

NEW MEXICO

Mike Clemens

Monica Garcia

BUTT THORNTON & BAEHR PC

P.O. Box 3170

Albuquerque, NM 87190

Phone: (505) 884-0777

Cell: (505) 228-0856 (Mike)

Cell: (505) 238-4996 (Monica)

Email: mpclemens@btblaw.com

mrgarcia@btblaw.com

www.btblaw.com

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

Lost earnings, medical expenses, nonmedical expenses, pain and suffering, loss of enjoyment of life, aggravation of preexisting condition, loss of earning capacity of a minor, loss of services of a spouse, and loss of consortium.

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

Yes, the Medical Malpractice Act and Tort Claims Act place caps on recovery.

The Medical Malpractice Act states as follows:

A. Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars (\$600,000) per occurrence. In jury cases, the jury shall not be given any instructions dealing with this limitation.

B. The value of accrued medical care and related benefits shall not be subject to the six hundred thousand dollar (\$600,000) limitation.

C. Monetary damages shall not be awarded for future medical expenses in malpractice claims.

D. A health care provider's personal liability is limited to two hundred thousand dollars (\$200,000) for monetary damages and medical care and related benefits as provided in Section 41-5-7 NMSA 1978. Any amount due from a judgment or settlement in excess of two hundred thousand dollars (\$200,000) shall be paid from the patient's compensation fund, as provided in Section 41-5-25 NMSA 1978.

E. For the purposes of Subsections A and B of this section, the six hundred thousand dollar (\$600,000) aggregate amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall apply only to malpractice occurring on or after April 1, 1995.

NMSA § 41-5-6.

The New Mexico Tort Claims act states as follows:

A. Unless limited by Subsection B of this section, in any action for damages against a governmental entity or a public employee while acting within the scope of the employee's duties as provided in the Tort Claims Act, the liability shall not exceed:

(1) the sum of two hundred thousand dollars (\$200,000) for each legally described real property for damage to or destruction of that legally described real property arising out of a single occurrence;

(2) the sum of three hundred thousand dollars (\$300,000) for all past and future medical and medically related expenses arising out of a single occurrence; and

(3) the sum of four hundred thousand dollars (\$400,000) to any person for any number of claims arising out of a single occurrence for all damages other than real property damage and medical and medically related expenses as permitted under the Tort Claims Act.

B. The total liability for all claims pursuant to Paragraphs (1) and (3) of Subsection A of this section that arise out of a single occurrence shall not exceed seven hundred fifty thousand dollars (\$750,000).

C. Interest shall be allowed on judgments against a governmental entity or public employee for a tort for which immunity has been waived under the Tort Claims Act at a rate equal to two percentage points above the prime rate as published in the *Wall Street Journal* on the date of the entry of the judgment. Interest shall be computed daily from the date of the entry of the judgment until the date of payment.

D. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

NMSA § 41-4-19.

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

New Mexico generally follows the "American Rule" regarding the award of attorneys' fees. Under the American Rule, each party pays its own attorneys' fees. *New Mexico Right to Choose/NARAL v. Johnson*. A party can only recover attorneys' fees if a statute, court rule, or an agreement expressly provides for their recovery. There are no statutes authorizing the award of attorneys' fees for torts actions in New Mexico.

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

Yes. NMSA Section 56-8-4(B) gives the court discretion to allow prejudgment interest of up to ten percent from the date the complaint is served upon the defendant after considering whether the plaintiff caused unreasonable delay and whether the defendant had made a reasonable and timely offer to settle. The New Mexico Court of Appeals held Section 56-8-4(B) "applies to *all actions* and is not limited to certain or specific actions, such as those based on contract or in which damages are ascertainable before trial." *Southard v. Fox*. The court further concluded Section 56-8-4(B) "permits the award of prejudgment interest on all damages awarded in a personal injury action, including those for nonpecuniary losses."

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

To establish a right of recovery for economic damages, a plaintiff must prove damages with reasonable certainty. *Sandoval v. Baker Hughes*. A party seeking to recover damages has the burden of proving the existence of injuries and resulting damage with reasonable certainty. Damages based on surmise, conjecture or speculation cannot be sustained. Damages must be proved with reasonable certainty. There is no exception to the . . . rule for future damages. The ultimate fact which the plaintiff has the burden of proving is future damages reasonably certain to occur as a result of the original injury. The verdict must be based upon proof and not upon speculation, guess, or conjecture. The general jury instruction on the measure of damages, simply instructs the jury to award damages where they have been proven by the evidence.

The Uniform Jury Instruction for the award of lost earnings instructs the jury to award "the value of lost earnings and the present cash value of earning capacity reasonably certain to be lost in the future." NMRA, Civ. UJI 13-1803.

To recover medical expenses, a plaintiff must prove medical expenses are medically necessary, reasonable, and causally connected to the incident. To award the reasonable expense of necessary medical care, treatment, and services received including prosthetic devices and cosmetic aids and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future.

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

No, there is no distinction relative to recovery for economic versus non-economic damages in New Mexico.