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

New York provides for three possible types of damages in tort actions: nominal, compensatory and punitive.

Nominal damages are awarded in intentional tort actions when a plaintiff does *not* need to allege that there has been a loss or injury in order to maintain an action against a defendant. Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 144, 75 N.E.3d 1159, 1164 (2017) (citing Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 95, 612 N.E.2d 289, 292 (1993)). In tort actions, an award of nominal damages is a departure from the general rule that a plaintiff must demonstrate actual injury. Kronos, Inc., 81 N.Y.2d at 95. Accordingly, nominal damages are only awarded in tort when needed to protect an "important technical right." Id.; Connaughton, 29 N.Y.3d at 143.

Compensatory damages may be either general or special damages. Special damages compensate for economic loss, such as cost of medical care or loss of earnings. See Liberman v. Gelstein, 80 N.Y.2d 429, 434, 605 N.E.2d 344, 347 (1992) (citing Restatement (Second) of Torts § 575 comment b; Prosser and Keeton, Torts (Prosser) § 112, at 794 (5th ed.)); N.Y. Pattern Jury Instr.--Civil 2:277. General damages compensate for the wrong complained of, such as pain and suffering or permanent injury. Lynch v. Third-Ave Co., 13 N.Y.S. 236, 238 (Super. Ct.), aff'd sub nom. Lynch v. Third Ave. R. Co., 128 N.Y. 681, 29 N.E. 149 (1891); B N.Y.Prac., Personal Injury Practice in NY § 3:11.

Punitive damages may be awarded when the conduct complained of rises to a level that implies a "criminal indifference to civil obligations." Marinaccio v. Town of Clarence, 20 N.Y.3d 506, 511, 986 N.E.2d 903, 906 (2013).

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

New York, in accordance with the New York State Constitution and public policy, does not cap or limit damages in tort actions. See N.Y. Const. Art. I, § 16; Edwards v. Erie Coach Lines Co., 17 N.Y.3d 306, 316, 952 N.E.2d 1033 (2011); In re New York City Asbestos Litig., 32 Misc. 3d 161, 174, 921 N.Y.S.2d 466 (Sup. Ct. 2011).

Although there are no limitations or caps on recovery in New York tort actions, New York's Civil Practice Law and Rules ("CPLR") § 5041(b), also known as Article 50-B, requires that a judgment for future damages be paid out in a sequence of periodic payments funded by an annuity that must be purchased by the defendant; rather than a present value paid in a single lump sum. After final judgment is entered, a plaintiff will receive payment for past damages in addition to the first $250,000.00 of future damages. The remaining portion of future damages must be paid in periodic installments. CPLR § 5041(e). The annuity cannot be for more than ten years and must be paid annually. Id.

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

Generally, attorneys' fees are not recoverable as an item of damage, unless authorized by agreement of the parties, court rule or by a statutory or contractual provision for allowance of such fees. See Chapel v. Mitchell, 84 N.Y.2d 345, 349, 642 N.E.2d 1082 (1994).

Particularly, New York Courts have determined that attorneys' fees may be awarded in tort actions when the opposing party's malicious acts cause a person to incur legal fees. Harradine v. Bd. of Sup'rs of Orleans Cty., 73 A.D.2d 118, 122, 425 N.Y.S.2d 182 (1980). The attorneys' fees must be related to the malicious acts and such acts must have been entirely motivated by a "disinterested" malevolence. Id. at 123. Under this rule, New York Courts have awarded attorneys' fees in tort actions involving malicious prosecution and false arrest. Pu v. Bruni, 24 Misc. 3d 1245(A), 899 N.Y.S.2d 62 (NY Sup. Ct., New York Cty. 2009).

Attorneys' fees may also be awarded under certain New York State statutes. CPLR § 909 gives the court discretion to grant attorneys' fees in class actions where judgment is rendered in favor of the class. Such fees may be awarded "to the representatives of the class and/or to any other person that the court finds has acted to benefit the class based on the reasonable value of legal services rendered . . ." Id.

Similarly, the New York Equal Access to Justice Act ("EAJA"), which is codified in CPLR §§ 8600-8605, allows the court to award attorneys' fees to economically disadvantaged litigants who prevail in civil actions against the State. New York enacted the EAJA in 1989 in order to "create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York." CPLR § 8600. Its purpose is to help economically disadvantaged litigants "seeking to obtain redress from wrongful actions of the state." Scott v. Coleman, 20 A.D.3d 631, 798 N.Y.S.2d 547 (2005). "The statute mandates an award of fees and other expenses to a prevailing party in any civil action brought against the state, unless the position of the state was determined to be substantially justified or that special circumstances render an award unjust." Id.; CPLR § 8601(a). Eligible parties include those individuals "whose net worth, not including the value of a homestead used and occupied as a principal residence, did not exceed [$50,000.00] at the time the civil action was filed . . ." CPLR § 8602(d)(i).

In addition, the court may award attorneys' fees under the New York Public Health Law, which establishes a private right of action for residents who sustain injuries as a result of deprivation of rights or benefits by a residential health care facility, such as a nursing home.

PHL § 2801-d. The law provides that the court may, in its discretion, order the defendant to pay attorneys' fees to the plaintiff "based on the reasonable value of legal services rendered," as required by justice. PHL § 2801-d(6).

Further, attorneys' fees may also be awarded as a sanction. CPLR § 8303-a(a) permits the court to award attorneys' fees to a prevailing party, where the losing party has filed frivolous claims and/or counterclaims. The fees may not exceed $10,000.00. Id. In the same way, 22 NYCRR § 130-1.1(a) provides that the court may award attorneys' fees as a sanction upon an attorney or party that engages in frivolous conduct. Moreover, the court may award attorneys' fees where a party fails to act in good faith during the course of discovery. See CPLR § 3126 (providing for sanctions, which may include attorneys' fees, where a party fails to make the necessary disclosures); CPLR § 3123(c) (providing for payment of reasonable expenses, including attorneys' fees, for unreasonable denial of a notice to admit).

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

In New York State, the law that governs pre-judgment interest is set forth in CPLR § 5002, which applies to allow a plaintiff to recover interest, computed from the date the verdict or decision was rendered to the date of entry of final judgment, on a sum awarded.

With respect to automobile-related personal injury actions commenced under New York Insurance Law § 5104(a) where the no-fault "serious injury" threshold is at issue, New York appellate courts are split on which date to compute pre-judgment interest from. The First, Second and Third Departments have determined that pre-judgment interest must be computed from "the date common-law liability attaches in favor of the plaintiff, either by default, summary judgment or bifurcated liability trial, and not from a finding of 'serious injury' [because in] a no-fault action, the 'serious injury' threshold is an issue of damages, not liability." See, e.g., Van Nostrand v. Froehlich, 44 A.D.3d 54, 844 N.Y.S.2d 293 (2d Dept. 2007). However, the Fourth Department has determined that pre-judgment interest must be computed from a decision or finding of liability, which must include a determination of causation and a finding that the plaintiff sustained a serious injury within the meaning of New York Insurance Law § 5104 (a). See, e.g., Manzano v. O'Neil, 298 A.D.2d 829, 747 N.Y.S.2d 813 (4th Dept. 2002).

Under certain circumstances, New York State allows plaintiffs to recover for pre-verdict interest from the time a cause of action accrues until the time of the verdict, report or decision. CPLR § 5001(a); See Commentary C5001:2. Pre-verdict interest is ***not*** allowed in personal injury actions or in punitive damages awards. See Gillespie v. Great Atl. & Pac. Tea Co., 26 A.D.2d 953, 276 N.Y.S.2d 372 (2d Dept. 1966) (citing CPLR § 5001(a)); Gersten v. Levin, 150 Misc. 2d 594, 596, 577 N.Y.S.2d 580, 581 (Sup. Ct., New York Cty. 1991). However, plaintiffs may recover pre-verdict interest in tort actions alleging property damage. CPLR § 5001(a).

Further, under New York's Estates, Powers and Trusts Law ("EPTL"), in a wrongful death action, pre-judgment interest is recoverable from the date of the decedent's death to the date of a verdict. See EPTL § 5-4.3.

Generally, both pre-judgment and pre-verdict interest rates must be calculated at a rate of nine percent (9%) per year. CPLR § 5004.

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

In New York, although not required, a plaintiff must generally use evidence from an expert economist, vocational rehabilitation expert, life care planner, or other qualified expert to establish economic damages. See, e.g., Kihl v. Pfeffer, 47 A.D.3d 154, 161, 848 N.Y.S.2d 200 (2d Dept. 2007); Madden v. Dake, 30 A.D.3d 932, 937, 819 N.Y.S.2d 121 (3d Dept. 2006); Tassone v. Mid-Valley Oil Co., 5 A.D.3d 931, 932, 773 N.Y.S.2d 744 (3d Dept. 2004); Smith v. M.V. Woods Const. Co., 309 A.D.2d 1155, 1157, 764 N.Y.S.2d 749 (2003).

With regard to lost wages, "under New York law, an award for loss of income must be established to a reasonable certainty given the plaintiff's earning capacity both before and after the accident giving rise to the suit." Carroll v. United States, 295 F. App'x 382, 385 (2d Cir. 2008). The measure of lost wages is generally based on either actual lost wages or on the diminished ability to earn wages. Kirschhoffer v. Van Dyke, 173 A.D.2d 7, 10, 577 N.Y.S.2d 512, 514 (3d Dept. 1991). The award cannot be based on mere conjecture. Carroll, 295 F. App'x at 385 (citing Bailey v. Jamaica Buses Co., 210 A.D.2d 192, 192, 620 N.Y.S.2d 257 (2d Dept. 1994)).

Of note, New York State also contemplates the loss of household services in awarding economic damages. Some New York Courts require a plaintiff seeking to recover for loss of household services to demonstrate that it is reasonably certain that the household services would have been performed ***but for*** the cause of action giving rise to the plaintiff's claim. See, e.g., Berrios v. 735 Ave. of the Americas, LLC, 103 A.D.3d 472, 473, 959 N.Y.S.2d 477, 478 (1st Dept. 2013) (holding that "in the absence of any evidence regarding the frequency and nature of the change in plaintiff's contribution to household services and that plaintiff retained or intended to retain, anyone to replace his contribution to household services, the Court properly excluded expert testimony as to the value of such loss.") Other New York Courts require a plaintiff to demonstrate that the lost services have been replaced at a cost and require proof of payment for the replacement services. See, e.g., Hyung Kee Lee v. New York Hosp. Queens, 118 A.D.3d 750, 754, 987 N.Y.S.2d 436, 441 (2d Dept. 2014).

With regard to medical costs, to recover ***past*** medical expenses a plaintiff must establish the actual cost of medical services rendered and that the treatment was "necessary and appropriate to the medical condition being treated." See Aragones v. State, 247 A.D.2d 657, 658, 668 N.Y.S.2d 772, 774 (3d Dept. 1998). A plaintiff that seeks to recover ***future*** medical expenses must provide credible testimony regarding the necessity and likelihood of future medical care. See Stylianou v. Calabrese, 297 A.D.2d 798, 799, 748 N.Y.S.2d 36, 37 (2d Dept. 2002) (denying plaintiff's claim for future medical costs because plaintiff's treating physician failed to state the basis for his opinion that plaintiff would require future surgery, thereby making the opinion speculative and unsupported by competent evidence).

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

Under CPLR § 4111(d)-(e), juries in personal injury and medical malpractice cases must specify which portions of a verdict account for economic (special) and non-economic (general) damages. The jury must then further identify which portions of the special and general damages account for "medical expenses, . . . loss of earnings, impairment of earning ability, and pain and suffering." Id. Subsequently, the jury must itemize these "amounts into amounts intended to compensate for damages that have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. Id. In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation." Id. Should the verdict, with respect to future damages, total greater than $250,000.00 CPLR § 5041(b) applies to reduce the future damages to present value.