

## VIRGINIA

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

In Virginia, damages in a tort action can include compensatory damages for injuries or damages like compensation for bodily injuries and property damage. Specific available damages are set forth in Virginia Model Jury Instruction No. 9.000. Future losses, though recoverable, must be proven with particularity. If speculative, these losses will not be allowed.

Regarding property damages, the measure of damage to property is the fair market value of the property, or the diminution in value of the property if it is not destroyed.

Punitive damages must be specifically requested by a plaintiff and are capped at \$350,000. Va. Code § 8.01-38.1.

As noted below, attorneys' fees are generally not recoverable in tort actions.

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

Punitive damages in Virginia are capped at \$350,000. Va. Code § 8.01-38.1.

In medical negligence cases, recovery is capped at \$2.30 million through June 30, 2018. Beginning July 1, 2018 through June 30, 2019, the medical malpractice cap is \$2.35 million. Va. Code § 8.01-581.15.

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

No. Attorneys' fees are not available in tort actions. Rather, Virginia follows the "American Rule" which provides that "[g]enerally, absent a specific contractual or statutory provision to the contrary, attorney's fees are not recoverable by a prevailing litigant from the losing litigant." *REVI, LLC v. Chicago Title Ins. Co.*, 290 Va. 203, 213 (2015) (citing *Mullins v. Richlands Nat'l Bank*, 241 Va. 447,

449 (1991)). However, in the event an attorney or his/her client is sanctioned for conduct during litigation, a court may, in its discretion, award attorneys' fees.

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

Yes. Va. Code Ann. 8.01-382 provides clear discretion to the trier of fact to award pre-judgment interest. However, if no such pre-judgment interest is awarded, then it is mandatory that interest begins to accrue on the judgment on the date of the final order, judgment or decree. Dairyland Ins. Co. v. Douthat, 248 Va. 627, 631, 449 S.E.2d 799, 801 (1994).

**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 prove economic damages as a result of a tort, the burden is on the plaintiff to prove by the greater weight of the evidence each item of damage she claims and to prove that each item was caused by the defendant's negligence. She is not required to prove the exact amount of her damages, but she must show sufficient facts and circumstances to permit the jury to make a reasonable estimate of each item. Va. Jury Instr. 9.010; Gwaltney v. Reed, 196 Va. 505, 507-08, 84 S.E.2d 501, 502 (1954).

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

Yes and no. Virginia Model Jury Instruction No. 9.000 provides that the jury shall consider any of the following which it believes by the greater weight of the evidence was caused by the negligence of the defendant:

- (1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;
- (2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future];
- (3) any disfigurement or deformity and any associated humiliation or embarrassment;
- (4) any inconvenience caused in the past [and any that probably will be caused in the future];
- (5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];
- (6) any earnings he lost because he was unable to work at his calling;
- (7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;

Damages for emotional distress are generally not recoverable unless they result directly from a physical injury caused by tortious conduct. There are exceptions to this general rule, including the following:

- Bowers v. Westvaco Corp, 244 Va. 139, 148, 419 S.E.2d 661, 667 (1992) (holding that litigant and family members could recover for emotional distress as element of damages in a nuisance suit);
- Fairfax Hosp. Sys., Inc. v. McCarty, 244 Va. 28, 37, 419 S.E.2d 621, 626-27 (1992) (holding that mother could recover for her emotional distress resulting from injuries to her fetus caused by negligence during delivery); Bulala v. Boyd, 239 Va. 218, 229, 389 S.E.2d 670, 675 (1990) (holding that mother could recover for mental suffering from birth of defective child);
- Russo v. White, 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991); Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974) (holding that a plaintiff may recover for damages when the tort is intentional or reckless, the tortfeasor's conduct is outrageous and intolerable, the emotional distress and the tortious conduct are causally linked, and the emotional distress is severe)