

MAINE

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

A party can recover nominal, compensatory (special and general), and punitive damages.

Nominal Damages

If a factfinder determines that a plaintiff has suffered a violation of a legally protected right or interest, but actual damages to property or personal injury are minimal, nominal damages may be awarded. *See* Andrew M. Horton and Peggy L. McGhee, Maine Civil Remedies, 56 (Tower Publishing, 4th ed. 2004); *Gaffny v. Reid*, 628 A.2d 155, 158 (Me. 1993) (“Some damage is presumed to flow from a legal injury to a real property right.”).

Compensatory Damages

Compensatory damages are awarded to a plaintiff to compensate her for injury, damage, or loss. The purpose is to put the plaintiff back into the position she would have been if she were not injured. *Wendward Corp. V. Group Designs, Inc.*, 428 A.2d 57, 61-62, (Me. 1981). “While the measure of damages should avoid a windfall to either party, it should compensate the Plaintiff as precisely as possible for the loss without recourse to speculation and conjecture.” *Cote Corp. V. Thom’s Transport Co., Inc.*, 2000 WL 762076, * 3 (D. Me) (citing *Wendward Corp.*, 428 A.2d at 61-62). Compensatory damages recoverable under Maine law include property loss; economic loss; lost profits and investment; past and future medical expenses and costs; past and future emotional distress, pain and suffering, mental anguish, and loss of enjoyment of life; employment-related damages; loss of consortium; and wrongful death. *See* Jack Simmons, et al., Maine Tort Law, § 19.02 (Matthew Bender Publications, 2004 ed. Supp. 2015). *See* answer to Question 5, below.

In Maine, as in other jurisdictions, there are two types of compensatory damages, general damages and special damages. General damages are damages that “naturally, logically and necessarily result” from the plaintiff’s injury. *Fournier v. Great Atlantic & Pacific Tea Co.*, 128 Me. 393, 148 A. 147, 68 A.L.R. 481 (1929) (cited by Maine Practice Series, Maine Civil Practice, §9:6 Special Damages (3d ed. 2017)). Special damages are damages that are specific to the plaintiff. Maine Practice Series, Maine Civil Practice,

§9:6 Special Damages (3d ed. 2017). Under the Maine Rules of Civil Procedure, special damages must be specifically pleaded, meaning that the plaintiff must include the damages prayed for in the pleading with enough particularity to discern how the damage is related to the tortious act or omission. M. R. Civ.P. 9(g). A defendant can move for a more definite statement when special damages have not been pleaded with particularity. Maine Practice Series, Maine Civil Practice, §9:6 Special Damages (3d ed. 2017).

Compensatory damages for both intentional and negligent infliction of emotional distress are allowed in Maine, but are widely misunderstood and warrant special discussion here. To recover for the intentional infliction of emotional distress (“IIED”), the plaintiff must prove, (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from her conduct; (2) the conduct was “so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community”; (3) the actions of the defendant caused the plaintiff’s emotional distress; and (4) the emotional distress suffered by the plaintiff was “so severe that no reasonable [person] could be expected to endure it.” *Curtis v. Porter*, 2001 ME 158, ¶ 10, 784 A.2d 18, 22-23 (quoting *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 15 711 A.2d 842, 847); *See also Schelling v. Lindell*, 2008 ME 59, ¶ 26, 942 A.2d 1226, 1233 (finding that “[s]tress, humiliation, loss of sleep, and anxiety occasioned by the events of everyday life are endurable” and do not satisfy the elements for IIED). A person can prove “recklessness” as an element of the claim by showing that the defendant knew or should have known that her conduct created an unreasonable risk of harm and her conduct exceeded mere negligence. *Curtis*, 1998 ME ¶ 13, 784 A.2d at 23.

To recover for negligent infliction of emotional distress (“NIED”) a plaintiff must prove that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff suffered severe emotional distress; and (4) the breach caused the plaintiff’s harm. *Curtis*, 1998 ME ¶¶ 18, 20, 784 A.2d at 25-26. The primary difference between IIED and NIED is that the defendant must owe a legal duty to the plaintiff to be held liable for the negligent version. Typically this duty arises out of the relationship between the parties, such as in the case of a patient and her therapist or doctor, a parent and his child etc. *Id*; *Steadman v. Pagels*, 2015 ME 122, P. 27, 125 A.3d 713, 720-21. Maine courts have been reluctant to impose a duty, refusing to find a number of relationships to be “special” enough to impose a duty. *See, e.g., Bryan R.*, 1999 ME 144, ¶ 17, 738 A.2d at 845 (minister and child of church members). An “ordinary business relationship,” such as between a landlord and tenant, employer and employee, and mortgagee and mortgagor, is insufficient for example. *Gavrilovic v. Worldwide Language Resources, Inc.*, No. Civ 05-38-P-H, 2005 WL 3369155 *23-24 (D. Me. 2005); *Oceanic Inn, Inc. v. Sloan’s Cove, LLC*, 2016 ME 34, P. 19, 133 A.3d 1021, 1027.

Maine recognizes NIED for a bystander plaintiff who is not also injured, but only limitedly. *Curtis*, 1998 ME ¶ 19, 784 A.2d at 26. “[F]or a bystander to recover for emotional distress proximately caused by a defendant’s negligence toward another person, the bystander must demonstrate that she was present at the scene of the accident; that she suffered serious mental distress as a result of contemporaneously perceiving the

accident; and that she was closely related to the victim.” *Carter v. Williams*, 2002 ME 50, ¶ 17, 792 A.2d 1093, 1098–99 (quoting *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 13 711 A.2d 842, 846.) In Maine, relations that are close enough to satisfy the *prima facie* elements of this tort include familial relationships such as parent and child, husband and wife, and siblings. See *Carter*, 2002 ME 50, ¶ 20, 92 A.2d at 1099 (bystander witnessed injuries causing sister’s death); *Michaud v. Great Northern Nekoosa Corp.*, 1998 ME 213, ¶ 16, 715 A.2d 955, 960 (refusing to find a special relationship between a rescuer and a victim in the absence of a familial relationship).

Medical expenses are recoverable as special damages, of course. There has been a longstanding debate in the Maine legal community over the recoverability and, therefore, admissibility, medical expenses. The debate revolves around whether the amount billed by the provider is recoverable or the reduced amount actually paid by the patient, her insurer, or the government. The argument stems from the fact that third-party payers such as Medicare and private insurers typically pay a lot less for medical care than the billed amount, either by contract or by law. Plaintiffs repeatedly argue to exclude evidence of the lesser amount actually paid, while defendants argue for its admission. In the right case, the difference can add up to hundreds of thousands of dollars.

The highest court in Maine, called the Law Court, has yet to decide whether the amount billed for medical care or the lesser amount paid is admissible as evidence of reasonable medical expenses. The trial court has addressed the issue, but little consensus has been reached, leading to a split amongst the Justices. There are three, sometimes conflicting, outcomes the Justices have reached: (1) admit only the actual amount paid by the patient or third party and accepted by the provider; (2) admit only the amount billed by the provider; (3) and admit both, the amount billed and the amount paid as evidence for the factfinder to consider.

Punitive Damages

Tuttle v. Raymond is the seminal case on the recovery of punitive damages under Maine law. Punitive damages are awarded in addition to compensatory damages only to promote “deterrence or punishment or both.” *Tuttle v. Raymond*, 494 A.2d 1353, 1355 (Me. 1985). The plaintiff must prove by clear and convincing evidence that the defendant acted with malice. 494 A.2d at 1354. “Such malice exists where the defendant’s tortious conduct is motivated by ill will toward the plaintiff.” 494 A.2d at 1361. Malice can also be implied:

Punitive damages will also be available, however, where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied. We emphasize that, for the purpose of assessing punitive damages, such “implied” or “legal” malice will *not* be established by the defendant’s mere reckless disregard of the circumstances.

Id. Punitive damages are not available for mere negligence or recklessness. *Id.*

Once a plaintiff has established either actual or implied malice, the factfinder must consider any aggravating or mitigation factors such as the outrageousness of defendant's conduct, defendant's financial ability to pay the award, and whether there was any criminal punishment for the same conduct. 494 A.2d at 1359. A punitive damages award should consider the facts particular to the case and the specific defendant in order to provide adequate deterrence and punishment. *Caron v. Caron*, 577 A.2d 1178, 1181 (Me. 1990) (finding that the defendant's financial condition supported a punitive damages award of \$10,000).

Punitive damages are not lightly awarded in Maine. The Law Court has set high legal and factual hurdles for prevailing.

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

Wrongful Death Act

If a deceased person had a right to maintain an action had death not ensued, then a wrongful death action can be brought by the representative of the estate instead. *Amica Mutual Insurance Company v. Estate of Esther Pecci, et al.*, 953 A.2d 369, 372 (Me. 2008). Under Maine's wrongful death statute, 18-A M.R.S. § 2-804, certain recoverable damages are capped:

1. \$500,000 for loss of consortium and emotional distress, and
2. \$250,000 for punitive damages.

Loss of consortium under the statute is for the loss of comfort, society, and companionship of the deceased. Such damages have been defined as resulting from the loss of a relationship and are "emotionally inchoate or sentimental losses ... and losses encompassing not only material services but such intangibles as society, guidance, companionship..." *Feighery v. York Hosp.*, 38 F.Supp.2d 142, 150 (D. Me. 1999). The wrongful death statute is meant to compensate the spouse and minor children of a decedent, but if the decedent did not have a spouse or any minor children, then the decedent's heirs benefit from the recovery. 18-A M.R.S. § 2-804(b).

The Wrongful Death Act's framework for recovery in the event of death is meant to be exclusive. A separate claim for emotional distress arising from the same set of facts and circumstances as the wrongful death claim is not viable, for example. *Carter*, 2002 ME 50 ¶ 25, 792 A.2d at 1100. ("[T]he wrongful death statute limits recovery for emotional distress, and should be construed to limit recovery when the effects of that emotional distress extend to cause a fellow beneficiary's loss of consortium").

If the plaintiff proves by clear and convincing evidence that the tort was caused by actual or implied malice, punitive damages may be recovered up to the stated cap. 18-A M.R.S. § 2-804(b); *Leighton ex rel. Leighton v. Reichert*, 2001 WL 1736575 * 1 (Me. Super. Ct. 2001) (finding punitive damages for the plaintiff when his daughter was murdered by the defendant).

Maine Tort Claims Act

While State and local government, and certain quasi-governmental entities, are statutorily immune from liability in most instances, express exceptions to that immunity apply, but only limitedly. Damages against the government entity are limited to \$400,000 per occurrence, including court costs and prejudgment interest. 14 M.R.S. § 8105. Post-judgment interest is not limited by the cap. 14 M.R.S. § 8105(2). Punitive damages may not be awarded against a government entity. 14 M.R.S. § 8105(5). The liability of a government employee for negligence committed within the scope of employment is limited to \$10,000 per occurrence. 14 M.R.S. § 8104-D. If a government employee is found to be personally liable, there is no immunity from punitive damages. *Rippett v. Bemis*, 672 A.2d 82, 89 (Me. 1996).

Comparative Fault

The comparative fault statute in Maine applies to negligence and similar tort claims. “Fault means negligence, breach of statutory duty or other act or omission that gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.” 14 M.R.S. § 156. Comparative fault is an affirmative defense that the defendant has to prove by a preponderance of the evidence. Maine is a “modified” comparative fault state, which compels a complete denial of a recovery to a plaintiff who was as negligent as, or more negligent than, the defendant she has sued. In numeric terms, if the plaintiff was 50% at fault or greater, then she is denied a recovery altogether. So long as the plaintiff was less negligent than the defendant, she can recover, but the factfinder may reduce her recovery. *Rodgers v. American Honda Motor Company*, 46 F.3d 1 (1st. Cir. 1995).

A reduction for comparative fault need not match the percentage of liability the plaintiff bears in relation to the defendant, so long as the factfinder believes the reduction fairly and equitably reflects the plaintiff’s own fault in causing her claimed damages. *Pomeroy et al., v. Glidden*, 1997 ME 118, ¶ 4, 695 A.2d 1185, 1186. In *Pomeroy*, the jury found that the plaintiff was less than 50% at fault. However, it reduced the plaintiff’s recovery from \$120,000 to \$18,000. “The comparative negligence statute...requires the factfinder to make two separate and distinct decisions: first, to determine liability, and second, to apportion damages in a just and equitable manner.” *Brown v. Crown Equipment Corp.*, 2008 ME 186, ¶ 24, 960 A.2d 1188, 1195.

Comparative fault integrates with joint and several liability such that the fault comparison in the case of multiple defendants is conducted by comparing the fault of all defendants collectively with that of the plaintiff. *Baker v. Jandreau*, 642 A.2d 1354, 1355 (Me. 1994)(finding a defendant joint and severally liable to the plaintiff for damages although the defendant was only 10% at fault, and less to blame than the plaintiff)(cited by *Peerless Div., Lear Siegler, Inc. v. Special Hydraulic Cylinders Corp.*, 1999 ME 189, ¶ 9, 742 A.2d 906, 909)).

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

In tort actions, Maine generally follows the “American Rule” under which each party pays his or her own legal expenses. As the Law Court has succinctly articulated,

A court's authority to award attorney fees "may be determined by statute, by the 'American Rule' at common law [which] generally prohibits taxing the losing party in litigation with a successful opponent's attorney fees, or by certain recognized common law authorizations of attorney fees."

"Although the prevailing party is not ordinarily entitled to an award of attorney fees, courts may award fees as damages for certain egregious conduct . . . and for some kinds of tortious conduct" . . . [such as a breach of fiduciary duty or in the exercise of the court's inherent authority to sanction parties and attorneys for abuse of the litigation process].

Because of the "American Rule," trial "courts should exercise their inherent authority to award attorney fees as a sanction only in the most extraordinary circumstances." The trial court's authority to sanction parties and attorneys for abuse of the litigation process "should be sparingly used and sanctions imposed only when the abuse of process by parties or counsel is clear."

Baker v. Manter, 2001 ME 26, ¶¶ 13-14, 765 A.2d 583, 585–86 (internal citations omitted).

Some jurisdictions award attorneys' fees as damages when the tortious conduct of the defendant caused the plaintiff to prosecute or defend against an action with a third party or in the case of prior, collateral litigation caused by the defendant's breach of contract or duty. However, "Maine has not recognized the collateral litigation exception to the American rule" *Soley v. Karll*, 2004 ME 89, 853 A.2d 755, 758.

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

Pre-judgment interest is available by statute in all civil actions that are not based on a contract or promissory note, except for small claims actions. 14 M.R.S. § 1602-B. Pre-judgment interest for tort actions is available at the one-year United States Treasury bill rate plus 3%, which is currently 3.87% for claims filed in 2017 or where Notice of Claim is sent in 2017. 14 M.R.S. § 1602-B (3); State of Maine Judicial Branch, *Writs of Execution: Pre-Judgment Interest Rate*, http://www.courts.maine.gov/citizen_help/attorneys/writ-pre.html.

Pre-judgment interest accrues from the time of service of a notice of claim served personally or by registered or certified mail or from the date on which the complaint is filed, whichever comes first. 14 M.R.S. § 1602-B (5). A non-prevailing party can petition the court to waive pre-judgment interest, and the court has the discretion to fully or partially waive interest upon a showing of good cause. 14 M.R.S. § 1602-B (5).

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

Past economic damages proximately caused by the defendant's tortious conduct and proven by a preponderance of the evidence are recoverable under Maine law. Alexander, *Maine Jury Instruction Manual* § 7-109 (2017 ed.). Damages do not need to be proven to a "mathematical certainty." A factfinder may make a "judgmental approximation..., provided the evidence establishes facts from which the amount of damages may be determined to a probability." See Andrew M. Horton and Peggy L. McGhee, *Maine Civil Remedies*, 59 (Tower Publishing, 4th ed. 2004); *Lee v. Scotia Prince Cruise, Ltd.*, 2003 ME 83, ¶ 21, 828 A.2d 210, 215; *Jenkins, Inc. v. Walsh Bros., Inc.*, 2001 ME 98, ¶18, 776 A.2d 1229, 1235-36.

Future damages, such as those for lost earning opportunity or loss of prospective profits, must meet a heightened "reasonable certainty" standard. Alexander, *Maine Jury Instruction Manual* § 7-109, 110 (2017 ed.). "Damages may not be awarded when the proof is speculative. When the evidence offered to show prospective damages is in the nature of mere guesswork and conjecture, the factfinder will be unable to determine the plaintiff's loss with reasonable certainty." *Snow v. Vilacci*, 2000 ME 127, ¶ 13, 754 A.2d 360, 364. Damages for prospective profits must be proved based on informed opinion and facts that a fact finder can effectively evaluate. Alexander, *Maine Jury Instruction Manual* § 7-109 (2017 ed.) (citing *Rutland v. Mullen*, 2002 ME 98 ¶ 22).

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

The economic loss doctrine has been adopted in Maine, as a matter of common law, to preclude tort claims when there is merely economic loss under certain circumstances. *Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267 (Me. 1995). For example, in a product liability case, if the only damage caused was to the product itself, the proper recovery is under warranty or contract theories, not tort. 659 A.2d at 270-1. Recovery under a tort theory is limited to situations where "the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property." *Id.*

The U.S. District Court for the District of Maine has recently determined that when a claim is not centered on the subject of the contract, meaning that the "value and quality of what was purchased" is not the issue, then the economic loss doctrine does not bar a tort claim. *Workgroup Technology Partners, Inc. v. Anthem, Inc.*, 2016 WL 424960 *18-19 (D. Me. Feb. 3, 2016)(the economic loss doctrine did not bar a claim for fraud when the product was misappropriated because it worked, rather than because it was defective). See *Tetra Tech Construction Inc. v. Summit Natural Gas of Maine Inc.*, No. 1:14-cv-00298-GZS, 2016 WL 3881056 *4 (D. Me. July 13, 2016) (economic loss doctrine barred a tort claim for negligent misrepresentation when the dispute revolved around the failure to pay for the performance of services); see, also, *Pendleton Yacht Yard, Inc. v. Smith*, No. CV-01-047, 2003 WL 21714927, *4 (Me Super. March 24, 2003) (that plaintiff's negligent misrepresentation tort claim was not barred by the economic loss doctrine if the defendant acted outside the scope of the contract).