OREGON

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

Oregon recognizes three types of damages: compensatory, nominal, and punitive. Recovery of nominal and punitive damages is limited to certain intentional torts and are not available for negligence claims.

In determining compensatory damages, Oregon follows the rule that "a plaintiff should recover only such sums as will compensate [the] plaintiff for the injury suffered as a result of [the] defendant's wrong." *See Yamaha Store of Bend, Oregon, Inc. v. Yamaha Motor Corp., U.S.A.*, 310 Or 333, 344, 798 P2d 656 (1990), *modified on other grounds*, 311 Or 88, 806 P2d 123 (1991). Compensatory damages encompasses injuries where damages are readily ascertainable (*i.e.*, economic damages) and injuries that have no precise monetary equivalent (*i.e.*, non-economic damages). While injuries must have a monetary value and be capable of estimation by a pecuniary standard, as a matter of practicality, determination of that standard "must be left to the sound judgment of the jury." *Fehely v. Senders*, 170 Or 457, 474, 135 P2d 283 (1943).

Economic damages are defined as:

> *[O]bjectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less.*

ORS 31.710(2)(a)

The term objectively verifiable monetary losses means "losses that are 'capable of verification through objective facts.'" *State v. Yocum*, 247 Or App 507, 512, 269 P3d 113 (2011), *rev den*, 352 Or 25 (2012) (quoting *DeVaux v. Presby*, 136 Or App 456, 463, 902 P2d 593 (1995)).

Noneconomic damages are defined as "subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment." ORS 31.710(2)(b).

Nominal damages are recoverable on claims in which damages are presumed. This includes certain intentional torts, such as trespass, wrongful attachment of property, and invasion of privacy. *See, e.g. Phillips v. Rathbone*, 194 Or App 90, 100, 93 P3d 835 (2004) (intentional trespass); *Crouter v. United Adjusters, Inc.*, 259 Or 348, 365, 485 P2d 1208 (1971) (wrongful attachment); *Hinish v. Meier & Frank Co.*, 166 Or 482, 506-07, 113 P2d 438 (1941) (invasion of privacy). But nominal damages are not always recoverable in every case in which a right has been violated, even if the claim is one for which damages are presumed. A court may decline to award nominal damages when "neither (1) danger of prescription nor (2) substantial loss or injury nor (3) willful wrongdoing by [the] defendant are established." *Kulm v. Coast-to-Coast Stores Cent. Org., Inc.*, 248 Or 436, 443, 432 P2d 1006 (1967).

Nominal damages are not recoverable on a negligence claim because proof of damage is an element of the tort. *See Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 410, 183 P3d 181 (2008). Additionally, if a jury awards economic damages in a personal-injury case, then an award of nominal noneconomic damages is not appropriate (*see Hall v. Cornett*, 193 Or 634, 643046, 240 P2d 231 (1952)), unless there is evidence from which the jury could have found that the plaintiff suffered only minor, insubstantial injuries. *Wheeler v. Huston*, 288 Or 467, 479, 605 P2d 1339 (1980).

Punitive damages are awarded to punish a defendant and to deter the defendant and others from similar misconduct. *See Oberg v. Honda Motor Co. Ltd.*, 320 Or 544, 888 P2d 8 (1995), cert den, 517 US 1219 (1996). They are not a substitute for compensatory damages or an offset against litigation expenses. *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 210, 797 P2d 1019 (1990). Punitive damages are recoverable in a civil action if a party can prove by clear and convincing evidence that "the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). Negligence alone is not sufficient to support an award of punitive damages. *Badger v. Paulson Inv. Co., Inc.*, 311 Or 14, 28, 803 P2d 1178 (1991).

"[U]nder Oregon law it is well established that whether a defendant's conduct is aggravated or wanton or comes within any of the other characterizations that permit the imposition of punitive damages is for the jury to decide." J*ane Doe 130 v. Archdiocese of Portland in Oregon*, 717 F Supp 2d 1120, 1141 (D Or 2010). A punitive-damages award is subject to postverdict review "to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole." ORS 31.730(2). In addition, a court has discretion to reduce the punitive-damages award if the defendant shows that it has taken reasonable remedial measures to prevent another occurrence of the conduct that gave rise to the punitive damages. ORS 31.730(3). A party may challenge a jury's punitive-damages award by filing a motion for a new trial under ORCP 64 B(5).

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

Yes. Under ORS 31.710(1), "in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed $500,000."

In the past two years, the cap on non-economic damages has received a lot of attention in both the courts and in the Legislature. Until recently, the Oregon Supreme Court held that under Article I, section 17, of the Oregon Constitution, the statutory cap on noneconomic damages was unconstitutional as applied to "civil actions for which common law provided a [right of] jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature." *Lakin v. Senco Products, Inc.*, 328 Or 62, 82, 987 P2d 463, clarified 329 Or 369, 987 P2d 476 (1999) (analyzing the predecessor statute, former ORS 18.560(1) (1989), renumbered as ORS 31.710(1) (2003)). Following *Lakin*, courts only applied the noneconomic damages in wrongful death cases.

In *Greist v. Phillips*, 322 Or 281, 290-300, 906 P2d 789 (1995), the Oregon Supreme Court held that the cap on noneconomic damages does not violate the remedy clause in Article I, section 10, of the Oregon Constitution because "100 percent of economic damages plus up to $500,000 in noneconomic damages is a substantial amount" for remedy-clause purposes.

In 2016, the Oregon Supreme Court in *Horton v. Oregon Health & Sci Univ*, 359 Or 168, 376 P3d 998 (2016), overruled *Lakin* and rejected *Lakin's* interpretation of Article I, section 17. The Court held that Article I, section 17, does not impose any "substantive limit on the legislature's authority to define . . . the extent of damages available for a claim." *Id.* at 250. In light of *Horton*, the damages cap of ORS 31.710 is back into play in personal injury cases and other common law causes of action (*i.e.*, it no longer violates the right to jury trial).

Since *Horton* was decided, a number of trial courts have applied ORS 31.710(1) to limit personal injury verdicts. In doing so, these courts have rejected plaintiffs' newly revived remedy-clause challenges to the statute. There are currently a number of remedy-clause challenges to ORS 31.710(1) pending in the Court of Appeals. In these challenges, the plaintiffs argue that whether ORS 31.710(1) violates the remedy clause should be analyzed anew under *Horton*.

Meanwhile, efforts are underway at the Oregon Legislature to repeal or replace the cap on noneconomic damages. The most recent efforts failed during the 2017 legislative session but the issue will likely be revisited again in February 2018 when the Legislature is back in session.

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

Generally no, with some limited exceptions. The Oregon Supreme Court, following the "American rule," has refused to grant attorney fees unless they are expressly authorized either by statute or by contract between the parties. *Brookshire v. Johnson*, 274 Or 19, 21, 544 P2d 164 (1976). Notable exceptions to this rule include the public-interest exception and the exception pursuant to contract. Under the public-interest exception, the court may, in its discretion, award attorney fees in which a party litigating in the interests of the public good. *See, e.g., Gilbert v. Hoisting & Portable Engineers, Local Union No. 701*, 237 Or 130, 137-38, 384 P2d 136 (1963), *modified*, 237 Or 138, 142, 390 P2d 320, *cert den*, 376 US 963 (1964) (involving a claim against a union by its members for fair and democratic elections). Contract provisions that allow for prevailing party attorney fees are also ordinarily enforceable. *See* ORS 20.083. By statute, the right to attorney fees in a contract is reciprocal and is applied "without regard to whether the prevailing party is the party specified in the contract and without regard to whether the prevailing party is a party to the contract." *See* ORS 20.096.

The most notable exception to the common-law rule is found in ORS 20.080. Under ORS 20.080(1), in any action for damages "for an injury or wrong to the person or property" when the amount pleaded is $10,000 or less and written demand for payment has been made not less than 30 days before commencement of the action, a prevailing party shall be entitled to attorney fees unless before suit the defendant tendered "an amount not less than the damages awarded to the plaintiff."

Certain information must be included in the demand in order for plaintiff to qualify for attorney fees. *See* ORS 20.080(3). For example, in an action for an injury or wrong to a person, the written demand made on the defendant must include "a copy of the medical records and bills for medical treatment adequate to reasonably inform the person receiving the written demand of the nature and

scope of the injury claimed." ORS 20.080(3)(a). Similarly, in an action for damage to property, the demand must include "documentation of the repair of the property or a written estimate of the difference in the value of the property before the damage and the value of the property after the damage." ORS 20.080(3)(b).

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

The general rule in Oregon is that prejudgment interest, like attorney fees, "cannot be recovered in actions at law unless there is an agreement to pay interest or a statute imposing interest." *Newell v. Weston*, 150 Or App 562, 583, 946 P2d 691 (1997), *rev den*, 327 Or 317 (1998). If there is a statutory or contractual basis for prejudgment interest, the plaintiff must plead and prove the grounds entitling plaintiff to prejudgment interest at the rate claimed, and the prayer of the complaint should ask for prejudgment interest. *See Emmert v. No Problem Harry, Inc.*, 222 Or App 151, 158, 192 P3d 844 (2008). The most common statutes authorizing prejudgment interest include claims for: recovery of purchase money for unlawfully sold securities (*see* ORS 59.115(2)(a)); wage claims (*see* ORS 652.150); and delayed progress payments (*see* ORS 279C.570).

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 Oregon, damages is one element in a negligence claim involving bodily injury. Therefore, damages must be proved not only to secure a specific amount of relief, but also to successfully prosecute the claim. Absent a special relationship that defines the defendant's duty to the plaintiff, a plaintiff's damages must be reasonably foreseeable. *See Bailey v. Lewis Farm, Inc.*, 343 Or 276, 171 P3d 336 (2007) and *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 83 P3d 322 (2004).

If plaintiff's damages are shown to be reasonably foreseeable, exact mathematical certainty is not required to prove the amount of damages incurred as a result of plaintiff's injuries. In *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 161, 20 P3d 837, *rev den*, 332 Or 518 (2001), the court underscored that only reasonable probability is required to establish economic damages. In *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or App 444, 473, 61 P3d 257 (2002), *rev den*, 335 Or 479 (2003), the court applied the analysis used in *Kahn* to a claim for loss of future earnings, which had previously been expressed as requiring proof to a "reasonable certainty." The *Benjamin* court allowed expert testimony on a loss-of-future-earnings claim that was based on assumptions regarding future economic conditions, including inflation, and future wage and interest rates. *Benjamin*, 185 Or App at 474. The court commented that "'reasonable certainty' is not a demanding standard," and that the "'[l]ack of absolute certainty does not bar submission of a claim for lost profits.'" *Benjamin*, 185 Or App at 473 (quoting

City of Eugene v. Monaco, 171 Or App 681, 688, 17 P3d 544 (2000), *rev den*, 332 Or 240 (2001)).

To recover medical expenses, a plaintiff must show that the medical supplies or services were actually provided, reasonable in amount, and necessary for the treatment of conditions related to the injury. *Tuohy v. Columbia Steel Co.*, 61 Or 527, 532, 122 P 36 (1912) ("The rule is that a plaintiff in a case involving personal injuries can recover, as a part of his damages, his reasonable expenses for medicines and medical treatment, but there must be some evidence that the charges are reasonable."). Future medical expenses are also recoverable.[1] To recover for future medical expenses, a plaintiff must show that it is reasonably probable the expenses will be incurred in the future. *See Harris v. Hindman*, 130 Or 15, 23, 278 P 954 (1929). In awarding future medical expenses, juries may consider evidence of future complications, including future medical treatment the need for which is merely possible rather than reasonably probable. *Feist v. Sears, Roebuck & Co.*, 267 Or 402, 410, 517 P2d 675 (1973). On the other hand, when there is no present physical injury, a plaintiff in Oregon cannot recover economic damages for the costs of future medical monitoring to detect a disease or condition that may manifest in the future. *See Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 414-15, 183 P3d 181 (2008)

Claims for lost business income or lost earnings must be established with reasonable certainty. For example, in *Owens v. Haug*, 61 Or App 513, 517-18, 658 P2d 523, rev den, 294 Or 792 (1983), the court entered a judgment notwithstanding the verdict, thereby setting aside the jury's award of $30,000 in special damages for lost wages, because the plaintiff failed to introduce any evidence by which to compute her wages, including evidence of past earnings either before or after the accident.

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

Although ORCP 18 B requires that the amount of damages be stated, the Oregon Court of Appeals has ruled that, in at least some circumstances, a plaintiff is not required to state the amount of non-economic damages. *McKenzie v. Pac. Health & Life Ins. Co.*, 118 Or App 377, 382, 847 P2d 879 (1993), rev dismissed as improvidently allowed, 318 Or 476 (1994) (when a plaintiff's treatment was ongoing for injuries allegedly sustained as a result of the defendant's wrongdoing, and the amount of damages was not yet ascertainable, the plaintiff was not required to state the amount of noneconomic damages in the complaint).[2] Although the lawyer need not plead a specific amount of noneconomic damages

[1] However, courts reduce any award of economic damages based on future medical expenses to present value. *See, e.g.*, *Denton v. EBI Companies*, 67 Or App 339, 343, 679 P2d 301 (1984).

[2] The holding in *McKenzie* may be limited to cases in which the damages are unascertainable or based on ongoing wrongful conduct. Absent such circumstances, a specific amount of noneconomic damage is likely required.

in some cases, the complaint must allege facts supporting the claim for noneconomic damages. *See Rieman v. Swope*, 190 Or App 516, 523, 79 P3d 399 (2003).