk of the court, and made available for examination by the parties,” and Section 79G, “provides for the admissibility of ‘an itemized bill and reports, including hospital medical records, relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured, or any report of any examination of said injured person,’ . . . ‘as evidence of the cost of medical treatment . . .’” Com. v. Palacios, 90 Mass. App. Ct. 722, 724–25, 65 N.E.3d 17, 20 (2016), review denied sub nom. Com. v. Palacios, 75 N.E.3d 1130 (Mass. 2017). “‘To be admitted, such records must be ‘subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance

organization rendering such services,” Id., and must be submitted via a three-step statutory process.. See Knight v. Maersk Container Service Co., Inc., 49 Mass. App. Ct. 254, 255, 728 N.E.2d 968, 969 (2000).

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

Massachusetts does distinguish purely economic damages in some key ways. Massachusetts follows the economic loss rule in the area of tort and strict liability. See, e.g., Bay State–Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co., 404 Mass. 103, 107, 533 N.E.2d 1350 (1989). “The rule establishes limitations on damages a plaintiff may plead and recover in a negligence action. It ensures that, ‘[i]n the absence of personal injury or physical damage to property [beyond the defective product itself], the negligent supplier of a defective product is not ordinarily liable in tort for simple economic loss.’” Wyman v. Ayer Properties, LLC, 469 Mass. 64, 69, 11 N.E.3d 1074, 1079 (2014).

“Economic loss includes ‘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.’” Berish v. Bornstein, 437 Mass. 252, 267, 770 N.E.2d 961, 975 (2002)(citing Marcil v. John Deere Indus. Equip. Co., 9 Mass.App.Ct. 625, 630 n. 3, 403 N.E.2d 430 (1980)(quoting Alfred N. Koplín & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 199, 7 Ill. Dec. 113, 364 N.E.2d 100 (1977)). It applies to both purchase and sale of products, and claims of negligent design and installation in new homes, but does not apply when a defective product causes damage to other property. Id.(quoting McDonough v. Whalen, 365 Mass. 506, 513-14, 313 N.E.2d 435 (1974)).